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WITNESS

JONATHAN KESSLER

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2 (Beginning of excerpt.)

3 THE COURT: All right. Got everybody?
4 You may resume.

5 BY MR. SMITH:

6 Q. Mr. Kessler, you are familiar with the
7 confidential work product in response to litigation
8 and you presented it to Mr. Krasilovsky; is that
9 correct?

10 A. I am familiar with the document. My
11 attorney provided it to our expert witness.

12 Q. These are all your words; is that fair
13 to say?

14 A. Correct.

15 Q. Are any elements of this document
16 intended to scold or embarrass me?

17 A. No, sir. That was never the intent.

18 Q. The significance of putting the
19 statement in there that I was late to session
20 because my car was on fire, can you explain why
21 that's relevant?

22 A. I believe we discussed that in
23 testimony or in deposition; however, four
24 and-a-half -- four years after the fact, revealing
25 my notes it very well could be having not put in a

1 pronoun I may have made that -- made an error
2 whether it had been your car or a car, my
3 recollection had not been clear.

4 Q. Did you chuckle at deposition when I
5 asked you the same question?

6 A. Did I do what?

7 Q. Chuckle at deposition when I asked you
8 the same question?

9 A. I don't recall.

10 Q. I'm not sure I am able to ask this
11 question, but I'm going to ask it. This document
12 was originally presented to the Court and asked to
13 be kept confidential; is that your understanding?

14 A. I am sorry?

15 Q. This document was presented to the
16 Court with your motion to dismiss and with
17 instructions initially to keep it confidential; are
18 you aware of that?

19 A. I don't recall. I don't.

20 Q. Do you recall that at the motion to
21 dismiss I asked Judge Jefferson or I waived
22 confidentiality and said it could be --

23 MR. WALLINGER: Objection, relevance.

24 THE COURT: Where are you going with
25 this?

1 MR. SMITH: I am basically making the
2 case this was intended to scold and embarrass me
3 and that it was written in the fashion it was in
4 order to -- so that I would not want it placed in
5 the public record and certain parts are rather
6 embarrassing to me. But I feel I had no choice
7 except to allow it to be admitted. I believe the
8 statements in here are prejudicial and to scold and
9 embarrass me and that continued the pattern.

10 THE COURT: Do you have a question that
11 you want to ask him? What is it?

12 MR. SMITH: Your Honor, I was trying to
13 respond why I believe it is relevant. I believe it
14 is relevant because I believe the intent is to
15 scold and embarrass me with this document.

16 THE COURT: Okay. You got a question
17 you want to ask him now?

18 MR. SMITH: Yes, Your Honor.

19 BY MR. SMITH:

20 Q. The issue regarding -- would you agree
21 that you stated Smith indicated that he had dated
22 someone for seven years, but he believed marriage
23 was for having kids and for financial benefit. Do
24 you agree those are your words?

25 A. I believe those are your words, but

1 they are my words in this document.

2 Q. Top of the paragraph number -- page
3 three. I have got a copy of it I can point out to
4 you.

5 A. The pages are not numbered.

6 Q. It's the third page in here.

7 A. Okay, I see it. Yes, sir.

8 Q. And that's protected health
9 information?

10 A. I am sorry?

11 Q. Is that protected health information?

12 A. I would say it is.

13 Q. Because it was released in session?

14 A. It was not released in session.

15 Q. Because it was addressed in session, in
16 a counseling session, that makes it protected?

17 A. Your employer would not have needed to
18 know that information, therefore, it wasn't and
19 would not have been revealed.

20 Q. But is that protected health
21 information?

22 A. It's protected in that it's not
23 included on the release.

24 Q. So to give that information out would
25 be a violation of that release?

1 A. In what context of it being released?
2 In the context of us in session or even after
3 session then it would be protected, but in this
4 report summarizing our sessions four plus years
5 later, then my understanding is that's off the
6 table.

7 Q. But this document could be released as
8 part of an administrative procedure or judicial
9 procedure?

10 A. Judicial, not administrative. Your
11 employer never asked or requested records from
12 SAVE, Inc., nor would they have been revealed to
13 them.

14 Q. Even if it were part of a judicial
15 proceeding?

16 A. If it were -- as I said, if it were
17 part of a judicial proceeding.

18 Q. Then it could have been released to the
19 employer?

20 A. It is possible. That's not ever
21 happened so I can't speak to that.

22 Q. Did the contract say that one of the
23 exceptions to privacy is that this type of
24 information can be released in an administrative
25 proceeding?

1 A. Would this be an administrative
2 proceeding?

3 MR. WALLINGER: Objection, relevance.

4 MR. SMITH: I am asking what is on the
5 contract again.

6 THE COURT: Overruled.

7 THE WITNESS: According to the
8 contract, I don't know what evidence number this
9 is, but under use and disclosure of following
10 protected health information does not require
11 consent. No. 4, uses and disclosures for judicial
12 and administrative proceedings. Judicial I believe
13 is what we are participating in.

14 BY MR. SMITH:

15 Q. Right.

16 A. In defense of myself, this is the
17 document in which I drafted and that was submitted
18 to our subject matter expert.

19 Q. And an administrative proceeding could
20 include a proceeding in front of the employee
21 commission?

22 A. Possibly, but it wasn't.

23 Q. I am simply asking what the terms of
24 that contract are again is what I am trying to
25 understand. And this document could be released

1 for health and oversight activities?

2 A. I suppose it could, but it wasn't.

3 Q. I am simply trying to understand the
4 terms of that contract. On page 4 starting where
5 we reviewed the profile XT?

6 A. Yes, sir.

7 Q. Can you read -- we reviewed the profile
8 XT test again together and the next sentence?

9 A. This is regarding this evidence before
10 we took a break?

11 Q. Right.

12 A. The profile suggested inflexibility and
13 inability to accommodate.

14 Q. How did you arrive at that conclusion?

15 A. Well, I arrived at that conclusion four
16 years later upon reviewing my notes which I don't
17 write everything down in the event that records
18 have to be released against my wishes or yours. So
19 the notes are primarily just to keep track of what
20 was discussed during our sessions. And so as I
21 mentioned earlier, the accomodation as you have
22 pointed out as well on this placement report, it
23 suggests that you scored quite highly. And I
24 contend that I made an error in that statement
25 because again the profile report suggested that

1 you're a nine, but again I'm not an expert. I
2 don't know about this instrument.

3 Q. The -- your perception of me was that I
4 was judgmental. Was that also stated in the
5 document?

6 A. I am sorry. Where are you reading
7 from?

8 Q. Would you -- without reading through
9 would you agree that you had determined that I was
10 judgmental and inflexible?

11 A. I haven't read over this document in
12 the last couple of days. Can you -- I surmise that
13 you are referring to it's in writing?

14 Q. Do you recall in session at all what --
15 do you recall any of our sessions? It was a while
16 back.

17 A. I recall our sessions to an extent.

18 Q. Just any mental impression about why
19 you thought I was judgmental and inflexible?

20 A. What is a mental impression? I am
21 sorry.

22 MR. WALLINGER: Objection.

23 THE COURT: Overruled.

24 THE WITNESS: What do you mean by
25 mental impression?

1 BY MR. SMITH:

2 Q. I am asking for your opinion on how you
3 arrived at the conclusion that I was judgmental and
4 inflexible?

5 A. The inflexibility perhaps with not
6 being willing to engage in the role-play for
7 example.

8 Q. Was I opinionated?

9 A. I think we're all full of opinions.

10 Q. Would you describe me as opinionated?

11 A. I don't know if I would use that
12 adjective necessarily.

13 Q. Am I open minded?

14 A. I don't know if I would use those words
15 either necessarily.

16 Q. Can you read what Dr. Thomas Walsh, you
17 know what the score was, just read what his
18 statements were in the profile XT?

19 A. It's a very lengthy document.

20 Q. Just under accommodating is what I am
21 asking just to establish those three statements?

22 A. Sure.

23 Q. What does accommodating mean in that
24 document? What does accommodating mean?

25 A. Says tendency to be friendly,

1 cooperative, agreeable, to be a team person.

2 Q. And then his comments written below the
3 graphical score there?

4 A. "Mr. Smith shares a high commitment to
5 reducing conflict and establishing cooperation. He
6 is comfortable working as part of a team and with
7 sharing ideas and information. Tracy tends to
8 minimize problems and negative information. He is
9 quick to seek solutions which are acceptable to
10 everyone. He is highly motivated by an informal,
11 positive and relaxed work environment. Mr. Smith
12 is quick to accommodate others to avoid
13 interpersonal conflicts."

14 Q. So you would agree that statement
15 differs from the statement that is in your work
16 product?

17 A. I believe I admitted to that during
18 deposition.

19 Q. Is it possible that I'm very
20 opinionated, but also open minded? Are those two
21 mutually exclusive? Can one be opinionated as well
22 as being open minded?

23 A. I suppose depending on the context.

24 Q. You're familiar with the release of
25 this document?

1 A. The DRG that Ms. Gainey drafted up when
2 you requested your records?

3 Q. Do you need a copy of it?

4 A. If we are going to speak to it.

5 Q. Actually here is the one that's on
6 record. This is Exhibit 6. You did not actually
7 produce this document, Ms. Gainey produced this
8 document?

9 A. That is correct. It appears to be her
10 handwriting.

11 Q. Can you explain what this document
12 says?

13 A. It's a typical document designated
14 record set that would share when session began,
15 when session ended in terms of dates, total number
16 of sessions, procedure code for treatment modality,
17 frequency of treatment.

18 Q. Can I ask you a question about the CBT
19 code for treatment modality. What is 90801? Do
20 you have any idea what that means?

21 A. I do not off the top of my head know
22 what those specific items mean. The procedure
23 codes are numerous.

24 Q. Would you agree that tests were given
25 during our sessions?

1 A. Right.

2 Q. And under symptoms would you agree that
3 no symptoms were found with the exception of other
4 problems?

5 A. According to the person who completed
6 this form, yes.

7 Q. And what were the other problems?

8 A. Occupational problem.

9 Q. Do you concur with that?

10 A. I do.

11 Q. And under functionality it says
12 abnormal?

13 A. Um-hmm.

14 Q. And the reason being? What's the
15 reason Ms. Gainey gives for abnormal functionality?

16 A. You should probably have asked her when
17 she was on the stand.

18 Q. Isn't it on the form right here?

19 A. It is. I didn't complete this form.

20 Q. Do you have any understanding of what
21 Axis I is?

22 A. Axis I can be typically medical
23 diagnosis, but it also can include those medical
24 diagnoses that would also be found in the DSM-V to
25 include depression and things of that nature.

1 Q. You would agree with the paper Ms.
2 Gainey stated it was an occupational problem seems
3 to -- does that concur with your diagnosis?

4 A. My working diagnosis? Yes.

5 Q. It was an occupational problem. And
6 are there any other diagnoses that you believe are
7 attributable or relevant to me? Did you find any
8 other diagnosis other than occupational problem?

9 A. I'm not going down that road in this
10 courthouse. So no, I am sticking with
11 occupational.

12 Q. And what does GAF mean?

13 A. That is global assessment of
14 functioning. It is no longer utilized in the
15 DSM-V. It's somewhat subjective, but there are
16 descriptions as to what would constitute a hundred
17 or what would constitute a zero and 50 meaning, you
18 know, somewhere middle of the road. So according
19 to this you were above middle of the road in terms
20 of your global functioning scale.

