

The South Carolina Court of Appeals

Karen Forman,

Appellant,

v.

South Carolina Department of Labor, Licensing and Regulation,
State Board of Social Work Examiners,

Respondent.

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable John D. McLeod, Case No. 2010-ALJ-11-0591-AP
The Honorable S. Phillip Lenski, Case No. 2012-ALJ-11-0495-AP

Appellate Case No. 2014-000285

INITIAL BRIEF OF RESPONDENT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Administrative Law Court properly held that guardian *ad litem*s are not entitled to quasi-judicial immunity in professional disciplinary proceedings?
2. Whether the South Carolina Board of Social Work Examiners exceeded its authority by making findings of fact regarding Appellant's compliance with S.C. Code Ann. § 63-3-830(A)(2)(a-f)?
3. Whether the Administrative Law Court properly held that the South Carolina Board of Social Work Examiners' findings of fact were supported by reliable, probative, and substantial evidence?
4. Whether the South Carolina Board of Social Work Examiners has the authority to prohibit a licensed social worker found in violation of S.C. Code Ann. § 40-63-110(B)(9) and S.C. Code Regs. 110-20(8) from working as a guardian *ad litem*?

STATEMENT OF THE CASE

This is an appeal from an Administrative Law Court (“ALC”) order issued June 12, 2011, and an ALC order issued January 9, 2014, affirming the South Carolina Department of Labor, Licensing and Regulation, State Board of Social Work Examiners’ (“Board”) order issued September 19, 2012, reinstating sanctions originally imposed against Appellant, a licensed social worker, for conduct that violated the Social Work Practice Act, S.C. Code § 40-63-5 *et seq.*, and the principles of professional ethics and standards of conduct as codified in S.C. Code Regs. 110-20.¹

Formal proceedings began on August 19, 2009, when the Board served Notice of Charges and Notice of Hearing on Appellant. (ALC order issued July 12, 2011, p. 1). On September 14, 2009, Appellant moved to have the charges against her dismissed on the grounds that the Board lacked jurisdiction. Appellant’s motion for dismissal was denied via e-mail on September 15, 2009. (*Id.* at 2). A two-day hearing was held on June 28-29, 2010, and Appellant’s second request for dismissal was denied. (*Id.*). At the conclusion of the hearing, the Board found Appellant’s conduct violated S.C. Code §§ 40-63-110(B)(9), 63-3-830(A)(2)(a-f), 63-3-820(D), and S.C. Code Regs. 110-20(8). (*Id.* at 2-3). On July 13, 2010, the Board issued an order prohibiting Appellant from working as a guardian *ad litem* (“GAL”) and prohibiting Appellant from all independent social work practice. (*Id.* at 2). The Board’s order further provided that Appellant could engage in supervised social work practice within a recognized, organized setting such as social, medical, and governmental agencies, subject to her submitting to the Board semi-annual, written reports from her supervisor(s) for a period of two years. (*Id.*)

¹ Though Appellant appeals both ALC orders, the issues raised to and ruled on by the ALC in its January 9, 2014, order are not on appeal.

On August 4, 2010, Appellant filed a Notice of Appeal and a motion to stay enforcement of the Board's order and to expedite the appeal with the ALC. (Id. at 4). The ALC granted the motion in part, allowing Appellant to continue performing GAL work and expediting the appeal. (Id.). On July 12, 2011, the ALC issued an order affirming in part and reversing in part the Board's order issued July 13, 2010. (Id. at 13). The ALC reversed the Board's finding that Appellant's failure to disclose in her private GAL affidavit that she was previously publicly reprimanded by the Board and her license was placed in a probationary status violated S.C. Code Ann. § 63-3-820(D). (Id.). The case was remanded to the Board for reconsideration of the sanctions in accordance with the ALC's order. (Id.). On November 3, 2011, the ALC denied Appellant's motion for a rehearing. (ALC order issued Jan. 9, 2014, p. 2).

Appellant then filed a Notice of Appeal with the South Carolina Court of Appeals on December 5, 2011. The appeal was initially dismissed on January 31, 2012, but later reinstated on March 15, 2012. (Id.). On May 30, 2012, the Court of Appeals declared the issues were not immediately appealable and dismissed the appeal. (Id.).

On September 17, 2012, the Board held the rehearing on remand to reconsider the sanctions. (Id.). The Board declined to reduce the sanctions, and on September 19, 2012, issued an order reinstating the sanctions originally imposed against the Appellant. (Id. at 10). On November 14, 2012, Appellant filed a Notice of Appeal with the ALC. (Id. at 1). The ALC determined the Board's sanctions were within the Board's authority and were supported by substantial evidence, and on January 9, 2014, issued an order affirming the Board's order to reinstate the sanctions originally imposed against the Appellant. (Id. at 10). Appellant now appeals.

FACTS

Appellant is a Licensed Independent Social Worker-Clinical Practice (“LISW-CP”) and, at the time of the alleged misconduct, was a Licensed Master Social Worker (“LMSW”). (ALC order issued July 12, 2011, p. 2). Appellant promoted her social work credentials in her work as a paid, private GAL. (Id. at 6-7). The Board commenced an investigation of Appellant, a licensed social worker, after receiving complaints against Appellant’s social work license. (Id. at 1). The investigation specifically focused on two family court cases in which Appellant served as a paid, private GAL. (Id.). The Board initiated a disciplinary hearing against Appellant at the conclusion of the investigation.

