THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY COURT OF COMMON PLEAS
Honorable Roger M. Young, Circuit Court Judge

Tracy Smith V. Jonathon Kessler

Circuit Court Civil Action Number: 2015-CP-10-6820

Appellate Case No. 2017-001766

Tracy Smith..... .....Appellant

v.

Jonathon Kessler .....Respondent

INITIAL BRIEF OF APPELLANT

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5) THE COURT ERRS IN FAILING TO FIND THAT MR. KESSLER'S INTENTIONAL UNLAWFUL CONDUCT, CONFIRMATION OF DIAGNOSIS AND TREATMENT PLAN DICATED BY A MINORITY OF HOSTILE COWORKERS AT SHOWA DENKO, AND CONCEALMENT OF THE SPECIFIC CONTENT OF THE CONVERSATION KESSLER HAD WITH SMITH'S HR DIRECTOR CLINT LUCAS WAS THE REASONABLY FORESEEABLE PROXIMATE CAUSE OF DAMAGE TO SMITH PROFESSIONAL REPUTATION, SMITH'S LOSS OF INCOME OF 72,000 ANNUALLY, SMITH'S TERMINATION AND INELIBILITY FOR REHIRE 40

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Statement of the Case

Tracy Smith ("Smith") is an IT Systems Engineer who was previously employed by Showa Denko as a Systems Engineer responsible for hardware and software systems. Defendant Jonathon Kessler ("Kessler") described Showa Denko as a "Long-Time Client". Smith's duties included administration and troubleshooting of hardware and software, rewriting major parts of the Carbon Electrode Shipping process to correct errors in the legacy customer data sheet system previously implemented by Greg Spires; maintenance of hardware and software for testing, quality control, and environmental compliance systems, backup of various hardware systems, and researching of hardware and software solutions required for environmental sound monitoring as requested by John Wing.

Smith is a Finance Major who also earned the Microsoft Certified Systems Engineer designation and frequently sings and plays guitar with friends at clubs and gatherings. Smith learned of the implicit

covenant of good will and fair dealing in undergraduate business law classes over 20 years ago and conducts himself accordingly. Jonathon Kessler is a Music Major and licensed independent social worker who works for the VA and part time for SAVE, Inc. Kessler stated under oath that in responding to Smith's questions about his conversation with Smith's HR Director Clint Lucas " I WASN'T OBLIGATED TO TELL YOU WHAT IT WAS THAT I WAS GOING TO COMMUNICATE OF MORE THAN WHAT YOU SIGNED".

Smith was transferred to Mr. Kessler by Sarah Gainey of SAVEEAP after two hour long sessions with Ms. Gainey the owner of SAVE. SAVE, Inc., also known as SAVEEAP.COM purports to render confidential Behavioral Health Care Services to Employees through an employer sponsored Employee Assistance Program which was offered as a Fringe Benefit to Employees of Showa Denko. Sarah Gainey was a Certified Employee Assistance Professional. Unknown to Smith at the time services were rendered, Mr. Kessler was not an Employee Assistance Professional during Mr. Smith's 6 sessions with Mr. Kessler spanning approximately 3 months until Smith was terminated without notice from Showa Denko.

On December 17, 2015, Smith filed suit against Defendant Kessler as a Pro Se Plaintiff asserting claims for breach of contract, professional negligence, breach of fiduciary duty, and intentional infliction of emotional distress. Plaintiff Smith was granted leave to amend his complaint to include Tortious Interference with prospective business relations, tortious interference with contract, and violations of the South Carolina Unfair Trade Practices Act. Smith asserted in documents and in court that the issues in this case were within the ambit of common knowledge such that no special training was needed for an unbiased trier of fact to assess the facts of this case.

Scott Wallinger, a former South Carolina Prosecutor represented Mr. Kessler. The bench trial was not conducted in the normal order of trial proceeding so that all witnesses with the exception of Defendant and Plaintiff could be heard on the same day and so that the Honorable Trial Judge could attend a funeral during the week. The court expressed its desire to complete the bench trial within three days by Thursday June 8, 2017 despite Plaintiff's estimate conveyed to the court that at least 4 days would be needed. The trial began at 2PM Monday afternoon and proceeded on Tuesday and Thursday.

Pro Se Plaintiff filed a motion shortly after the deposition requesting a Jury Trial as Mr. Wallinger during that deposition stated Smith had failed to request a Jury trial. Smith acknowledges that he inadvertently failed to check the box requesting a jury trial when filing his pleading. The court ruled against the Motion for Jury trial on June 5, 2017 and immediately proceeded to conduct a "bench trial" that

afternoon where the Honorable Roger Young, would be the sole finder of fact as well as sole finder of law.

Prior to trial plaintiff Smith also filed a Motion in Limine asking the court to exclude testimony from Defendant's expert witnesses on the grounds that Mr. Kraviloski had offered in his expert affidavit erroneous opinions on matters of Law, specifically Fiduciary Duties in which he is not an expert and has no training and would likely do so at trial. Smith offered extended excerpts from in SARD v. Hardy to show that the fiducial duties Kessler owed to Smith were fixed as a matter of law, not customary practice:

> "....A physician occupies a position of trust and confidence as regards his patient — a fiduciary position. It is his duty to act with the utmost good faith. This duty of the physician flows from the relationship with his patient and is fixed by law — not by the contract of employment. The law's exaction of good faith extends to all dealings between the physician and the patient. A person in ill health is more subject to the domination and influence of another than is a person of sound body and mind. The physician has unusual opportunity to influence his patient. Hence, all transactions between physician and patient are closely scrutinized by the courts which must be assured of the fairness of those dealings. (Citations omitted.)" SARD v. Hardy, 367 A. 2d 525 - Md:Court of Special Appeals 1976

The court denied this motion during trial prior to Kraviloski taking the stand.

(Later in this brief, Appellant cites extended excerpts from the US Supreme Court in Jaffee v. Redmond which found that the same doctor/patient privilege and confidentiality standards extend to psychotherapists and to social workers.)

In contrast to the above mentioned credible sources of Law, Defense counsel Wallinger stated on page 580 line 14 of the Official Transcript prepared by Ruth Weese that:

> "As to the breach of fiduciary duty cause of action, I would argue that there is no fiduciary duty in the context of a counseling relationship with the **patient** and that the standards of care are set by the sources of information that our expert witness has already identified and also because **EAP services *necessarily* are providing services to two parties, the employer and the employee.** It is impossible to have a fiduciary duty because you're dealing with more than one

> person in a fiduciary relationship as such that there is always just the professional and the other."

Plaintiff also filed a Motion to Compel SAVE, Inc. and Sarah Gainey to produce contracts and documentation of the relationship of SAVE, Mr. Kessler, and Employer Showa Denko and Showa Denko personnel as Sarah Gainey had refused to bring any documents to her deposition or produce any documents whatsoever despite 2 subpoena signed by the clerk of court. The Honorable Judge Young denied this motion at some time during trial.

At Trial Scott Wallinger argued that Showa Denko was a "CONTRACTUAL, NON-CLINICAL CLIENT OF SAVE IN A DUAL RELATIONSHIP." No documentation was offered to support Mr. Wallinger's assertion that Showa Denko was a "CONTRACTUAL, NON-CLINICAL CLIENT OF SAVE IN A DUAL RELATIONSHIP".

The court expressed apparent displeasure with Smith's self-representation and lack of law degree on several occasions stating that Smith's self-representation made it impossible for Smith to plead his case dispassionately and needed an attorney to speak on his behalf.

The court stated on Page. 589 line 16:

> "Because one of the problems about representing yourself is you cannot do it dispassionately like a lawyer can."
>
> "That's why it is best to get a lawyer because your lawyer, it's not him. He's the advocate."

The transcript shows the court frequently interrupted Smith's questioning of witnesses especially when Smith was questioning John Wing who instigated the mandate the Smith seek counseling at SAVE as a condition of employment and then instigated the termination of Smith while Smith was attending counseling at SAVE with Mr. Kessler.

On page 4 of his "Confidential Work Product in Response to Litigation" Kessler states that on December 18, 2012, after Smith was terminated that he explained to Smith:

> **"I explained that EAP is neutral and my goal is to promote employer/employee satisfaction and productivity."**

Mr. Kessler stated during direct examination by his attorney Scott Wallinger that in a conversation with Clint Lucas Showa Denko's HR Manager that occurred on October 23rd, 2012

"Lucas indicated that Smith still was not forming constructive relationships at employer. Smith was offending people. Smith was talking down to supervisor and coworkers and Smith was trying to change their system."

It is undisputed that Kessler never told Smith of the existence and substance of this discussion for over two months of counseling prior to his Smith's termination without notice.

In response to Smith's cross exam of Kessler regarding this undisclosed conversation with Clint Lucas Mr. Kessler, a licensed independent Social Worker stated that:

"I wasn't obligated to tell you what it was that I was going to communicate of more than what you signed."

During Sworn testimony Mr. Kessler appeared reluctant to answer Smith's question regarding whether Kessler counseled Smith in a health care setting three times until finally admitting that it was a health care setting.

Page 559 Smith Cross Examining Kessler

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

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

A. You are a client.

Q. Is this a health care setting?

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

Q. Is this a health care setting?

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

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

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

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

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

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

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

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

A. To some people it's a place where they go see a shrink. Doesn't mean they are right or wrong.

Q. Are you a shrink?

The Court (The Honorable Judge Young) intervened on behalf of Mr. Kessler without an objection from Scott Wallinger:

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

The court notably interrupted Smith's questioning of John Wing Smith's former supervisor stating that:

"I guess it's your theory that they [the counselor] can talk to them [employer] if it helps me [patient receiving counseling], but not if it hurts me."

And then subsequently stated:

"You can't have it both ways".

As stated later in this brief the **United States Supreme Court in JAFFEE, special administrator for ALLEN, DECEASED v. REDMOND et al. No. 95-266** extended the doctor patient privilege and confidentiality rules to psychotherapists, psychologists and social workers stating "Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears.... **the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.**"

At the close of oral testimony Defense moved for a directed verdict. The court allowed closing arguments to be submitted in writing and adjourned on Thursday afternoon June 8, 2017.

Smith submitted his closing argument carefully addressing issues the Honorable Judge raised on Thursday June 8 with particular emphasis on the reasonable foreseeability of harm, the damage that resulted from Mr. Kessler's conduct, rebuttal of numerous statements made by Defense Counsel Wallinger, and polite rebuttal of the Honorable Trial Judge's assertion that John Wing knew nothing about the counseling explaining to the court explaining that the evidence clearly showed that it was John Wing who had initially required Smith to attend counseling with SAVE, Inc. as a condition of employment stating that Smith needed to work on his interpersonal skills and be more of "team player". Approximately 3 months later at approximately 9AM, while Smith was still regularly attending SAVE counseling, Mr. Wing after arriving approximately one hour after Smith called Smith into HR Director Clint Lucas office and with Lucas present stated Smith, a Systems Engineer was being terminated for his attention to "hardware". Smith was offered the opportunity to resign as Lucas stated that "it wouldn't look so bad on your record". Smith declined and was terminated immediately.

Referring to Defense Counsel Wallinger's Questioning of Kessler Pg. 540 line 17 Kessler testified that:

> So when you spoke to Mr. Lucas on that date you just read from your statement which I think you said was in October?
>
> A. 23.
>
> Q. Right. And told him that your continuing EAP goal was on improving Smith's Interpersonal skills, you are not telling him anything that he didn't already know?
>
> A. That is correct.
>
> Q. What you told him in essence was I'm working on the thing that is the same thing that Smith was referred for?
>
> A. That is correct.

