

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

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

versus

Karen A. Forman

Petitioner

PETITION FOR WRIT OF CERTIORARI

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¹Rule 242(b), SCACR.

CERTIFICATION

A Petition for Rehearing was made to the Court of Appeals and was denied by Order filed February 21, 2017.

QUESTIONS PRESENTED FOR REVIEW

1. “A writ of certiorari is not a matter of right.”² Rule 242(b), SCACR, provides five examples of cases considered for review. Petitioner Forman presented arguments to the Court of Appeals involving a novel issue of law and a substantial constitutional issue. The Court of Appeals’ opinion conflicts with a prior decision of the Supreme Court of South Carolina. Are these special and compelling reasons for the Supreme Court, in exercising its sound judicial discretion, to grant review?
2. Rule 220(b), SCACR, requires the appellate court to decide every point fairly arising from the record. The Court of Appeals did not mention or address separation of powers nor the constitutional provision and six statutes appellant cited regarding separation of powers.
3. 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.” with no explanation. All tests require analysis and correct analysis requires reversal.
4. The Court of Appeals 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 of Appeals relies upon *dicta* from non-controlling jurisdictions while ignoring the facts supporting the holdings in those cases.

²Rule 242(b), SCACR.

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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.” The Administrative Law Court (ALC) dismissed other allegations, which are not relevant. The Board found misconduct and imposed sanctions. Forman appealed to the ALC. After reversing some findings, the ALC 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 ALC affirmed.

Forman appealed to the Court of Appeals, which affirmed by Opinion No. 5453, heard November 10, 2015, and filed November 9, 2016. Forman petitioned for a rehearing *en banc*. The Court of Appeals denied a rehearing by Order filed February 21, 2017.

ARGUMENT

1. CERTIORARI

“A writ of certiorari is not a matter of right.”³ Rule 242(b), SCACR, provides five examples of cases considered for review. Petitioner Forman presented arguments to the Court of Appeals involving a novel issue of law and a substantial constitutional issue. The Court of Appeals’ opinion conflicts with a prior decision of the Supreme Court of South Carolina. Are these special and compelling reasons for the Supreme Court, in exercising its sound judicial discretion, to grant review?

The primary question of law presented to the Court of Appeals was whether the judicial branch or the executive branch has the authority to discipline guardians *ad*

³Rule 242(b), SCACR.

litem appointed by the judicial branch. Forman's argument centered on the S.C. Const. Art. I, §8: "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." This argument created and directly involved a substantial constitutional issue.⁴

The Supreme Court has issued no opinion stating who may discipline a guardian ad litem. Both parties before the Court of Appeals cited cases suggesting answers, but the issue the Supreme Court has never heard or answered the question. This is a novel question of law.⁵

The Supreme Court stated public policy regarding guardians in a similar but different situation. "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."⁶ The Court of Appeals' opinion conflicts with the spirit, if not the absolute letter, of a prior decision of the Supreme Court of South Carolina.⁷

Applying the Supreme Court's criteria for certiorari, the Court should review the opinion of the Court of Appeals. Aside from the criteria of Rule 242(b), the Court of Appeals misinterpreted the facts and misapplied the law, as described in the Petition for Rehearing.

⁴Rule 242(b)(4).

⁵Rule 242(b)(1).

⁶*Fleming v. Asbill*, 326 S.C. 49, 57, 483 S.E.2d 751, 755-56 (1997).

⁷Rule 242(b)(3), SCACR.

2. SEPARATION OF POWERS

Rule 220(b), SCACR, requires the appellate court to decide every point fairly arising from the record. The Court of Appeals 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 violated of the separation of powers doctrine, which raised a constitutional issue. The Court of Appeals' opinion does not mention separation of powers. The same panel, two days after oral argument in Forman, issued an 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.⁸

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

Under the separation of powers principle, judicial review of non-judicial functions by administrative agencies is limited.⁹ 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, rendering the "substantial evidence" rule inapplicable.

These statements from the Brief of Appellant and Reply Brief of Appellant demonstrate the practical reasons why the separation of powers principle is

⁸Joseph 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).

⁹Bd. of Bank Control v. Thomason, 236 S.C. 158, 165, 113 S.E.2d 544, 547 (1960).

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."¹⁰ 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 governor¹¹ with the advice and consent of the senate¹² with the secretary of state¹³ monitoring the Board.¹⁴ The second is the family court system, which belongs to the judicial branch.¹⁵ Guardians *ad litem* are appointed by a family court judge in the exercise of his or her absolute discretion¹⁶ 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.¹⁷

¹⁰S.C. Const. Art. I, §8.

¹¹S. C. Code Ann. Section 1-1-110.

¹²S. C. Code Ann. Section 40-63-10(A).

¹³S. C. Code Ann. Section 1-1-110.

¹⁴S. C. Code Ann. Section 14-1-70(6).

¹⁵S. C. Code Ann. Section 14-1-70(6).

¹⁶S. C. Code Ann. Sections 63-3-530(37) and 63-3-810.

¹⁷Brief of Appellant, pages 12-13.

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.¹⁸

The parties, the bench, the bar, and guardians *ad litem* need a definitive ruling whether anyone, other than the court, may discipline a guardian *ad litem* performing her judicial duties.

3. 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,” with no explanation. All tests require analysis and correct analysis requires reversal.

While stating the standard of review correctly, the Court of Appeals 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;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure,
- (d) affected by other error of law,

¹⁸Reply Brief of Appellant, page 10.

- (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 under *Separation of Powers*, Argument 2, page 6.

Excess of statutory authority. This is addressed in both the section on *Separation of Powers* Argument 2, page 6, and the section on *Professional Disciplinary Proceedings*, Argument 4, page 11.