Appellant’s testimony at the June 28-29, 2010, Board hearing contradicted her statements to the Board’s investigator. During the Board’s investigation, Appellant stated that her conduct conformed to the requirements set forth in the GAL statute, S.C. Code Ann. § 63-3-830(A)(2)(a-f). Appellant’s own testimony revealed otherwise; she admitted that, in one of the family court cases, she failed to meet with and observe the children, and that she did not visit the home setting of either parent. (Id. at 9). In another statement to the Board’s investigator, Appellant indicated she was never shown anything to substantiate a claim that one of the parents was violent. (Id. at 11). Contrary to her investigative statement, Appellant testified that she received a package with over two thousand pages of documents. (Id.). Appellant was unable to prove what documents she received and reviewed because she destroyed the documents after the case concluded. (Id.).

Appellant made inconsistent statements to the Board about her work as a paid, private GAL. During the investigation of Appellant’s recommendation in one case,

Appellant stated that she advocated for the child to start seeing the noncustodial parent in a supervised environment. In reality, Appellant's affidavit withheld any mention of supervision, which was required by a then-existing family court order requiring all visitation with the noncustodial parent to be supervised. (Id. at 12). In another statement to the Board's investigator, Appellant stated that the noncustodial parent had not gone through any rehabilitation/counseling for his alcohol abuse, despite attending a counseling session with the parent and his counselor. Appellant testified at the hearing that she did not ask for or attempt to ask for information regarding the parent's alcohol abuse.

The Board concluded that Appellant, in her statements to the Board affirming her compliance with the GAL statute, represented that she performed services she did not actually perform. (Id. at 2). Specifically, Appellant failed to obtain and review relevant documents; failed to meet with and observe the child(ren) in question on at least one occasion, or even to speak with them by telephone; only visited one of at least four homes; failed to interview all relevant parties such as parents, stepparents, grandparent(s), school officials, and others with relevant knowledge; failed to obtain criminal histories of each party; and failed to consider the wishes of the child(ren). (Id. at 2-3).

At the conclusion of the initial Board hearing, the Board concluded that as a licensed social worker, Appellant violated the principles of professional ethics or standards of conduct by committing fraud and representing that she performed services she did not perform. Furthermore, the Board found by a preponderance of the evidence Appellant failed to perform GAL responsibilities as required by S.C. Code Ann. § 63-3-830(A)(2)(a-f). (Id. at 3).

STANDARD OF REVIEW

The Administrative Procedures Act (“APA”) provides the standard used by appellate bodies to review agency decisions. See S.C. Code Ann. § 1-23-380(5); cf. Trimmier v. S.C. Dep’t of Labor, Licensing and Regulation, 405 S.C. 239, 243, 746 S.E.2d 491 (2013); Deese v. S.C. State Bd. of Dentistry, 286 S.C. 182, 184, 332 S.E.2d 539 (1985). Specifically, S.C. Code Ann. § 1-23-380(5) states:

The court may reverse or modify the decision [of the agency] if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(5). The section further provides, “[t]he court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact.” Id.

The party challenging an agency action has the burden of proving convincingly that the agency’s decision is unsupported by substantial evidence. Waters v. S.C. Land Res. Conservation Comm’n, 321 S.C. 219, 226, 467 S.E.2d 913 (1996). A decision is supported by substantial evidence when the record as a whole allows reasonable minds to reach the same conclusion as the agency. Friends of the Earth v. Pub. Serv. Comm’n of S.C., 387 S.C. 360, 366, 692 S.E.2d 910 (2010). The fact that the record, when considered as a whole, presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency’s findings from being supported by

substantial evidence. Waters, 321 S.C. at 226. In applying the substantial evidence rule, “a reviewing court will not overturn a finding of fact by an administrative agency ‘unless there is no reasonable possibility that the facts could be as related by a witness upon whose testimony the finding was based.’” Sea Pines Ass’n for Prot. of Wildlife, Inc. v. S.C. Dep’t of Natural Res., 345 S.C. 594, 603-04 (2001) (quoting Lark v. Bi-Lo, Inc., 276 S.C. 130, 136 (1981)). When applying the substantial evidence rule, the factual findings of the agency are presumed to be correct. Rodney v. Michelin Tire Co., 320 S.C. 515, 466 S.E.2d 357 (1996). Furthermore, the reviewing court is prohibited from substituting its judgment for that of the agency as to weight of the evidence on questions of fact. Grant v. S.C. Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995).

ARGUMENTS

I. The ALC properly held that GALs are not entitled to quasi-judicial immunity in professional disciplinary proceedings.

A. Extending immunity to professional disciplinary hearings is unwarranted and against public policy.

Appellant argues that she is absolutely immune from professional discipline in connection with her work as a GAL. In support of her claim, Appellant relies on Fleming v. Asbill, wherein the South Carolina Supreme Court held that GALs in private custody actions are entitled to absolute quasi-judicial immunity from suits. 326 S.C. 49, 483 S.E.2d 751 (1997). Appellant posits that because the court did not mention professional disciplinary proceedings in its decision, the type of proceeding is irrelevant. (Br. of Appellant pp. 14-15). Appellant thus urges this Court to extend the immunity bestowed by Fleming to the boards and agencies of the executive department, (Br. of Appellant p. 17), thereby creating a blanket immunity that shields Appellant from disciplinary action by her very own licensing Board.

