THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger Young, Circuit Court Judge
Ninth Judicial Circuit

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Appellate Case No. 2017-001766

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Tracy Smith,.....Appellant,

v.

Jonathon Kessler.....Respondent.

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# INITIAL BRIEF OF RESPONDENT

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R. SCOTT WALLINGER, JR.
swallinger@collinsandlacy.com
AMY L. NEUSCHAFER
aneuschafer@collinsandlacy.com
Collins & Lacy, PC
Post Office Box 12487
Columbia, SC 29211
(803) 256-2660 (voice)
(803) 771-4484 (fax)

ATTORNEYS FOR RESPONDENT

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## STATEMENT OF ISSUES ON APPEAL

I. Did the circuit court properly find Appellant's claims are barred by S.C. Code Ann. §19-11-95?

II. Is the circuit court's finding that Respondent was not a proximate cause of Appellant's termination reasonably supported by the evidence?

III. Are the circuit court's findings that Appellant failed to prove the elements of each cause of action reasonably supported by the evidence?

## STATEMENT OF THE CASE

The instant case appeal arises out of the circuit court's entry of judgment in favor of Respondent Jonathon Kessler ("Kessler") in connection with the non-jury trial of the claims asserted by Appellant Tracy Smith ("Smith").

On December 17, 2015, Smith commenced this *pro se* action against Kessler, his employee assistance counselor. (Complaint). The Complaint purported to allege causes of action for breach of contract, professional negligence, and breach of fiduciary duty. At trial, Smith was granted leave to amend to allege causes of action for tortious interference with business relations, tortious interference with contract, and violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"). (Order dated August 10, 2017; Tr. p. 12, lines 3-24, p. 27, lines 18-24, p. 348, lines 4-6, p. 577, lines 2-10). On May 31, 2017, Smith filed a Motion for Jury Trial after the case was placed on the non-jury trial roster for the week of June 5, 2017. (Motion for Jury Trial). On June 2, 2017, Smith filed a Motion to Compel production of documents from a non-party witness, Sarah Gainey. (Motion to Compel).

A bench trial was held before the Honorable Roger M. Young, Sr. on June 5-8, 2017. The Circuit Court denied Smith's Motion for Jury Trial and Motion to Compel. (Tr. p. 27, lines 17-18; p. 573, line 16-p. 576, line 2). At trial on June 5, Smith also filed a Motion in Limine regarding Kessler's expert, which was likewise denied.[1] (Motion in Limine; Tr. p. 226, line 15-p. 231, line 4). At the close of Smith's case, Judge Young heard argument on Kessler's motion for involuntary

[1] Smith's Notice of Appeal (entitled "Notice of Civil Appeal to Cure in 30 Days") references his Motion for Jury Trial, Motion to Compel, and Motion in Limine. However, his brief contains no arguments on these rulings. Accordingly, these issues have been abandoned. See Rule 208(b)(1)(D), SCACR; Jinks v. Richland County, 355 S.C. 341 n. 3, 585 S.E.2d 281 n. 3 (2003) (an issue which is not argued in the brief is deemed abandoned and precludes consideration on appeal); Charleston Lumber Co. v. Miller Hous. Corp., 338 S.C. 171, 525 S.E.2d 869 (2000) (an unappealed ruling, right or wrong, is the law of the case).

dismissal pursuant to Rule 41(b), SCRCP. Judge Young then allowed the parties the opportunity to submit proposed orders to further set forth their positions regarding Kessler's motion and the merits of the case. (Tr. p. 589, line 16-p. 591, line 21). By Order entered August 10, 2017, the circuit court entered judgement in favor of Kessler, granting Kessler's motion for involuntary dismissal and further finding that Smith had failed to prove each of his claims by a preponderance of the evidence. (Order dated August 10, 2017).

This appeal follows.

## STATEMENT OF FACTS

Smith, a college graduate, has worked in various information technology positions over the course of the past twenty (20) years. In 2010, Smith began working for Showa Denko Carbon, Inc. ("Showa Denko"), a Dorchester County manufacturer, in the company's information technology department. It is undisputed that Smith was an at-will employee. (Tr. p. 152, line 5-p. 153, line 8; Def. Ex. 1). Showa Denko's management experienced significant difficulties with Smith's workplace behavior and performance, including hostility towards co-workers, use of profanity, and an expressed interest in having Showa Denka make various changes in its information technology and plant operations that were deemed not necessary or desirable by co-workers and management. (Tr. p. 321, line 10-p. 330, line 21). Ultimately, Showa Denka concluded Smith needed to improve his interpersonal skills and interactions with other employees. To that end, on or about September 4, 2012, Smith was referred to SAVE, Inc. ("SAVE") for employee assistance counseling as a condition of his continued employment. (Tr. p. 195, line 14-p. 196, line 12).