21 Q. What is the normal scale for an
22 individual?

23 A. What's normal? Define that for me,
24 please, because I have yet to see normal.

25 Q. A mean score?

1 A. It's a zero to 100.

2 Q. Do you have any idea where 70 lies
3 relative to the mean?

4 A. I don't recall off the top of my head.
5 I'd have to refer to the DSM which is typically
6 what had been done back then.

7 Q. And under progress at the last session
8 it says about the same; is that correct?

9 A. That's correct.

10 Q. So it was not getting better or getting
11 worse, is that --

12 A. That's what she concluded.

13 Q. Do you concur with that conclusion? I
14 did see you last, right?

15 A. That is correct. When we saw each
16 other last you had just been terminated so I
17 wouldn't suspect that this would necessarily reveal
18 that.

19 Q. Prognosis of the last session? What is
20 the result of report on that?

21 A. It would suggest kind of middle of the
22 road. Neither good nor bad. There's definitely an
23 unsure about it. So it's guarded. They could go
24 either -- could have gone either way.

25 Q. So prognosis was not good; fair

1 statement?

2 A. No, because then it would have said
3 poor.

4 Q. You concur with the diagnosis that
5 occupational problem was my --

6 A. Probably for the fifth time, yes.

7 Q. I am sorry. I am just trying to be
8 thorough. I don't mean to -- on page 4 on the
9 second paragraph, you start where you explain that
10 EAP?

11 A. Right here? "I explained that EAP is
12 neutral and my goal is to promote employer/employee
13 satisfaction and productivity." Would you like me
14 to continue?

15 Q. That's fine. And is that the first
16 time you had told me that?

17 A. I don't recall. You had asked me
18 specifically that session which is why I documented
19 that.

20 Q. Is it documented anywhere else in this
21 document?

22 A. I don't believe so.

23 Q. And that was the last session and my
24 mother had accompanied me; is that correct?

25 A. It appears so, yes. That was

1 December 18th which was the last session.

2 Q. On the last page you state, "In my
3 opinion I have not deviated from any standard of
4 care applicable to my professional EAP services nor
5 have I done anything improper or unethical. My
6 limited communications with Smith's employer were
7 proper in scope and were with Smith's express
8 permission." Are those your words?

9 A. I don't know if those are precisely my
10 words, but that's most certainly my intent that I
11 concur with.

12 Q. Did you write this document?

13 A. I wrote the majority of the document,
14 yes, I did.

15 Q. Did anybody else write parts of this
16 document?

17 A. Maybe not some of the format of the
18 final draft of it, but I concurred with it. I
19 signed it.

20 Q. Are those your words "in my opinion"?

21 A. I may not have used the word
22 "deviated".

23 Q. Who -- I am asking who wrote that and
24 do you agree with it?

25 A. I do agree with it. I signed it.

1 Q. So those are your words today in court?

2 A. If you are asking do I agree with what
3 is written in this document, I would agree with
4 what is written in the document. As you pointed
5 out about the accommodating factor, I have already
6 admitted to that having been an error on my part
7 after four years.

8 Q. Would you say this document was written
9 to influence your expert witness?

10 A. As I believe I have stated earlier, no.
11 This is not the only document which he received.

12 Q. Were you employed by Ms. Gainey to find
13 a problem that did not exist?

14 A. Can you be a bit more specific as to
15 what you are referring to?

16 Q. Do you believe you were employed by Ms.
17 Gainey to find a problem that did not exist?

18 A. You just repeated the question. Are
19 you asking me a problem with you, a problem with
20 your employer, a problem with the refrigerator? I
21 don't understand.

22 MR. SMITH: Am I supposed to object?

23 THE COURT: Pardon?

24 MR. SMITH: Can I ask the witness to
25 answer the question?

1 THE COURT: Repeat your question.

2 BY MR. SMITH:

3 Q. Were you employed by Ms. Gainey to find
4 a problem that did not exist?

5 A. No.

6 Q. So what problem existed?

7 A. You have an occupational problem.

8 Q. Not interpersonal problems?

9 A. That was part of it.

10 Q. Is there a diagnosis code for
11 interpersonal problems?

12 A. Not specifically, no.

13 Q. Is there a diagnosis code that might
14 indicate interpersonal problems more specific than
15 occupational problem?

16 A. With the new CPD codes version 11 there
17 are thousands upon thousands. There's one if you
18 get struck by an orca. There's probably one that
19 would apply that there is an interpersonal problem.
20 I can't say for certain.

21 Q. To your knowledge the diagnosis of
22 occupational problem was made by Ms. Gainey?

23 A. As she indicated on the DRG, that is
24 correct.

25 Q. And when was that diagnosis made? When

1 did you become aware of that diagnosis?

2 A. I really have answered or tried to
3 answer that question to the best of my ability. I
4 don't recall the exact session or date in which I
5 personally concluded that that was the diagnosis.

6 Q. Would you agree we began therapeutic
7 treatment prior to a diagnosis being determined?

8 A. Part of the treatment is exploration.
9 It's not uncommon to start with an idea of what it
10 was that had brought you to session. It was
11 clearly occupational, but it's fluid.

12 Q. Were you predisposed to find
13 interpersonal problems as the diagnosis?

14 A. That was what I understood that you
15 were being referred to EAP services for.

16 Q. So it's fair to say that based on why I
17 was being referred to EAP services you presumed
18 that interpersonal problems must be an issue?

19 A. I'm a professional. I will start with
20 what is presented and I will explore to determine
21 if that is accurate, inaccurate, if there is some
22 validity to it or there's not some validity to it.
23 But occupational is a very global diagnosis. You
24 came to us as a result of a referral from your
25 employer as a result of your job which is your

1 occupation.

2 Q. Would it be fair to say when you spoke
3 to Clint Lewis on October 23rd that you believed
4 therapy to improve interpersonal problems was
5 warranted by the diagnosis?

6 A. Well, there was certainly indication
7 that there were interpersonal problems. You
8 admitted as much; whether it be on your behalf,
9 maybe not so much as your belief, but on the part
10 of the employer or, excuse me, the colleague that
11 took deference to you.

12 Q. When did I indicate that interpersonal
13 problems were the root cause of my occupational
14 problems?

15 A. That was what I had to explore with
16 you.

17 Q. I did not state that in session?

18 A. I don't recall if you stated it or did
19 not state it.

20 Q. In fact, I argued against that in
21 session?

22 A. Perhaps.

23 Q. I ask again were you employed to find a
24 problem that did not exist?

25 A. No, sir.

1 Q. Do you believe your conduct cost me the
2 vote of Clint Lucas at Showa Denko?

3 A. As I responded to that question
4 probably two hours ago, I haven't changed my mind,
5 so no.

6 Q. I am almost done, Your Honor. Did you
7 make the disclosure to Clint Lucas, president of
8 HR, to bolster your purported diagnosis that
9 interpersonal problems were the root cause of my
10 occupational problems?

11 A. No. I purported that we were going to
12 continue to explore that possibility.

13 Q. Did you do -- make those disclosures
14 because I would not concede that my interpersonal
15 skills were the root cause of the problems at Showa
16 Denko?

17 A. Say that one more time.

18 Q. Would you concede that because I would
19 not concede that interpersonal problems were the
20 root cause that you in your discussion with Clint
21 Lucas, you made the statements to bolster the
22 designation to fit your skill set?

23 A. You lost me.

24 Q. When you spoke to Clint Lucas were you
25 bolstering the diagnosis of interpersonal problems?

1 Do you know what the word "bolster" means or to --

2 A. Yes, I do understand that. It's a very
3 long question.

4 Q. Were you looking for validation that
5 interpersonal problems were the root cause of the
6 problem?

7 A. I was not looking for validation.

8 Q. Did you receive evidence from Clint
9 Lucas that --

10 A. Only what he reported.

11 Q. And then you said that you would
12 continue treatment with the goal of improving my
13 interpersonal skills?

14 A. Exploring it and seeing if that indeed
15 is a root cause of the problems that were
16 presented.

17 Q. I will ask one last time. What is the
18 origin of the duty to the employer?

19 A. What do you mean by origin?

20 Q. There are no written contracts between
21 SAVE and Showa Denko that you are aware of?

22 A. If that's what Ms. Gainey stated.

23 Q. Just that you are aware of? You not
24 aware of any agreements?

25 A. Correct.

1 Q. And so I am trying to understand where
2 the dual obligation comes from.

3 A. The dual obligation referring to the
4 client dual?

5 Q. Right. Normally -- would a layperson
6 assume when they entered a clinical counselor's
7 office that that clinical counselor had a duty only
8 to the patient? Would that be a reasonable
9 assumption by a layperson?

10 A. Any time that I have had an employer
11 referred -- well, employer referral I make it very
12 clear that there's a dual relationship at stake.
13 And this is all explained as we are completing the
14 release of information form and the purpose behind
15 that.

16 Q. Can you read that from that contract?

17 A. What would you like me to read?

18 Q. I am trying to find the part that says
19 that you have a duty to the company, to the
20 employer?

21 A. This form is used for many different
22 types of releases. So whether or not -- there's no
23 specific form that states just that. This is a
24 general release of information that we tailor for
25 the purposes. Why else would I be communicating

1 with your employer? Why else have you signed it?

2 Q. Again, a layperson entering your
3 office, would he assume that you have a duty, a
4 trust relationship to me as the patient?

5 A. If you are suggesting I didn't explain
6 this to you prior to you signing this, I don't know
7 where to go with that. Like I said, it's a very
8 important detail which would have been explained.
9 Had you had any questions prior to signing it we
10 would have explored that further.

11 Q. So your testimony is now that you did
12 explain the dual relationship to me?

13 A. My testimony has never changed in that
14 regard. I don't believe you have asked me that
15 specifically. That's what makes EAP unique from
16 just a typical therapeutic counselor practice.

17 Q. On the last -- first page, last
18 paragraph?

19 A. "I went over with Smith and had him
20 execute an employee statement of understanding
21 which is self-explanatory."

22 Q. Let me ask you this: If it were
23 self-explanatory did I need explanation? Would you
24 agree I am a reasonably intelligent person?

25 A. Is that a question?

1 Q. Yes. Do you believe I'm a reasonably
2 intelligent person?

3 A. Yes, sir.

4 Q. And so you're asserting that those
5 contracts are self-explanatory; is that correct?

6 A. That's correct.

7 MR. SMITH: Nothing further.

8 THE COURT: All right. Cross?

9 MR. WALLINGER: Well, he's my witness,
10 Your Honor, I can either do my --

11 THE COURT: You can do it any way on
12 how you examine him, but I don't see any reason
13 since he is the only witness we have got left to
14 have him sit down and then come back up.

15 MR. WALLINGER: That's fine. Am I
16 protected as to the stage at which I would make my
17 motions?

18 THE COURT: You are.

19 MR. WALLINGER: Thank you.

20 (DFT. EXH. 19 was marked for
21 identification.)

22 MR. WALLINGER: Your Honor, I need just
23 a minute to put this exhibit back together so I can
24 use it.

25 THE COURT: All right.

1 (Brief pause.)

2 THE COURT: Let's take ten so you can
3 get a few minutes to get organized.

4 MR. WALLINGER: Thank you, Your Honor.

5 (A recess transpired.)