Contrary to Appellant's contention, the type of proceeding is highly relevant to the immunity analysis.² The court in Fleming went to great lengths to discuss the policy reasons underlying its decision to grant GALs quasi-judicial immunity from civil suits, none of which involved protecting GALs from disciplinary action by professional

² The Fleming court specifically determined that the action in tort against the GAL was a factor that distinguished it from other cases where a GAL was not entitled to judicial immunity. See McIver v. Thompson, 117 S.C. 175, 108 S.E. 411 (1921) (action for partition of land); Clarendon Holding Co. v. Witherspoon, 258 S.C. 296, 188 S.E.2d 480 (1972) (action to quiet title); Cumbie v. Cumbie, 245 S.C. 107 139 S.E.2d. 477 (1964) (action for partition of land); Simpson v. Doggett, 159 S.C. 294, 156 S.E. 771 (1930) (tort action against a third party, not the GAL); Cagel v. Schaefer, 115 S.C. 35, 104 S.E. 321 (1920) (action for specific performance of contract for the sale of certain lands).

licensing boards. The court, in one of its many passages on the strong policy reasons necessitating its decision, wrote:

To safeguard the best interests of the children, . . . the guardian's judgment must remain impartial, unaltered by the intimidating wrath and litigious penchant of disgruntled parents. Fear of liability to one of the parents can warp judgment that is critical to vigilant loyalty for what is best for the child; the guardian's focus must not be diverted to appeasement of antagonistic parents.

Fleming, 326 S.C. at 56 (citing Short v. Short, 730 F. Supp. 1037, 1039 (D. Colo. 1990)).

The court further explained that, because the primary responsibility of a GAL is to ascertain the best interests of the child and advocate those interests to the family court judge, a GAL must be cloaked with immunity in order to discharge her duties faithfully without fearing exposure to “unlimited liability” and “a constant threat of lawsuits from disgruntled parents.” Id. (emphasis added).

Applying the policy reasons above to administrative disciplinary proceedings makes clear that an extension of immunity is not only unwarranted, but also against public policy. Notably, a GAL is afforded immunity from civil suits because the immunity is necessary to the GAL's “impartial, unaltered” judgment in ascertaining the best interests of the child. Fleming, 326 S.C. at 56. The court's grant of immunity is premised on the notion that the GAL will be acting in the best interests of the child, not engaging in unethical conduct. See Carruba et al. v. Moskowitz, 274 Conn. 533, 540, 877 A.2d 773 (2005) (quoting Spring v. Constantino, 168 Conn. 563, 565 (1975) (“Th[e] role of judicial immunity is ‘to promote principled and fearless decision-making by removing a judge's fear that unsatisfied litigants may hound him with litigation”)) (emphasis added)). Thus, while a GAL's misconduct may not be subject to a civil suit due to overriding policy concerns, the misconduct may be probed by the family court.

See Shainwald v. Shainwald, 302 S.C. 453, 395 S.E.2d 441 (1990) (noting the family court has the duty to insure that GALs perform their duties properly and in the best interest of their wards); cf. S.C. Code Ann. § 63-3-870 (“A guardian ad litem may be removed from a case at the discretion of the court”). Further, the conduct may be probed by a professional licensing board if the GAL holds an occupational license. See, e.g., S.C. Code Ann. § 40-63-90(A).

Additionally, Appellant’s argument that the disciplinary proceeding initiated against Appellant was retaliation by disgruntled litigants is without merit. A social work disciplinary proceeding is brought by the Board, not by disgruntled parents, for the purpose of protecting the public from the unscrupulous act(s) of a licensee. Further, the disciplinary process is initiated only after a thorough investigation reveals a likelihood of misconduct in violation of S.C. Code Ann. § 40-63-5 et seq. See S.C. Code Ann. § 40-63-90(A). Contrary to Appellant’s argument, the Fleming court’s concern over disgruntled parents is inapplicable to the instant case. See Deatherage v. State Examining Bd. of Psychology, 134 Wash. 2d 131, 138-39, 948 P.2d 828, 831 (Wash. 1997) (“[E]ven if the injured party initiates a disciplinary complaint, that individual is not a party to the proceedings.”) (emphasis added) (citing 1 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 1.9, at 33 (3d ed. 1989)).

While the policy reasons underlying the Fleming court’s decision to grant immunity are significant, so too are the policy reasons requiring that immunity not be extended to professional disciplinary proceedings. Pursuant to S.C. Code Ann. § 40-1-40(A), the Board’s administrative process is to protect the public from the unprofessional and unethical conduct of its licensees. S.C. Code Ann. § 40-1-40(A) (“The purpose of

the . . . South Carolina Department of Labor, Licensing Regulation,” by and through its licensing boards, “is to protect the public through the regulation of the profession and occupational licensees”); see S.C. Code Ann. § 40-1-20(3) (“[The Board is] charged by law with the responsibility of . . . regulating an occupation or profession within the State.”). To accomplish this responsibility, the Board may discipline licensees found in violation of S.C. Code Ann. § 40-63-5 et seq. or S.C. Code Regs. 110-20. See S.C. Code Ann. § 40-63-110.

In this case, the Board discharged its responsibility of protecting the public by imposing sanctions on Appellant who was, at all times, a licensed social worker. After a two-day hearing, the Board concluded that Appellant violated S.C. Code Ann. § 40-63-110(B)(9) in that she violated the principles of professional ethics in S.C. Code Regs. 110-20(8). Thus, so as to prevent Appellant from adversely affecting the public interest and reflecting poorly on the social work profession, the Board ordered that Appellant may not practice as a paid, private GAL or work in an independent setting, but that she may work “in a supervised practice, within a recognized, organized setting such as social, medical, and governmental agencies.” (Bd. order p. 4). If this Court were to grant Appellant immunity from professional discipline, the Board’s central function would be largely undermined. See Huhta v. State Bd. of Med., 706 A.2d 1275, 1277 (Pa. Commw. Ct. 1998) (“It is the Board that is charged with the responsibility of overseeing the medical profession and determining the competency and fitness of an individual to practice medicine within the Commonwealth, and we decline to handicap the Board in performing this important function.”).

B. Professional discipline is an additional safeguard in place to ensure that GALs are accountable for misconduct.

Another reason behind the court's decision in Fleming to grant absolute quasi-judicial immunity to GALs was the existence of certain safeguards that serve to protect the ward from a GAL's misconduct. The court noted:

It has been argued that a grant of immunity could lessen the protection of the ward, if a guardian *ad litem* knows that she cannot be found liable for gross negligence or even recklessness in the performance of her duties. Although it may not be possible to fully protect against this danger, certain safeguards do exist.