ISSUES ON APPEAL

1) **DID THE HONORABLE TRIAL JUDGE, SOLE FINDER OF FACT IN THIS BENCH TRIAL, ERR IN RELYING ON DEFENSE COUNSEL WALLINGER TO DETERMINE FACTS AND LAW AND WRITE THE FINDINGS AND ORDER FOR THE COURT?**

2) **DID THE HONORABLE COURT ERR IN FAILING TO IDENTIFY THE ILLEGALITY EVIDENT IN DEFENDANT KESSLER'S TESTIMONY REGARDING HIS DUTY TO SMITH AS SMITH'S TRUSTED CONFIDANT. *KESSLER: "I WASN'T OBLIGATED TO TELL YOU WHAT IT WAS THAT I WAS GOING TO COMMUNICATE OF MORE THAN WHAT YOU SIGNED."***

3) **DID THE HONORABLE COURT ERR IN FAILING TO IDENTIFY THE ILLEGALITY OF THIRD PARTY KESSLER'S COMPLICITY WITH EMPLOYER DICTATED DIAGNOSIS AND TREATMENT PLAN IN THIRD PARTY CONFIDENTIAL COUNSELING OF SMITH WITHOUT SMITH'S CONSENT?**

4) **DID THE HONORABLE TRIAL JUDGE AND SOLE FINDER OF FACT ERRS IN LIMITING PLAINTIFF'S CROSS EXAMINATION OF JOHN WING EXHIBITING A MATERIALLY BIASED PRECONCEPTION OF THE COUNSELING RELATIONSHIP PRESUMING DEFENDANT KESSLER'S ROLE WAS ONE OF NEUTRAL MEDIATOR NOT TRUSTED CONFIDANT?**

5) **DID THE HONORABLE COURT ERR IN FAILING TO FIND THAT: MR. KESSLER'S INTENTIONAL UNLAWFUL CONDUCT; AFFIRMATION TO SMITH'S HR DIRECTOR CLINT LUCAS OF DIAGNOSIS AND TREATMENT PLAN DICATED BY A MINORITY OF HOSTILE COWORKERS AT SHOWA DENKO; AND CONCEALMENT OF THE SPECIFIC CONTENT OF THE CONVERSATION KESSLER HAD WITH SMITH'S HR DIRECTOR CLINT LUCAS FOR TWO MONTHS OF COUNSELING UNTIL SMITH WAS TERMINATED WAS THE REASONABLY FORESEEABLE PROXIMATE CAUSE OF DAMAGE TO SMITH'S PROFESSIONAL REPUTATION, SMITH'S LOSS OF $72,000 IN ANNUAL INCOME, SMITH'S WRONGFUL TERMINATION, AND SMITH'S INELIGIBILITY FOR REHIRE OR CONTRACT WORK AT SHOWA DENKO?**

ARGUMENT

1) The Honorable Trial Judge and sole finder of fact in this Bench Trial, erred in relying on Defense Counsel Wallinger to determine facts and write the Findings and Order for the Court as Mr. Wallinger intentionally deceived the court regarding material facts and a preposterous contortion of relevant law intended to conform to his client's testimony.

Appellant asserts that the Honorable Trial Judge and sole finder of fact, errs in relying on Defense Counsel Wallinger to determine the factual findings for the court and write the findings/order for the court.

Appellant respectfully asserts that Defense Counsel Wallinger violates his duties of Candor Toward the Tribunal and has made intentional material misrepresentations interfering with the proper functioning of the court aimed at compromising the machinery of the court and materially impaired the court's impartial performance of its legal task.

The record clearly shows that in the "Findings" he authored for the court Mr. Wallinger is intentionally deceptive regarding the existence and purpose of Smith's PLACEMENT REPORT clearly labeled **Profile XT PLACEMENT REPORT Industrial Production Manager** prepared by Thomas Walsh PhD of Grenell Consulting Group which was discussed with Mr. Kessler during counseling. Further, Mr. Wallinger articulates an absurd, unconscionable legal argument citing no legal authority and employing clearly circular reasoning aimed at validating Kessler's assertion that Kessler had neutral, mutual, contractual dual obligations to Showa Denko in counseling Smith which overrode Kessler's inherent fiduciary duties of trustworthiness acting as trusted confidant to Smith and despite the absence of any proof of such contractual obligations or production of documentation of such obligations.

Defense Counsel Wallinger in responding to formal requests to admit, during trial, and in the findings/order he wrote has persisted in perpetrating material false and intentionally misleading statements denying that the document he and Kessler refer to as Profile XT is indeed a PLACEMENT REPORT.

This Placement Report (Plaintiff Exhibit 2 – placement report marked 81, admitted 63) assessed Smith for a management position at Showa Denko and was presented to Kessler during the course of confidential counseling and was part of the SAVE/Kessler file obtained by Wallinger from SAVE, Inc.

Yet Defense Counsel Wallinger in answering Smith's formal Requests to Admit refused to admit that this was a Placement Report stating that the term Placement Report was Vague and Ambiguous. Yet, Kessler during deposition stated that the Placement Report was not Vague or Ambiguous as it was clearly titled Profile XT Placement Report.

The issue of intentional mischaracterization of this PLACEMENT REPORT is material and finds its way into the Order For Entry of Judgement in Favor of Kessler written by Defense Counsel.

In Item 18 of the Order Wallinger writes for the court:

"Smith testified that prior to this termination by Showa Denko, he had hoped to eventually become the IT Manager at the Plant. Beyond this hope Smith offered no evidence that Smith was hired to assume that role or that he was likely to ever be promoted to that position. The court finds that Smith had no employment contract with Showa Denko."

In Item 20 of the Order Wallinger writes for the court:

"Smith offered as exhibit 2 a 'Profile XT' report which had been prepared during his employment with Showa Denko and which Smith maintains demonstrates various behavioral and psychological traits. The author of that report [Thomas Walsh, PhD] did not testify, the methodology and underlying test data is unknown, and the Court finds the report not probative as to proof of liability of Kessler or of any damages alleged by Smith."

Smith maintained throughout that this was, as it is titled a PLACEMENT REPORT! Defense Counsel Wallinger's statement In the written order signed by the Honorable Trial Judge is FALSE, MISLEADING, AND INTENTIONALLY DECEPTIVE.

The issue of the existence of this PLACEMENT REPORT is material to the proceedings as Smith stated to Kessler during counseling that one of the key reasons Smith was Ostracized by two coworkers who also reported to John Wing is that they were aware that Smith was under consideration for a Management position and that Greg Spires felt "passed over" which was his motivations for impugning Smith with John Wing.

Kessler testified under oath as to the content of this PLACEMENT REPORT which Smith brought to counseling but was only briefly discussed during counseling. Kessler indeed knew this was a PLACEMENT REPORT but refused to consider that the findings of Dr. Walsh were favorable. Indeed

contrary to Kessler's assertions in his "Work Product" document submitted to his "Expert Witness" Dr. Walsh found Smith to be "friendly, cooperative, agreeable, to be a team person" whereas Defendant Kessler erroneously stated that the PLACEMENT REPORT showed "many positive traits but also that Smith was rigid and judgmental which he has been of his employer and colleagues".

On Page 544 of Transcript line 3 Kessler testified (referring to Kessler's Work Product marked 81 admitted 62) that:

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

On Page 501 line 24 Smith questioning Kessler:

Q. Can you read -- we reviewed the profile XT test [PLACEMENT REPORT] again together and the next sentence?

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

Q. Right.

A. The profile [Placement Report] suggested inflexibility and inability to accommodate.

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

A. It's a very lengthy document.

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

A. Sure.

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

A. Says tendency to be friendly, cooperative, agreeable, to be a team person.

Q. And then his [Author Thomas Walsh PhD] comments written below the graphical score there?

A. "Mr. Smith shares a high commitment to reducing conflict and establishing cooperation. He is comfortable working as part of a team and with sharing ideas and information. Tracy tends to minimize problems and negative information. He is quick to seek solutions which are acceptable to everyone. He

is highly motivated by an informal, positive and relaxed work environment. Mr. Smith is quick to accommodate others to avoid interpersonal conflicts."

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

A. I believe I admitted to that during deposition.

The Honorable Court of Appeals should recognize Mr. Wallinger's intent to mislead in writing the findings for the court and determining the "probative value" of this PLACEMENT REPORT.

Further, Mr. Wallinger's insistence on refusing to recognize this document as a PLACEMENT REPORT shows his intent to deceive the court.

Further the statement that Smith offered no evidence that he was likely to assume that role given that Smith asserted that he was being considered for a Management Position and that he had received pay raises to $72,000 annually and had been given a prominent private office with a window his intentionally deceptive.

The Court of Appeals should consider that the only reasonable inference is that Mr. Wallinger had considerable input into Kessler's Work Product in Response to Litigation and that this Work Product Document was written in part to disparage Smith while influencing Wallinger's expert witness' testimony without Smith's consent.

Smith questioning Kessler Pg 510 line 19 continued on to Pg. 511:

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

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

Q. Did you write this document?

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

Q. Did anybody else write parts of this document?

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

Mr. Wallinger biased the proceedings and the Sole Finder of Fact by presenting a deceptive and disparaging hearsay document lacking any signature or any other proof of authenticity into evidence in an attempt to deceive and ambush Smith a pro se Plaintiff whose career was destroyed by his client.

Pg. 156 line 17 Wallinger Cross Exam of Smith:

A. Can you repeat what you just said?

Q. All right. Let's just strike and start over. I'm going to hold this and try to stand over here next to you so we can work off one document.

THE COURT: Are you offering that into evidence?

MR. WALLINGER: I will after I get him to --

MR. SMITH: It is not signed by anyone.

THE COURT: It's an unsigned letterfrom somebody else to you? How is it not hearsay?

MR. SMITH: Thank you, Your Honor.

THE COURT: Let me deal with this.

MR. WALLINGER: Parts of this letter are not hearsay under 803 (6).

THE COURT: It's a business record?

MR. WALLINGER: Yes, sir.

THE COURT: It's something that's put in his personnel file? Who is it from and to?

MR. WALLINGER: I will let Your Honor look at it. It is from the director of administrative computer services.

THE COURT: Who is it to?

MR. WALLINGER: It look likes it's a memo file to someone in the college as best I can tell. I want to ask the witness whether the witness agrees with the reason that the witness was terminated from that position.

THE COURT: You can ask him what his reason was. But unless you got somebody here to authenticate that as a business record it's a --

MR. SMITH: It is not signed.

MR. WALLINGER: It's authentic.

Mr. Wallinger, after ambushing Smith with this letter appears to personally attest to it's authenticity. Smith stated to the court that Mr. Wallinger's deceptive conduct and personal attestation of the facts were "Par for the Course".

In contorting the Findings for the court to comply with Kessler's unfounded assertion that he [Kessler] owed a neutral, mutual, contractual dual obligation to Showa Denko during Smith's counseling, Defense Counsel Wallinger articulates an unconscionable statement of Law citing no legal basis producing no contracts and employing Circular Reasoning before the Honorable Trial Judge, the Sole Finder of Fact.

THE COURT ERRS IN DETERMING THAT THE EMPLOYER IS A "CONTRACTUAL, NON-CLINICAL CLIENT OF SAVE IN A [PURPORTED] NEUTRAL DUAL RELATIONSHIP.