SAVE provided certain professional and counseling services, referred to as "employee assistance counseling" or "employee assistance programs" or "EAP" to employees referred by their Charleston-area employers. Employee assistance counseling differs from other clinical counseling services. Employee assistance counseling generally involves an employer referring its employee for short-term counseling regarding matters and difficulties the employee is having within the employment setting. (Tr. p. 186, line 5-p. 188, line 3; p. 215, lines 19-23; Def. Ex. 6; p 9). A dual relationship exists between the employee, the employer, and SAVE—the employee is a clinical client of SAVE and the employer is a contractual, non-clinical client of SAVE. (Tr. p. 204, line 24-p. 205, line 1; p. 225, lines 2-19; p. 401, lines 4-7). The goal of employee assistance

assistance counseling is to resolve issues identified by the employer, the employee, and SAVE for the mutual benefit of the employee and the employer. (Tr. p. 189, lines 1-12). SAVE periodically verbally reports to the employer, within the confines of the consent given by the employee, on the employee's counseling attendance and sometimes on the progress of the counseling sessions. (Tr. p. 201, line 2-5, p. 206, line 10-p. 208, line 209; p. 212, line 18-p. 213, line 22).

Sarah Gainey, LPC, is the owner of SAVE and a Certified Employee Assistance Professional ("CEAP"). Gainey explained that the CEAP certification recognizes a specialized skillset related to interactions with organizations, industries, and municipalities in order to develop employee assistance programs. (Tr. p. 182, lines 5-20). Smith completed various intake paperwork and had two counseling sessions with Gainey. (Tr. p. 162, lines 5-12). Gainey decided the client-counselor relationship was not going well, and she assigned Kessler, a counselor for SAVE whom she supervised administratively, to take over counseling of Smith.

Kessler began providing employee assistance counseling to Smith on September 25, 2012. (Tr. p. 535, lines 5-6; Pl. Ex. 1). Kessler has been a Licensed Independent Social Worker with a clinical practice designation since 2003. He has worked full-time for the Veterans Administration Hospital in Charleston for twenty (20) years. Kessler has also worked part-time for SAVE since 2004. (Tr. p. 522, line 7-p. 524, line 17). He has provided employee assistance counseling to hundreds of individuals at SAVE during the course of his employment. He has never had a professional complaint or suit filed against him. (Tr. p. 525, lines 10-22). Kessler is not a CEAP, meaning he has not opted to attain the voluntary certification from the Employee Assistance Professionals Association. (Tr. p. 528, line 21-p. 529, line 6). As explained by

At the outset of Smith's counseling sessions with Kessler, Kessler explained his role and the counseling process. Kessler also obtained new written consent for Kessler and SAVE to periodically communicate with Smith's employer and disclose certain information to Showa Denko's human resources manager, Clint Lucas, including the dates of sessions, compliance, progress, and recommendations. (Tr. p. 529, line 13-p. 531, line 8; Def. Ex. 6, p. 28). Smith also executed the SAVE Employee Statement of Understanding, which outlines the services provided by SAVE, how EAP works, and the applicable confidentiality rules. (Tr. p. 531, line 19-p. 532, line 13; Def. Ex. 6, pp. 30-31). Kessler reviewed these documents with Smith and there was no question in Kessler's mind that Smith understood and agreed to the information contained in the documentation. (Tr. p. 532, line 14-p. 533, line 9).

Kessler conducted employee assistance counseling sessions with Smith on September 25, October 9, October 23, November 13, December 4, and December 18, 2012. Kessler notified Clint Lucas of Showa Denko that Smith had attended the first two counseling sessions. (Tr. p. 556, lines 8-22). After the conclusion of the October 23 session, Kessler notified Clint Lucas only that Smith was continuing to work on his interpersonal communication skills—the very issue for which Smith had been referred to SAVE. (Tr. p. 432, line 21-p. 435, line 25; p. 538, line 24-p. 541, line 9; Pl. Ex. 1, p. 3). Kessler testified his communications with Showa Denko were squarely within the confines of the written consent form executed by Smith and he never divulged any unauthorized information to Showa Denko[2] (Tr. p. 541, line 21-p. 544, line 2; Pl. Ex. 1, p. 3).

[2] For instance, Kessler testified that in the sessions up to that point, Smith had resisted engaging in aspects of counseling discussions and strategies which Kessler felt necessary and appropriate to assist Smith. According to Kessler, rather than engage in constructive counseling strategies, Smith seemed focused on convincing Kessler that he was correct in his disputes with his co-workers. (Tr. p. 391, line 23-p. 393, line 10; p. 446, line 9-p. 449, line 20).

Kessler testified he had no further contact with Showa Denko after the October 23, 2012 counseling session. However, unbeknownst to Kessler, Smith was engaging in unauthorized workplace endeavors and projects in direct violation of his supervisors. As a result of Smith's continued unauthorized actions, Showa Denko decided to terminate Smith's at-will employment for insubordination on December 18, 2012. (Tr. p. 329, line 1-p. 330, line 25; p. 332, line 16-p. 333, line 25; Def. Ex. 17).

John Wing, a member of management at Showa Denko who supervised Smith, testified regarding the circumstances giving rise to Smith's termination. (Tr. p. 316, lines 15-18; p. 329, line 1-p. 330, line 25; p. 332, line 16-p. 333, line 25; Def. Ex. 17). Wing testified he had repeatedly instructed Smith that he was not to involve himself with company hardware issues. On August 31, 2012, Smith was provided a Positive Discipline Procedure ("PDP") notice outlining the deficiencies in his performance and the expectations for his continued employment, including seeking counseling from SAVE. (Def. Ex. 4). Smith was then placed on paid suspension for two days to decide whether he wished to remain employed at Showa Denko. Smith did return to work, but had to be reminded again on September 10 and 17 and November 21 that he was not to interject his opinions or devote his time to hardware issues. (Tr. p. 326, line 15-p. 328, line 25; Def. Ex. 17, ¶¶13-16).