Fleming, 326 S.C. at 56, 483 S.E.2d at 755. The court observed that immunity would not protect GALs for actions beyond the scope of their duties. The court went on to list, non-exhaustively, the following safeguards: the ability of the opposing party to cross-examine the GAL and any witnesses whose testimony forms a basis of the GAL's recommendation; the appointing court's oversight of the GAL's discharge of duties; the parents' ability to move the court for termination of the GAL; the court's prerogative to reject the GAL's recommendation; and judicial review of the family court's decision relying on the GAL's recommendation. 326 S.C. at 56-57, 483 S.E.2d at 755.

Ostensibly, yet another safeguard is the GAL's accountability to her licensing board for professional or unethical misconduct. In the context of this case, the Board's administrative function to protect the public from Appellant's unprofessional or unethical conduct is an additional mechanism in place to protect against the danger posed by Appellant's absolute immunity from civil suits. See Deatherage, 134 Wash. 2d at 140, 948 P.2d at 832 (listing a number of court decisions that found "the threat of professional discipline is an appropriate check on individuals who are otherwise immune from civil liability").

Though Appellant points to the fact that this Court has yet to rule on the issue of immunity in the context of disciplinary proceedings, (Br. of Appellant p. 14), she fails to mention that other jurisdictions have explicitly held that judicial immunity does not prevent professional licensing boards from disciplining licensees for actions taken outside their licensed practice. See Deatherage, 134 Wash. 2d at 139 (holding absolute witness immunity does not extend to professional disciplinary proceeding); Huhta, 706 A.2d at 1277 (declining to extend immunity to administrative disciplinary proceedings before the State Medical Board); Moses v. McWilliams, 379 Pa. Super 150, 157 n.7, 549 A.2d 950 (Pa. Super. Ct. 1988) (finding absolute immunity for physician does not prohibit professional discipline); see also Moses v. Parwatar, 813 F.2d 891, 893 (8th Cir. 1987) (stating absolute immunity for psychiatrist bars a suit for monetary damages, but does not prohibit other corrective action); Coralluzzo v. Fass, 450 So.2d 858, 859 (Fla. 1984) (“Whether [a physician] has violated the ethical standards of [the medical profession] is a matter to be addressed by the profession itself.”).

Appellant also fails to mention that other jurisdictions have taken the position that attorney-GALs are not entitled to judicial immunity. In Carruba, the Connecticut Supreme Court held that immunity afforded to a GAL did not extend to professional discipline for the attorney’s violation of the Rules of Professional Conduct while acting as a court-appointed GAL. 274 Conn. 533, 877 A.2d 773. The court wrote:

[T]here exist sufficient procedural safeguards in the system to protect against improper conduct by an attorney for the minor child. Because the attorney is appointed by the court, she is subject to the court’s discretion and may be removed by the court at any time. Additionally, the attorney for the minor child, just as any other attorney, is subject to discipline for violations of the Code of Professional Conduct.

Id. at 781-82 (emphasis added). Likewise, in McKay v. Owens, the Idaho Supreme Court held “that granting quasi-judicial immunity to a guardian does not leave the parties without recourse. The attorney-guardian is still subject to the Idaho Rules of Professional Conduct.” 130 Idaho 148, 158, 937 P.2d 1222, 1232 (Idaho 1997). So, too, in Missouri ex rel. Bird v. Weinstock, the Missouri Court of Appeals wrote, “Extension of judicial immunity to guardians at litem in custody matters does not . . . remove all accountability. There are numerous mechanisms in place to prevent abuse and misconduct. Attorney guardians remain subject to the Rules of Professional Conduct.” 864 S.W.2d 376, 386 (1993).

Further still, the South Carolina Supreme Court has held that licensed real estate brokers and salesmen are bound by professional standards and ethics even when they are not engaging in the practice of real estate. See S.C. Real Estate Comm’n v. Boineau, 267 S.C. 574, 579, 230 S.E.2d 440, 442 (1976) (“Even as members of the bar are subject to disciplinary procedures for conduct not strictly related to the practice of law, realtors may have their licenses revoked for conduct not strictly related to a transaction in which they are acting as broker.”). South Carolina law is also clear that attorneys must abide by ethical and professional standards when engaging in activities other than the practice of law. See, e.g., Matter of Tedder, 296 S.C. 500, 374 S.E.2d 294 (1988) (stating attorneys are subject to discipline for conduct not strictly related to the practice of law); In re Brown, 361 S.C. 347, 605 S.E. 2d 509 (2004) (holding attorney could be disciplined for misconduct occurring outside the legal profession, and the purpose of the disciplinary process was to protect the public from a lawyer who may endanger the public).

In light of the forgoing, Appellant's immunity from civil suits does not remove all accountability. Appellant is still accountable to the Board, and she is bound by the principals of professional ethics and standards of conduct adopted by the Board and promulgated in its regulations. S.C. Code Ann. §§ 40-63-110(A), 40-1-110, 40-1-115, and 40-1-120. There is simply no provision in the Social Work Practice Act that allows Appellant to opt out of her professional ethics and standards of conduct as a licensed social worker simply because she is working as a GAL. Because Appellant is always bound by her social work professional and ethical standards, she is not immune from professional disciplinary proceedings.

II. The Board did not exceed its statutory authority by making factual findings that Appellant failed to comply with S.C. Code Ann. § 63-3-830(A)(2)(a-f).