Scott Wallinger has gone to great lengths to try to Justify Mr. Kessler's Sworn Testimony that Kessler had neutral, mutual, contractual dual obligations to Employer as part of Smith's counseling despite production of no documentation whatsoever.

On page 580 line 14 of the Official Transcript prepared by Ruth Weese, Defense Counsel Wallinger states:

> "As to the breach of fiduciary duty cause of action, I would argue that there is no fiduciary duty in the context of a counseling relationship with the **patient** and that the standards of care are set by the sources of information that our expert witness has already identified and also because **EAP services *necessarily* are providing services to two parties, the employer and the employee.** It is impossible to have a fiduciary duty because you're dealing with more than one

> person in a fiduciary relationship as such that there is always just the professional and the other."

On Page 2 Paragraph 3, of the ruling written by defense counsel Wallinger and signed by the Honorable Judge Young states:

> "The employee is a clinical client of SAVE. The employer is a **contractual, non-clinical client of SAVE in that dual relationship.**"

Appellant asserts that there was never any disclosure by SAVE or Kessler prior to counseling that the "Employer was a contractual, non-clinical client of SAVE in [a] dual relationship." nor any agreement by Smith to engage is such a relationship. **There is no such language asserting the existence of this purported "dual relationship" on the SAVE EAP EMPLOYEE STATEMENT OF UNDERSTANDING or any other SAVE documents and the services are simply described as an EMPLOYEE BENEFIT PAID FOR BY EMPLOYER in paragraph 2 of the SAVE EAP EMPLOYEE STATEMENT OF UNDERSTANDING.** Authorization contract is labeled as complying with HIPAA and that the Department of Health and Human Services is the governing body.

Furthermore, Mr. Wallinger's **use of the word patient clearly shows that the relationship between Smith and Kessler was a caregiving relationship in which Mr. Kessler acting as mental health provider was the dominant party such that Mr. Kessler assumed implicit fiducial (*fidelis: trustworthy, confidant*) duties and obligations as the caregiver.**

In addition there is no law, evidence, reasonable inference, or agreement by Smith that there services are necessarily provided to two parties. Further, in writing the court's ruling Defense counsel Wallinger's uses the term **"contractual, non-clinical client".** Based simply on this purported lack of written contract, as well as no mention of this purported relationship on any SAVE Documents, this court may wish to draw a reasonable adverse inference as to the existence of this purported **"contractual, non-clinical client"** relationship. Further, this court of appeal should consider that Mr. Wallinger is indeed contorting or concocting a fiction in order to conform to Kessler's testimony that this was a neutral, mutual, dual obligation and to absolve Kessler of liability for making damaging statements to Smith's HR Director.

The United States Supreme Court states in Jafee V. Redmond that "Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust

in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. "

"Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment."

"By protecting confidential communications between a psychotherapist and her patient from involuntary disclosure, the proposed privilege thus serves important private interests."

"Like the spousal and attorney-client privileges, the psychotherapist-patient privilege is "rooted in the imperative need for confidence and trust." Ibid. Treatment by a physician for physical ailments can often proceed successfully on the basis of a physical examination, objective information supplied by the patient, and the results of diagnostic tests. Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. "

"The reasons for recognizing a privilege for treatment by psychiatrists and psychologists apply with equal force to treatment by a clinical social worker such as Karen Beyer.[15] Today, social workers provide a significant amount of mental health treatment. See, e. g., U. S. Dept. of Health and Human Services, Center for Mental Health Services, Mental Health, United States, 1994, pp. 85-87, 107-114; Brief for National Association of Social Workers et al. as Amici Curiae 5-7 (citing authorities). Their clients often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist, id., at 6-7 (citing authorities), but whose counseling sessions serve the same public goals.[16] Perhaps in recognition of these circumstances, the vast majority of States explicitly extend a testimonial privilege to licensed social workers.[17] We therefore agree with the Court of Appeals that [d]rawing a distinction between the counseling provided by costly psychotherapists and the counseling provided by more readily accessible social workers serves no discernible public purpose." 51 F. 3d, at 1358, n. 19."

DEFENSE COUNSEL WALLINGER INTENTIONALLY FALSELY AND CLEARLY CONTRARY TO THE EVIDENCE STATES IN THE FINDING THAT DEFENDANT FULLY EXPLAINED THE PURPORTED EMPLOYEE ASSISTANCE COUNSELING CONCEPT PRIOR TO EMPLOYER MANDATED COUNSELING OF SMITH.

On Page 15 of the Court's Ruling, Mr. Wallinger states:

> "As previously outlined, **Defendant fully explained the employee assistance counseling concept to Plaintiff prior to beginning counseling** and obtained written consent for Defendant and SAVE to periodically communicate with Plaintiff's employer and disclose certain information, such as dates of sessions, compliance, progress, and recommendations."

Mr. Wallinger's false statement is directly contradicted by his client's sworn deposition where Defendant stated "as I had attempted to explain it *at our last session*". Beginning on Page 6 line 19 of Kessler's deposition taken on April 25, 2017:

> Q. So you do have an obligation to the employer as well as to the employee?
>
> A. It's a mutual obligation, correct.
>
> Q. Can you explain that a little bit better, a little bit more?
>
> A. Okay, **I think, as I had attempted to explain it at our last session,** the purpose behind employee assistance is for the benefit of the employee .....

Further corroborating evidence that Mr. Kessler did not explain the employee assistance counseling concept (or existence of dual obligations/conflict of interest) prior to December 18, 2012 is found in Mr. Kessler's "Confidential Work Product in Response To Litigation" which was provided to Mr. Kessler's "expert" witness and then to Plaintiff Smith through discovery.

On Page 4, 2nd paragraph of Mr. Kessler's "Confidential Work Product in Response to Litigation" Mr. Kessler States:

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

From Transcript Smith Questioning Kessler Pg 509 line 24 continuing on to 510 :

Q. I am sorry. I am just trying to be thorough. I don't mean to -- on page 4 on the

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

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

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

Q. Is it documented anywhere else in this document?

A. I don't believe so.

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

A. It appears so, yes. That was December 18th which was the last session.

Appellant asserts that the above excerpts are compelling evidence that Defendant Kessler did not explain the purported employee assistance counseling concept, or the purported "dual obligations", purported neutrality, and concealed conflicts of interest to Smith prior to beginning counseling and only disclosed the true nature of the relationship and conflicts of interest during the last session on

December 18, 2012 after plaintiff had already been terminated and in the presence of Smith's mother who Smith brought to witness the discussion. Further, this undisclosed "dual obligation", is a clear conflict of interest, leading to breach of contractual and fiducial duties; deceptive, unfair, oppressive trade practice; and tortious interference with business relations and potential business relations and was not explained to Patient Smith prior to counseling or prior to Mr. Kessler's conversation with Smith's HR Director on October 23, 2012 (which Kessler concealed throughout counseling) which severely disadvantaged and damaged Smith and damaged Smith's professional reputation costing him his professional reputation and job which paid $72,000 per year and further resulted in Plaintiff being ineligible for rehire or contract work with Showa Denko.

APPELLANT FURTHER ASSERTS THAT THERE IS NO LEGAL BASIS FOR THIS PURPORTED "NEUTRALITY" BY MR. KESSLER.

Mr. Kessler described Showa Denko as a Long Time client in documents submitted to the court. Appellant again asserts that Showa Denko was Mr. Kessler's illegal *"Client in Fact"* to whom he was allegiant or aligned with even to the detriment of Smith to whom he owed fiducial duties as a trusted confidant and counselor.

2) THE COURT ERRED IN FAILING TO IDENTIFY THE ILLEGALITY EVIDENT IN DEFENDANT KESSLER'S TESTIMONY REGARDING HIS DUTY TO SMITH AS SMITH'S TRUSTED CONFIDANT.

KESSLER TESTIFIED: "I WASN'T OBLIGATED TO TELL YOU WHAT IT WAS THAT I WAS GOING TO COMMUNICATE OF MORE THAN WHAT YOU SIGNED." When responding to Smith's question regarding Kessler's undisputed concealment of damaging information shared with Kessler by Showa Denko personnel director Clint Lucas for nearly two months of counseling.

> Q. You did not inform me of any communication with Clint Lucas; is that correct?
>
> A. It is right here. That is what was communicated. **I wasn't obligated to tell you what it was that I was going to communicate of more than what you signed.**

But in Sworn testimony Sarah Gainey owner of SAVE, Inc. who contracted with Kessler stated:

> Pg. 209 line 15 Smith Cross Exam of Sarah Gainey

Q. So do you really know what the word --it is a legal term of art, you are right.
Would it be proper to disclose damaging personal information
to an employer even if the employee had signed that
release?
A. No, it would not be.

Further, when asked whether Provider Kessler thought that Patient Smith assumed this was a health care setting, Mr. Kessler stated:

"I do not know what you assumed or did not assume."

This sworn statement made under oath in open court shows clearly that there was never a meeting of the minds and that Mr. Kessler did not obtain consent from Patient Smith. Appellant asserts that Kessler intended to mislead Smith as to the nature of the relationship and the nature of the relationship and his overriding allegiance to Showa Denko who Kessler described as a "Long Time Client".

MR. KESSLER NEVER OBTAINED CONSENT DUE TO DECEPTIVE MISREPRESENTATION OF SERVICES AND INADEQUATE DISCLOSURE OF MR. KESSLER'S CONFLICTS OF INTEREST AND UNDISCLOSED ALLEGIANCE TO SHOWA DENKO.

Further referring to pg. 570 line 20 of transcript of JONATHAN KESSLER-REDIRECT EXAMINATION BY MR. SMITH

Q. And did you believe I could trust – do you believe I can trust you?

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

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

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

This statement is clear, convincing evidence indicative of Mr. Kessler's trustworthiness and that **Mr. Kessler did not fulfill his obligations to fully inform Smith his patient before disclosing what**

confidence is to be used and how it is to be used as required by SC CODE OF LAWS TITLE 19, CHAPTER 11, SECTION 19-11-95.

Appellant cites excerpts from SOUTH CAROLINA CODE OF LAWS TITLE 19, CHAPTER 11, SECTION 19-11-95:

> (3) "Confidence" is a private communication between a patient and a provider or information given to a provider in the patient provider relationship.
>
> (B) Except when permitted or required by statutory or other law, a provider knowingly may not:
>
> (1) reveal a confidence of his patient;
>
> (2) use a confidence of his patient to the disadvantage of the patient;
>
> (3) use a confidence of his patient for the advantage of himself or of a third person, unless the patient gives written authorization **after disclosure to him of what confidence is to be used and how it is to be used.**

Referring to paragraph 1 On page 3 of Mr. Kessler's Confidential Work Product in Response to Litigation, regarding Mr Kessler's conversation with Clint Lucas on October 23, 2012, Mr. Kessler states:

> "Lucas indicated that Smith still was not forming constructive relationships at Employer, Smith was offending people, Smith was talking down to supervisors and co-workers, and Smith was trying to change their system. I indicated to Lucas my continuing EAP goal of improving Smith's interpersonal skills. We discussed nothing that went beyond that, **nothing that went beyond the proper scope of such an EAP plan** and/or any employer feedback, and we discussed **nothing outside the categories of and limitations on information Smith had authorized me and SAVE to disclose to Employer."**

Appellant directs the court to review the SAVE, INC. EMPLOYEE ASSISTANCE PROGRAM AUTHORIZATION FOR THE RELEASE OF PROTECTED HEALTH INFORMATION and note that the category of **Treatment Planning is clearly not checked.** Even if the tribunal found the disputed HIPAA Release/Authorization valid, clearly the category for discussion for purposes of the "Treatment Planning" was clearly not authorized by Smith.

