THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

John D. McLeod, Judge, Administrative Law Court
Case No. 2010AL1100591

S. Phillip Lenski, Judge, Administrative Law Court
Case No. 2012ALJ-11-0495-AP

Opinion No. 5453, Filed November 9, 2016

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

versus

Karen A. Forman Petitioner

PETITION FOR REHEARING

Thomas F. McDow
Erin K. Urquhart
McDow & Urquhart, LLC
514 Oakland Avenue, Second Floor
Post Office Box 891
Rock Hill SC 29731-6891
Telephone 803-896-4852

Other counsel of record are:

Prentiss Counts Shealey
Megan Joan Flannery
Attorneys for Respondent
110 Centerview Drive
Post Office Box 11329
Columbia SC 29211
Telephone 803-896-4852

STATEMENT OF THE CASE

The Social Work Review Board (Board) brought a proceeding alleging Karen A. Forman (Forman) engaged in misconduct in violation of the Social Work Examiners Practice Act. The Board asserted "Forman made recommendations to the family court without interviewing all of the parties involved, conducting a full investigation of all relevant documents and allegations that may be relevant, or supporting her conclusions with a full report." Other allegations were dismissed by the Administrative Law Court (ALC) and are not relevant. The Board found misconduct and imposed sanctions. Forman appealed to the ADMINISTRATIVE LAW COURT. After reversing some findings, the ADMINISTRATIVE LAW COURT remanded the case to the Board to determine if the reversed findings affected the sanctions. The Board found the reversed findings of misconduct did not affect the sanctions. The sanctions included a prohibition of Forman working as a guardian ad litem. The ADMINISTRATIVE LAW COURT affirmed.

Forman appealed to the Court of Appeals which affirmed by Opinion No. 5453, heard November 10, 2015, and filed November 9, 2016. Forman petitions for a rehearing *en banc*.

PETITION FOR REHEARING EN BANC

Forman petitions for a rehearing *en banc* because the three-judge-panel overlooked or misapprehended these points:

Separation of Powers. Rule 220(b), SCACR, requires the appellate court to decide every point fairly arising from the record. The appellate court did not mention or address separation of powers or the constitutional provision or six statutes appellant cited regarding separation of powers.

Standard of Review. The Court of Appeals correctly stated the standard of Review, which permits reversal when substantial rights are prejudiced because findings, inferences, conclusions, or decisions meet any of six tests, but overlooked these: constitutional issues, statutory authority, unlawful procedure, errors of law, and abuses and unwarranted exercises of discretion. Focusing only on the

substantial evidence test, it says, "Forman argues the Board's findings of fact are not correct. We disagree." without explanation. All tests require analysis and correct analysis reversal.

Professional Disciplinary Proceedings. The court states, "Forman argues quasi-judicial immunity afforded to GALs applies to professional disciplinary proceedings." This is not correct. Forman argues (1) the logic of *Fleming* applies to these facts and (2) *Fleming* addresses the remedies for rogue guardians. The court relies upon *dicta* from non-controlling jurisdictions while ignoring the facts supporting the holdings in those cases.

MEMORANDUM WITH AUTHORITIES

Separation of Powers

Rule 220(b), SCACR, requires the appellate court to decide every point fairly arising from the record. The appellate court did not mention or address separation of powers nor the constitutional provision and six statutes appellant cited regarding separation of powers.

Forman's leading point in her Brief of Appellant was the Board's action violation of the separation of powers doctrine, which raised a constitutional issue. The court's opinion does not mention separation of powers. The same panel, two days after oral argument in Forman, issued an unpublished opinion uncitable opinion including the phrase "Under the separation of powers doctrine, which is the basis for our form of government ...." In September 2016, the Supreme Court reversed an LLR decision in which Justice Kittredge, concurring, affirmed the "once sacrosanct constitutional principle of separation of powers" and criticized the power granted administrative agencies.[1]

Like the court, LLR does not mention separation of powers in the Brief of Respondent.

---

[1]Joseph v. S.C. Dep't of Labor, Licensing & Regulation, 417 S.C. 436, 455–56, 790 S.E.2d 763, 773 (2016), reh'g denied (Dec. 7, 2016).

