IN THE MISSOURI SUPREME COURT

SC95482

KAREN CARPENTER,

Appellant,

vs.

STATE BOARD OF NURSING,

Respondent.

Appeal from the Circuit Court of the City of St. Louis

State of Missouri

Honorable Judge David Dowd

SUBSTITUTE REPLY BRIEF OF APPELLANT

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I.

THE BOARD WAS NOT ACTING IN AN ADJUDICATIVE CAPACITY WHEN THE BOARD PURSUED SPECIFIC DISCIPLINE AGAINST CARPENTER'S NURSING LICENSE THROUGHOUT THE UNDERLYING PROCEEDINGS, WHEREIN THE BOARD WAS A NAMED, ADVERSARIAL PARTY REPRESENTED BY COUNSEL WHO PRESENTED EVIDENCE AND ARGUMENT AGAINST CARPENTER. (REPLY TO RESPONDENT'S POINT I).

A. Respondent Mischaracterizes The Issue On Appeal.

Respondent asks this Court to answer the following question: "when a licensing board as a litigant successfully obtains authority to discipline a professional license, does §536.087 subject that board to fees if the disciplinary order the Board imposes as an adjudicator is reduced upon judicial review?" (Resp. S. Br., p. 6). However, this is not the question before the Court, as it erroneously assumes the Board acted solely as an "adjudicator" in rendering its Disciplinary Order.[1] Respondent ignores the reality of the adversarial nature of administrative licensure disciplinary proceedings (which, as explained in Section I.B. infra, the record on appeal corroborates) and insists on an

[1] As an initial matter, Respondent's failure to raise the issue of whether the Board acted in an adjudicative capacity before the Circuit Court should result in waiver of the issue on appeal. See, e.g., Douglass v. Safire, 712 S.W.2d 373, 374-75 (Mo. banc 1986) (holding issue of inconsistent verdicts waived for purposes of appeal due to the party's failure to raise it before the trial court); see also infra pp. 6-7.

untenable extension of a fact-specific holding in Garland v. Ruhl to insulate licensing board disciplinary hearings and orders from meaningful review.

B. The Board Acted As An Adversarial Litigant From Initiation Of The Contested Case Through Judicial Review.

The Board did not act solely in an adjudicative capacity because it was the adverse party, represented by counsel, from the beginning of this contested case to the present, as required by law. Respondent mistakenly applies Garland v. Ruhl to conclude the Board acted in an "adjudicative capacity" and therefore cannot be subject to the fee provisions of § 536.087. (Resp. S. Br., pp. 8-10).

Section 536.087 provides for an award of attorneys' fees in "an agency proceeding or civil action arising therefrom." Section 536.085(1) defines an "agency proceeding" as "an adversary proceeding in a contested case pursuant to this chapter in which the state is represented by counsel." Section 536.010(4) defines a "contested case" as a "proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing." See also Lipic v. State, 93 S.W.3d 839, 841 (Mo. Ct. App. 2002) (citing State ex rel. Yarber v. McHenry, 915 S.W.2d 325, 328 (Mo. banc 1995) ("[t]he relevant inquiry is not whether the agency actually held an 'adversary proceeding in a contested case,' but whether a statute, ordinance, or constitutional provision required the agency to do so")). A contested case proceeding is one "at which a 'measure of procedural formality' is followed." Id. at 842. The Lipic court noted:

> The following procedures are usually present in contested cases: notice to all necessary parties, oral evidence presented under oath or affirmation and

> subject to cross-examination, use of exhibits, adherence to evidentiary rules, a record preserving the proceedings and written decisions with findings of fact and conclusions of law.

Id. (internal citations omitted).

Here, Carpenter is entitled to a fee award because she prevailed in a civil action arising from an agency proceeding (i.e., her disciplinary hearing). § 536.087(1) RSMo. The disciplinary hearing was an adversary proceeding in a contested case in which Respondent was represented by counsel. §§ 536.085(1) and 536.010(4) RSMo. All of the contested case procedures set forth in Lipic apply at every stage of the underlying administrative disciplinary proceedings, **including the disciplinary hearing itself**. At or before the disciplinary hearing, Respondent noticed all necessary parties about the disciplinary hearing (L.F. 29, 90, 128), was represented by counsel (Angela Marmion) (L.F. 29), oral evidence was presented under oath and subject to cross-examination by both the Board and its counsel (L.F. 29, 32-33), exhibits were used and received (L.F. 29), evidentiary rules were observed (L.F. 29), a record of the disciplinary hearing was preserved via a transcript (L.F. 89-91, 127), and a written decision (denominating the Board as an adversarial party represented by counsel) was issued with findings of fact and conclusions of law (L.F. 29-39, 90).[2] In particular, Respondent admitted the adversarial

[2] To the extent this Court believes the appropriate factual analysis requires examination of the disciplinary hearing transcript itself to evaluate whether the disciplinary hearing constituted an agency proceeding wherein Respondent assumed an adversarial position

nature of the proceeding by justifying the discipline imposed therein exclusively on the basis of Carpenter's failure to rebut the allegations brought against her by Respondent. (L.F. 32-33).