On Page 4 or the Courts Ruling, Defense Attorney Wallinger writes for the court:

> "At the outset of Plaintiff's course of interaction with Defendant, Defendant explained his role, the process, and obtained new written consent for Defendant and SAVE to periodically communicate with Plaintiff's employer and disclose certain information, such as dates of sessions, compliance, progress, and recommendations. (Def. Exhibit 6, Bates page 28). Such disclosures are a common part of employee assistance counseling, **since the employer is also a client of SAVE.** Plaintiff was given ample opportunity to review the written consent documentation. The Court finds that Plaintiff had the ability to understand and did understand the various documents and disclosures he read and signed willingly and voluntarily, and that there was no deception or malfeasance on the part of Defendant or SAVE in that regard. **The Court finds that Plaintiff was a clinical client of Defendant and SAVE and that Showa Denko Carbon, Inc. was a non-clinical client of SAVE within the context of employer-referred counseling services."**

There is no such language asserting the existence of this purported "dual relationship" on the SAVE EAP EMPLOYEE STATEMENT OF UNDERSTANDING or any other SAVE documents.

SAVE services are simply described as an employee benefit paid for by employer in paragraph 2 of the SAVE EAP EMPLOYEE STATEMENT OF UNDERSTANDING.

3) THE COURT ERRED IN FAILING TO IDENTIFY THE ILLEGALITY OF KESSLER'S COMPLICITY WITH EMPLOYER DICTATED DIAGNOSIS AND TREATMENT PLAN IN THIRD PARTY CONFIDENTIAL COUNSELING OF SMITH WITHOUT SMITH'S CONSENT

This court should carefully consider that the trial court erred in finding it legal for a third party counselor to follow a diagnosis and treatment plan dictated by an employer in a third party behavioral healthcare clinic without the adult patient's consent. Emanating from this is whether it is legal for the Employer to be informed whether or not the counselor is following this specific Treatment Plan; and whether it is legal for the licensed social worker to withhold material disclosures made by Employer to the Employee/Patient during a course of counseling sessions. While EAP programs are typically in house referral programs, in this case SAVE, Inc. is a distinct corporation from Employer Showa Denko and Jonathon Kessler was a subcontracted counselor with SAVE who represented himself as a qualified employee assistance professional to Smith.

The U.S. Supreme Court in Jaffee v. Redmond states that privacy and confidentiality are essential in a counseling relationship as in other trusted privileged relationships to encourage full disclosure(including fears and frailties) without fear that damaging information would be shared outside the counseling relationship and that communications are "privileged" in such a relationship, and that this privilege extends not only to doctors of psychiatry but also to Social Workers. As guidance, Oleszko v. State compensation Insurance funds in the 9th circuit holds EAPs subject to the same laws governing confidentiality and privilege using similar reasoning applicable to protecting trusted confidences used by the US Supreme Court.

Despite Mr. Wallinger's assertion in writing for the court on page 11 2nd paragraph that:

> "...the matter of employee assistance counselling is not within the ambit of common knowledge'"

Appellant asserts that Mr. Kessler's intentionally deceptive conduct and failure to maintain Trusted Confidences is easily understood by any competent Juror. Fundamental duties owed of a Trusted Confidant to act with Good Will and Deal Fairly and not damage the party who has put trust in the counselor is clearly within the ambit of common knowledge of any juror without any special training. Further, Federal HIPAA regulations cited to the lower court clearly state in plain language that a valid authorization requires that the information to be disclosed outside counseling must be described in a **"specific and meaningful fashion".** SC CODE OF LAWS TITLE 19, CHAPTER 11, SECTION 19-11-95 similarly defines the meaning of a "confidence" and requires that any written authorization is only valid after disclosure to him (the patient) of what **specific confidence** is to be used and how it is to be used.

Mr. Kessler, in the document provided to his "Expert Witness" stated that in addition to sharing false and damaging information while reinforcing a diagnosis (dictated by employer but disputed by Smith) to Showa Denko HR Manager Clint Lucas and that Mr. Kessler had obtained additional complaints and derogatory hearsay from Clint Lucas which was concealed from Smith by Kessler. The agreement with SAVE and Mr. Kessler are clearly silent regarding Mr. Kessler's purported right to conceal information he obtained from Showa Denko who Kessler described as "long-time client" from Mr. Smith. And it is unconscionable that Mr. Kessler would not disclose the existence or the substance of the conversation he had with Clint Lucas for over 2 months of counseling. Smith only learned of this conversation through discovery more than a year after being abruptly terminated without notice and subsequently denied eligibility for unemployment insurance and rehire or contract work based on false statements by Showa Denko Personnel which Mr. Kessler was made aware of during counseling of Mr. Smith but concealed from Mr. Smith during two months of counseling.

The issues in this case involve Mr. Kessler's intentional deception, intentional misrepresentation, and, in layman's terms, knowing participation in an **illegal bait and switch** scheme easily recognized and understood by any unbiased trier of fact. While all the SAVE literature and documents contains the word Health, HIPAA, Behavioral Healthcare, for the benefit of the employee and makes no mention of purported "dual obligations" to "non-clinical clients", Analysis of the evidence and indeed the ruling itself written by Defense Counsel Scott Wallinger clearly shows that Defendant Kessler attempts in open court to represent to the court that he is not a healthcare provider working in a healthcare setting and therefore does not owe fundamental fiducial and legal duties of loyalty, good faith, fair dealing, to act solely in the patient's best interest with the patient's informed consent.

Mr. Kessler admits to the conflict of interest (inherent in the so-called neutral dual relationship) on page 4 of his Confidential Work Product In Response to Litigation when he states that on December 18, 2012, after Smith was terminated that:

> "I explained that EAP is neutral and my goal is to promote employer/employee satisfaction and productivity."

Appellant reiterates that this goal of promoting employer satisfaction is never described in SAVE literature and that Mr. Kessler masqueraded as a trusted counselor to Smith while simply taking orders and trafficking in hearsay from Showa Denko. Further, as stated elsewhere in this document, Kessler never even disclosed the statements and false perceptions of Clint Lucas to Smith over nearly two months of counseling.

Appellant asserts that the use of this term "client" to refer to the recipient of diagnosis and care is intentionally misleading and that the correct term is "patient". Appellant asserts that Mr. Wallinger deceptively uses the term "client" in efforts to evade the relevant applicable Healthcare law by attempting to establish that Mr. Kessler was not a trusted healthcare "provider" in order to evade the legal duties such a provider owes his patient.

Clearly an unbiased finder of fact should infer that Mr. Kessler is trying to avoid stating that this is a health care setting, avoid admitting that he is the provider, avoid admitting that Smith is a patient and that as provider he is the dominant party in a caregiving relationship with fundamental duties and obligations emanating from his role as the dominant party in the caregiving relationship with his patient. This testimony clearly shows that Mr. Kessler is simply trying to shirk his legal fiducial duties and responsibility to Smith.

Kessler admits to discussing and confirming the Diagnosis and Treatment Plan Dictated by Showa Denko to Clint Lucas on October 23, 2012.

Referring to Defense Counsel Wallinger's Questioning of Kessler Pg. 540 line 17

> So when you spoke to Mr. Lucas on that date you just read from your statement which I think you said was in October?
>
> A. 23.
>
> Q. Right. And told him that your continuing EAP goal was on improving Smith's interpersonal skills, you are not telling him anything that he didn't already know?

A. That is correct.

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

A. That is correct.

Appellant again asserts that the evidence shows Smith never consented or agreed that interpersonal skills were the cause of his problems at Showa Denko and that the statement:

"you [Kessler] are not telling him [Lucas HR Director] anything that he didn't already know"

Proves Kessler was simply repeating and indeed trafficking in false damaging hearsay with Clint Lucas. And:

"What you told him in essence was I'm working on the thing that is the same thing that Smith was referred for?"

is clear proof that Kessler obediently followed the Showa Denko dictated the diagnosis and Treatment Plan without Smith's (the patient's) consent.

Furthermore, Kessler should have conveyed to Lucas (after discussion and obtaining Smith's informed consent) that Smith believed he was being targeted and ostracized by coworkers as Smith had repeatedly shown Mr. Kessler the emails which clearly showed this targeting and that the reason for this targeting is that Smith had succeeded where they had not and was being considered for a Management Position as evidenced by the Profile XT Industrial Production Manager Placement Report shown to Mr. Kessler. Smith would have authorized this specific and meaningful information be shared but clearly never authorized the Treatment Plan Kessler insisted on or authorized Kessler to disclose a Treatment Plan or confirm the treatment plan to Mr. Lucas as dictated to Kessler by Showa Denko.

In layman's terms, the above testimony shows that Kessler "toed the company line", a line that started with hearsay allegations by a malicious coworker of Smith. Mr. Kessler, who was not a coworker or employee of Showa Denko simply piled on, asked Smith not to bring emails or other documents to sessions and refused to consider the information in these emails and written documents that clearly show the root cause of the personnel problems and hostile work environment Smith was subjected to as a condition of employment.

4) THE HONORABLE TRIAL JUDGE AND SOLE FINDER OF FACT ERRS IN LIMITING PLAINTIFF'S CROSS EXAMINATION OF JOHN WING RELYING ON A MATERIALLY BIASED MISCONCEPTION OF THE COUNSELING RELATIONSHIP PRESUMING DEFENDANT KESSLER'S ROLE WAS ONE OF NEUTRAL MEDIATOR NOT TRUSTED CONFIDANT

THE TRANSCRIPT SHOWS, THE HONORABLE TRIAL JUDGE INTERVENED IN SMITH'S QUESTIONING OF JOHN WING SMITH'S FORMER SUPERVISOR STATING:

"I GUESS IT'S YOUR THEORY THAT THEY [THE COUNSELOR] CAN TALK TO THEM [EMPLOYER] IF IT HELPS ME [PATIENT RECEIVING COUNSELING], BUT NOT IF IT HURTS ME." AND THEN SUBSEQUENTLY STATING: "YOU CAN'T HAVE IT BOTH WAYS."

Appellant respectfully asserts that this exchange during Smith's cross examination of John Wing shows the Honorable Judge held a fundamentally biased misconception as to the legal role of a trusted counselor and purpose of counseling, presumed that the counselor was acting as some type of neutral mediator, and prejudged the relevance of Smith's cross examination of Wing relying on this misconception. Further, this misconception is articulately "tangled" by Defense counsel Wallinger in erroneous statements of law and circular reasoning articulated in oral argument as the basis for Findings and the Order.

Appellant asserts that even if there were some legal contractual obligation to employer as Defense claims, there would be no presumption that Kessler would be neutral or have any right to disclose anything that would damage Smith the patient. Sarah Gainey clearly states this in her testimony while also stating that there aren't any written agreement between SAVE, Kessler, or Employer Showa Denko described by Kessler as a "long-time client".

Indeed, contrary to the Honorable Judge's assertion, in confiding to a supposedly "trusted confidant" during counseling Smith had every right to expect that nothing damaging would be disclosed to any third party.

US Supreme Court Jaffee v. Redmond : "rooted in the imperative need for confidence and trust.":

> **Like the spousal and attorney-client privileges, the psychotherapist-patient privilege is "rooted in the imperative need for confidence and trust." Ibid. Treatment by a physician for physical ailments can often proceed successfully on the basis of a physical examination,**

objective information supplied by the patient, and the results of diagnostic tests. Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.