Under the separation of powers principle judicial review of non-judicial functions by administrative agencies is limited.[2] Here, the Board exercised judicial functions, interpreting the Private Guardian ad Litem statute and restricting the judiciary's right to appoint guardians. These are questions of law, controlled by the Constitution, statutes, and case law, not questions of fact to be affirmed by a "substantial evidence" rule.

These statements from the Brief of Appellant and Reply Brief of Appellant demonstrate the practical reasons why the separation of powers principle is important to the courts, litigants, lawyers, and guardian ad litem in this and similar cases.

> Separation of powers is a fundamental principal of American democracy. Correspondingly, South Carolina's government consists of three equal branches: the executive branch, the legislative branch and the judicial branch. "In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other."[3] Because each branch has its own duties and responsibilities, the branches need not come into conflict. Blurring these duties and responsibilities creates conflict and confusion as is discussed more fully in Argument III. In addition to the branches' checks and balances, the separation of powers allows for specialized knowledge regarding a particular branch's province.
>
> This case involves two distinct government entities. The first being the State Board of Social Work Examiners, which falls within the executive branch with its members appointed by the governor[4] with the advice and consent of the senate[5] with the secretary of state[6] monitoring the Board.[7]

---

[2]Bd. of Bank Control v. Thomason, 236 S.C. 158, 165, 113 S.E.2d 544, 547 (1960).

[3]S.C. Const. Art. I, §8.

[4]S. C. Code Ann. Section 1-1-110.

[5]S. C. Code Ann. Section 40-63-10(A).

[6]S. C. Code Ann. Section 1-1-110.

[7]S. C. Code Ann. Section 14-1-70(6).

> The second is the family court system, which belongs to the judicial branch.60 Guardians ad litem are appointed by a family court judge in the exercise of his or her absolute discretion61 and thus fall within the judicial branch. Where the executive assumes judicial functions, the result is an improper exercise of power lacking subject matter jurisdiction by the executive branch.[8]
>
> Finally, Respondent misunderstands Appellant's argument about reciprocal sanctions. It is not simply that the judicial branch must act first. Appellant's argument is based on the theory that only the judicial branch has the authority to interpret the guardian statutes and to determine if Appellant did or did not comply with the statutes. As argued more fully in Issue I, the Board lacks the education, training, and experience that the judicial branch has to understand and interpret the guardian statutes. The Respondent, again, fails to acknowledge that this case represents a violation of the separation of powers – an overreach by the executive branch to "protect the public" from a judicial appointee.[9]

The parties, the bench, the bar, and guardians ad litem need a definitive ruling of who, if anyone, other than the court, has a right to discipline a guardian ad litem.

Standard of Review

The Court of Appeals correctly stated the Standard of Review, which permits reversal where substantial rights are prejudiced because findings, inferences, conclusions, or decisions meet any of six tests, but overlooked these: constitutional issues, statutory authority, unlawful procedure, errors of law, and abuses and unwarranted exercises of discretion. Focusing only on the substantial evidence test, it says "Forman argues the Board's findings of fact are not correct. We disagree," without explanation. All tests require analysis and correct analysis requires reversal.

While stating the standard of review correctly, the court misapprehends or overlooks both its authority and duty of judicial oversight, focusing only on the "substantial evidence" test regarding the Board's findings of fact, while ignoring its authority to reverse or modify decisions:

(a) in violation of constitutional or statutory provisions;

---

[8]Brief of Appellant, pages 11-12.

[9]Reply Brief of Appellant, page 10.

(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.

Constitutional or statutory provisions. Forman addresses this in the section on *Separation of Powers.*

Excess of statutory authority. This is addressed in both the section on *Separation of Powers above* and the second on *Professional Disciplinary Proceedings* below.

Unlawful procedure. Any proceeding in violation of the Constitution and the statutes which ignores the separation of powers principle, and which allows a panel of laypersons untrained in the law to interpret and apply the Private Guardian ad Litem statute to deprive person operating under the judicial branch of a livelihood, is unlawful.

Affected by Other Error of Law. The Board misinterpreted and misapplied the Private Guardian ad Litem statute. The Board does not have the background of *Patel v. Patel,*[10] this history of the Private Guardian ad Litem statue,[11] or the practical application of the statute.