Ultimately Showa Denko decided to terminate Smith's at-will employment in December 2012 due to Smith's insubordination in contacting and holding a meeting with a hardware vendor in direct contravention of Wing's instructions. (Tr. p. 329, line 1-p. 330, line 7; Def. Ex. 17, ¶¶17-20). Wing further testified he had never communicated with Kessler and was not familiar with the substance of Smith's counseling sessions. Wing explicitly testified the decision to terminate Smith had nothing to do with SAVE or Kessler. (Tr. p. 378, line 21-p. 379, line 10; Def. Ex. 18).

Rather, Wing's testimony made clear that the decision to terminate Kessler was the culmination of a lengthy history of issues dating back to January 2012 concerning interactions with co-workers and management and over-stepping his job duties in contravention of Wing's direct instructions.

After his termination, Smith went on the same day to see Kessler for his final employee counseling session. Smith brought his mother to the session, indicating she was there "as a witness." Smith advised Kessler that Smith had been terminated earlier that day. (Tr. p. 546, line 7-p. 547, line 5; Pl. Ex. 1, p. 4). Although Kessler learned of Smith's termination during this final session, he testified he did not learn of the reason for Smith's termination until after the filing of the instant lawsuit nor was he aware of the issues Showa Denko was having with Smith interjecting himself into hardware matters. (Tr. p. 547, line 22-p. 548, line 2; p. 548, lines 3-16; Pl. Ex. 1, p. 4). At no point prior to Smith's termination did Showa Denko ask Smith for a recommendation regarding whether it should terminate Kessler. (Tr. p. 547, lines 6-21).

Smith did not present any expert testimony at trial. Kessler, on the other hand, offered extensive testimony of a retained expert, Arthur Krasilovsky, who is a Licensed Independent Social Worker and a Certified Employee Assistance Professional ("CEAP"), and introduced his written report. (Tr. p. 231, line 13-p. 243, line 10; Def. Exs. 7 & 8). Krasilovsky offered his opinions on the applicable standards of care, and in particular opined that Kessler was obligated to follow only internal policies of SAVE, the National Association of Social Workers ("NASW") Code of Ethics, and South Carolina statutes and regulations governing the practice of social work. (Tr. p. 247, line 24-p. 250, line 22). Krasilovsky testified that because Smith was not a CEAP, he was not obligated to follow the ethical and professional standards promulgated by the National Employee Assistance Professionals Association and those standards did not provide the minimum standard of care to be followed in Kessler's provision of counseling services to Smith. (Tr. p. 244,

line 11-p. 247, line 15). In addition, Kessler was not required to be a CEAP to provide employee assistance counseling in South Carolina. (Tr. p. 250, lines 18-22).

Krasilovsky opined that Kessler provided appropriate counseling to Smith and did not deviate from the applicable standards of care, including in his communications with Showa Denko. Krasilovksy further testified Kessler owed no duty to obtain any "peer-consultation" or to refer Plaintiff to other professionals, legal counsel, or regulatory agency to assist with his employment difficulties. (Tr. p. 254, line 16-p. 260, line 24). On cross-examination, Plaintiff elicited further unfavorable testimony from Krasilovsky, specifically that Smith was indeed disruptive in the workplace, despite his counseling, and that the workplace controversy was not the result of the co-workers or supervisors or to any hostile work environment, but instead was due to Smith's own behavior. (Tr. p. 302, line 7-p. 312, line 20).

Smith subsequently commenced three (3) separate lawsuits in connection with his termination. Smith filed suit against Showa Denko, which was settled and dismissed under confidential terms. Smith v. Showa Denko Carbon, Inc., 2014-CP-18-02381. Smith likewise filed suit against Gainey and SAVE, Inc., which resulted in dismissal by the circuit court. Smith's appeal subsequently was dismissed by this Court. Smith v. Gainey, Appellate Case No. 2016-001379. Finally, Smith commenced the instant action against Kessler, alleging causes of action for breach of contract, professional negligence, and breach of fiduciary duty.[3] (Compl.). At trial, Smith was granted leave to amend to allege causes of action for tortious interference with business relations, tortious interference with contract, and violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"). (Tr. p. 348, lines 4-6, p. 577, lines 2-10). The crux of each of Smith's

[3] Smith previously dismissed the intentional infliction of emotional distress claim.

causes of action is that Kessler's counseling sessions and disclosures to Showa Denko financially and emotionally damaged Smith. (Compl.)