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* statute¹⁹ 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.²⁰ The Board does not have the background of *Patel v. Patel*,²¹ the history of the Private Guardian *ad Litem* statute,²² or the practical application of the statute.

Record as a Whole. Both cases in which Forman was the guardian 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 of Appeals dismissed these with the single phrase "We disagree," either overlooking or misapprehending the factual arguments asserted by Forman.

¹⁹S. C. Code Ann. §§ 63-3-810, et seq.

²⁰S. C. Code Ann. §§ 63-3-810, et seq.

²¹*Patel v. Patel*, 347 S.C. 281, 555 S.E.2d 386 (2001).

²²S. C. Code Ann. § 63-3-810, et seq.

Neither the Board nor the Court of Appeals find any duty or responsibility of Forman to be performed by a particular date before a final 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."²³

The Court of Appeals' 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 partner 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 of Appeals' finding is a Roddeyism.

²³S. C. Code Ann. § 63-3-860(3).

4. Professional Disciplinary Proceedings

The Court of Appeals 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 of Appeals relies upon *dicta* from non-controlling jurisdictions while ignoring the facts supporting the holdings in those cases.

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The parties advance two different public policy concerns. The first, advanced by Forman, 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.”²⁴ The second public policy consideration, advanced by LLR, 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,²⁵ life, health and welfare of the people at large.²⁶

The Court of Appeals misapprehends Forman’s argument to favor the first public policy consideration while ignoring the second. The Court of Appeals also overlooks the violation of the separation of powers which comes from prioritizing the second public policy concern while ignoring the first. Requiring the separation of the different branches of government satisfies the public policy interests without eliminating or superceding either.

²⁴Fleming v. Asbill, 326 S.C. 49, 57, 483 S.E.2d 751, 755–56 (1997).

²⁵S.C. Code Ann. § 40-1-40.

²⁶Wilson v. State Bd. of Med. Examiners, 305 S.C. 194, 196, 406 S.E.2d 345, 346 (1991).

The question becomes under what governmental role the suspect activity is being performed. Forman is not arguing 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 by appointment from the judicial system, discipline is imposed by the judicial branch (as in *Bronson*,²⁷ *Carruba*,²⁸ *McKay*,²⁹ *Weinstock*,³⁰ and *Dobbs*³¹). Separately, where the professional's role in a judicial proceeding stems from her professional expertise, such as testifying as an expert, discipline is imposed by the executive branch (as in *Deatherage*,³² *Lythgoe*,³³ *Budwin*,³⁴ *Sibel*,³⁵ *Curd*,³⁶ and *Huhta*³⁷).

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

²⁷*Bronson v. Kinzie*, 42 U.S. 311, 11 L. Ed. 143 (1843).

²⁸*Carrubba v. Moskowitz*, 274 Conn. 533, 534, 877 A.2d 773, 777 (2005).

²⁹*McKay v. Owens*, 130 Idaho 148, 937 P.2d 1222 (1997).

³⁰*State ex rel. Bird v. Weinstock*, 864 S.W.2d 376, 377 (Mo. Ct. App. 1993).

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

³²*Deatherage v. State, Examining Bd. of Psychology*, 134 Wash. 2d 131, 948 P.2d 828 (1997).

³³*Lythgoe v. Guinn*, 884 P.2d 1085, 1086 (Alaska 1994).

³⁴*Budwin v. Am. Psychological Assn.*, 24 Cal. App. 4th 875, 29 Cal. Rptr. 2d 453 (1994).

³⁵*Seibel v. Kemble*, 63 Haw. 516, 523, 631 P.2d 173, 177 (1981).

³⁶*Curd v. Kentucky State Bd. of Licensure for Prof'l Engineers & Land Surveyors*, 433 S.W.3d 291 (Ky. 2014).

³⁷*Huhta v. State Bd. of Med.*, 706 A.2d 1275 (Pa. Commw. Ct. 1998).

individuals, couples, families, groups, and direct clinical needs of organizations and communities,”³⁸ 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”³⁹ and “conduct an independent, balanced, and impartial investigation...”⁴⁰ The Court of Appeals seeks to fit a guardian-*ad-litem*-shaped peg in a social-work-shaped hole.

The slew of cases cited by the Court of Appeals for their *dicta*, not holdings, span over one hundred fifty years and range from Alaska to Connecticut. In 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

Applying the Court’s considerations governing review, this is an appropriate case for the grant of a Writ of Certiorari. The opinion of the Court of Appeals should be reversed because of the constitutional principle of separation of powers, because the Court of Appeals’ failure to apply properly the standard of review it correctly found applicable, and because the facts do not support the sanctions.

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

³⁸S.C. Code Ann. § 40-63-20(25).

³⁹S.C. Code Ann. § 63-3-830(A)(1).

⁴⁰S.C. Code Ann. § 63-3-830(A)(2)

serve as guardians for South Carolina's children. Reversal will allow the family courts and guardians to proceed with confidence and courage.

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March 15, 2017

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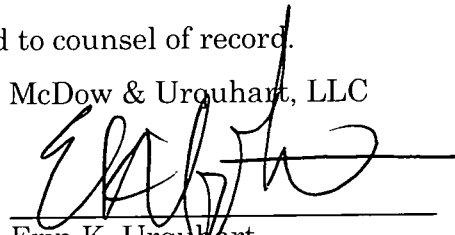
I certify that I served the petition for writ of certiorari by depositing copies of it in
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Simultaneously, two copies of the appendix were mailed to the clerk of the
Supreme Court of South Carolina and emailed to counsel of record.

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March 17, 2017

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