Appellant argues that the Board lacks subject matter jurisdiction to make findings of fact concerning Appellant's compliance with S.C. Code Ann. § 63-3-830(A)(2)(a-f). (Br. of Appellant 18). As an initial matter, Appellant confuses the concepts of subject matter jurisdiction with the scope of the Board's statutory authority. Subject matter jurisdiction over a proceeding is the "power to hear cases of the general class to which the proceedings in question belong." Theisen v. Theisen, 394 S.C. 434, 440-41, 716 S.E.2d 271, 274 (2011) (quoting Dove v. Gold Kist, 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994)). Conversely, the scope of the Board's statutory authority "concern[s] the limits of what a tribunal may properly consider or order regarding a case within the tribunal's general class." Cottingham v. S.C. Dep't of Labor, Licensing and Regulation, Op. No. 027 (S.C. Ct. App. filed Jan. 16, 2013) (citing Theisen, 394 S.C. 434, 716 S.E.2d 271).

The legislature expressly granted the Board the power to hear all matters pertaining to the acts of a licensed social worker. Pursuant to S.C. Code Ann. § 40-1-115, the Board has subject matter jurisdiction “over the actions committed or omitted by current and former licensees during the entire period of licensure.” S.C. Code Ann. § 40-1-115 (emphasis added). Here, the acts committed by Appellant occurred while she was a licensed social worker; therefore, S.C. Code Ann. § 40-1-115 gives the Board subject matter jurisdiction. Because Appellant is not arguing that the Board lacked subject matter jurisdiction to consider Appellant’s actions during the period of licensure, Appellant was required to preserve the issue of the Board’s statutory authority to make “findings of fact” for appellate consideration. This she did not do.

A. Appellant did not preserve the issue of the Board’s authority for appellate review, as it was not raised to or ruled on by the Board or the ALC.

In general, issue preservation rules require “an issue be raised to and ruled upon” in order to preserve it for appellate review.³ Because the ALC has appellate jurisdiction over final orders of an administrative agency, “issues not raised to and ruled on by the [administrative] agency are not preserved for judicial consideration” by the ALC. Brown v. S.C. Dep’t of Health & Envtl. Control, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002). Similarly, “issues not raised to and ruled on by the ALJ are not preserved for appellate consideration.” Id.

Here, Appellant argued below that her conduct was in compliance with the GAL statute, S.C. Code Ann. § 63-3-830(A)(2)(a-f), yet she failed to argue that the Board lacked the authority to determine whether Appellant complied with that statute. Because

³ Under the previous version of Administrative Law Court Rule 40, issues raised on appeal but not addressed in the order were deemed denied; however, under the revised rules, the editor notes that “issues raised on appeal but not addressed in the order are no longer deemed denied.” Rule 40, ALC (2013).

Appellant failed to raise the issue of the scope of the Board's statutory authority with the Board or the ALC, Appellant failed to preserve the issue for appellate review. See Brown, 348 S.C. at 519, 560 S.E.2d at 416-17 (holding an issue was not preserved for appellate review because the "issue had been raised neither to the ALJ nor to the Board").

B. Even if the issue of the Board's authority was preserved, Appellant nonetheless abandoned the issue.

In her brief, Appellant provides neither an argument nor supporting authority for her position. An issue raised on appeal but not argued in the brief is deemed abandoned. First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994). Furthermore, the argument should include citations to supporting authority. Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 164, 584 S.E.2d 390, 396 (Ct. App. 2003); First Sav. Bank, 314 S.C. at 363, 444 S.E.2d at 514. Where the argument in the brief is conclusory and is without supporting authority, the issue is deemed abandoned. D.R. Horton, Inc. v. Wescott Land Co., 398 S.C. 528, 548-49, 730 S.E.2d 340, 350-51 (Ct. App. 2012).

In Eaddy, this Court determined the appellant abandoned an issue on appeal by failing to argue the issue. 355 S.C. at 164, 584 S.E.2d at 396. In that workers' compensation case, the appellant claimed he was entitled to a credit offsetting its obligation to pay workers' compensation to the respondent. The appellant cited to three statutes as supporting authority; however, this Court found each statute "inapplicable to the present situation." Id. at 165-66, 396-97. Without addressing the merits, this Court concluded that the appellant abandoned the issue because an argument consisting of "short conclusory statements made without supporting authority [is] deemed abandoned on appeal." Id.

In this case, Appellant represented to the Board that she had complied with the GAL statute in both family court cases. Appellant contends, however, that the Board cannot make findings of fact that Appellant failed to comply with the GAL statute, because doing so would infringe upon the family court's "absolute discretion in determining who will be appointed a GAL." (Br. of Appellant p. 18). Appellant bases this contention on S.C. Code §§ 63-3-530(37)⁴ and 63-3-810(B),⁵ yet these statutes address only the family court's exclusive jurisdiction to appoint GALs.

In similar fashion to the appellant in Eaddy, who cited to inapplicable authority to support his argument, Appellant cites to two statutes that are inapplicable to the issue of the Board's authority to make findings of fact regarding whether Appellant complied with the GAL statute. Further still, Appellant does not argue or explain why the statutes support Appellant's assertion that the Board cannot make factual findings concerning whether a licensee has complied with a family law statute. Because Appellant has neither argued the issue raised on appeal nor provided citations to applicable authority, Appellant has abandoned the issue, thereby precluding this Court from addressing the merits.

C. The Board did not exceed its statutory authority in determining that Appellant failed to comply with the responsibilities and duties enumerated in S.C. Code Ann. § 63-3-830(A)(2)(a-f).

The Board is authorized to sanction a social worker when it is established, by a satisfactory showing to the Board, that a social worker is guilty of misconduct. S.C. Code Ann. § 40-63-110(A). A social worker is guilty of misconduct when, among other things, the social worker "violates the principles of professional ethics or standards of

⁴ The family court has exclusive jurisdiction "to appoint guardians ad litem in actions pertaining to custody or visitation pursuant to Section 63-3-810."