Appellant quotes the court (Honorable Trial Judge) from transcript from Pg. 344 line 13:

SMITH-- I know you're impatient with me. I apologize.

THE COURT: I am -- you keep wandering off how you were not justified and you weren't treated right. I get that. I would possibly feel that way. Listen. And that's part of your problem. I am trying to explain something so you don't go wandering off all over the place. This gentleman is who you sued and that's why we are in court today. Now, I have told you one thing that you need to try to prove and if you have got something get it out of him on that.

Now, if you want to allege that he had some other duty, that is, to mediate the dispute and pass that on, there is a problem that you have with your theory. And that is you're saying they have a confidential relationship with me and are not supposed to talk to my employer**. I guess it's your theory that they can talk to them if it helps me, but not if it hurts me. I mean I don't –** if they are not supposed to talk -- he's not supposed to talk with them and doesn't matter whether or not he was -- knew all the details of what your disputes were with your other employees. I am just saying that's an issue.

You can't have it both ways.

Appellant asserts that careful reading of the above portion of the transcript:

Pg. 345 beginning line 5:

"—if they are not supposed to talk -- he's not supposed to talk with them and doesn't matter whether or not he was -- knew all the details of what your disputes were with your other employees."

shows the Honorable Judge failed to recognize that Kessler had a duty not to confirm a Treatment Plan or damaging diagnosis to Showa Denko without Mr. Smith's informed consent to disclosure of that

specific diagnosis and consent as to the diagnosis itself (root cause of personnel problems/disputes). HIPAA and SC State Law require *specific and meaningful description of the information to be shared in order to obtain Patients consent to disclose to third parties.* The net effect was that Kessler confirmed a false diagnosis dictated by John Wing and Plan of Treatment dictated by John Wing back to Clint Lucas HR Director damaging Smith's reputation with Lucas without Smith's informed consent and indeed concealed that he had done this for nearly two additional months of counseling. **(Note that Smith asserts the entire authorization is invalid due to Kessler's deception but regardless Kessler did not check the box for Treatment/Planning on the purportedly HIPAA compliant release and the release is silent as to any right to conceal the existence of this discussion or specific disclosures made to HR Director Lucas).**

And, respectfully, the court erred using the following rationale in limiting Smith's cross examination of Wing.

> **[it] "doesn't matter whether or not he was -- knew all the details of what your disputes were with your other employees."**

Appellant respectfully asserts that the Honorable Judge is in err as Smith needed to show in proving his case that Mr. Wing's (instigator of counseling as well as Smith's termination) statements that Smith was "trying to change their systems" relayed by Lucas (HR Director) to Kessler without Smith's knowledge were false and to disprove the Sole finder of fact's assertion that "messing with hardware" is what got you fired. **The only reasonable inference from the preponderance of the evidence is that Warren Sneed and Greg Spires recruited John Wing in their efforts to see Smith ousted from Showa Denko after Smith had received favorable scores on the Profile XT PLACEMENT REPORT and as Smith's technical success, made him a threat (on the merits of his work) to their jobs despite no ill will by Smith was ever directed towards them.**

The evidence is clear that Witness John Wing instigated both the counseling mandate as well as instigated the wrongful termination of Smith both based on reports from Warren Sneed and Greg Spires. The evidence also shows that Wing dictated through written documents to SAVE and through Clint Lucas a purported diagnosis (root cause) of Smith's interpersonal skills being lacking and a

Treatment Plan. Despite these facts clearly evident in written evidence singed by Wing, the Honorable Trial Judge determined:

Yet citing page Pg 348 line 7 the court:

> "This witness has a limited purpose here. Try to get out of it what you want and then we will come back and finish Thursday. Okay? "

Respectfully, Appellant suggests most politely that the appeals court should also consider that the hour was getting late that Tuesday afternoon that Wing was the 3rd witness called by Defense, that the Honorable Trial Judge had a funeral to attend on Wednesday, and that the court did not want to trouble Mr. Wing by requiring him to return for a second day of testimony and that this may have influenced the Honorable Judges decisions and statements regarding the relevance of Smith's line of questioning during Smith's Cross Exam of John Wing who ultimately succeeded in seeing Smith banished from Showa Denko .

Indeed Honorable Judge Young relied heavily on Wing's testimony and affidavit near the close of trial on Thursday June 8 stating:

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

It is clear that it was John Wing who instigated both actions acting on behalf of Warren Sneed and Greg Spires who targeted Smith beginning in Septermber 2011 (shown by the emails Smith attempted to share in detail with Kessler and the court) shortly after Smith had met with Thomas Walsh Phd. Who had begun assessment of Smith for a management position as evidenced by the **"Profile XT – PLACEMENT REPORT – Industrial Production Manager (Preliminary) "**

Pg. 587
So let's just say he, Mr. Kessler, owed you a fiduciary duty. And he told Mr. Lucas when he shouldn't have told Mr. Lucas something. That's not what caused you to get fired. You messing with

the hardware is what caused you to get fired. It wasn't even your interpersonal skills according to Mr. -- what was his name?

MR. SMITH: Mr. Wing for the record.

THE COURT: The guy that fired you.

MR. WALLINGER: Wing.

The court may wish to consider the above statements by the Honorable Judge Young in light of the Honorable Judge's comments regarding Smith's attempts to Question Wing on specifics related to Wing's assertions that, as the Honorable Judge put it was "messing with hardware". Appellant respectfully asserts that the record clearly shows the court's partiality and deference to Employer [Mr. Wing] and Defendant.

Appellant respectfully asserts that the Honorable Judge Young asked what (to layperson Smith) appear to be leading questions of Wing during Smith's Cross Examination that are intended to bolster defendant's claim that it was not Kessler's damaging disclosures to HR Director Lucas and concealment of the October 23rd conversation which resulted in the reasonably foreseeable outcome of Lucas' withdrawing support for Smith which was unknown to Smith (who thought he was doing what was needed by religiously attending SAVE) . This communication by Kessler and concealment of Lucas Statements left Smith defenseless to the constant drumbeat (which as the emails show lasted for over a year ever since Smith's Profile XT PLACEMENT REPORT) of complaints from Warren Sneed and Greg Spires relayed to Wing who relayed them to Lucas who relayed them to Kessler who concealed this information from Smith for two months until Smith was terminated.

Wing Pg. 378 line 20.

Pg. 378 line 20

BY THE COURT:

Q. Mr. Wing, let me ask you a question. You are the guy that fired Mr. Smith?

A. Yes, sir.

Q. And why did you fire him?

A. He did not listen to a direct order

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that I had for him to not engage in hardware research.

Q. Did you ever talk to Mr. Kessler about Mr. Smith?

A. No, sir.

Q. Did any of this stuff that came up before he got referred to counseling have anything to do with why you fired him?

A. No, sir. I don't know anything about Mr. Kessler or --

MR. SMITH: I was sent to SAVE based on his signature on the form based on what Warren Sneed said about exactly what I am describing about my work, reported to Mr. Wing the discussion between Bob Park. Mr. Park did not report me. Bob had some heated discussions. We actually got along fairly well, but Mr. Sneed's report to Greg Spires then reported to you who then referred me to SAVE and that's how I got to Jonathon Kessler based on all of what you're saying right here right now which most of is simply character assassination.

THE COURT: I am just -- he's the guy that fired you. He has said all of this stuff that you are talking about with these e-mails and your disputes has nothing to do with why you got fired.

Appellant respectfully asserts this is simply not a reasonable inference on the part of the sole finder of fact in this case as Wing, the witness on the stand was the person who mandated counseling as a condition of employment in the first place for reasons other than "messing with hardware" and that the reasons Wing cites are based on false reports from Warren Sneed and Greg Spires. It was late Tuesday afternoon(the day before the funeral the Honorable Trial Judge was to attend) and it is understandable that the court may have faced personal time constraints which contributed to impatience with Smith's questioning of John Wing.

By questioning Wing Smith was trying to establish that Wing knew that Smith was a Systems Engineer with responsibilities for Hardware and Software essential to the shipping process; tried to establish that it was Greg Spires along with Warren Sneed who reported the alleged altercation with Bob Park; and then again Warren Sneed who made the similar baseless complaints regarding Smith's purported "messing with hardware" and that they had targeted Smith because Smith's success (where they had not succeeded) threatened their standing and jobs at Showa Denko. Further, the evidence is clear that Mr. Park never reported Smith for any alleged wrongdoing. Mr. Spires (who was aligned with Wing) was the ring leader in targeting and ostracizing Smith (because Smith succeeded with the Shipping process and Customer Data Sheets where Spires had not) Spires reported hearsay he had apparently received from Mr. Sneed to Mr. Wing. Mr. Wing reported it to Clint Lucas. Mr. Wing insisted in writing that Smith attend SAVE as condition of further employment with Clint Lucas present. Mr. Kessler refused to

consider Smith's rendition of these facts and the hostile work environment Smith was subjected to as a condition of employment. Mr. Kessler reinforced the false diagnosis (root cause) of the long-standing personnel problems to Clint Lucas while concealing additional complaints about Smith's involvement in Systems (systems include both hardware and software) that Kessler had received from Lucas in October 23, 2012. **Smith was blindsided by a wrongful termination purportedly for cause without notice in December 18, 2012 while still being counseled by Kessler.**

Pg. 380 [the court]You got fired because you basically ignored a direct order that he gave you.

Appellant asserts this again is simply repeating Wing's false allegation and is not a reasonable inference considering all the evidence and the Honorable Judge Young's intervention and directives to Smith prevented Smith from showing that Wing's affidavit and statements were not credible to the finder of fact (the Honorable Judge Young) as to why Wing had instigated counseling and then instigated Smith's termination.

The evidence shows Smith was a IT Systems Engineer dealing with hardware and software throughout his employment with keys to the secure server room and with responsibility for ensuring accurate performance and safety data was transmitted to customers through the Customer Data Sheet process necessitated maintenance of hardware which Smith implemented (with the approval of Greg Ruffing Smith's previous supervisor) and software (which Smith largely personally wrote).

THE COURT: We are eliciting why this fellow says he fired you. He's saying it's got nothing to do with all that other stuff. So I know you dispute that.

MR. SMITH: I do, Your Honor.

THE COURT: Well, you have asked him several different ways and it's improper to just badger him by continuing to ask him different things. And so I have got to cut you off. I have given you a lot of leeway because you are not a lawyer. **But you can't just keep asking somebody**

the same question over and over and over again.

MR. SMITH: Your Honor, I believe when we review the transcript I am not doing that.

Probably sounds that way because of what we're --this is tedious work. I believe when we review the transcript you will see there is a reason for asking every question that I have asked.

THE COURT: It might be, but this is the man who says he fired you and this stuff with

Mr. Kessler he is saying has nothing to do with why he fired you.

THE COURT: Go ahead.

BY MR. SMITH:

Q. So when you took tenure Warren complained about a server in my office in your words, right?

A. That's correct.

Q. But when Greg Ruffing was there it wasn't a problem with what I describe and accurately so as a test box in my office. So it changed when you became my team manager?

A. I don't know what you and Greg Ruffing had discussed.

Q. But suddenly -- it wasn't a problem while Greg Ruffing was manager, but once you were manager it became a problem?

A. It was brought to my attention by the person that was responsible for the security of the network.

Q. So was he responsible for a development system like that, system that I -- because I deployed for example, a SQL server -- **in your opinion as IT manager do you want to do development work on production systems?**

A. No.

Q. Why not?

A. Because if there's anything wrong with what you are developing it creates a problem for the data or the system that is running.