During the almost three-day non-jury trial, Judge Young heard testimony of several defense witnesses out of order for the convenience of the witnesses and to accommodate the court. (Tr. p. 168, lines 8-25; p. 171, line 21-p. 172, line 4; p. 226, lines 3-14; p. 385, lines 3-23; p. 520, lines 2-9). At the conclusion of Smith's case, Kessler moved for an involuntary dismissal pursuant to Rule 41(b), SCRCP.[4] Judge Young afforded the parties the opportunity to submit proposed orders setting forth their positions on Kessler's motion for involuntary dismissal, as well as on the merits. The Judge Young subsequently granted Kessler's motion for involuntary dismissal and further ruled that Smith had failed to prove each of his claims by a preponderance of the evidence. (Order dated August 10, 2017).

[4] The circuit court construed Kessler's motion for directed verdict as a motion for involuntary dismissal pursuant to Rule 41(b), SCRCP. (Order, p. 1-2).

## STANDARD OF REVIEW

Pursuant to Rule 41(b), SCRCP, "[a]fter the plaintiff in action tried by the court without a jury has competed the presentation of his evidence, the defendant . . . may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief." Rule 41(b), SCRCP; see also Ducworth v. Neely, 319 S.C. 158, 159 n. 1, 459 S.E.2d 896, 897 n. 1 (Ct. App. 1995) (noting that motion styled as directed verdict in non-jury action is properly construed as motion for involuntarily dismissal under Rule 41(b) and therefore reviewing as such). Rule 41(b) allows the judge as fact finder to weigh the evidence and determine the facts. Johnson v. J.P. Stevens & Co., 308 S.C. 116, 118, 417 S.E.2d 527, 529 (1992). Likewise, pursuant to Rule 52(a), SCRCP, "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon." Rule 52(a), SCRCP.

The same appellate standard of review applies to decisions rendered under Rule 41(b) and Rule 52(a), SCRCP. Specifically, in an action at law, on appeal of a case tried without a jury, the judge's findings have the same force and effect as a jury verdict and are conclusive on appeal when supported by competent evidence and the appellate court is limited to correcting errors of law. Waterpointe I Prop. Owner's Assn. v. Paragon, Inc., 342 S.C. 454, 459, 536 S.E.2d 878, 881 (Ct. App. 2000); Shepard v. South Carolina Dept. of Corrections, 299 S.C. 370, 372, 385 S.E.2d 35, 36 (Ct. App. 1989). The appellate court will not disturb findings that depend on credibility of a witness. Daisy Outdoor Advertising Co. v. Abbott, 317 S.C. 14, 451 S.E.2d 394 (Ct. App. 1994), rev'd in part on other grounds, 322 S.C. 489, 473 S.E.2d 47 (1996). Although the appellate court must view the evidence in a light most favorable to the non-moving party, if there is any evidence which reasonably tends to support the judge's findings, the judgment must be affirmed. Shepard, 299 S.C. at 372, 385 S.E.2d at 36.

## ARGUMENT

### I. The Circuit Court Properly Ruled Smith's Claims are Barred by S.C. Code Ann. §19-11-95

As an initial matter, Smith fails to address the circuit court's ruling that his claims are barred by S.C. Code Ann. § 19-11-95. Accordingly, the circuit court's ruling on this issue is the law of the case and requires affirmance. See Anderson v. Short, 323 S.C. 522, 476 S.E.2d 475 (1996) (where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case).

Regardless, the circuit court properly ruled Smith's claims are all barred by S.C. Code Ann. § 19-11-95. This statute provides "a provider may reveal: (1) confidences with the written authorization of the patient or patients affected, but only after disclosure to them of what confidences are to be revealed and to whom they will be revealed." S.C. Code Ann. § 19-11-95(C)(1). The statute further provides:

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

S.C. Code Ann. § 19-11-95(H). Kessler, a licensed independent social worker, is a "provider" within the ambit of this statute. See S.C. Code Ann § 19-11-95(A)(1)(c).

The evidence demonstrates Kessler properly obtained Smith's written authorization to disclose the specific information he provided to Showa Denko regarding Smith's counseling sessions. On two (2) separate occasions, September 7 and September 25, 2012, Smith was provided and executed the SAVE Employee Statement of Understanding. This document provides that employees who have been mandated by their supervisor to participate in employee assistance

counseling "acknowledge and accept that the EAP will notify the referring person of the kept or missed appointment and whether a plan to solve the problem has been devised." (Def. Ex. 6, pp. 19 & 24) (emphasis in original). The next page of the document discusses patient rights under the Health Insurance Portability Act of 1996 ("HIPAA") and advises "[i]f you do not understand these rights or the Statement of Understanding on the reverse side, please ask your therapist to explain them to you before signing." (Def. Ex. 6, pp. 20 & 25). Smith additionally signed an Authorization for the Release of Protected Health Information before his first session with Kessler. This Authorization explicitly allows Kessler to disclose information regarding Smith's dates of sessions, progress, recommendations, and compliance/attendance/participation to Clint Lucas of Showa Denko via telephone. (Def. Ex. 6, p. 28).