⁵ "The [family] court has absolute discretion in determining who will be appointed as a guardian ad litem in each case."

conduct adopted by the board.” *Id.* at (B)(9). As part of the social work principles of professional ethics, a social worker is prohibited from “committing fraud . . . or represent[ing] that [s]he performed services which [s]he did not perform.” S.C. Code Regs. 110-20(8).

In this case, Appellant represented to the Board that she performed certain services in both of the family court cases in which she served as a GAL. Specifically, Appellant represented that she complied with S.C. Code Ann. § 63-3-830(A)(2)(a-f), which enumerates the minimum responsibilities and duties of a GAL. The relevant portion of the statute provides:

- (A) The responsibilities and duties of a guardian ad litem include, but are not limited to:
 - (1) representing the best interest of the child;
 - (2) conducting an independent, balanced, and impartial investigation to determine the facts relevant to the situation of the child and the family. An investigation must include, but is not limited to:
 - (a) obtaining and reviewing relevant documents, except that a guardian ad litem must not be compensated for reviewing documents related solely to financial matters not relevant to the suitability of the parents as to custody, visitation, or child support. The guardian ad litem shall have access to the child's school records and medical records. The guardian ad litem may petition the family court for the medical records of the parties;
 - (b) meeting with and observing the child on at least one occasion;
 - (c) visiting the home settings if deemed appropriate;
 - (d) interviewing parents, caregivers, school officials, law enforcement, and others with knowledge relevant to the case;
 - (e) obtaining the criminal history of each party when determined necessary; and
 - (f) considering the wishes of the child, if appropriate;

S.C. Code Ann. § 63-3-830(A)(2)(a-f).

To determine if Appellant had or had not complied with S.C. Code Regs. 110-20(8), the Board had to determine whether Appellant did, in fact, perform the services in S.C. Code Ann. § 63-3-830(A)(2)(a-f). To make this determination, the Board had to

make factual findings based on the evidence presented to the Board during the two-day disciplinary hearing. Appellant has not cited any provision of the Social Work Practice Act, S.C. Code Ann. § 40-63-5 et seq., which restricts the Board's authority to make factual findings on an issue requiring resolution.

III. The ALC properly held that the Board's conclusions were supported by reliable, probative, and substantial evidence.

Because this is an appeal from an agency decision, the lower court was governed by the APA. Under the APA, the lower court was confined to determining whether substantial evidence existed which could support the Board's conclusions. Substantial evidence is relevant evidence that a reasonable mind might accept as being adequate to support a given conclusion. Midlands Utility, Inc. v. S.C. Dep't of Health & Env'tl. Control, 298 S.C. 66, 69, 378 S.E.2d 256, 258 (1989); Lark, 276 S.C. 130, 276 S.E.2d 304. Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached. Jennings v. Chambers Dev. Co., 335 S.C. 249, 516 S.E.2d 453 (1999). The possibility of drawing two inconsistent conclusions from the evidence will not mean the agency's conclusion was unsupported by substantial evidence. Palmetto Alliance, Inc. v. S.C. Pub. Service Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984). Where there is a conflict in the evidence, the agency's findings of fact are conclusive. Id.; see also Harbin v. Owens-Corning Fiberglass, 316 S.C. 423, 450 S.E.2d 112 (Ct. App. 1994).

The lower court properly held there is reliable, probative, and substantial evidence to support the Board's finding that Appellant violated S.C. Code Ann. § 40-63-110(B)(9) and S.C. Code Regs. 110-20(8). The ALC's order specifically notes that the Board's decision to sanction Appellant was based upon the following findings of fact:

Appellant's failure to obtain and review relevant documents . . . ; failure to meet with and observe the child(ren) in question on at least one (1) occasion, or even speak with them by phone; only visited one (1) of at least four (4) homes; failure to interview each parent, to interview step-parents, to interview grandparent(s), to interview school officials, and others with relevant knowledge; failure to obtain criminal histories of each party; failure to consider the wishes of the child(ren) and representing herself as a licensed Social Worker while acting as a GAL, but failing to conduct herself in a professional, ethical, or competent manner. The Board also concluded that Appellant failed to perform the GAL responsibilities as required under the private GAL statute of S.C. Code Ann. § 63-3-830(A)(2)(a-f).

(ALC order dated July 12, 2011, pp. 2-3). To illustrate that the Board relied on reliable, probative, and substantial evidence in reaching those findings, the ALC devoted seven pages of its order recounting the multitude of testimonial and documentary evidence considered by the Board during the two-day hearing. (*Id.* at 7-13).

The order chronicles the relevant testimony provided by (1) the State's expert, Jania Sommers; (2) Mr. Evans, a party to a family court case in which Appellant served as GAL; (3) Mr. Fortia, a clinical social worker who held sessions for Mr. Evans; (4) Peggy Infinger, Mr. Evans's attorney; (5) Ms. K, a party to a family court case in which Appellant served as GAL; and (6) Kate Schmutz, Ms. K's attorney. (*Id.*). The order also recounts documentation including, but not limited to, investigative statements, documents, and affidavits submitted to the family court, and records from other professionals with knowledge relevant to the case. (*Id.*). Appellant's own testimony is recounted, much of which was inconsistent or contrary to the testimony provided by other witnesses. See Trimmier, 405 S.C. at 246, 746 S.E.2d at 494 (finding appellant's testimony alone constituted substantial evidence supporting the State Board of Dentistry's decision); cf. Be Mi, Inc. v. S.C. Dep't of Revenue, No. 2012-212861, 2014

WL 2199837 (S.C. Ct. App. May 28, 2014) (holding a witness' testimony and a SLED report constituted substantial evidence to support the ALC's decision).