6 THE COURT: Ready?

7 MR. WALLINGER: I am, Your Honor.

8 CROSS-EXAMINATION

9 MR. WALLINGER:

10 Q. Jonathan, I'm going to ask you some
11 questions.

12 A. Yes, sir.

13 Q. And try to fill in some areas that you
14 have not been able to testify sufficiently about
15 yet. First of all, can you tell us how old you
16 are?

17 A. I am 46.

18 Q. Are you single or married?

19 A. I'm married.

20 Q. How long have you been married?

21 A. It will be 20 years on Flag Day, so the
22 14th, next Wednesday.

23 Q. Do you have any children?

24 A. I have three children.

25 Q. And how long have you lived in the

1. Charleston area?

2. A. Since 1995.

3. Q. I'm going to hand you Defendant's
4. Exhibit 19 which is a copy of your vitae from which
5. I have redacted your telephone number and your home
6. address and your e-mail. What I would like to do
7. is just kind of go backward very quickly. What
8. year did you get your undergraduate degree from
9. Florida State?

10. A. That would have been 1994.

11. Q. And where did you obtain your masters?

12. A. Obtained it at Florida State

13. University.

14. Q. What year?

15. A. 1999.

16. Q. And what was the first year that you
17. had the certification as a licensed independent
18. social worker?

19. A. That would have been 2004. Hold on.
20. 2003, excuse me.

21. Q. All right. So insofar as that from the
22. time you first obtained that certification where
23. have you practiced?

24. A. Well, I have been with the VA for
25. 20 years.

1 Q. Let's start at the beginning. You
2 initially worked with youth; is that correct?

3 A. When I received certification for --
4 you mean when I got my license?

5 Q. Yes, sir.

6 A. So after graduating from Florida State
7 with my masters I worked with youth at a risk
8 shelter for a couple years and then I worked at --
9 in a methadone clinic in North Charleston for
10 several months, then I became employed where I had
11 done my internship which would be the Ralph H.
12 Johnson Medical Center downtown here. That would
13 have been in 1999 the fall.

14 Q. So have you worked full time for the VA
15 hospital in Charleston since 1999?

16 A. I have.

17 Q. And have you been a social worker and a
18 counselor in some role thereof since?

19 A. Of course SAVE, Inc.

20 Q. I don't mean SAVE. Let's talk about
21 the VA first.

22 A. Sure.

23 Q. At the VA have you worked as a
24 counselor and licensed independent social worker in
25 a clinical practice?

1 A. Yes.

2 Q. And currently do you supervise others?

3 A. I do.

4 Q. How many people do you supervise?

5 A. At this very moment?

6 Q. Yes.

7 A. About 60.

8 Q. And is there a significant counseling
9 component to what those people do?

10 A. There is.

11 Q. Do you also see and counsel veterans
12 directly?

13 A. I do.

14 Q. Have you done that for years at the VA?

15 A. I have.

16 Q. Is it fair to assume at this point then
17 that you have counseled hundreds of veterans?

18 A. Easily.

19 Q. Now, you started working part time with
20 SAVE, Inc.; is that right?

21 A. Correct.

22 Q. When did that begin?

23 A. 2004.

24 Q. Have you worked part time continually
25 since 2004 with SAVE, Inc.?

1 A. Correct.

2 Q. And your legal relationship to SAVE,
3 Inc. is that you are an independent contractor,
4 correct?

5 A. That is correct.

6 Q. And you are paid an hourly rate for
7 seeing or doing whatever you're doing while you're
8 there?

9 A. That is correct.

10 Q. And individuals are referred to you by
11 SAVE, Inc.?

12 A. Yes.

13 Q. And SAVE, Inc. is an EAP; is that
14 right?

15 A. It is.

16 Q. And that stands for employment
17 assistance program?

18 A. Correct.

19 Q. Is it safe to say at this point then
20 that you have counseled and assisted hundreds of
21 people at SAVE, Inc. in your part-time efforts
22 there?

23 A. It would be fair to say that, yes.

24 Q. Other than this case have you ever been
25 sued for any kind of breach of contract or claim of

1 any kind?

2 A. I have not.

3 Q. Have you ever had a professional
4 complaint made to any disciplinary or regulatory
5 authority about you?

6 A. I have not.

7 Q. And you currently have in good standing
8 a license independent social worker certification
9 with the State of South Carolina?

10 A. I do.

11 Q. And you did in 2012?

12 A. I did.

13 Q. Do social workers have training,
14 experience and expertise in how to counsel and help
15 people?

16 A. Basically, yes.

17 Q. Is some of what social workers do
18 similar to what licensed professional counselors
19 do?

20 A. Yes.

21 Q. Is some of what social workers do
22 similar to what psychologists do?

23 A. To an extent, yes.

24 Q. Understanding that there are other
25 things that each discipline may do differently, can

1 a licensed independent social worker work in an EAP
2 and provide counseling to EAP clients or patients?

3 A. Yes.

4 Q. Does the social worker need to
5 understand how the EAP process works as part of
6 that?

7 A. The business?

8 Q. No, the nature of the relationship to
9 the client and to the employer?

10 A. Has to have a knowledge base that that
11 exists.

12 Q. Okay. Are you familiar with the
13 professional obligations that a licensed
14 independent social worker working in an EAP setting
15 would need to comply with and meet?

16 A. Yes.

17 Q. You heard testimony earlier in the week
18 from an expert witness, Mr. Krasilovsky from Emory
19 University?

20 A. Correct.

21 Q. And during his testimony he mentioned
22 the applicability of certain South Carolina
23 statutes governing social work?

24 A. Correct.

25 Q. Do you remember that? Do you agree

1 that as a social worker in an EAP setting that you
2 are obligated to comply with those standards?

3 A. I do.

4 Q. Mr. Krasilovsky also mentioned the
5 South Carolina promulgated regulations addressing
6 social work practice. Do you remember that
7 testimony?

8 A. I do.

9 Q. Do you agree that you are obligated to
10 comply with those --

11 A. I do.

12 Q. -- rules?

13 A. I do.

14 Q. And he also mentioned and I marked as
15 an exhibit, Exhibit 16, a code of ethics set out by
16 the National Association of Social Workers?

17 A. I am familiar with that.

18 Q. Do you agree that your duties need to
19 be done in compliance with and meet whatever those
20 standards are?

21 A. Absolutely.

22 Q. And all of those address in particular
23 confidentiality of patient information, correct?

24 A. It does cover that, yes.

25 Q. To your knowledge are those sources of

1 information the information that SAVE would have
2 expected you to comply with in performing your
3 obligations relative to Mr. Smith?

4 A. Yes.

5 Q. Now, you are not a certified employee
6 assistance professional also known as a CEAP?

7 A. That's correct.

8 Q. You have not applied to become one
9 today, correct?

10 A. That's correct.

11 Q. Is it your testimony that you do not
12 believe you are obligated to follow those not being
13 a member of or certified within that organization?

14 A. I'm not obligated having not -- I do
15 not hold that certification, correct.

16 Q. All right. So insofar as your various
17 educational background and your work experience, do
18 you believe that in 2012 you were qualified to and
19 capable of providing counseling and EAP services to
20 the Plaintiff, Mr. Smith?

21 A. I did.

22 Q. I'm going to hand you what's been
23 marked as Defendant's Exhibit 6 which is a packet
24 of documents that's already been introduced into
25 evidence, been testified to be the file that SAVE,

1 Inc. had on Tracy Smith. I'm going to give you and
2 ask you to turn to the page that has the Bates
3 label at the bottom 28. Got blue ink. Do you
4 recognize that document?

5 A. I do.

6 Q. And for the record is that a SAVE, Inc.
7 authorization for release of protected health
8 information?

9 A. Yes, it is.

10 Q. And did you assist in completing that
11 document to the extent any writing needed to be put
12 on it?

13 A. I did.

14 Q. And was that the authorization which
15 Plaintiff Tracy Smith signed on September 25, 2017?

16 A. That is correct.

17 Q. Did you also sign it?

18 A. Yes, I did.

19 Q. There is a reference at the beginning
20 at the top to certain categories of information
21 that could be revealed or communicated by SAVE,
22 Inc. or you to the employer Showa Denko Carbon, in
23 particular Mr. Lucas; is that right?

24 A. That is correct.

25 Q. Did that document indicate that dates

1 of sessions could be communicated to Mr. Lewis?

2 A. That is correct.

3 Q. Did that document indicate that
4 progress of Mr. Smith could be communicated?

5 A. That is correct.

6 Q. Can you indicate whether or not the
7 document indicated that telephone exchange of
8 information of that category was permissible?

9 A. Yes.

10 Q. Can you state whether the document
11 permitted disclosure of your recommendations to Mr.
12 Lucas?

13 A. That is correct.

14 Q. Can you state whether this document
15 authorized disclosure of Mr. Smith's attendance at
16 and participation and compliance at SAVE, Inc.?

17 A. That is correct.

18 Q. All right. Now, let's turn over to the
19 next page, Bates No. 29.

20 A. (Witness complies with request.)

21 Q. And do you recognize that document?

22 A. I do.

23 Q. That is -- well, just tell us what that
24 is, briefly.

25 A. It's a cancellation no show policy and

1 it also includes insurance copay and deductible
2 what our policy is.

3 Q. Let's turn over to the next page,
4 page 30. It's a two-page document, continues on to
5 Bates 31 and it's a pink paper document. Do you
6 see that?

7 A. I do.

8 Q. Can you explain what the name of that
9 document is?

10 A. It's SAVE, Inc. employee statement of
11 understanding.

12 Q. Okay. And does that document among
13 other things explain what SAVE would offer in the
14 way of services and how the employee assistance
15 program works and what confidentiality rules would
16 be followed?

17 A. That's correct.

18 Q. And did you sign that document on
19 September 25, 2012?

20 A. Yes, I did.

21 Q. Did Mr. Smith sign it?

22 A. Yes, he did.

23 Q. With regard to these three documents we
24 have been over which I will call the blue, the
25 white and the pink, did you explain to Mr. Smith

1 what those documents were and why he needed to sign
2 them?

3 A. To a degree, yes, I did.

4 Q. All right. And was he coherent while
5 he was with you?

6 A. He appeared to be.

7 Q. Did he appear to be impaired in any way
8 as to his mental function in terms of being able to
9 understand or not understand you?

10 A. He did not appear to be.

11 Q. Did he look at the documents after they
12 were presented to him?

13 A. I would presume so. He did sign it.

14 Q. All right. And was there any question
15 in your mind about whether Mr. Smith had seen,
16 understood and agreed to the information set out in
17 those documents?

18 A. None.

19 Q. Is that information information that
20 would be provided to any client coming in for EAP
21 counseling if it's a referral from an employer?

22 A. It would be provided to every client.

23 Q. Okay. So I think what I would like to
24 do now is to move on to and have you just identify
25 for the record whether the documents contained in

1 that exhibit appear to be a complete set of
2 whatever information that you had looked at,
3 generated or dealt with while counseling Mr. Smith.

4 A. It is.

5 Q. Now, Ms. Gainey had seen Mr. Smith
6 before he was referred to you; is that right?

7 A. That is correct.

8 Q. Now, I'm going to hand you the document
9 that has been referenced many times, Plaintiff's
10 Exhibit 1, which is a narrative statement that you
11 have signed and testified about already. And I
12 want to ask you a few questions about it. First of
13 all, this document did not exist before the lawsuit
14 was filed, correct?