Kessler reviewed these documents with Smith and testified there was no question in his mind that Smith understood and agreed to the information contained in the documentation. (Tr. p. 532, line 14-p. 533, line 9). Smith asked Kessler no questions regarding the documents. (Tr. p. 201, lines 14-24). Accordingly, there is evidence to support the circuit court's finding that Smith knowingly and voluntarily executed the Authorization. Furthermore, the evidence shows that Kessler's communications with Clint Lucas of Showa Denko fell squarely within the limitations imposed by the Authorization. Specifically, Kessler merely notified Clint Lucas of Showa Denko that Smith had attended the first two counseling sessions. (Tr. p. 556, lines 8-22). The Authorization provides Kessler may release information to Lucas regarding Smith's attendance. (Def. Ex. 6, p. 28). After the conclusion of the October 23 session, Kessler notified Clint Lucas only that Smith was continuing to work on his interpersonal communication skills. (Tr. p. 432, line 21-p. 435, line 25; p. 538, line 24-p. 541, line 9; Pl. Ex. 1, p. 3). This communication was covered by the portion of the Authorization permitting Kessler to communicate with Lucas

regarding Smith's progress. (Def. Ex. 6, p. 28). Moreover, this particular communication revealed nothing more to Lucas than what he already knew—that Smith was in counseling to work on his interpersonal communication skills.

In other words, any confidences Kessler revealed to Showa Denko were revealed only after obtaining a written authorization disclosing to Smith what confidences would be revealed and to whom they would be revealed. Thus, the circuit court's finding that Plaintiff's claims are barred by S.C. Code Ann. § 19-11-95(H) is supported by competent evidence and must be affirmed.

## II. The Circuit Court Properly Ruled Kessler Was Not a Proximate Cause of Smith's Termination

Each of the causes of action alleged by Smith require proof that his alleged damages were proximately caused by Kessler's actions. The circuit court ruled with respect to each of Smith's causes of action that he failed to show any acts by Kessler were the proximate cause of Smith's termination from Showa Denko. Rather, the circuit court found Smith was fired by Showa Denko due to his insubordination, actions with which Kessler had nothing to do. (Order). Because evidence exists which reasonably tends to support the trial judge's findings on the issue of causation, judgment in favor of Kessler must be affirmed.

Proximate cause is the efficient or direct cause of an injury or damages and requires proof of both causation in fact and legal cause. Small v. Pioneer Machinery, Inc., 329 S.C. 448, 464-65, 494 S.E.2d 835, 842-43 (Ct. App. 1997). Causation in fact is proved by establishing the alleged injury or damage would not have occurred "but for" the defendant's conduct. Legal cause is proved by establishing foreseeability and the test of foreseeability is where some injury to another is the natural and probable consequence of the complained-of act. Id.

Here, the only evidence presented regarding the proximate cause of Smith's termination was that Smith was terminated as a result of the culmination of months of interpersonal and

behavioral issues with co-workers and management and a failure to heed the repeated, explicit instructions of his supervisor to stay out of matters pertaining to the company's hardware. Smith offered no evidence that he was terminated as a result of Kessler's action beyond his own bald allegations. Smith's testimony primarily focused on rehashing the issues he had with his co-workers and supervisors in an attempt to demonstrate he was in the right, but did nothing to establish any act by Kessler caused his termination. To the contrary, Smith's direct testimony is replete with references to and discussions concerning the difficulties he was having with his co-workers and supervisors. Smith acknowledged Wing told him he was being terminated for the hardware issues. (Tr. p. 68, lines 15-22). Furthermore, Smith acknowledged that he had previously testified in his deposition that he believed he was fired so another employee could be made an IT manager. (Tr. p. 163, line 18-p. 164, line 4). In short, Smith presented no evidence that any action on the part of Kessler led to Smith's termination.

To the contrary, Smith's supervisor made it abundantly clear that Smith was terminated solely as a result of his own behavior. Specifically, Wing testified that Showa Denko decided to terminate Smith's employment due to Smith's insubordination in contacting and holding a meeting with a hardware vendor in direct contravention of Wing's instructions. (Tr. p. 329, line 1-p. 330, line 7; Def. Ex. 17). This decision came after months of interpersonal conflicts with co-workers and repeated refusals to follow Wing's instructions that Smith was not to involve himself with hardware matters. (Tr. p. 316, lines 15-18; p. 329, line 1-p. 330, line 25; p. 332, line 16-p. 333, line 25; Def. Ex. 17). Wing further testified he had never communicated with Kessler and was not familiar with the substance of Smith's counseling sessions. Wing explicitly testified the decision to terminate Smith had nothing to do with SAVE or Kessler. (Tr. p. 378, line 21-p. 379, line 10).

Accordingly, because there is evidence which reasonably tends to support the trial judge's finding of no proximate cause, the judgment must be affirmed.

## III. The Circuit Court Properly Found for Kessler on Each of Smith's Causes of Action

Smith alleges causes of action for breach of contract, professional negligence, breach of fiduciary duty, tortious interference with business relations, tortious interference with contract, and violation of the SCUTPA. As discussed in Section II, above, the circuit court properly found that no actions on the part of Kessler proximately caused Smith's termination. However, even assuming sufficient evidence of proximate cause exists, as discussed below, the circuit court properly found Smith had not proven the remaining elements of each cause of action asserted.

### a. Breach of Contract

The circuit court found Smith had no contract with Kessler and even assuming a contract existed, Smith failed to prove any damages recoverable for breach of contract. To recover for a breach of contract, the plaintiff must prove: 1) a binding contract entered into by the parties; 2) breach of unjustifiable failure to perform; and 3) damages suffered as a direct and proximate result of the breach. Fuller v. Eastern Fire & Casualty Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962).