Despite the plethora of reliable and probative evidence that substantially supports the Board's decision, Appellant urges this Court to sit as a finder of fact so that she may re-litigate this case to achieve a more favorable result. Indeed, throughout this section of her brief, Appellant argues that the Board's findings of fact are "incomplete and out-of-context"; accordingly, she attempts to color in facts she posits are incomplete and give context where she believes context is missing. This, however, runs afoul of the standard of review. Appellant had the opportunity to fully flesh out the facts before the Board, the sole finder of fact. Because Appellant failed to provide any basis as to why the Board's findings of fact contravene S.C. Code Ann. § 1-23-380(5), the Board's findings of fact are "not clearly erroneous or an abuse of discretion based on the substantial evidence in the Record and the plain language of S.C. Code Ann. § 63-3-830(A)(2)(a-f)." (ALC order issued July 12, 2011, p. 13).

IV. Pursuant to S.C. Code Ann. § 40-63-110(A), the Board may prohibit Appellant from working as a GAL.

A. The Board did not infringe upon the family court's absolute discretion in determining who may be appointed as a GAL under S.C. Code Ann. § 63-3-810(B).

S.C. Code Ann. § 63-3-810(B) provides that "[t]he [family] court has absolute discretion in determining who will be appointed as a guardian *ad litem* in each case." In light of this provision, Appellant maintains the Board has wrongfully "prevented the family court from exercising its discretion in appointing a guardian," because the Board lacks the authority to "prevent the family court from exercising its discretion in

appointing a guardian *ad litem*” (Br. of Appellant pp. 28). Appellant’s argument mischaracterizes the Board’s action.

In its order dated July 13, 2012, the Board ruled, *inter alia*, that Appellant “may not work as a guardian *ad litem* (GAL).” (Bd. order p. 4). The Board did not decree that the family court is barred from appointing Appellant as a GAL. Appellant would be hard-pressed to cite any part of the Board’s order that speaks to the family court’s appointment power, because such verbiage is wholly absent from the order. In fact, Respondent concedes that the family court has the absolute discretion to appoint Appellant as a GAL and that, should the family court appoint Appellant, the Board could not prevent the appointment. The Board could, however, discipline Appellant for violating the Board’s order. See S.C. Code Ann. § 40-63-110(B)(3).

B. The Board has the statutory authority to “restrict” Appellant’s social work practice or “discipline” Appellant when it is established that Appellant is guilty of misconduct.

The Board’s statutory authority to sanction its licensees is codified chiefly in S.C. Code Ann. § 40-63-110(A). That provision provides, “[t]he board may revoke, suspend, publicly reprimand, or otherwise restrict the practice or discipline a licensee when it is established that the licensee is guilty of misconduct as defined in this Chapter.” S.C. Code Ann. § 40-63-110(A) (emphasis added). In this case, the Board determined that Appellant violated S.C. Code Ann. § 40-63-110(B)(9) by violating the principles of professional ethics as adopted by the board and promulgated in regulations, specifically S.C. Code Regs. 110-20(8), which states, “[a] social worker shall not commit fraud and shall not represent that [s]he performed services which [s]he did not perform.”

After finding Appellant guilty of misconduct under S.C. Code Ann. § 40-63-110(B)(9), the Board exercised its sanctioning authority as authorized by S.C. Code Ann. § 40-63-110(A). The Board ordered, among other things, that Appellant may not work as a GAL and is prohibited from all independent practice. Though there is substantial evidence in the record to support the Board's findings, Appellant argues the Board may not prohibit Appellant from working as a GAL because the responsibilities of a GAL do not fall within the definition of Licensed Independent Social Worker-Clinical Practice ("LISW-CP") pursuant to S.C. Code Ann. § 40-63-20(25).

Appellant's argument is without merit. First, the Board may restrict Appellant's social work practice to "engage in only supervised practice, within a recognized, organized setting such as social, medical, and governmental agencies." (Bd. order p. 4). As stated before, the purpose of a licensing board is to protect the public by holding licensees accountable and ensuring that those licensees meet the standards necessary to adequately practice the profession. In this case, Appellant's actions gave the Board sufficient concern about her ability to work in an independent setting. Because the work of a paid, private GAL requires independence, the Board, in order to protect the public, ordered that she not work as a GAL.

This restriction was proper because Appellant frequently promoted social work "theory, knowledge, methods," S.C. Code Ann. § 40-63-20(25), in her GAL practice. For example, Appellant's article entitled The Importance of Cultural Competency in the Guardian Ad Litem Investigation, provides: "Cultural Competence is an ethical standard for Social Work practice . . . and . . . Guardian ad Litem programs would have better outcomes for the children and families involved if Cultural Competence training became

a standard for [a] Guardian Ad Litem entering the system.” (Hearing Transcript p. 237). Further, Appellant lectured to attendees at a Continuing Legal Education sponsored by the South Carolina Bar about the importance of applying social work concepts to GAL work. (Hearing Transcript p. 391, 771). Because the Board had reason to believe that Appellant’s work as a GAL included some degree of social work, the Board had the authority to restrict Appellant’s practice by prohibiting her from working as a GAL.

Should this Court find the Board’s restriction of Appellant’s practice to include work as a GAL improper, S.C. Code Ann. § 40-63-110(A) still provides that the Board may “restrict the practice or discipline a licensee when it is established that the licensee is guilty of misconduct” S.C. Code Ann. § 40-63-110(A) (emphasis added). In this case, the Board’s prohibition against Appellant working as a GAL work can safely be said to constitute discipline. Indeed, the Board’s order specifically refers to the Board’s action as a “sanction.”⁶ (Bd. order p. 4).