15 A. That is correct.

16 Q. And it is not part of SAVE's file to
17 your knowledge?

18 A. That is correct.

19 Q. This document was prepared after you
20 were served with this lawsuit?

21 A. Correct.

22 Q. And at that point it was over three
23 years after your last contact with Mr. Smith; is
24 that right?

25 A. Correct.

1 Q. What I would like to do is go to page
2 one, three-quarters of the way down which starts
3 with the paragraph I saw Smith for a total. Do you
4 see that?

5 A. I do.

6 Q. I would like you to just read slowly
7 enough that the court reporter can easily keep up
8 the information that is contained in that, and if I
9 can interrupt you which I will try not to do
10 frequently, it will be because I might want to ask
11 you a question or two, okay?

12 A. Starting with Smith for six sessions.

13 Q. Yes, sir.

14 A. "I saw Smith for a total of six
15 sessions between September 25th and December 18th,
16 2012. I understand that Smith had been referred to
17 SAVE by employer's human resource director Clint
18 Lucas as part of a disciplinary action by employer
19 against Smith. On September 25th, 2012, Smith
20 arrived for his session with me. I went over with
21 Smith and had him execute employee statement of
22 understanding which is self-explanatory. I also
23 went over with Smith and had him execute an
24 authorization for release of protected health
25 information. That agreement states that Smith

1 expressly consented to my communicating," I believe
2 that's in, it's a smudged copy, "In person or
3 telephonically certain information to employer such
4 as dates of my sessions with Smith, progress and my
5 sessions with Smith, Smith's compliance and
6 attendance and participating in the sessions and my
7 recommendations as to Mr. Smith's ability to engage
8 in the therapeutic process.

9 That signed agreement was faxed to
10 employer HR director as I understand it. On that
11 date Smith in his session reported to me that he
12 was on administrative leave. He understood that he
13 was there as a result of disciplinary action.
14 Smith stated that IT department employee had
15 overheard Smith yelling and cursing at another IT
16 team member which Smith denied doing.

17 Smith stated that he had believed that
18 some of his team members resented him because he
19 "plays the course and not the people." Smith
20 explained that he was brought in by employer IT
21 manager to eventually take on the role as IT
22 manager. Smith stated when he started with
23 employer Smith wanted to integrate the employers
24 network as a personal goal, but he came to conclude
25 that he was there for data management and not for

1 systems improvement. Through anecdotes Smith
2 shared quote unquote evidence of his value to
3 employer and Smith presented a file folder of
4 alleged evidence (e-mails, spreadsheets, et
5 cetera). Smith came across in that session as
6 somewhat self-depreciating. "I tend to ramble,"
7 but also as grandiose. "I'm the most qualified to
8 act as the IT manager."

9 Q. Incidentally, does the word
10 depreciating actually mean deprecating?

11 A. It's deprecating, apologize.

12 Q. Go ahead.

13 A. "Smith indicated that his "outburst" at
14 work was reported by a "spiteful coworker" and
15 Smith minimized the incident. Smith admitted to
16 job dissatisfaction and not receiving validation
17 for his ideas on technical mastery. Our next
18 session goal was to work on his interpersonal
19 relationship and communication skills. On
20 September 26th I called employer and reported that
21 Smith had attended EAP counseling the day prior.
22 Again, before seeing this client I understood from
23 my coworker Ms. Gainey that Mr. Smith was on
24 administrative leave and that the referral to SAVE
25 was supervisor mandated.

1 The next session was on October 9th,
2 2012. Smith arrived 30 minutes late to the session
3 and reported that his "car" was on fire. Smith
4 brought with him a folder containing more evidence/
5 data. Smith was difficult to redirect during the
6 session and I asked him not to bring the data
7 folder to future sessions in order to let us focus
8 on interpersonal skills. Smith stated that he
9 thought employer was "squeezing" out the older work
10 force. Smith stated that his aspiration was to
11 complete a working product (network goal) as I have
12 previously stated as a "direct link" to upper
13 management. He also stated that in the two years
14 of employment there the company was always quote
15 contentious as it was in quote recovery from an
16 earlier incident.

17 I asked Smith about his prior work
18 experience and he reported some consultant work and
19 work at All State, Brooks Hill and some accounting.
20 Smith mentioned that he scored low. He reported
21 that he "sidesteps" that issue but Smith was still
22 perceived as aggressive. I offered to role-play at
23 our next session the part of the employer or
24 coworker in order to facilitate identification of a
25 positive communication style while alerting Mr.

1 Smith to ineffective or condescending speech. I
2 was unable to initiate interpersonal or
3 communication skill building this session due to
4 Smith's late arrival and his insistence on speaking
5 to his evidence and data. Later I notified
6 employer (HR) of Smith's attendance at that
7 session.

8 The next session was on October 23rd,
9 2012. I recall that Smith did not intend to
10 propose to management his ideas then to help --
11 excuse me -- I recall that Smith did not intend to
12 propose to management his idea then to help improve
13 the company and that Smith declined to participate
14 in role-play. The session focused on Mr. Smith's
15 personal background and family. Smith reported
16 that he had a "survivor" mentality and a quote
17 nurturing solitude. He described some traits of
18 his parents and siblings. Smith indicated he had
19 dated someone for seven years. He believed
20 marriage was for having kids and for financial
21 benefit. Smith's personal goals included
22 developing a professional accounting system,
23 maintaining health and having a quote cash cushion
24 and growing fruit trees on a farm in Louisiana.
25 Smith indicated his parents wanted him to settle

1 down and buy a house.

2 At some point that day I spoke with
3 Clint Lucas, the human resources director at
4 employer. Smith submitted -- Lucas indicated that
5 Smith was still not forming constructive
6 relationships at employer. Smith was offending
7 people. Smith was talking down to supervisors and
8 coworkers and Smith was trying to change their
9 system.

10 I indicated to Lucas my continuing EAP
11 goal of improving Smith's interpersonal skills."

12 Q. Let me stop you there. Let's go back
13 to Defendant's Exhibit 6, the packet from the file.
14 If you will turn to page Bates 7 which is not
15 colored.

16 A. (Witness complies with request.)

17 Q. That is note from an activity on
18 September 4th of '12; is that right?

19 A. That is correct.

20 Q. That was prior to your involvement?

21 A. That's correct.

22 Q. And according to the notes there
23 regarding this referral did Showa Denko indicate
24 some difficulty with Smith's interpersonal skills?

25 A. That they did.

1 Q. So when you spoke to Mr. Lucas on that
2 date you just read from your statement which I
3 think you said was in October?

4 A. 23.

5 Q. Right. And told him that your
6 continuing EAP goal was on improving Smith's
7 interpersonal skills, you are not telling him
8 anything that he didn't already know?

9 A. That is correct.

10 Q. What you told him in essence was I'm
11 working on the thing that is the same thing that
12 Smith was referred for?

13 A. That is correct.

14 Q. And nothing else was said to Mr. Lucas
15 about Mr. Smith's state of health or these other
16 details that you have already mentioned that you
17 had learned to that point forward?

18 A. That's correct.

19 Q. Okay. So from your perspective as an
20 EAP professional was there anything improper about
21 telling Mr. Lucas, the HR manager, that you were
22 working on improving his EAP --

23 MR. SMITH: Objection.

24 Q. His interpersonal skills?

25 THE COURT: What?

1 MR. SMITH: Assumes -- I believe the
2 premise of the question is not true.

3 THE COURT: Overruled.

4 BY MR. WALLINGER:

5 Q. Just to repeat the question. When you
6 spoke with Mr. Lucas on October 23, 2012, and
7 communicated that you were working on improving
8 Smith's interpersonal skills, in your opinion were
9 you communicating something that was appropriate
10 within the scope of EAP professional services?

11 A. It was.

12 Q. And in your opinion was that
13 information true?

14 A. It was.

15 Q. And based upon the prior authorization
16 for release of protected health information, which
17 is Bates 28 in that packet, was that a telephone
18 exchange?

19 A. It was.

20 Q. And was that a report on progress?

21 A. It was.

22 Q. Did you provide any diagnosis or
23 assessment to Mr. Lucas on the thing that's not
24 checked here?

25 A. I did not.

1 Q. Did you provide any kind of test result
2 block that's not checked?

3 A. Did not.

4 Q. Did you provide any symptoms, one of
5 the blocks not checked here?

6 A. I did not.

7 Q. So that was, what, the third time that
8 you had spoken to Mr. Lucas?

9 A. I believe so, yes.

10 Q. So the first two times were to just
11 tell him or leave that message that Smith had had
12 his appointment?

13 A. Yes, sir.

14 Q. Did you speak with Mr. Lucas again
15 after October 23, 2012?

16 A. I don't believe that I had. There was
17 no requirement to have done so necessarily.

18 Q. All right. So let's pick up then where
19 you had just stopped.

20 A. Would that have been I indicated to
21 Lucas my continuing EAP goal?

22 Q. Yes. Right after that when after it
23 says improving Smith's interpersonal skills. I
24 think that might be where you stopped.

25 A. "We discussed nothing that went beyond

1 that. Nothing that went beyond the proper scope of
2 such an EAP plan and/or any employer feedback. And
3 we discussed nothing outside the categories of and
4 limitations on information Smith had authorized me
5 and SAVE to disclose to the employer. Again,
6 employer's stated goal for Mr. Smith was to assist
7 him with developing better interpersonal skills,
8 more specifically to be able to better articulate
9 his ideas in a manner less "offensive" and more
10 "palatable" in order to form more constructive
11 working relationships.

12 The next session was on November 13th,
13 2012. Smith arrived on time and brought along a
14 professional profile. (Profile XT, Grenell
15 Consulting Group LLC." Smith indicated that the
16 profile (test) was completed on him and some other
17 colleagues. The profile was dated 8-28-2011.
18 Profile documents showed many positive traits but
19 also that Smith was rigid and judgmental which he
20 has been of his employer and colleagues. Smith
21 stated "I know my failures."

22 We then focused on Smith's
23 interpersonal skills, but also explored his job
24 culture and dynamics. Smith reported that
25 employees were like the TV show "Survivor" and

1 people there were getting pushed out. Smith
2 believed that it would be best for employer to have
3 a better company culture but that "now the best
4 defense is offense." Smith viewed his job as a
5 career stepping stone. Smith was not open to the
6 concept of having more willingness to admit
7 mistakes in order to gain trust with his colleagues
8 and to help a better work culture for increased
9 productivity. Smith indicated that he felt he
10 "inherited" employer's problems. Interpersonal
11 skills training begins with a robust education on
12 interpersonal dynamics, identification of his
13 interactive style and communication pattern which
14 Smith would only superficially explore with me. I
15 did not to the best of my recollection inform
16 employer of this session and employer did not
17 contact SAVE to inquire about whether Smith had
18 attended the session. There was no requirement I
19 contact the employer.