Q. Right. So if I were developing lots of reports and different processes and wanted to run them in parallel to be sure they worked before actually deploying them in an operational system, it would make sense to have a test box in my office; would you agree with that?

A. Yes.

Appellant asserts that Mr. Wing's sworn affidavit is vindictive and full of blatantly false statements and slanted half truths, that Wing's testimony is not true or credible and that the reason for Smith's termination had nothing to do with alleged "messing with hardware" **a false hearsay allegation originating with Warren Sneed the same person who originated the purported altercation with Mr. Park.** In similar fashion to Smith's hostile coworkers, Kessler jumped on board, "toed the company line" and affirmed the false diagnosis and treatment plan dictated by John Wing affirmed Smith's lack of interpersonal skills as the reason for the hostilities in Showa Denko's IT department in unauthorized communication with Smith's HR Director. Kessler was indeed complicit in trafficking of damaging

falsehoods while complicit in following an Employer dictated diagnosis and Treatment Plan without Smith's consent. Given sufficient time and reasonable latitude to question Wing, Smith would have been able to show to the Honorable Judge and sole finder of fact that after Wing instigated the mandated counseling at SAVE and Smith dutifully complied, Wing and his crony's, determined to oust Smith, fabricated another false set of accusations relayed through Wing to Lucas. Kessler simple "toed the company line" took orders from Showa Denko and simply affirmed the hearsay without regard for his legal duties to Smith as Smith's Trusted Confidant causing great damage to Smith's professional relationship with HR Director Lucas and Showa Denko and hardship to Smith.

5) **THE COURT ERRS IN FAILING TO FIND THAT MR. KESSLER'S INTENTIONAL UNLAWFUL CONDUCT, CONFIRMATION OF DIAGNOSIS AND TREATMENT PLAN DICATED BY A MINORITY OF HOSTILE COWORKERS AT SHOWA DENKO, AND CONCEALMENT OF THE SPECIFIC CONTENT OF THE CONVERSATION KESSLER HAD WITH SMITH'S HR DIRECTOR CLINT LUCAS WAS THE REASONABLY FORESEEABLE PROXIMATE CAUSE OF DAMAGE TO SMITH PROFESSIONAL REPUTATION, SMITH'S LOSS OF INCOME OF 72,000 ANNUALLY, SMITH'S TERMINATION AND INELIBILITY FOR REHIRE**

On page 12 2nd paragraph the court ruling written by Defense Counsel Wallinger states:

> "Again, Smith fails to show that such actions by Kessler were the proximate cause of why he was fired by Showa Denko."

Proximate Cause and Reasonable Foreseeability

Smith addressed Proximate cause as instructed by the Honorably Judge asserting that under the modern framework as articulated in the Third Restatement of Torts, the concept of "foreseeability," in one formulation or another, is the cornerstone of Proximate Cause. It is Plaintiff's understanding that the responsibility of an actor for the consequences of wrongful action is indeed limited by principles of reasonable "foreseeability." This outer boundary of tortious responsibility seeks to prevent actors from being held liable for consequences that fall outside the scope of their wrongdoing, beyond their moral accountability. The idea here is that responsibility for consequences should be based on the quality of an actor's choices that led to the consequences. The moral fiber of such choices is gauged by consequences the actor should have contemplated as plausible eventualities at the time the choice was made. If some other, "unforeseeable," consequence eventuates from a chosen action, the fact that it lies outside the bundle of consequences the actor reasonably should have contemplated means that it probably did not inform the actor's deliberations and choice. There thus is no substantial moral

connection between a person's actions and their consequences that are unforeseeable. So, in evaluating the moral quality of an actor's choice, only foreseeable consequences of the choice may fairly be considered.

While the court has correctly stated that "It wasn't even your interpersonal skills according to Mr. – what was his name?" (referring to transcript Pg. 95 Lines 4-6) that led to Plaintiff's firing and loss of professional reputation, Plaintiff asserts that this is precisely Plaintiff's point. Mr. Kessler's admitted insistence on focusing on treatment for "Interpersonal Skills" (as again dictated by Clint Lucas on October 23rd) while stubbornly defending bad acts of long time client Showa Denko and refusing to take an adequate history of the Hostilities Plaintiff dealt with on a daily basis from Plaintiff resulted in the reasonably foreseeable risk of Plaintiff being terminated and his professional reputation destroyed by personnel at Showa Denko who acted in bad faith to ostracize Plaintiff and thwart Plaintiff's efforts for their own petty personal gain. Furthermore, the deliberate concealment of the conversation with Clint Lucas over nearly two months indicates a far more sinister motivation rising to the level of criminality on the part of Mr. Kessler. This criminality arises from extent of the blatant conflict of interest Mr. Kessler failed to disclose and the flow of funding from Showa Denko that influenced Mr. Kessler to take direction from this longtime client and ignore the repeated pleas for help from Plaintiff to whom he owed duties of loyalty, trustworthiness, and to act in Good Faith in the best interest of Plaintiff in a counseling relationship.

Duty: Plaintiff asserts that the conduct of Mr. Kessler acting in the Scope and Capacity of an Employee Assistance Professional in a trusted, confidential counseling relationship with plaintiff discussing sensitive issues regarding his career and livelihood owed a duty to first do no harm, to seek assistance or other professionals in other disciplines if his skills were not sufficient to address Plaintiff's situation, to not share trusted confidences, and to provide a description of the information to be used or disclosed that identifies the information in a specific and meaningful fashion to Plaintiff in obtaining informed consent. These duties are clearly specified in the EAP Bill of Rights as well as in HIPAA regulations and are also fundamental elements of the Hippocratic ***Oath as well as common sense duties of any Trusted Confidant.***

Indeed had Plaintiff been informed of the conversation with Clint Lucas he would have taken appropriate legal steps to SAVE his job and his professional reputation.

THE COURT ERRS IN FINDING MR. KESSLER'S UNDISPUTED CONCEALMENT OF THE EXISTENCE AND SUBSTANCE OF THE CONVERSATION WITH CLINT LUCAS WHICH OCCURRED ON OCTOBER 23, 2012 FOR NEARLY 2 MONTHS OF COUNSELING DID NOT RESULT IN A BREACH OF TRUST AND BREACH OF FIDUCIARY DUTY, TORTIOUS INTERFERENCE WITH JOB PROSPECTS AND VIOLATION OF THE SC UNFAIR TRADE PRACTICES ACT

IT IS UNDISPUTED THAT MR. KESSLER CONCEALED THE EXISTENCE AND SUBSTANCE OF THE CONVERSATION WITH CLINT LUCAS WHICH OCCURRED ON OCTOBER 23, 2012 FOR NEARLY 2 MONTHS OF COUNSELING.

Appellant Smith only found out about this discussion through discovery and production of Mr. Kessler's document entitled "Confidential Work Product In Response to Litigation". Further, there is no written agreement or contract term stating that Mr. Kessler had any right to conceal statements made to Kessler by Smith's employer.

Referring to transcript pg.571 line 8:

> Q. You did not inform me of any communication with Clint Lucas; is that correct?
>
> A. It is right here. That is what was communicated. **I wasn't obligated to tell you what it was that I was going to communicate of more than what you signed.**

This statement is clear, convincing evidence that **Mr. Kessler did not fulfill his obligations to fully inform Smith his patient before disclosing what confidence is to be used and how it is to be used as required by SC CODE OF LAWS TITLE 19, CHAPTER 11, SECTION 19-11-95** which reads in part:

> (3) "Confidence" is a private communication between a patient and a provider or information given to a provider in the patient provider relationship.
>
> (B) Except when permitted or required by statutory or other law, a provider knowingly may not:
>
> (1) reveal a confidence of his patient;
>
> (2) use a confidence of his patient to the disadvantage of the patient;
>
> (3) use a confidence of his patient for the advantage of himself or of a third person, unless the patient gives written authorization **after disclosure to him of what confidence is to be used and how it is to be used.**

Further Plaintiff Smith introduced at trial (and included in written argument) over the objection of Defense Counsel that Mr. Kessler has indeed violated Federal HIPAA laws specified in 45 CFR Section 164.508 (c)(1) published by Department of Health and Human Services pg. 755 which reads:

> Citing 45 CFR Section 164.508 (c)(1):
>
> [A valid authorization under this section includes:]
>
> *(i) A description of the information to be used or disclosed that identifies the information in a **specific and meaningful fashion**.*

The record shows that Kessler Clearly was informed by Lucas that Smith's supervisor was complaining that Smith was "trying to change their system" but Kessler never told Smith of this conversation as Kessler acted on the illegal premise that : "I WASN'T OBLIGATED TO TELL YOU WHAT IT WAS THAT I WAS GOING TO COMMUNICATE OF MORE THAN WHAT YOU SIGNED."

Referring to transcript Pg. 539 beginning line 18

> At some point that day I spoke with
> Clint Lucas, the human resources director at
> employer. Smith submitted -- Lucas indicated that
> Smith was still not forming constructive
> relationships at employer. Smith was offending
> people. **Smith was talking down to supervisors and coworkers and SMITH WAS TRYING TO CHANGE THEIR SYSTEM.**

Page 548 line 11 – Question by Wallinger

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

A. I did not have knowledge of that.

Kessler's statement is false and misleading. Clearly Clint Lucas had conveyed complaints to Mr. Kessler including that "Smith was trying to change their (Showa Denko's) Systems" . Smith, a Systems Engineer asserts that his assigned duties included maintenance of hardware/software Systems. **Yet it is undisputed that Mr. Kessler concealed this information or even the existence of this conversation with Mr. Smith even though Smith attended sessions for almost two more months until he was terminated without notice for reasons Kessler was made aware of on October 23, 2012: "Trying to Change Their Systems".** Further, Kessler has testified that this was the last conversation he had with Mr. Lucas even though Smith religiously attended counseling sessions over a two month period after Lucas made these statements to Kessler. Smith had assumed that Kessler was reporting attendance to Wing as this was a mandate term of Smith's employment. In testimony Kessler stated he had "no obligation" to report dates of attendance.

Clearly Kessler was aware that these statements relayed by Lucas were complaints or disparaging to Smith's work but Kessler never informed Smith of the existence of this conversation or the substance of Clint Lucas' remarks. Smith did not speak to Lucas frequently. During September, October, November, December up to the date Smith was wrongly terminated, Smith spoke to Kessler about work more than any one single individual at work. There is no agreement or other legal authority allowing Mr. Kessler to conceal information shared by his "long-time" *client-in-fact* Showa Denko from Smith his patient.

Argument Summary

The Facts and Established Law Clearly, Convincingly Contradict the Ruling written by Defense Counsel Scott Wallinger and endorsed by the Honorable Judge Young.

Mr. Kessler's sworn testimony shows that he was aware of false derogatory complaints supervisor (John Wing by reasonable inference – Smith's only supervisor) shared by Clint Lucas to Mr. Kessler on October 23, 2012 that Smith was "trying to change Showa Denko Systems". It is undisputed that he concealed the existence of this conversation for nearly two months of counseling. Just as in counseling with Smith, during Smith's questioning Kessler was evasive, deceptive, belligerent, and non-responsive as to his role as trusted confidant in a behavioral healthcare setting while stating that his only duty to Smith was limited to checkboxes (which differed with those of the release Smith signed with Gainey and could be

easily altered) on the boilerplate release which Kessler himself filled out. **(Regardless, Kessler did not check the box for disclosure of Treatment/Planning to employer and there is no verbiage that would give Kessler the right to conceal information shared by employer with Smith).**

Defense witness Sarah Gainey vehemently defended Kessler while embellishing false hearsay in an effort to sway the finder of fact. **Yet even Sarah Gainey admitted that Kessler should not have disclosed damaging information to Smith's employer during the counseling even if Smith had signed a purported HIPAA compliant release.**

Defense witness Kravilosky's testimony showed he clearly did not know the meaning of informed consent which is the HIPAA standard, medical standard, and indeed listed on the SAVE intake forms nor fiduciary duty even though he had stated in his expert affidavit that there was "absolutely no evidence of breach of fiduciary duty."