As found by the circuit court, there is no evidence of a contract between Smith and Kessler. If Smith had any contract relating to the provision of employee assistance counseling, such contract was with SAVE, the entity to whom he was referred for such counseling, and not Kessler. Furthermore, Smith failed to prove by a preponderance of the evidence that any contract with Kessler was breached. As described above, the only testimony was that Kessler's disclosures to Showa Denko complied with the Authorization given by Smith. Finally, Smith failed to present any evidence of damages recoverable in contract. He provided no evidence regarding economic

damages[5] and in fact, Smith's only testimony regarding damages was that he was emotionally distressed by his termination. It is well-established that damages for emotional distress are not recoverable in contract. See Whitten v. American Mut. Liability Ins. Co., 468 F. Supp. 470, 473 (D.S.C. 1977). Accordingly, because evidence exists to support the circuit court's rulings regarding Smith's breach of contract claim, such rulings must be affirmed.

**b. Professional Negligence**

The circuit court found Smith's professional negligence claim was barred by his failure to present expert testimony regarding the applicable standard of care. To establish a professional negligence claim, the plaintiff mush show: (1) the generally recognized and accepted practices and procedures that would be followed by average, competent practitioners under the same or similar circumstances; (2) that the defendant departed from the recognized and generally accepted standards; and (3) that the defendant's departure from such generally-recognized practices and procedures was the proximate cause of the plaintiff's alleged injuries and damages. David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 248, 626 S.E.2d 1, 4 (2006). The plaintiff must provide expert testimony to establish both the required standard of care and the defendant's failure to conform to that standard, unless the subject matter lies within the ambit of common knowledge so that no special learning is required to evaluate the conduct of the defendant. Id.; see also Gilliland v. Elmwood Props., 301 S.C. 295, 301, 391 S.E.2d 577, 580 (1990); Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 351 S.C. 459, 472, 570 S.E.2d 197, 203 (Ct.

[5] Smith presumably recognizes this failure to present evidence of economic damages, as in his Brief, he makes assertions regarding the amount of his lost salary (Appellant's Brief, pp. 47 & 50). However, no such evidence or testimony was presented to the circuit court. Accordingly, this issue is not preserved for appellate review. See, e.g., Lucas v. Rawl Family Ltd. Partnership, 359 S.C. 505, 598 S.E.2d 712 (2004) (it is well settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court).

App. 2002). A lay witness cannot testify as to the standard of care or any deviations therefrom. See Rule 701, SCRE.

As an initial matter, the standard of care applicable to a licensed clinical social worker performing employee assistance counseling is not a matter of common knowledge. Assessing the pertinent standard of care involves issues of confidentiality and proper counseling techniques and approaches, which require special learning, training, or experience. Cf. Sharpe v. South Carolina Dept. of Mental Health, 292 S.C. 11, 14, 354 S.E.2d 778, 780 (Ct. App. 1987) (holding standard of care and proper treatment of a mental patient is not within common knowledge). Smith has presented no competent evidence, through either expert testimony or otherwise, which addresses the issue of the applicable standard of care with regard to his psychological care and treatment, any breach of the applicable standard of care, or any damages proximately resulting therefrom. Because Smith has failed to provide expert testimony with respect to these required elements, the circuit court properly found that any claim for professional negligence arising out of the provision of employee assistance counseling by Kessler must fail.

Kessler, on the other hand, did in fact present expert testimony demonstrating the applicable standard of care and his compliance. The testimony of licensed clinical social worker, Krasilovsky, as well as that of Sarah Gainey, demonstrates Kessler complied with the standard of care with regards to his provision of employee assistance counseling to Smith. (Tr. p. 254, line 16-p. 260, line 24; p. 178, line 23-p. 179, line 3). Krasilovsky further opined Kessler owed no duty to obtain a "peer consultation" or refer Smith to other clinicians, legal counsel, or government agencies for further assistance. (Tr. p. 257, lines 10-24). Therefore, the circuit court's rulings regarding Smith's professional negligence claim are supported by the evidence and must be affirmed.

At various points in his Brief, Smith references portions of the Health Insurance Portability and Accountability Act ("HIPAA") (Brief, pp. 11, 16, & 40). However, these arguments are not preserved for appellate review because they were not ruled on by the circuit court. See Lucas, 359 S.C. 505, 598 S.E.2d 712 (issue raised to but not ruled upon by trial judge is not preserved for review). Regardless, Smith's arguments concerning HIPAA are without merit. HIPAA does not provide for a private civil cause of action. See Webb v. Smart Document Solutions, LLC, 499 F.3d 1078, 1080 (9th Cir. 2007); Acara v. Banks, 470 F.3d 569, 571-72 (5th Cir. 2006).

**c. Breach of Fiduciary Duty**

The circuit court found Smith failed to prove any breach of fiduciary duty. To establish a claim for breach of fiduciary duty, a plaintiff must prove: (1) the existence of a fiduciary duty, (2) a breach of that duty, and (3) damages proximately resulting from the wrongful conduct of Defendant. Turpin v. Lowther, 404 S.C. 581, 745 S.E.2d 397, 401 (Ct. App. 2013). A fiduciary relationship exists when a person places special trust or confidence in another. See, e.g., O'Shea v. Lesser, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992).