Record as a Whole. Both cases settled before a final hearing was scheduled. The guardian's report was not due in either case nor was the investigation complete, yet the Board made findings as if there had been final hearings in each case. Forman asserted errors in the findings of fact but the Court dismissed these with the single phrase "We disagree," either overlooking or misapprehending the factual arguments asserted by Forman. Neither the Board nor the Court find any duty or responsibility of Forman to be performed by a particular date prior to a final

[10]Patel v. Patel, 347 S.C. 281, 555 S.E.2d 386 (2001).

[11]S. C. Code Ann. § 63-3-810, et seq.

hearing. This is akin to deciding a baseball game in the sixth inning or a football game in the third quarter.

The allegations were "Forman made recommendations to the family court without interviewing all of the parties involved, conducting a full investigation of all relevant documents and allegations that may be relevant, or supporting her conclusions with a full report." The time for interviewing all parties had not expired. Nor had the time expired for conducting a full investigation of documents and allegations. The full report was not due until 20 days before the final hearing, an event that did not occur because the parties settled at preliminary hearings. Forman did all the statutes, reason, and good judgment required of her. A literal compliance with the statute would have required her to travel to a home in Nevada, even though the home was not in issue.

Abuse or Unwarranted Discretion. The Board arbitrarily found Forman promoted herself with her credentials, ignoring the requirement for a guardian to disclose "any membership or participation in any organization related to child abuse, domestic violence, or drug and alcohol abuse."[12]

The Court's finding that the family court may appoint Forman as a guardian, "However, the decision whether to accept such an appointment lies in Forman, who either may comply with the Board's restriction or face the consequences of noncompliance." This finding defies logic and practical experience. It reminds one of the late John T. Roddey, the respected senior painter of Roddey, Carpenter & White, who was known among the York County Bar for his Roddeyisms. He once denied having fired a secretary, explaining, "We quit paying her and she quit coming to work." The Court's finding is a Roddeyism.

Professional Disciplinary Proceedings.

The court states, "Forman argues quasi-judicial immunity afforded to GALs applies to professional disciplinary proceedings." This is not correct. Forman argues (1) the logic of *Fleming* applies to these facts and (2)

[12]S. C. Code Ann. § 63-3-860(3).

***Fleming* addresses the remedies for rogue guardians. The court relies upon *dicta* from non-controlling jurisdictions while ignoring the facts supporting the holdings in those cases.**

There are two public policy concerns that must balance. The first is the independence required of guardians ad litem in custody cases, including protection from disgruntled parties. "Because one of the guardian's roles is to act as a representative of the court, and because this role can only be fulfilled if the guardian is not exposed to a constant threat of lawsuits from disgruntled parties, a finding of quasi-judicial immunity is necessary. Such a grant of immunity is crucial in order for guardians to properly discharge their duties."[13] The second public policy consideration is the mandate of the professional disciplinary board, under the umbrella of the South Carolina Department of Labor, Licensing, and Regulation to protect the public,[14] life, health and welfare of the people at large.[15]

The Court misapprehends Forman's argument to favor the first public policy consideration while ignoring the second. The Court also overlooks the violation of the separation of powers which comes from prioritizing the second public policy concern while ignoring the first. By requiring the separation of the different branches of government, the public policy interests are balanced and neither is eliminated or superceded.

The question becomes under what governmental role the suspect activity is being performed. Forman is not arguing that she is afforded judicial immunity in disciplinary proceedings simply because she had a role in a judicial proceeding. Where her role in that judicial proceeding is granted by the judicial system, the appropriate remedy is discipline through the judicial branch (as in Bronson,[16]

---

[13]Fleming v. Asbill, 326 S.C. 49, 57, 483 S.E.2d 751, 755–56 (1997).

[14]S.C. Code Ann. § 40-1-40.

[15]Wilson v. State Bd. of Med. Examiners, 305 S.C. 194, 196, 406 S.E.2d 345, 346 (1991).

[16]Bronson v. Kinzie, 42 U.S. 311, 11 L. Ed. 143 (1843).

Carruba,[17] *McKay*,[18] *Weinstock*,[19] and *Dobbs*[20]). Separately, where the professional's role in a judicial proceeding stems from her professional expertise, the appropriate remedy is through the executive branch (as in *Deatherage*,[21] *Lythgoe*,[22] *Budwin*,[23] *Sibel*,[24] *Curd*,[25] and *Huhta*[26]).