Defense witness John Wing offered his Sworn affidavit citing numerous purported altercations involving Smith. Yet Smith's cross examination, prior to the Honorable Trial Judge intervening in questioning, began to show the many falsities in Wing's sworn statement including the fact that **Wing's statement that Smith had an unauthorized DELL Server in his office was utterly false (the root of the false hearsay "messing with hardware");** that Smith did work well with others; that Warren Sneed had pitched a fit in front of Mr. Wing and Mr. Smith in September 2012; that Bob Park never complained about Smith's conduct; and that Smith did do good work for the company.
Smith was limited and hindered by the Honorable Trial Judge from detailed questioning of Wing about his assertions and about Greg Spires, Warren Sneed's conduct, performance, and motivations for spreading hearsay of an alleged altercation with Bob Park (and which Bob, who was recently retired from the NAVY and frequently cursed, did not report) . Smith was prevented from questioning Wing on the long standing problems with IT performance which existed prior to Smith being hired by Clint Lucas as an IT Systems Engineer which were clear in the emails the Honorable Trial Judge admitted in evidence and which Smith had attempted to Share and discuss at length with Mr. Kessler during counseling. Mr. Kessler's work product document states that Kessler asked Smith not to bring in such documentation.

Appellant Smith respectfully asserts herein that the Honorable Trial Judge, the sole finder of fact, erred by intervening in Smith's questioning stating that Wing was there to testify for a "Limited Purpose"; that there was no reason for Smith to question the validity of assertions in Wing's sworn statement; that

Smith was badgering the witness; that Wing fired Systems Engineer Smith for "messing with hardware"; and that:

> **"Mr. Kessler and your getting counseling had nothing to do with your getting fired and he [Wing]didn't even know anything about it [mandated counseling]."**

Appellant asserts that the record is clear that it was Mr. Wing who instigated mandatory counseling and indeed signed the initial agreement mandating counseling as a condition of employment.

Appellant further asserts that the record is clear that Wing was Smith's only supervisor during the 3 months of counseling and that the complaint's from "supervisor(s)" relayed to Kessler by Clint Lucas (and concealed from Smith) could have only come from Wing. Had the Honorable Trial Judge not erred in presumed the "Limited Role" of Witness Wing and prevented Smith from questioning Wing about the assertions in Wing's lengthy sworn affidavit, it would have been abundantly clear to any unbiased finder of fact that Wing instigated the counseling on false pretense as part of a concerted effort to oust Smith (who had succeeded in pleasing company personnel with his ability to quickly solve problems Showa Denko IT personnel had wrestled with for years) from the company and that Wing ultimately succeed due to Mr. Kessler's damaging disclosures (affirmation of Employer dictated diagnosis and treatment) to Clint Lucas and Mr. Kessler's concealment of the false complaints Lucas (HR Director) shared with Mr. Kessler on October 23, 2012, which Kessler stated was the last conversation Kessler had with Mr. Lucas prior to Smith's termination on December 18, 2012 which was also the last date Smith was counseled by Kessler after being dismissed without notice.

The Facts Presented the Lower Court clearly shows Mr. Kessler engaged in a pattern of deception, routinely breached fiduciary duties, was intentionally evasive as to his conduct and professional status, that this conduct was the deciding factor in Clint Lucas Head of HR withdrawing support for Smith **resulting in Smith's termination without notice (for reasons Kessler was aware of but concealed from Smith)** and that such continued conduct puts the general public and their careers at considerable risk.

Kessler allowed Showa Denko to dictate the diagnosis, confirmed the damaging diagnosis back to Showa Denko HR Manager Clint Lucas despite Smith's disagreement with and documentation that did not support the diagnosis, concealed damaging information Lucas Shared with Kessler from Smith over two months of counseling and acted under a false premise that he owed a neutral, mutual, dual obligation to

Showa Denko, Inc. while rendering behavioral health care to Smith only disclosed at the final counseling session.

While Sarah Gainey the owner of SAVE who contracted with Mr. Kessler to render services to Smith and provided the boilerplate release forms Mr. Kessler filled out for his Patient's signature testified under oath (prior to Kessler's testimony with Kessler in the courtroom) that a counselor should not disclose damaging information to an employer even if employee had signed the release, Mr. Kessler, a music major, licensed independent social worker, and a part time therapist when questioned about communications with Clint Lucas, Mr. Kessler stated defiantly in sworn testimony :

Pg. 571 line 8 Smith cross exam of Kessler

> **"I wasn't obligated to tell you what it was that I was going to communicate of more than what you signed."**

Mr. Kessler's damaging disclosures, concealment from Mr. Smith of damaging statements relayed to Mr. Kessler by Clint Lucas (who had hired Smith for Showa Denko at a pay rate of 72,000 annually) over two months of counseling until Smith was terminated, and refusal to review documentation Smith presented that clearly showed the origin of personnel problems at Showa Denko were clearly the deciding factor in Smith's wrongful termination from his position as Systems Engineer, loss of 72,000 in annual salary, loss of professional reputation, and loss of eligibility to be rehired in the future by Showa Denko as an employee or contractor. Clearly Mr. Kessler should have reasonably foreseen that: his affirmation of a disparaging Wing dictated diagnosis (poor interpersonal skills); along with his (Kessler's) concealment of the conversation of October 23,2012 where Lucas relayed further derogatory complaints ("Trying to Change Their Systems") were very likely to cause damage to Smith. Smith, hard at work at 9AM December 18,2012 , was blindsided by false allegations regarding hardware systems and terminated without notice.

The Law is Clear. The United States Supreme Court in Jaffee v. Redmond finds that Social Workers offering counseling are held to the same level of patient privilege and confidentiality as psychiatrists and other mental health providers. HIPAA law is clear and likewise State Law is clear that any valid authorization of the release of information must include **specific and meaningful** description of the information to be released.

The United States Supreme Court in Jaffee v. Redmond states that mental health professionals are held to a high standard as "Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears.... the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment."

The Honorable Lower Court Errs on Material Matters of relevant Law, and determination of Fact in this opinion written by Scott Wallinger. The Honorable Lower Court erred on relying on Defense Counsel Wallinger to write the opinion for the court and endorsing this opinion. The Honorable Lower Court errs in relying on Mr. Wallinger's assertion that "there is no fiduciary duty in the context of a counseling relationship."

The Honorable Lower Court errs in relying on Mr. Wallinger's unfounded, legally unsubstantiated assertion that "EAP services necessarily are providing services to two parties, the employer and the employee". **The SAVE EAP EMPLOYEE STATEMENT OF UNDERSTANDING CLEARLY STATES:**

"These services are paid by your employer and offered to you as an employee benefit." making no mention of a neutral, mutual, contractual dual obligation to employer.

The Honorable Lower Court errs in relying on Mr. Wallinger's **Circular Reasoning: there is no fiducial duty to disclose a potential conflict of interest arising from a dual counseling relationship because it is impossible to have a fiducial duty because of the dual counseling relationship.**

On page 580 beginning at line 14 Mr. Wallinger articulates to the court his personal theory citing no legal authority that:

> "As to the breach of fiduciary duty cause of action, I would argue that there is no fiduciary duty in the context of a counseling relationship with the patient and that the standards of care are set by the sources of information that our expert witness has already identified and also because EAP services necessarily are providing services to two parties, the employer and the employee. It is impossible to have a fiduciary duty because you're dealing with more than one person in a fiduciary relationship as such that there is **always just the professional and the other.**"

As a member of the "other" referenced above, Appellant pro se Smith asserts respectfully that: Honorable Lower Court errs by failing in recognizing the fundamental duty to "first do no harm"

inherent in a "trust relationship". This err is shown in the Honorable Judges comment that a patient in confidential counseling "can't have it both ways" apparently indicating the Honorable Judges erroneous belief that the counselor had the right to disclose damaging information to patient's employer. This purported right to disclose damaging information is clearly refuted by Ms. Gainey who contracted with Mr. Kessler to render confidential counseling services to Smith.

The Honorable Lower Court errs in inferring that John Wing didn't know anything about the counseling when the facts clearly show it was Mr. Wing who mandated the counseling as a part of Smith's employment agreement in the first place. The Honorable Lower Court erred in determining that "messing with hardware is what got you fired" as there is clear evidence that Mr. Smith was a Systems Engineer responsible for hardware and software and despite **Mr. Wing's admission during cross examination that the statements is his affidavit regarding the alleged Dell Server in Smith's office were false, that the machine in question was indeed an authorized test system used to test software and reports and had been authorized by Smith's previous IT Manager Gregg Ruffing** and before Wing became the Interim IT Manager and despite the fact that Smith had also been asked to research sound monitoring systems (hardware and software) by Wing himself.

The Honorable Lower Court erred in diverting and sidetracking Pro Se Plaintiff's questioning of John Wing intended to show to the court the hostilities Smith was subjected to as a condition of employment which ultimately led to his termination which Mr Kessler refused to reasonably determine due to his unfounded allegiance to Showa Denko who he described as a long time client. Had plaintiff been given reasonable amount of time and had the Honorable Judge not intervened it would have been clear to any unbiased triers of fact the clear and decisive role Mr. Kessler played in Smith's termination. **Specifically, in conversation with Clint Lucas the head of HR Kessler reinforced Mr. Lucas' inaccurate perceptions regarding the reason Smith had been mandated to attend SAVE and concealed, derogatory, damaging hearsay and complaints shared by Clint Lucas to Kessler on October 23, 2012 preventing Smith the opportunity to deal appropriately with innacurate statements relayed by Clint Lucas and SAVE his own Job.**

The damage and injury to Smith by Kessler was clearly reasonably foreseeable given Kessler's role as a Trusted Confidant offering Confidential Counseling provided as an EmploYEE Benefit to Smith at SAVE clinic as Kessler operated under the premise clearly articulated in Sworn Testimony that: "I WASN'T OBLIGATED TO TELL YOU WHAT IT WAS THAT I WAS GOING TO COMMUNICATE OF MORE THAN WHAT YOU SIGNED." Kessler's complicity in following an EmploYER Dictated Diagnosis and Plan of Treatment ;

Kessler's discussion with Smith's HR Director Lucas on October 23, 2012; and Kessler's concealment of the discussion and substance of the discussion for nearly two months of counseling at the SAVE clinic clearly created a reasonably foreseeable risk to Smith's Career, Professional Reputation and Job Prospects and clearly proximately caused damage to Smith. Furthermore, it is clearly reasonably foreseeable that the potential for repeated damage to other members of the public and other South Carolina workers is inevitable from similar conduct.

The type of damage to Smith was clearly reasonably foreseeable; Damage to Smith's Career and Business Opportunities as well as Professional Reputation with Showa Denko HR Director Lucas and others was clearly reasonably foreseeable given Kessler's false, damaging, unauthorized disclosures and concealment of these disclosures and other substantive matters he discussed with HR Director Lucas.