Finally, Appellant ignores the fact that she is held to a higher standard because she holds a professional license. In being afforded the privilege to practice social work, Appellant is bound by the provisions of S.C. Code Ann. § 40-63-5 et seq. and S.C. Code Regs. 110-20. See, e.g., Mo. Real Estate Comm’n v. Rayford, 307 S.W. 3d 686, 699 (Mo. Ct. App. 2010) (noting a professional license is a privilege and not a vested right) (citing State Bd. of Registration for Healing Arts v. Boston, 72 S.W.3d 260, 266 (Mo. Ct. App. 2002) (holding a professional license is a privilege granted by the state)). If Appellant wishes to practice as a GAL, she may surrender her license to the Board. See

⁶ “The sanction imposed is consistent with the purpose of these proceedings and has been made after weighing the public interest and the need for the continuing services of qualified social workers against the countervailing concern that society be protected from professional misconduct and ineptitude.”

S.C. Code Ann. §§ 40-1-150, 40-63-150. In doing so, Appellant will be bound no longer to the ethical and professional mores of the social work profession.

C. The Board may sanction Appellant even if her misconduct was not addressed by the family court.

Appellant posits that a prerequisite to the Board's sanctioning authority is the family court's finding of wrongdoing. In other words, the Board is powerless to sanction its licensee unless the judicial branch acts first. Appellant, as before, has failed to cite any authority in support of her argument. In Wagner v. Ezell, however, the South Carolina Supreme Court was asked to consider whether a conviction by a court of competent jurisdiction was a prerequisite to the Board of Examiners of Optometry's exercise of its discretion in ordering a suspension of a license. The court wrote:

Wagner submits that the Board has no authority to act i[n] suspending a license until and unless a criminal conviction is brought about in a court of competent jurisdiction. This question is answered adversely to the appellant in the case of Ezell v. Ritholz, 188 S.C. 39, 198 S.E. 419, wherein the Court specifically held as relates to these same sections of the Code that even though a wrong may be a criminal wrong, it may also be a civil wrong and may furnish basis for both criminal and civil redress. This case so adequately covers this point that it will not be necessary to elaborate on the same.

249 S.C. 421, 433, 154 S.E.2d 731 (1967).

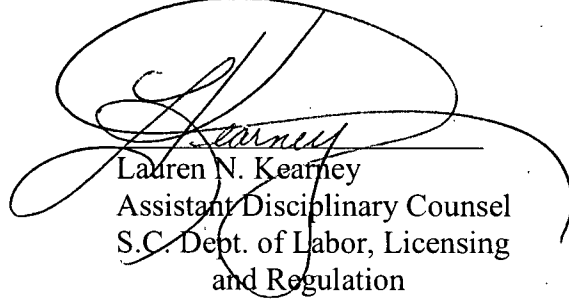
Applying the Court's reasoning to this case, Appellant is accountable to both the family court and the Board. The Board need not await judicial action in order to sanction the wrongdoing of its licensee or to prevent continued wrongdoing of its licensee. There is simply no error with the ALC's holding that "[t]he South Carolina Family Court has jurisdiction of court appointed paid private Guardian ad Litem, but a licensing Board maintains its jurisdiction to sanction it's [sic] licensee for misconduct as a paid private

GAL, even if the misconduct was not addressed by the family court.” (ALC order issued July 12, 2011, p. 5).

CONCLUSION

For the reasons stated above, the ALC orders dated July 12, 2011, and January 9, 2014, should be affirmed.

Respectfully submitted,

A large, stylized handwritten signature in black ink, which appears to read "Lauren N. Kearney". The signature is written over the typed name and title.

Lauren N. Kearney
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June 25, 2014

The South Carolina Court of Appeals

Appellate Case No. 2014-000285

Karen Forman,

Appellant,

v.

South Carolina Department of Labor, Licensing and Regulation,
State Board of Social Work Examiners,

Respondent.

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable John D. McLeod, Trial Court Case No. 2010-ALJ-11-0591-AP,
The Honorable S. Phillip Lenski, 2012-ALJ-11-0495-AP

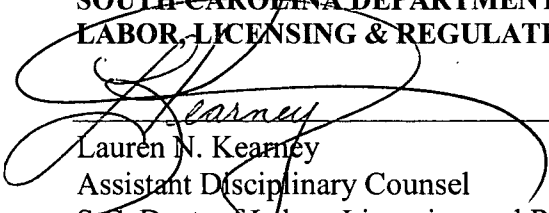
CERTIFICATE OF SERVICE

I hereby certify that I have this day filed the original **Respondent's Initial Brief** with or served a copy thereof on the persons hereafter named, by depositing same in an envelope, securely wrapped in the United States mail, by certified mail, properly addressed to the said persons hereafter named, at the places and addresses stated below, which are the last known addresses for same:

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JUN 25 2014

SC Court of Appeals

Columbia, South Carolina
June 25, 2014



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June 25, 2014

The Honorable Jenny Abbot Kitchings
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JUN 25 2014
SC Court of Appeals

RE: Karen Forman vs. SC Department of Labor, Licensing & Regulation
Appellate Case No. 2014-000285

Dear Ms. Kitchings:

Enclosed for filing are the Designation of Matter and Initial Brief of Respondent. In accordance with Rule 208, SCACR, I am enclosing an original and two copies, and ask that you please stamp a copy as filed and return it in the self-addressed stamped envelope.

Also enclosed you will find an original Certificate of Service and two copies. Please also file stamp one of the copies and return.

By copy of this letter and enclosure, I am hereby serving Appellant's counsel with same.

Thank you for your assistance with this matter.

Sincerely,

Pamela S. Pierce, CP
Certified Paralegal to Lauren N. Kearney
Assistant Disciplinary Counsel

psp
Enclosure

cc: Erin K. Urquhart, Esquire