20 The next session was on December 4th,
21 2012. Smith arrived on time for the session and
22 was cooperative and fully participatory in process.
23 He reported that he had initially resented EAP
24 sessions, but no longer did. He expressed
25 frustration with employer and immediate supervisors

1 regarding implementing change. Smith wanted to
2 remain employed for his quote resume but he had
3 hoped to make an "impact" that would be noticed
4 (i.e. system networking) as I previously mentioned.
5 We reviewed the profile XT again together. The
6 profile suggested inflexibility and inability to
7 accommodate. Smith considered asking employer more
8 directly for its "recommendations" and specifically
9 whether Smith should leave employment as part of a
10 growth opportunity. We discussed Smith finding a
11 mentor in his profession and he stated that he has
12 one in mind. I did not to the best of my
13 recollection inform employer of this session and
14 his employer don't contact SAVE to inquire about
15 whether Smith had attended.

16 The last session was on December 18th,
17 2012. Smith arrived early to session joined by his
18 mother. I required his mother to execute the same
19 confidentiality agreements and authorizations that
20 Smith had previously executed. Smith appeared
21 agitated and defensive. He indicated his mother
22 was present as a "witness." Smith asked me to
23 explain my role, my professional background and to
24 describe EAP's services and my relationship with
25 Smith's employer which I did.

1 I explained that EAP is neutral and my
2 goal is to promote employer/employee satisfaction
3 and productivity. Smith then reported that he was
4 "fired" that morning. Smith stated his intention
5 to retain an attorney. The remainder of our
6 session was not particularly productive. I have
7 had no further sessions with Smith."

8 Q. So let me stop you there. Based upon
9 what we have been over then, you did not become
10 aware of Mr. Smith's termination or of the
11 employer's decision to terminate Smith until that
12 day in December that he came in for his last
13 session?

14 A. The 18th, correct.

15 Q. And prior to that date had the employer
16 or its representative indicated to you they were
17 going to terminate Mr. Smith?

18 A. Prior to that date? No, sir.

19 Q. And had he ever asked you for any
20 recommendation regarding the issue of whether to
21 terminate Mr. Smith?

22 A. No, sir.

23 Q. So that's roughly seven weeks between
24 the October 23rd session you had when you last
25 contacted Mr. Lucas and when Smith came in and said

1 he was terminated; is that right?

2 A. Sure, yes.

3 Q. With two sessions in between those
4 dates, correct?

5 A. Yes.

6 Q. Now, after this lawsuit was filed and
7 various discovery was done under authority of the
8 court did you become aware at some point of what I
9 will hand you what is Defendant's Exhibit 18 which
10 was the one-page termination notice or memo?

11 A. After the lawsuit was filed? Correct.

12 Q. And you were here when Mr. Wing
13 testified earlier this week?

14 A. I was.

15 Q. And do you have an understanding both
16 from that exhibit and from his testimony of whether
17 Mr. Smith was terminated for getting involved in IT
18 department hardware needs?

19 A. That was my understanding, yes.

20 Q. During the course of your sessions and
21 counseling with Mr. Smith and up until his last
22 session with you had you been aware of any issue
23 with Mr. Smith getting involved in IT hardware
24 needs or disobeying an order by Mr. Wing?

25 A. I did not have knowledge of that.

1 Q. With respect to the confidentiality
2 documents that were in the SAVE file that started
3 the 28th and went all the way over to 30, did you
4 cosign those documents if they had a cosignature as
5 a representative of SAVE?

6 A. As a representative, yes.

7 Q. All right. And can we agree then Mr.
8 Smith's agreement as referenced in those documents
9 was between him and SAVE?

10 A. Correct.

11 Q. Having said that, you would agree that
12 as a contractor an agent of SAVE would have been
13 bound to follow that agreement, correct?

14 A. Correct.

15 Q. Let's move on. Mr. Smith's lawsuit
16 against you alleges that you failed to obtain an
17 adequate history and understanding of his work
18 environment.

19 A. Yes.

20 Q. Did you in your opinion obtain an
21 adequate history and understanding of his work
22 environment?

23 A. I believe so, yes.

24 Q. His lawsuit alleges that you failed to
25 provide adequate assistance, treatment and

1 counseling of him. Are you aware of that
2 allegation?

3 A. I am.

4 Q. Do you believe that you provided
5 adequate assistance, treatment and counseling of
6 him?

7 A. I do.

8 Q. While no longer a cause of action being
9 pursued in this case, there was in the past an
10 assertion by Mr. Smith that you intentionally
11 inflicted emotional distress upon him. Did you at
12 any time do that?

13 A. I did not.

14 THE COURT: He has withdrawn that cause
15 of action.

16 MR. WALLINGER: All right.

17 MR. SMITH: Objection for the record.

18 THE COURT: I was just pointing out you
19 withdrew, didn't you, on Monday?

20 MR. SMITH: Right. I object to the
21 question Mr. Wallinger made.

22 THE COURT: Okay. No harm no foul.

23 BY MR. WALLINGER:

24 Q. Mr. Smith's lawsuit also alleges that
25 you breached a duty to obtain peer consultation

1 from other people or agencies to reconcile his dual
2 obligation -- your dual obligation to him and to
3 Showa Denko. Are you aware of that?

4 A. I am.

5 Q. Do you believe in your opinion you had
6 any duty to obtain a peer consultation from other
7 people or agencies?

8 A. I did not.

9 Q. Were you qualified to counsel Mr. Smith
10 based upon what -- how he presented and the
11 information you had and the issues that you saw to
12 deal with?

13 A. I do.

14 Q. Did you ever make any false
15 representation to Mr. Smith?

16 A. I did not.

17 Q. In your opinion did you obtain
18 appropriate and adequate informed consent from Mr.
19 Smith at the time that he signed the documents we
20 have been over?

21 A. I did.

22 Q. The remainder of the statements we had
23 had you read from that you have not read yet in the
24 record, aside from whatever issue you have already
25 corrected in the past testimony, do you agree and

1 stand by that information?

2 A. I do.

3 Q. I think those are all the questions I
4 have. If there is any cross-examination please
5 answer those questions.

6 THE COURT: All right. Do you have any
7 redirect?

8 MR. SMITH: I do briefly, Your Honor.

9 REDIRECT EXAMINATION

10 BY MR. SMITH:

11 Q. Mr. Kessler, you just said that you
12 believe you obtained informed consent from me; is
13 that correct?

14 A. That is correct.

15 Q. Whose duty would it be to insure that
16 informed consent had been arrived at?

17 A. It would be both parties honestly.

18 Q. Is that personal opinion or --

19 A. No, it would be both parties. You
20 would have to have been informed to be able to
21 provide consent, you were informed and you provided
22 consent. If you had a question I would have been
23 there to respond or answer.

24 Q. Do you understand in a -- to your --
25 that in a trust relationship one party is dominant

1 over the other party?

2 A. Not necessarily.

3 Q. Can you -- when you say necessarily,
4 can you elaborate further?

5 A. Sure. There's -- most individuals in
6 which I counsel or couples for that matter are on
7 equal footing. There is no dominant. I am not
8 there to judge. I am not there to pick sides.

9 Q. An example you just gave, both would be
10 patients in that case; is that correct?

11 A. They would be clients.

12 Q. Would they both be patients?

13 A. Patients, clients, sure.

14 Q. Was Showa Denko a patient?

15 A. They are not a patient.

16 Q. But they are a client?

17 A. They're a client of SAVE.

18 Q. Mr. Wallinger used the term informed
19 consent. Do you know what that means?

20 A. I have already been over that.

21 Q. Am I correct you said earlier that it
22 was my duty to ask questions of this
23 self-explanatory contract if I did not understand
24 it; is that correct?

25 A. If you want to use the word duty,

1 that's up to you. But --

2 Q. That's my word.

3 A. You had the opportunity at the time
4 before signing something and there was no reason
5 for me to think that you were all -- that you were
6 impaired or incapable or incompetent.

7 Q. Do you believe I had all the
8 information I needed to consent to that agreement?

9 A. I do.

10 Q. In your work product you describe in
11 the last session that you explained the dual nature
12 of the relationship; is that correct?

13 A. Correct. And we have talked about that
14 as well as I recall.

15 Q. In your document -- nowhere in your
16 document do you say that you provided that
17 information to me; is that correct?

18 A. I am sorry?

19 Q. In your document prior to that last
20 session there is no evidence that you told me that
21 you had --

22 A. This was already six pages long. I
23 didn't go line by line minute by minute for the six
24 sessions in which you and I had met.

25 Q. And you produced that document from

1 your notes; is that correct?

2 A. Correct.

3 Q. So in your notes is there any
4 indication that you had explained to me there was a
5 dual obligation in your role to both me and to the
6 employer?

7 A. As I have pointed out several hours
8 ago, when an employee is referred by the employer
9 prior to initiating a release of information there
10 would have been full explanation of why information
11 must be shared back to the employer.

12 Q. Is it possible I believed that the
13 reason you had shared the date of the sessions was
14 because I was obligated to attend sessions and that
15 I relied on you to provide the date of the sessions
16 to show human resources that I was complying with
17 their mandate that I see you?

18 A. That was part of it.

19 Q. At any time did you -- did you tell me
20 that you had a duty to Showa Denko?

21 A. A duty to do what?

22 Q. At any time did you tell me that you
23 had a duty to Showa Denko?

24 A. Specifically what duty?

25 Q. Any duty?

1 A. That's what you would have signed the
2 release permitting me to be able to communicate
3 with them which was an expectation of theirs.

4 Q. Would you say the communication to
5 Showa Denko regarding attendance was basically a
6 condition of my employment?

7 A. That I have no knowledge of. That's
8 your employer -- what they chose to do with that
9 information was -- it was up to them.

10 Q. Am I correct that the last
11 communication you had with Clint Lucas was the
12 communication where you stated it was your
13 continuing EAP goal to work on my interpersonal
14 skills?

15 A. To the best of my recollection that was
16 it.

17 Q. And you communicated with Clint Lucas
18 about the previous sessions; was that correct?

19 A. Either by speaking with him or leaving
20 a voice mail that you had attended.

21 Q. So you let him know about attendance.
22 Up until that communication where you actually
23 talked to him about the treatments you were
24 pursuing with me?

25 A. That's correct.

1 Q. And then there was no communication
2 after that?

3 A. Not to my recollection.

4 Q. No communication of the dates of the
5 attendance?

6 A. Not to my recollection.

7 Q. Why wouldn't we go ahead and keep
8 communicating if you -- why wouldn't you continue
9 to communicate that information after that?

10 A. It's not a requirement. It wasn't part
11 of the duty as you are stating it to be.

12 Q. Duty to who?

13 A. As you said, a duty to your former
14 employer.

15 Q. Was it the duty to me to inform my
16 employer that I was attending sessions regularly as
17 required? That duty was owed to me, wasn't it?

18 A. In cases that I have had in which the
19 employee was referred to me it was never required
20 that every single session be reported back, nor had
21 it been every single time.

22 Q. Where would that requirement come from?
23 Where would a requirement to contact the employer
24 to let them know that you were attending sessions
25 as required, where would that requirement of you

1 come from?

2 A. The employer would like to know whether
3 or not their employee is participating. If they
4 had any question or concern then they also had the
5 ability to contact SAVE during business hours to
6 make an inquiry of that.

7 Q. Was it my duty to notify the employer
8 that I was attending sessions?

9 A. You could have done so if you had
10 wished. It was not a duty.

11 Q. But you did it for the first couple of
12 sessions; you talked to Clint Lucas, he said I was
13 still having trouble forming constructive
14 relationships allegedly with certain people and the
15 organization. You told him of your continuing --
16 can you repeat your words, your continuing effort
17 to improve my interpersonal skills, but you never
18 notified him after that of any sessions?