The manner of harm to Smith was clearly reasonably foreseeable; that HR Director Lucas would withdraw support for Smith (and thus Smith would be terminated) as Kessler wrongfully and without authorization affirmed to HR Director Lucas the diagnosis and Treatment Plan dictated by a minority of Showa Denko personnel (who Lucas described in emails shown to Kessler during sessions as Hostile towards Smith and his good work).

The extent of the damage to Smith was clearly reasonably foreseeable; that Kessler's affirmation to HR Director Lucas of a diagnosis and Treatment Plan dictated by a small minority of Hostile Showa Denko personnel, and Concealment of this conversation for nearly two months until Smith was terminated (for cause alleged by John Wing) would cause grave damage to Smith's Professional Reputation as well as loss of his job where he earned 72,000 dollars annually and was being assessed for a Management Position.

Defense Counsel Wallinger, in determining and writing the Order for the Court, contorts the Law to conform to his Client's testimony and clearly fails to address or acknowledge the clear reasonable foreseeability and proximate causaton of damage to Smith resulting from his Client's unlawful conduct. **No authorization was given by Smith to discuss the Treatment Plan; no authorization was given by Smith to conceal conversations Kessler had with Showa Denko HR Director Clint Lucas; and it is unconscionable to conclude that Kessler's unlawful conduct did not proximately cause damage to Smith and his career prospects. Further, referring to Defense Counsel Wallinger's statements in the Order regarding the SC Unfair Trade Practices Act, it is unconscionable to conclude that Kessler's**

conduct and view of his legal obligations does not put other SC workers and members of the general public at significant risk of similar damage.

For all the reasons stated herein, Appellant respectfully asserts that the Honorable Trial Judge, the sole finder of fact in this case, erred in relying on Defense Counsel to determine the findings and write the order and further erred in endorsing the Findings and Order written by Defense Counsel Wallinger.

Conclusion

The Facts and Law are clear

The facts are clear that Mr. Kessler was deceptive from the outset as to his role and acted under the presumption that "I wasn't obligated to tell you what it was that I was going to communicate of more than what you signed" and shirked his inherent obligations as the dominant party in a purportedly HIPAA compliant provider/patient relationship.

Defense Counsel who wrote the opinion for the court clearly misconstrues the counseling relationship as some type of neutral mediation where Showa Denko is owed disclosure of Smith's compliance with dictated diagnosis and treatment simply because it funded this confidential "employee benefit". Smith as well as any member of the Public has the right to rely on EAP sponsored behavioral counseling as offering confidential diagnosis, informed consent on treatment protocols, and that provider **duties to patient are matters of law and public policy – not mere handshakes and provider customs** . The evidence and testimony and indeed the verbiage of the Court's ruling (written by Defense Counsel Scott Wallinger) clearly show **a pattern of evasion and intentional deception by Defendant discernable by any unbiased, reasonable finder of fact.**

Yet the Court's ruling (written by Defense Counsel Scott Wallinger) never uses the word Healthcare and concocts **this fiction of a neutral, mutual, dual obligation as a necessity of the Employer's sponsorship and funding of the EAP employee benefit** . Mr. Kessler only admits that this was a healthcare setting after repeated requests from Smith for a truthful response stating: "It could be defined as that I'm sure." **The court should consider the evasion and misdirection Defendant Kessler exhibited in sworn testimony, just as he had in counseling Smith.**

No less than the **US Supreme Court** in Jafee v. Redmond states what most of society already knows to be true, that **counseling even by a Social Worker is inherently "rooted in the imperative need for confidence and trust."**

Reasonable citizens already know human decency, good will, and fair dealing, inherent in a trusted counseling relationship are as essential to counseling as they are essential to the maintenance of a civil society.

HIPAA regulations and State regulations make it clear that a **confidence can only be disclosed after "specific and meaningful" description** of what confidence is to be shared and how it is to be used. Ms. Gainey clearly stated that regardless of any signed release (which in this case clearly omits any authorization for disclosure of Treatment/Planning), damaging information should not be shared by the counselor.

Specific Relief Sought

Appellant respectfully asks this court to reverse the lower court's ruling and find that Kessler Tortiously Interfered with business and prospective business relations by discussing Treatment Plan with Smith's HR Director while concealing the substance of such conversations which according to Kessler included additional complaints from Smith over two months of counseling.

Furthermore, the evidence and indeed Mr. Kessler's sworn testimony clearly show that Mr. Kessler engaged in unfair, deceptive, oppressive, damaging acts in the conduct of trade or commerce and that this conduct had the reasonably foreseeable outcome of damaging Smith's Career and indeed did damage Smith's career, professional reputation, and prospects for future work with Showa Denko who Kessler described as a long time client. While all the literature presented by SAVEEAP and Mr. Kessler refer to their confidential mental and behavioral health care services offered as an employee benefit, Mr. Kessler's sworn testimony clearly shows his attempts at evasion in admitting violation of the legal responsibilities inherent when engaging in services as a Trusted Confidant. His conduct is a menace to the public and a danger to many workers' careers in South Carolina.

For all the reasons stated herein and reasonable inferences based on the facts, Appellant respectfully requests this court:

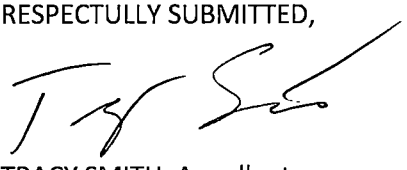
to reverse the ruling of the lower court in whole or in part and to award Appellant an amount for damages equal to 6 months of the salary lost: $36,000 lost as a result of Defendant's damaging, unfair,

dishonest, intentionally deceptive, unjust, intentional misrepresentations of material facts regarding his duties, professional capacity, and obligations to Appellant Smith.

Appellant also asks this Court of Appeals to find that Defendant violated the SC Unfair Trade Practices Act and award Appellant an additional amount of $108,000 as allowed by the SC UTPA.

In the alternative, Appellant asks this Court of Appeals to set-aside the Findings and Order resulting from this Bench Trial and grant Smith a new trial so that Findings can be determined by a Jury of Smith's peers.

RESPECTULLY SUBMITTED,



TRACY SMITH, Appellant *pro se*

318 233 8572

LEGAL SOURCE AND EXCERPTS

HIPAA law specified in 45 CFR Section 164.508 (c)(1) published by Department of Health and Human Services pg. 755:

Citing 45 CFR Section 164.508 (c)(1):

[A valid authorization under this section includes:]

*(i) A description of the information to be used or disclosed that identifies the information in a **specific and meaningful fashion.***

SC CODE OF LAWS TITLE 19, CHAPTER 11, SECTION 19-11-95:

(3) "Confidence" is a private communication between a patient and a provider or information given to a provider in the patient provider relationship.

(B) Except when permitted or required by statutory or other law, a provider knowingly may not:

(1) reveal a confidence of his patient;

(2) use a confidence of his patient to the disadvantage of the patient;

(3) use a confidence of his patient for the advantage of himself or of a third person, unless the patient gives written authorization **after disclosure to him of what confidence is to be used and how it is to be used.**

JAFFEE, special administrator for ALLEN, DECEASED v. REDMOND et al.
No. 95-266.

United States Supreme Court.

Argued February 26, 1996.

Decided June 13, 1996.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Like the spousal and attorney-client privileges, the psychotherapist-patient privilege is "rooted in the imperative need for confidence and trust." Ibid. Treatment by a physician for physical ailments can often proceed successfully on the basis of a physical examination, objective information supplied by the patient, and the results of diagnostic tests. Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during

counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.[9] As the Judicial Conference Advisory Committee observed in 1972 when it recommended that Congress recognize a psychotherapist privilege as part of the Proposed Federal Rules of Evidence, a psychiatrist's ability to help her patients

"`is completely dependent upon [the patients'] willingness and ability to talk freely. This makes it difficult if not impossible for [a psychiatrist] to function without being able to assure . . . patients of confidentiality and, indeed, privileged communication.

SARD v. Hardy, 367 A. 2d 525 - Md:Court of Special Appeals 1976

"Many forms of conduct permissible in a workday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the `disintegrating erosion' of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd."

"In a fiducial relationship, one of the parties is justifiably dependent to some extent upon the other. Consequently, the dominant party has certain duties and obligations toward the other and is responsible for protecting the other's interests. Included among those duties and obligations is a duty to disclose any information which it is important for the other party to know.[13] The dependent party is not obligated to inform himself and is entitled to rely upon the dominant party to provide him with the information he 246*246 needs.[14] Accordingly, the dependent party's failure to inform himself does not constitute negligence and such a party is not precluded from showing a lack of knowledge of the contents, nature and consequences of a signed document. In short, where there is a fiducial relationship between the parties, the presumption of knowledge of the contents of a written document does not apply....."

"....A physician occupies a position of trust and confidence as regards his patient — a fiduciary position. It is his duty to act with the utmost good faith. This duty of the physician flows from the relationship with his patient and is fixed by law — not by the contract of employment. The law's exaction of good faith extends to all dealings between the physician and the patient. A person in ill health is more subject

to the domination and influence of another than is a person of sound body and mind. The physician has unusual opportunity to influence his patient. Hence, all transactions between physician and patient are closely scrutinized by the courts which must be assured of the fairness of those dealings. (Citations omitted.)" SARD v. Hardy, 367 A. 2d 525 - Md:Court of Special Appeals 1976

Oksana Oleszko, Plaintiff-Appellant,v. State Compensation Insurance Fund, David Howard, and Dora Cooke, Defendants-Appellees.
No. 99-15207.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted October 4, 2000.

Filed March 20, 2001.

"EAPs work to address serious national problems, from substance abuse and depression to workplace and domestic violence. Given the importance of the public and private interests EAPs serve, the necessity of confidentiality in order for EAPs to function effectively, and the importance of protecting this gateway to mental health treatment by licensed psychiatrists, psychologists, and social workers, we hold that the psychotherapist-patient privilege recognized in *Jaffee v. Redmond* extends to communications with EAP personnel."

US v. Shaffer Equipment Co., 11 F. 3d 450 - Court of Appeals, 4th Circuit

"Even the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process. As soon as the process falters in that respect, the people are then justified in abandoning support for the system in favor of one where honesty is preeminent."

PROOF OF SERVICE

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Honorable Roger M. Young, Circuit Court Judge

Tracy Smith V. Jonathon Kessler

Circuit Court Civil Action Number: 2015-CP-10-6820

Appellate Case No. 2017-001766

Tracy Smith, ...Appellant pro se

v.

Jonathon Kessler .....Respondent

Represented by Scott Wallinger
1330 Lady Street, Sixth Floor
Columbia, SC 29201

Proof of Service

I certify that I have served Appellant's initial brief on Jonathon Kessler by depositing a copy of it in the US Mail, postage prepaid on December 9, 2017 addressed to his attorney of record Scott Wallinger, 1330 Lady Street, Sixth FloorColumbia, SC 29201.

Tracy Smith, Pro Se Appellant
c/o 4351 Park Island Road
Hollywood, SC 29449
318 233 8572

Tracy Smith
c/o 4351 Park Island Road
Hollywood, SC 29449

December 8, 2017

V. Claire Allen
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Tracy Smith v. Jonathon Kessler Appellate Case No. 2017-001766

Dear Ms. Allen,

Please find the enclosed INITIAL BRIEF OF APPELLANT and PROOF OF SERVICE.

Respectfully,

Tracy Smith

cc: R. Scott Wallinger, Jr. Esquire

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envelope shipping

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