Consider whether Forman's role in these custody cases relates to the broader and more ambiguous definition of LISW-CP: "Professional application of social work theory, knowledge, methods, principles, values, and ethics, and the professional use of self to restore or enhance social, psychosocial, or biopsychosocial functioning of individuals, couples, families, groups, and direct clinical needs of organizations and communities,"[27] or whether her role in an individual custody case more closely resembles the statutory requirements of a guardian ad litem to "represent the best interests of the child"[28] and "conduct an independent, balanced, and impartial

---

[17]Carrubba v. Moskowitz, 274 Conn. 533, 534, 877 A.2d 773, 777 (2005).

[18]McKay v. Owens, 130 Idaho 148, 937 P.2d 1222 (1997).

[19]State ex rel. Bird v. Weinstock, 864 S.W.2d 376, 377 (Mo. Ct. App. 1993).

[20]State ex rel. Oklahoma Bar Ass'n v. Dobbs, 2004 OK 46, 94 P.3d 31.

[21]Deatherage v. State, Examining Bd. of Psychology, 134 Wash. 2d 131, 948 P.2d 828 (1997)

[22]Lythgoe v. Guinn, 884 P.2d 1085, 1086 (Alaska 1994).

[23]Budwin v. Am. Psychological Assn., 24 Cal. App. 4th 875, 29 Cal. Rptr. 2d 453 (1994).

[24]Seibel v. Kemble, 63 Haw. 516, 523, 631 P.2d 173, 177 (1981).

[25]Curd v. Kentucky State Bd. of Licensure for Prof'l Engineers & Land Surveyors, 433 S.W.3d 291 (Ky. 2014).

[26]Huhta v. State Bd. of Med., 706 A.2d 1275 (Pa. Commw. Ct. 1998).

[27]S.C. Code Ann. § 40-63-20(25).

[28]S.C. Code Ann. § 63-3-830(A)(1).

investigation..."[29] The Court is disciplining a guardian-ad-litem-shaped peg in a social-work-shaped hole.

The slew of cases cited by the Court for their dicta, not holdings, span over one hundred fifty years and range from Alaska to Connecticut. In all of these cases, where the accused's behavior during their participation in a court proceeding is in question, the determining factor has been the role the accused is serving. Where Forman's role is judicial, oversight or discipline by the Judiciary is appropriate.

CONCLUSION

Because guardian discipline is the sole prerogative of the judicial department, the principles and logic expressed in *Fleming v. Asbill* control. The Board, no matter how well intentioned, has no authority to intrude upon the prerogative of the judicial department. Reversal of the Board's findings and sanctions will serve the cause of justice, will protect guardians ad litem, and encourage qualified persons to serve as guardians for South Carolina's children. Reversal will allow the family courts and guardians to proceed with confidence and courage.

McDow & Urquhart, LLC

By Thos. F. McDow

Thomas F. McDow
Attorneys for Petitioner
514 Oakland Avenue, Second Floor
Post Office Box 891
Rock Hill SC 29731-6891
Telephone 803-327-4151

December 13, 2016

[29] S.C. Code Ann. § 63-3-830(A)(2)

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

John D. McLeod, Judge, Administrative Law Court
Case No. 2010AL1100591

S. Phillip Lenski, Judge, Administrative Law Court
Case No. 2012ALJ-11-0495-AP

Opinion No. 5453, Filed November 9, 2016

Karen A. Forman — Appellant,

versus

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

PROOF OF SERVICE

I certify that I served the petition for rehearing by depositing copies of it in the United States Mail, postage prepaid, on December 13, 2016, addressed as follows:

Prentiss Counts Shealey
110 Centerview Drive
Post Office Box 11329
Columbia SC 29211-1329

Megan Joan Flannery
110 Centerview Drive
Post Office Box 11329
Columbia SC 29211-1329

Simultaneously, the petition for rehearing was faxed to the clerk of the South Carolina Court of Appeals and emailed to counsel of record.

McDow & Urquhart, LLC

Erin K. Urquhart
Attorney for Appellant
514 Oakland Avenue, Second Floor
Post Office Box 891
Rock Hill SC 29731-6891

December 13, 2016