19 A. There's no obligation to have done so.

20 Q. What would create such an obligation?

21 A. If he said I need to know every single
22 session Mr. Smith has attended or not attended.

23 Q. In your position and trusted
24 relationship as the dominant party you don't
25 believe it would be --

1 A. I'm not a dominant party here. I am
2 sorry. You are putting that expectation on me. I
3 am trying to suggest that's not the dynamic.

4 Q. Am I a patient of yours in that
5 setting?

6 A. You are a client.

7 Q. Is this a health care setting?

8 A. I'm there -- I was there in the attempt
9 to help you.

10 Q. Is this a health care setting?

11 A. It's not a doctor's office.

12 Q. So is it your testimony this is not a
13 health care setting?

14 A. It's not a doctor's office.

15 Q. You are a licensed independent social
16 worker. Can you give me your honest opinion is
17 this a health care setting or not?

18 A. It could be defined as that I'm sure.

19 Q. When I came in do you think I assumed
20 it was a health care setting?

21 A. I do not know what you assumed or did
22 not assume.

23 Q. Do you believe a reasonable layperson
24 would assume it's a health care setting?

25 A. To some people it's a place where they

1 go see a shrink. Doesn't mean they are right or
2 wrong.

3 Q. Are you a shrink?

4 THE COURT: That's really not a thing,
5 all right? It's what people call a psychiatrist,
6 but it's really not a thing. Okay?

7 MR. SMITH: Your Honor, this is for the
8 relevance. I believe that he sees himself in that
9 fashion as a counselor and that's where --

10 THE COURT: Well, ask him if he's a
11 psychiatrist or a psychologist, but to ask him
12 something that is really just -- it's not a thing.

13 MR. SMITH: It's an utterance, Your
14 Honor. I just wanted to make it clear on the
15 record.

16 THE COURT: Whatever.

17 BY MR. SMITH:

18 Q. Implicit in the communication with
19 Clint Lucas -- is there a diagnosis implicit to the
20 communication with Clint Lucas?

21 A. It was an occupational problem that had
22 brought you to SAVE, Inc. What he implied from my
23 communication with him is whatever he implied from
24 my communication with him. I do not know.

25 Q. By telling him that you were -- a

1 course of treatment included working on
2 interpersonal skills weren't you confirming a
3 diagnosis that I had problems with interpersonal
4 skills?

5 A. I am sorry, Your Honor. I feel like I
6 have addressed this before, at least it feels very
7 familiar to me. I will answer the question.

8 THE COURT: Sorry, I didn't hear you.

9 THE WITNESS: I feel like I have
10 addressed this before. I'm willing to answer the
11 question again if need be.

12 THE COURT: It's been trod over, so if
13 you got new material.

14 MR. SMITH: These are coming from the
15 notes of Mr. -- to the best of my ability from Mr.
16 Wallinger. I am just trying to refine a few
17 points. I am almost done, Your Honor.

18 THE COURT: Proceed.

19 BY MR. SMITH:

20 Q. Is this the form that I signed with
21 Sarah Gainey?

22 A. Appears to be so.

23 Q. And this is the form you say I signed
24 with you, correct?

25 A. We have already established that that's

1 correct.

2 Q. And we have established that treatment
3 planning is not checked; is that correct?

4 A. Already established that, yes.

5 Q. So have we established there was no
6 diagnosis prior to when you spoke with Clint for
7 the last time?

8 A. Sure.

9 Q. You also said there was -- regarding
10 contacting Clint Lewis there was no requirement to
11 do so necessarily. Is that your statement?

12 A. Yes.

13 Q. When you say necessarily, what would
14 have made it necessary for you to contact Clint
15 Lewis?

16 A. I have already answered that. Had he
17 said I really require you, Mr. Kessler, or SAVE,
18 Inc. to notify me each and every session that Mr.
19 Smith has attended, has not attended, if he were
20 late, if he arrived early so and so forth.

21 Q. Would that have been a written
22 agreement?

23 A. Not necessarily. I never wrote
24 anything to the man.

25 Q. Was the obligation on me to make sure

1 that my counselor contacted my employer and told
2 him that I was attending?

3 A. I don't know what he and you agreed on
4 prior to coming to SAVE. That was not made known
5 to me.

6 Q. And it was my duty to inform you of why
7 I was there?

8 A. We had that. It's in this file right
9 here when the receptionist took the referral
10 information down for Mr. Lucas.

11 Q. You were bound to follow the SAVE
12 agreement; is that correct?

13 A. As an employee a -- obligated to
14 follow, yes.

15 Q. And what is that agreement with SAVE,
16 Inc.?

17 MR. WALLINGER: Your Honor, objection.
18 I can't even understand what that question is.
19 What is the agreement.

20 THE COURT: How about rephrase the
21 question.

22 BY MR. SMITH:

23 Q. What is your agreement with SAVE, Inc.?

24 A. That's the same question.

25 THE COURT: Do you have a contract? Is

1 it in evidence?

2 THE WITNESS: No, it is not.

3 THE COURT: Okay.

4 MR. SMITH: I made a motion to compel.

5 THE COURT: I am trying to -- I'm not
6 trying to favor you, but I have been cutting you a
7 lot of slack, all right? On redirect you are
8 limited with your lawyer to discussing matters he
9 brought up in cross. If this wasn't brought up by
10 you or by him --

11 MR. SMITH: Mr. Wallinger brought it
12 up.

13 THE COURT: It wasn't in evidence.

14 MR. SMITH: Mr. Wallinger said -- Mr.
15 Wallinger said -- I can have the transcriptionist
16 read back -- address the issue of he's an agent of
17 SAVE and bound to follow the SAVE agreement. I am
18 asking --

19 THE COURT: Go ahead.

20 MR. SMITH: -- what the agreement is.

21 THE COURT: If it is not in evidence
22 it's not in evidence.

23 MR. SMITH: I've made a motion to
24 compel the documents from SAVE, Inc.

25 MR. WALLINGER: Your Honor, this is why

1 I objected to the question because he's
2 misconstruing testimony. The witness testified
3 that he followed the agreement that he signed on
4 SAVE letterhead. He is not talking about some -- I
5 didn't even bring up a contract or agreement
6 because there is no written agreement. So this
7 testimony he is asking about is confusing that he's
8 getting into some other agreement that I didn't
9 even address at all. He has had two and-a-half
10 hours of direct exam of my client. I took 25 to
11 30 minutes of cross of my client and now we are
12 heading for another hour of questioning that I
13 perceive have long since been asked and dealt with
14 already.

15 THE COURT: Sustained. So just go on
16 to the next question you have.

17 BY MR. SMITH:

18 Q. There was no obligation emanating from
19 the agreement with SAVE for you to contact my
20 employer regarding dates of services; is that your
21 testimony?

22 A. Correct.

23 Q. You stated that I was not willing to
24 admit mistakes in your document or seemed unwilling
25 to admit mistakes. On what do you base that

1 assertion?

2 A. Would you me like to use examples from
3 today?

4 THE COURT: I'm sorry?

5 Q. You understand this is a little
6 different proceeding than our counseling sessions.
7 I am a Plaintiff in this case and I have the right
8 -- you are an adverse party and I have the right to
9 ask you questions that are adverse to your
10 interests.

11 THE COURT: What was the question?

12 MR. SMITH: I asked -- he said that I
13 was not willing to make -- to admit mistakes. I am
14 asking him on what he bases that assertion on.

15 THE COURT: If you can answer it answer
16 it.

17 THE WITNESS: One suggestion. Your
18 perspective is that you are in this survivor like
19 work environment because this colleague who felt
20 threatened. Well, there is another possibility,
21 Mr. Smith. In reading those e-mails it could come
22 across that you are following your own agenda and
23 trying to pursue your own interests and feel that
24 because someone else is taking issue with it and
25 saying let me out of it that perhaps actually

1 that's your problem and not everybody else's. So
2 you come across at times as not being able to admit
3 as perhaps you're the problem, Mr. Smith.

4 MR. SMITH: Your Honor, he just brought
5 up the issue of these e-mails. I know the Court is
6 not eager to go through these e-mails again.

7 THE COURT: So we are not going to.

8 MR. SMITH: I object to his statement
9 he made as nonresponsive.

10 THE COURT: Overruled.

11 BY MR. SMITH:

12 Q. Aside from the e-mail a specific
13 example as you just described?

14 A. I did. When an employee said count me
15 out of this, I want nothing further to do with this
16 incident, this discussion, this whatever it might
17 have been. That was my example.

18 Q. Who is the employee?

19 A. I fail to see the relevance. I don't
20 know who the employee was.

21 THE COURT: I couldn't hear what you
22 are saying.

23 A. I just said that I am having trouble
24 seeing the relevance to that particular question.
25 I don't recall the employee specifically, I am

1 sorry.

2 THE COURT: Okay. He doesn't know then
3 the answer to your question.

4 BY MR. SMITH:

5 Q. Do you believe it's appropriate to base
6 your conclusions on hearsay that is not
7 corroborated as to the source?

8 A. You brought me hearsay. You could have
9 edited those e-mails and I would have never known.

10 Q. Are you suggesting that I edited those
11 e-mails?

12 A. I am suggesting that you're asking
13 about hearsay. It goes both ways which is why I
14 would prefer to have communication with you and
15 your perception of what is happening as opposed to
16 going over a file demonstrating your expertise on
17 what it is you do which was never in question and
18 some select e-mails that you chose and selected to
19 bring to me to demonstrate your side.

20 Q. You say there was never in question.
21 How do you know that?

22 A. I wasn't there to judge your
23 capabilities at your workplace.

24 Q. You said with the e-mails my
25 professional skills were never in question. That

1 is -- actually I would offer that's not true.

2 A. You came to us as a result of your
3 employer saying you lacked the interpersonal
4 skills. You did not come to us for me to determine
5 if you had the technical skills to perform your
6 job.

7 Q. Nor was I asking you to determine
8 whether I had the technical skills to do my job. I
9 was asking you to read the e-mails so that you
10 could understand where people were being
11 cooperative and where they were not being
12 cooperative.

13 A. And we did and we -- I attempted to
14 have us move on.

15 Q. Did I agree that that was what was
16 needed in the situation?

17 A. That what was needed?

18 Q. Needed to move on and not address the
19 issues illustrated in these e-mails? Did I agree
20 with that?

21 A. I don't recall.

22 Q. You said that I was hard to redirect;
23 isn't that true?

24 A. That is true.

25 Q. Did I agree on a course of treatment

1 with you?

2 A. I don't recall. You could have
3 withdrawn and said I'm not interested in
4 participating in those any longer. I request
5 another therapist. I request a referral from the
6 agency to another agency. You did none of those
7 things.

8 Q. That was my duty to do those things?

9 A. It was not your duty. It was your
10 option.

11 Q. Did you have an obligation to inform me
12 of those options?

13 A. I did not.

14 Q. And did you?

15 A. I said I did not.

16 Q. Did you inform me of any of those
17 options?

18 A. It wasn't an issue at the time.

19 Q. Did you inform me of any of those
20 options?

21 A. It wasn't a matter at the time to have
22 brought forth. It was not relevant at that time.

23 Q. Mr. Kessler, please answer the
24 questions. Is the answer no, you did not do that?
25 You did not refer me to anyone else?