Even assuming a fiduciary relationship existed between Smith and Kessler, there is no evidence that Kessler breached any fiduciary duty with respect to the provision of employee assistance counseling to Smith. As discussed previously, the evidence demonstrates all Kessler's communications with Clint Lucas of Showa Denko fell within the confines of the Authorization executed by Smith allowing disclosure of attendance and progress. (Tr. p. 432, line 21-p. 435, line 25; p. 538, line 24-p. 541, line 9; p. 556, lines 8-22; Def. Ex. 6, p. 28). In addition, Krasilovsky's expert testimony was that Kessler breached no duty in his treatment of Smith and that he had no duty to refer Kessler to other clinicians, legal counsel, or government agencies for further assistance. (Tr. p. 254, line 16-p. 260, line 24; p. 178, line 23-p. 179, line 3). Therefore,

the circuit court's decision that Smith failed to establish a breach of fiduciary duty by a preponderance of the evidence is supported by the evidence and must be affirmed.

**d. Tortious Interference with Existing and Potential Contractual Relations**

The circuit court held Smith failed to establish Kessler interfered with Smith's existing or prospective contractual relations. To establish tortious interference with an existing contract, a plaintiff must prove: (1) a contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) the damage resulting therefrom. Camp v. Springs Mortgage Co., 310 S.C. 514, 426 S.E.2d 304 (1992); DeBerry v. McCain, 275 S.C. 569, 274 S.E.2d 293 (1981). Similarly, the elements of tortious interference with a prospective contractual relationship, are: (1) intentional interference with prospective contractual relations; (2) for an improper purpose or by improper methods; and (3) resulting injury. Crandall Corp. v. Navistar Int'l Transp. Corp., 302 S.C. 265, 266, 395 S.E.2d 179, 180 (1990).

Smith presented no evidence that he had an existing or prospective contractual relationship with Showa Denko. To the contrary, the circuit court specifically held Smith had an at-will employment relationship with Showa Denko rather than a contractual relationship. This finding is soundly supported by Smith's testimony regarding the contents of his employment application, which he admitted explicitly states "I understand that this is not a contract for employment. I understand and agree that if hired my employment is at will for no definite period and may regardless of the date of payment of my wages and salary be terminated at any time without any prior notice at the company's sole discretion." (Tr. p. 152, line 5-p. 153, line 10; Def. Ex. 1).

In a suit for interference with prospective contractual relations, the plaintiff must show a reasonable likelihood that the relationship would have developed. Santerro v. Schulthess, 384 S.C. 250, 681 S.E.2d 897 (Ct. App. 2009). Regarding a prospective contract with Showa Denko, Smith

presented only his own vague testimony that he "might" have become the company's IT manager. (Tr. p. 64, line 16-p. 65, line 4). In support of this assertion, Smith offered a document entitled "Profile XT" report, which he alleged was conducted to assess his skills and qualifications to be an IT manager at Showa Denko. (Tr. p. 66, line 14-p. 67, line 13; Pl. Ex. 2). As noted by the circuit court, Smith did not present testimony of the author of this report and its methodology and underlying test data is unknown. Accordingly, the circuit court found this report was not probative to establish liability on Smith's interference with prospective contractual relations claim. Such findings are supported by the evidence, as the record is devoid of any indication of a reasonable likelihood that Smith's employment with Showa Denko would have developed into a managerial position, particularly in light of the difficulties with his co-workers and supervisors.

**e. South Carolina Unfair Trade Practices Act**

The circuit court found Smith failed to prove any of the elements of a violation of the SCUTPA. To recover in an action under the SCUTPA, a plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) unfair or deceptive act affected the public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act. S.C. Code Ann. § 39–5–10 et seq.; Health Promotion Specialists, LLC v. South Carolina Bd. of Dentistry, 403 S.C. 623, 743 S.E.2d 808 (2013). An act is "unfair" when it is offensive to public policy or when it is immoral, unethical, or oppressive. Id. It is essential that the act complained of have an impact on the public interest, which may be established by showing the acts or practices have potential for repetition. Noack Enters., Inc. v. Country Corner Interiors of Hilton Head Island, Inc., 290 S.C. 475, 480, 351 S.E.2d 347, 350-51 (Ct. App. 1986).

Smith presented no evidence of unfair or deceptive conduct by Kessler that impacted the public interest. To the contrary, the evidence demonstrates Kessler obtained Smith's consent to disclose specific information to Showa Denko and that Kessler communications with Showa Denko were all within the limitations imposed by Smith's Authorization. Prior to commencing counseling, Smith reviewed and executed the SAVE Employee Statement of Understanding outlining the nature of employee assistance counseling. Accordingly, the only evidence presented was that Kessler acted ethically and fairly in his sessions with Smith. Even assuming Kessler somehow acted unfairly with respect to Smith, there is no evidence that Kessler's counseling interactions had an impact on the public interest or the potential for repetition. Because there is evidence to reasonably support the circuit court's findings, they must be affirmed.