1 A. No, I did not. I have already
2 established that. I did not refer you to anyone
3 else.

4 Q. And did you believe I could trust -- do
5 you believe I can trust you?

6 A. I don't know what you believe, whether
7 you could have trusted me or not trusted me. It
8 appears that you were resistant. You stated in one
9 session that you felt resentful for having to come
10 to these sessions. That's understandable. Whether
11 or not you believed you could trust me I do not
12 know. Sometimes it takes many sessions to develop
13 that rapport and trust.

14 Q. You did not inform me of any
15 communication with Clint Lucas; is that correct?

16 A. It is right here. That is what was
17 communicated. I wasn't obligated to tell you what
18 it was that I was going to communicate of more than
19 what you signed.

20 Q. Specific and meaningful communication
21 of what was said?

22 A. We have already been over this, Mr.
23 Smith.

24 MR. WALLINGER: Your Honor, I object
25 and I agree. I think this was asked and answered.

1 THE COURT: We have beaten this line of
2 questioning to death so if you got something else
3 then we will talk about it. But we are just
4 rehashing what we hashed over a dozen times already
5 today.

6 BY MR. SMITH:

7 Q. Were you employed to find a problem
8 that did not exist?

9 A. I have already been over that as well,
10 Mr. Smith.

11 THE COURT: You have asked that I don't
12 know how many times. Do you have anything on
13 recross?

14 MR. WALLINGER: I do not.

15 THE COURT: You may step down. Do you
16 have any other witnesses that you intend to call?

17 MR. WALLINGER: I do not.

18 THE COURT: Do you have any other
19 witnesses that you intend to call?

20 MR. SMITH: I do not.

21 THE COURT: So everybody had rested?

22 MR. WALLINGER: He had mentioned
23 something to offering designations and I don't know
24 if he still wants to do it.

25 THE COURT: Are you putting in a

1 deposition?

2 MR. SMITH: I would put in the three
3 depositions, myself, Kessler and Gainey are on the
4 record; is that correct?

5 MR. WALLINGER: I have introduced the
6 depositions. Whether he wants to designate to have
7 Your Honor hear page and line is up to him.

8 MR. SMITH: Can you put them in there
9 so you can read them?

10 THE COURT: That's the point of it.

11 MR. SMITH: Right. I would do that,
12 yes, Your Honor.

13 THE COURT: Whose? Is there somebody
14 that's not already in? That's what I am asking.
15 Are you putting in anything new?

16 MR. SMITH: No, Your Honor. I just
17 want to be sure these three depositions are in and
18 I believe they are, so no, Your Honor.

19 THE COURT: Okay. All right. Then you
20 have been asking me for two days to make a motion
21 and I have -- we have gone so far out of order in
22 order to accommodate other witnesses. We are at
23 the point where you can make your motions that you
24 could have made yesterday probably.

25 MR. SMITH: Your Honor, I would like to

1 -- one question. If I am out of order I apologize.
2 I do have a motion to compel the documents from
3 Sarah Gainey. Have you -- is it appropriate to
4 rule on that at this time?

5 MR. WALLINGER: That was already denied
6 before trial, Your Honor, Tuesday morning.

7 MR. SMITH: I thought you took it under
8 advisement, but motion to produce the documents
9 from Sarah Gainey related to their documents on the
10 subpoena, for all documents related to her
11 agreements with Mr. Kessler and with Showa Denko.

12 THE COURT: That was a motion that I
13 heard?

14 MR. WALLINGER: He made a discovery
15 motion either Friday or over the weekend, I don't
16 know, and it was one of the things that we
17 mentioned Tuesday morning before the case was --

18 THE COURT: You mean Monday morning?

19 MR. WALLINGER: Yes, sir, I am sorry.
20 Monday morning before trial began there was three
21 pretrial motions.

22 THE COURT: What is the documents that
23 he wants?

24 MR. WALLINGER: He wanted documents
25 relating to their relationship to the employer and

1 any contract they had with my client and they have
2 already indicated through their counsel they don't
3 have any documents to give him.

4 MR. SMITH: I asked for all documents.
5 I asked -- I would also ask the identified versions
6 of these documents with employees of Showa Denko be
7 considered in that motion to compel.

8 THE COURT: The lawyer has responded by
9 saying they don't have any documents responsive to
10 your request. I gather that has already been
11 produced. You have the entire file.

12 MR. SMITH: That is myself, Your Honor.
13 I am questioning the trade practices of this
14 organization and to prove that I should have access
15 to these documents to prove that there are --

16 THE COURT: You have them in your hand.

17 MR. SMITH: Of other people, of the
18 other people to establish the pattern of unfair
19 trade practices by this enterprise.

20 THE COURT: You want other peoples
21 files? You are not getting those. We would have
22 to have --

23 MR. SMITH: For the record --

24 THE COURT: We would have to give every
25 single one of those people the opportunity to come

1 in and object for privacy reasons just like you
2 and --

3 MR. SMITH: Based on this agreement you
4 don't, Your Honor, with all due respect. He
5 identified -- it would be certainly fine to have --
6 to see what checked boxes are typically checked for
7 the typical patient of SAVE. I am making the
8 motion if you --

9 THE COURT: All right.

10 MR. SMITH: For the record.

11 THE COURT: And your motion is denied.
12 All right. Do you have motions that you want to
13 make?

14 MR. WALLINGER: I do, Your Honor.

15 THE COURT: You can sit down while he's
16 talking.

17 MR. WALLINGER: As a preliminary
18 matter, I need to clarify that the pro se complaint
19 is somewhat unclear as to what causes of action are
20 actually claimed because he made a motion to amend
21 the complaint before trial that has not yet been
22 ruled upon to add three more causes of action. I
23 am a little uncertain as to what I have to argue
24 against in trial to defeat.

25 With that said, I will just make an

1 argument what I think I am dealing with and then we
2 can go from there if the Court would allow me to do
3 that.

4 THE COURT: Well, let me look at this.
5 Again, they are kind of scattered, but based on
6 what I see is left I would say there is a breach of
7 contract cause of action, there's a
8 misrepresentation cause of action, there's a breach
9 of fiduciary duty cause of action and a negligence
10 cause of action.

11 MR. WALLINGER: All right. And his
12 motion to amend which has not been technically
13 granted or denied seeks to add three more causes of
14 actions. One is South Carolina Unfair Trade
15 Practices Act, one is tortious interference with a
16 contract, and the third is tortious interference
17 with prospective economic advantage. Okay.

18 THE COURT: Okay. You can address
19 those as well.

20 MR. WALLINGER: At this time the
21 defense will make a motion which we were prepared
22 to make and I think for the record technically it
23 is retroactively made at the close of the
24 Plaintiff's case.

25 THE COURT: Hold on one second. Do you

1 need a break?

2 THE REPORTER: We can go a little
3 longer.

4 MR. WALLINGER: We are now as I
5 understand at the close of the Plaintiff's and the
6 defense's case and I would make a motion for a
7 directed verdict in favor of the Defendant and for
8 dismissal with prejudice of the suit and all of the
9 causes of action that are alleged or attempted to
10 be alleged. I will briefly break these down into
11 two groups of issues. One are legal issues. The
12 second are factual issues based upon the evidence
13 in the trial.

14 With regard to the legal issues, as to
15 the breach of contract cause of action, the
16 Plaintiff had a contract with SAVE, Inc. Mr.
17 Kessler as the representative of SAVE signed that
18 contract. The breach of contract cause of action
19 fails as a matter of law because there is no
20 contract between my client and the Plaintiff. I
21 would also assert as I did in the motion for
22 summary judgment that that cause of action is
23 barred by the statute of limitations in that it is
24 alleged that the actual conduct happened in October
25 of 2012. The suit was filed on December 18, 2015,

1 which was three years to the day after the
2 Plaintiff was fired.

3 So the issue for the Court is whether
4 the firing was the first notice of any damage or
5 not.

6 As to the breach of contract cause of
7 action, finally I would argue that there has been
8 no proof of the type of damages that can be
9 recoverable in contract. The Plaintiff has
10 basically alleged through the suit and allegations
11 and the statements two kind of damages, emotional
12 distress and lost earnings from the position that
13 he held. One cannot in a breach of contract cause
14 of action obtain emotional distress damages.
15 There's an old case that I can hand up, I have got
16 it in the box somewhere. It's a pretty sound
17 principle of law, that emotional distress can't
18 just flow from a tort cause of action.

19 The second issue is there has been no
20 evidence at all of what damage, if any,
21 economically Mr. Smith has had from losing his job.

22 For all we know, he went and got a new
23 job the next day. For all we know, he did not want
24 another job after losing the job he had. But there
25 was no testimony from him or any other witness that

1 he called to establish a single cent of lost
2 pecuniary damages. And so legally and factually I
3 submit that the directed verdict on the breach of
4 contract cause of action should be granted.

5 On the misrepresentation cause of
6 action, Your Honor, the elements of that are proof
7 of a false representation to the Plaintiff by the
8 Defendant, that the Defendant had a pecuniary
9 interest in making a statement, that the Defendant
10 owed a duty to only communicate truthful
11 information, that the Defendant breached the duty
12 by failing to exercise due care, that the Plaintiff
13 justifiably relied on the representation and the
14 Plaintiff suffered pecuniary loss as a result of
15 reliance on the representation.

16 I would submit that was a failure of
17 proof factually on those elements. That there is
18 no reasonable inference to be drawn by the fact
19 finder in this case that could support that. I
20 would renew as well the position that the claim is
21 barred by the statute of limitations based upon the
22 date of the alleged tortious conduct.

23 As to the breach of fiduciary duty
24 cause of action, I would argue that there is no
25 fiduciary duty in the context of a counseling

1 relationship with the patient and that the
2 standards of care are set by the sources of
3 information that our expert witness has already
4 identified and also because EAP services
5 necessarily are providing services to two parties,
6 the employer and the employee. It is impossible to
7 have a fiduciary duty because you're dealing with
8 more than one person in a fiduciary relationship as
9 such that there is always just the professional and
10 the other. And I think that's barred by the
11 statute of limitations.

12 As to the negligence cause of action,
13 there was some discussion during the case about
14 whether general simple ordinary negligence could be
15 pursued or whether a professional negligence claim
16 had to be asserted. I think the Court can glean
17 from the nature of this case that this is not a
18 case of a person having a slip and fall in a
19 clinician's office or being hit with a blunt
20 instrument in the clinician's office. The
21 complaint here is the nature of the specialized
22 counseling services, in particular the duty of
23 confidentiality and how broad or narrow that is.
24 It is my position that those are specialized things
25 that a layperson cannot prove on their own and that

1 expert testimony is required to prove those and
2 that he has not offered any expert testimony to
3 support his claim of negligence.

4 And I would just mention the case of
5 Griffin Plumbing 351 S.C. 459, 570 S.E. 2d 197 from
6 the court of appeals of 2002 that in essence there
7 has to be expert testimony to support a claim of
8 professional negligence and there has been none.
9 And his claim fails as a matter of law and proof
10 from that.

11 I would argue for the record again the
12 statute of limitations would bar the claim. The
13 defense to those causes of action I have already
14 been over is principally consent. And I would also
15 argue that there is no reasonable inference from
16 the evidence available other than the Plaintiff
17 consented to the communications that my client
18 made.

19 Additionally, I would say that there is
20 no reference from the evidence other than what he
21 did communicate was squarely within what he was
22 allowed to do. And Mr. Kessler's testimony as the
23 last witness is fresh in our mind and there is no
24 showing of him having communicated anything more
25 than what is in the record. And notably Mr. Smith

1 did not bring in Mr. Lucas to see if Mr. Lucas had
2 any testimony the same or different on the issue.
3 And so there's a failure of proof of anything my
4 client said being the cause or a cause of the
5 Plaintiff's termination. The only evidence in the
6 record is that the Plaintiff disobeyed the
7 supervisor's instructions to not get involved in
8 hardware analysis and procurement, that the
9 Plaintiff disobeyed those instructions and that the
10 supervisor had had enough and terminated him.

11 As far as the tortious interference
12 with contract cause of action has the elements of
13 proof of a contract, the Defendant wrongdoer's
14 knowledge of that contract, the Defendant's
15 intentional procurement of the breach of the
16 contract, the absence of justification for the
17 breach, and damage flowing from that. I have put
18 in evidence, Your Honor, the application of the
19 Plaintiff which showed that it was an at will
20 employment relationship. There was no contract
21 between the Plaintiff and the employer that could
22 be breached through procurement and there is a
23 failure of proof of any of those elements and it
24 would be barred by the statute of limitations.

25 As to the tortious interference with

1 prospective economic advantage, I will take the
2 same position that there was no interference and
3 there was no proof or reasonable inference
4 otherwise.

5 With regard to the South Carolina
6 Unfair Trade Practice Act cause of action, there
7 was a failure of proof. In addition as a matter of
8 law, it would be my client's position that he is a
9 licensed clinician in a regulated profession and
10 that pursuant to the act and the statute, the act
11 does not apply him. He would be exempt from that
12 and I would support that by the case of Ward vs.
13 Dick Dyer and Associates 304 S.C. 152 403 SE 2d
14 310, 1991. There is also a total failure of proof
15 and no reasonable factual inference that the
16 Defendant engaged in an unfair or deceptive act in
17 the conduct of trade or commerce or that it
18 affected the public interest or that the Plaintiff
19 suffered monetary or property loss from those acts.

20 And I again as to all the causes of
21 action that he asserted remind the Court that
22 despite all of the discussion that the Plaintiff
23 has seen fit to have in this courtroom about what
24 should or shouldn't be done by the Defendant or by
25 the employer or anybody else, he didn't take any

1 time to put into evidence proof of the pecuniary
2 loss or of another kind of damage that's
3 recoverable. And indeed insofar as the mental
4 anguish claimed, there's no evidence of him having
5 sought treatment for that by any clinician or the
6 cost of that.

7 So for all those reasons, Your Honor,
8 the Defendant would move for a directed verdict and
9 dismissal of the cause of action with prejudice and
10 I haven't had a bench trial in a couple years, so I
11 wasn't sure if Your Honor would take this under
12 advisement to issuance of a final order, but I just
13 wanted to protect the record by making a motion at
14 this time.

15 THE COURT: All right. Thank you. All
16 right. Mr. Smith, do you want to respond?

17 MR. SMITH: Yes, Your Honor. Again I
18 am not an attorney. And is it appropriate to --
19 because I want to hit all the things he just
20 discussed, I have done my best to take notes, can I
21 get any of that from the transcript so I can go
22 down and see exactly what he's claimed?

23 THE COURT: Well, I don't have the
24 ability to give you a real-time transcript. So
25 just do your best.

1 MR. SMITH: First of all, the date of
2 October 2012 is incorrect. I have asserted that
3 the actions or inactions that caused my dismissal
4 occurred throughout -- through December through the
5 date I was terminated. I saw Mr. Kessler the date
6 I was terminated.

7 THE COURT: Let me ask you some
8 questions because maybe that will make your
9 argument a little more focused as to what I see are
10 the strengths and the weaknesses of your case, all
11 right? First of all, breach of contract. You
12 don't have a contract with him. Do you? You had a
13 contract with --

14 MR. SMITH: What is this?

15 THE COURT: That's a release, isn't it?

16 MR. SMITH: This is authorization for
17 release of protected health information.

18 THE COURT: Okay.

19 MR. SMITH: What is this? This is not
20 an agreement with Mr. Kessler in any way?

21 THE COURT: I don't know. Is that your
22 agreement with SAVE?

23 MR. SMITH: Mr. Kessler signed it.

24 THE COURT: Okay. That answers the
25 question. You -- all of the things that you are

1 claiming that he did wrong or didn't do to assist
2 you, viewing them in the light most favorable to
3 you, as I must do at this point, I don't remember
4 the gentleman's name, but the guy that fired you,
5 your supervisor said he fired you because you kept
6 messing with hardware after he repeatedly told you
7 not to do it. And he didn't know anything about
8 you talking to Mr. Kessler and it had nothing to do
9 with his decision to fire you. All right?

10 Now, in the eyes of the law, you --
11 there are a lot of people out there that have
12 causes of action. I know you are excited and you
13 want to respond, trust me, it's in your best
14 interest to be quiet and listen, all right? You
15 may have all of the elements of a cause of action,
16 but then people forget even though I may have had a
17 contract with somebody, and they breached it or I
18 may have had a fiduciary duty relationship with
19 somebody and they told somebody that they were
20 supposed to do something, or they told somebody
21 that they shouldn't have told them, you still have
22 to show that that is what caused you to lose your
23 job. That's called proximate cause. You may have
24 come across that.

25 So let's just say he, Mr. Kessler, owed

1 you a fiduciary duty. And he told Mr. Lucas when
2 he shouldn't have told Mr. Lucas something. That's
3 not what caused you to get fired. You messing with
4 the hardware is what caused you to get fired. It
5 wasn't even your interpersonal skills according to
6 Mr. -- what was his name?

7 MR. SMITH: Mr. Wing for the record.

8 THE COURT: The guy that fired you.

9 MR. WALLINGER: Wing.

10 MR. SMITH: Clint Lucas was in on the
11 discussion where they decided to terminate me.
12 That's on the record. That was Mr. Wing's
13 testimony.

14 THE COURT: Mr. Wing, that was it. Mr.
15 Wing, I asked him specifically why did you fire
16 him. And he said he was the one that fired you and
17 he fired you because of your insistence on messing
18 with hardware that he didn't have -- Mr. Kessler
19 and your getting counseling had nothing to do with
20 your getting fired and he didn't even know anything
21 about it.

22 MR. SMITH: And I would suggest --

23 THE COURT: So how do you get past that
24 proximate cause gap in your case?

25 MR. SMITH: Mr. Wing is not credible

1 first of all.

2 THE COURT: That's for me to decide.

3 MR. SMITH: I assert Mr. Wing is not
4 credible first of all. The same person who had me
5 sent to SAVE, Warren Sneed as Mr. Wing said who
6 reported to Greg Spires through the e-mails show
7 had a vendetta against me who reported it to Mr.
8 Lucas who had me sent to SAVE is the same person
9 who claimed that I was messing with hardware when I
10 didn't have the right to and the evidence is right
11 here in Mr. Wing's hand that I did have the right
12 to. That is a false statement. I had the right to
13 SDKC net, the SATS and G server, I had access to
14 those machines throughout my employment. I was
15 hired as a systems engineer. The same person who
16 made these false allegations that Mr. Kessler --
17 hearsay basically Mr. Kessler relied on is the same
18 person who set up another set of lies and I was not
19 able to -- I was not informed of those lies because
20 he broke off communication with Mr. Lucas after
21 Mr. Lucas had shared a number of harsh things,
22 never told me about them, never gave me a chance to
23 save my job. To save my job. Save. I deserve an
24 opportunity --

25 THE COURT: Let's leave it like this.

1 I'm going to give you the opportunity as I told you
2 to make your argument in writing. Because I think
3 it would help you to work through in order this
4 argument. Because one of the problems about
5 representing yourself is you cannot do it
6 dispassionately like a lawyer can. And you get
7 upset because you perceive it's not going your way.
8 That's why it is best to get a lawyer because your
9 lawyer, it's not him. He's the advocate. And
10 you're your own advocate so you can't do it
11 dispassionately. So you get upset. That's
12 understandable, but it is one of the reasons. Plus
13 you are not a lawyer so as I have told you there
14 are proof problems in your case. But I will let
15 you argue them.

16 I will just tell you my biggest issues
17 with your case is that proximate cause issue --
18 listen to me, proximate cause and damages. You put
19 in no proof of damages. Listen to me.

20 You need to address those two issues,
21 all right? You also need to address in addition to
22 the elements of the proof on some of these because
23 Mr. Wallinger has made good arguments on some of
24 these that you simply haven't proved the elements
25 of the various things, is -- there's a statute of

1 limitations issue. If the basis of your breach of
2 fiduciary duty claim is Mr. Kessler telling
3 Mr. Lucas things that he wasn't supposed to and
4 that breached confidence, well, he did that in
5 October of 2012 and you didn't file suit until more
6 than three years later in December 15th. You need
7 to address that.

8 MR. SMITH: Two years I believe.
9 Regardless I am again alleging that he did not
10 contact Mr. Lucas as he was obligated to do
11 throughout December 18th. He did not --

12 THE COURT: Okay. Mr. Smith, stop
13 again. Because I'm telling you you wear a person
14 out and I am trying to give you advice --

15 MR. SMITH: Yes, Your Honor.

16 THE COURT: -- on what the strengths
17 and weaknesses are of your case. And I'm giving
18 you time to address them in writing and I am just
19 telling you you don't have to wonder where I think
20 your strengths and weaknesses are. I just told
21 you. All right? So you need to address those.

22 MR. SMITH: Yes, Your Honor.

23 THE COURT: You don't need to argue
24 with me now. You need to address them in writing.
25 All right. I'm going to give you 30 days to do

1 that. I'm going to give Mr. Wallinger 30 days.
2 You come up with proposed orders. If you need a
3 little more time let me know before the 30th day.
4 I will consider an extension, but 30 days is a lot
5 of time. I'm sure you will get right at it. But
6 today is June the 8th. Let's see what July the 8th
7 falls on here. That is a Saturday. So July 10th
8 submit to my office here in Charleston in writing
9 your proposed order. Mr. Wallinger, same thing.
10 And then I will review them, study them and make my
11 decision after I have had a chance to think about
12 it. Okay?

13 MR. SMITH: Thank you, Your Honor. I
14 do appreciate it.

15 THE COURT: All right. Go home and get
16 some rest.

17 (These proceedings were concluded at
18 4:07 p.m., June 8, 2017, Charleston
19 County, South Carolina.)
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CERTIFICATE OF REPORTER

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2
3 I, Ruth C. Weese, Registered Diplomate
4 Reporter for the State of South Carolina at Large,
5 do hereby certify that the foregoing transcript is
6 a true, accurate, and complete record.

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

10 Witness my hand, I have hereunto affixed my
11 official seal this 5th day of July, 2017 at
12 Charleston, Charleston County, South Carolina.

13
14 *Ruth C. Weese*

15
16 _____
17 Ruth C. Weese

18 Registered Diplomate

19 Reporter
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