As an additional sustaining ground, Kessler notes that Smith's SCUTPA claim is barred because the disclosure of confidences by a provider is specifically authorized by statute. (Tr. p. 583, line 21-p. 584, line 5). The SCUTPA does not apply to "[a]ctions or transactions permitted under laws administered by any regulatory body or office acting under statutory authority of this State or the United States or actions or transactions permitted by any other South Carolina law." S.C. Code Ann. § 39–5–40. This exemption is intended to exclude those actions or transactions which are allowed or authorized by regulatory agencies or other statutes. Ward v. Dick Dyer and Assocs., 304 S.C. 152, 155, 403 S.E.2d 310, 312 (1991).

Here, Smith's SCUPTA claim stems from the allegation that Kessler made unauthorized disclosure of Smith's confidences to Showa Denko. As outlined in Section I, above, S.C. Code Ann. § 19-11-95 states "a provider may reveal: (1) confidences with the written authorization of the patient or patients affected, but only after disclosure to them of what confidences are to be revealed and to whom they will be revealed." S.C. Code Ann. § 19-11-95(C)(1). This statute

applies to Kessler by virtue of the fact he is a licensed independent social worker regulated by S.C. Code Ann § 40-63-5 et seq. Kessler's disclosure of Smith's session attendance and progress to Showa Denko were explicitly authorized by Smith's written Authorization. (Def. Ex. 6, p. 28). Accordingly because the activity that is the crux of Smith's SCUTPA claim—the disclosure of information to Showa Denko—is specifically allowed by statute, such action is exempt from the SCUTPA. See also Trident Neuro-Imaging Lab v. Blue Cross & Blue Shield of South Carolina, Inc., 568 F. Supp 1474, 1483 (D.S.C. 1983) (concluding Blue Cross was exempt under SCUTPA because insurance commission specifically approved complained-of exclusion of coverage); Calcaterra v. City of Columbia, 315 S.C. 196, 432 S.E.2d 498 (1993) (holding no violation of SCUTPA existed where city charged non-residents higher rates for water because city sold water at published rate set by ordinance). Therefore, as an additional sustaining ground, the Court should find Kessler is exempt from the SCUTPA with regard to the disclosure of Smith's confidences.

## CONCLUSION

Based on the foregoing, Respondent Kessler respectfully requests this Court affirm the decision of the circuit court.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

COLLINS & LACY, P.C.

By: _____

R. SCOTT WALLINGER, JR.
swallinger@collinsandlacy.com
AMY L. NEUSCHAFER
aneuschafer@collinsandlacy.com
P.O. Box 12487
Columbia, SC 29211
(803) 256-2660 (voice)
(803) 771-4484 (fax)

ATTORNEYS FOR RESPONDENT

March 28, 2018
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger Young, Circuit Court Judge
Ninth Judicial Circuit



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Appellate Case No. 2017-001766

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Tracy Smith,.....Appellant,

v.

Jonathon Kessler.....Respondent.

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**PROOF OF SERVICE**

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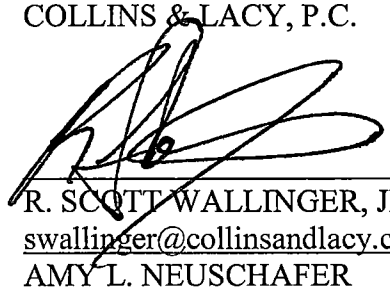
I hereby certify that I served Respondent's Initial Brief and Designation of Matter by placing a copy in the United States mail, postage prepaid, to Appellant Tracy Smith on March 28, 2018, addressed to the following:

**SERVED:**
Tracy Smith
4351 Park Island Road
Hollywood, SC 29449
*Pro Se Appellant*

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

COLLINS & LACY, P.C.



R. SCOTT WALLINGER, JR.
swallinger@collinsandlacy.com
AMY L. NEUSCHAFER
aneuschafer@collinsandlacy.com
Post Office Box 12487
Columbia, SC 29211
(803) 256-2660 (voice)
(803) 771-4484 (fax)

ATTORNEYS FOR RESPONDENT

**PROOF OF SERVICE-RESPONDENT'S INITIAL BRIEF AND DESIGNATION OF MATTER**

Columbia, South Carolina
March 28, 2018

Collins Lacy
ATTORNEYS AT LAW

R. Scott Wallinger, Jr. | D: 803.255.0419 | E: swallinger@collinsandlacy.com
Shareholder

March 28, 2018

**VIA HAND DELIVERY**
The Honorable Jenny A. Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201



Re: Tracy Smith v. Jonathan Kessler
Civil Action No. 2017-001766
Claim No. 2016000405 -1
C&L File No. 001185-00127

Dear Ms. Kitchings:

Please find enclosed for filing the unbound original and two (2) copies of Respondent's Initial Brief and Designation of Matter in the above referenced matter. Please file the originals and return a clocked copy of each via my courier.

By copy of this letter and enclosure, I am serving same on Appellant.

With warmest regards, I am,

Very truly yours,

R. Scott Wallinger, Jr.
Shareholder

RSW/mmm
Enclosures
cc: Tracy Smith