Respondent's position before the Circuit Court further confirms the adversarial nature of the disciplinary hearing. Respondent not only failed to raise an "adjudicative capacity" argument before the Circuit Court, but also **conceded** the adversarial nature of the disciplinary hearing in its trial court briefing:

> The Order of the Board was made after lawful procedure and Petitioner [Carpenter] received a fair trial. Petitioner received proper notice of the hearing. She signed for the notice of the disciplinary hearing before the Board. The notice informed her when the hearing would be held and Petitioner appeared for the hearing. The Decision of the AHC was admitted into evidence. The Board additionally incorporated the record of the AHC into the record before the Board. Petitioner also testified and presented

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(*i.e.*, opposed Carpenter's testimony and exhibits through cross-examination, re-cross-examination, and rebuttal), and to the extent this Court deems it proper and just under the circumstances, the parties could promptly supplement the record on appeal with the disciplinary hearing transcript upon order by this Court. The disciplinary hearing transcript was before the Circuit Court on judicial review. (See L.F. 173-75, fn. 5, 7-8).

evidence. The disciplinary hearing held by the Board was based upon lawful procedure and she was afforded a fair trial.

(L.F. 175-76). Respondent cited to and relied upon the disciplinary hearing transcript to as evidence Carpenter had a "fair trial." (L.F. 169-76). As a result, the combination of Respondent's failure to raise the "adjudicative capacity" issue before the Circuit Court and its concessions in the Circuit Court proceeding (as reflected in its briefing) should result in waiver of the "adjudicative capacity" issue on appeal. See generally Douglass, 712 S.W.2d at 374-75. Respondent cannot now disregard the adversarial reality of administrative disciplinary proceedings and *post hoc* mischaracterize licensing boards' role in such proceedings as that of a neutral "adjudicator."

C. Garland Does Not Support Respondent's Argument That It Acted Solely As A Neutral Adjudicator.

Respondent exclusively relies upon a factually and legally inapposite case—Garland v. Ruhl—to make its "adjudicative capacity" argument. In Garland, this Court held the Family Support Division ("FSD") of the Department of Social Services ("DSS") did not waive its sovereign immunity from liability for a mother's attorneys' fees incurred in her petition for judicial review because it acted solely in an "adjudicative capacity." 455 S.W.3d 442, 450 (Mo. banc 2015). The mother in Garland applied to FSD for child support enforcement services and FSD issued a Notice and Finding of Financial Responsibility ("NFFR"). Id. at 445 ("…not only did FSD not initiate this agency proceeding on its own accord pursuant to section 454.470, it could not have done so. FSD had no authority to do anything until Mother applied for child support enforcement services"). The NFFR

identified the mother as "Petitioner" and father as "Respondent" in the matter, and stated the proposed rights and obligations of both parties. Id. ("[n]ot only was FSD not a party, but it was the adjudicator"). Under the terms of the NFFR, the father was obligated to enroll the child in his health insurance plan and pay the mother $558 per month in child support. Id.

The father requested a hearing to challenge the NFFR. Id. FSD heard evidence and entered an order requiring the father to enroll the child in his health insurance plan and pay the mother $357 per month in child support. Id. The mother filed a petition for judicial review to contest the FSD order. Id. However, before the petition for judicial review could be heard, the mother and father reached an agreement: the mother would enroll the child in her health insurance, the father would pay the mother $500 per month in child support, and each would pay his or her own court costs and attorneys' fees. Id. The trial court entered the agreed-upon, new judgment and dismissed the mother's petition for judicial review. Id. at 446. However, the mother applied for attorneys' fees under § 536.087 because she claimed: (1) she prevailed when the trial court superseded the FSD order with a new, more favorable judgment, and (2) the FSD order was not substantially justified. Id. The trial court dismissed her fee application. Id.

On transfer from the Court of Appeals, this Court affirmed the trial court's dismissal because the mother failed to show: "(1) that the applicant and the state agency were adversarial parties in an 'agency proceeding' brought by or against the state; (2) that the state agency asserted an erroneous position in that 'agency proceeding;' and (3) that the non-governmental party prevailed against the agency's position, either in the agency

proceeding or in a civil action arising from it." Id. at 447-48. Because FSD acted solely and exclusively as the adjudicator of a dispute between the father and mother in the original proceeding, the Court reasoned the FSD order **did not** constitute a "*position* asserted 'during such agency proceeding' by an **attorney representing the state agency**." (former emphasis original; latter emphasis added). Id. at 448. The mother's fee application failed because: (1) FSD did not act as an adversary represented by counsel, and (2) the mother challenged an agency "decision"—not an agency "position."[3] Id.

[3] In his dissent, the Honorable Richard Teitelman foretold the need for analytically clarifying the issue of when and how the state takes an adversarial position against private litigants under § 536.087. Id. at 451. Judge Teitelman observed, "FSD is a party to Mother's petition for judicial review of the FSD child support order" and "FSD took the position that its child support order was justified" in the judicial review action. Id. Noting that Missouri law allows for an award of attorneys' fees where a party obtains a favorable settlement, Judge Teitelman concluded he would have reversed the trial court's dismissal and remanded the matter. Id. Significantly, the mother made this argument before the Court—that is, that FSD was represented by counsel and named as an adversarial party before the circuit court on judicial review—but the Garland majority (in a footnote) claimed it failed based on the following distinction: "**the plain of [sic] language of section 536.085(1) requires that the state be represented** 'in a contested case pursuant to this chapter,' **not in a subsequent judicial review proceeding**." Id. at 448 n. 4 (emphases added). Assuming *arguendo* that the Court's concurrent reading of §§ 536.085 and

Here, unlike FSD in Garland, the Board did not act solely as an adjudicator in the underlying administrative proceedings. Respondent—not Carpenter—initiated the agency proceeding by filing a complaint with the AHC alleging cause existed to discipline Carpenter's license, unlike FSD in Garland which did not—and **legally could not**—initiate an agency proceeding on its own accord. (L.F. 19-22); Garland, 455 S.W.3d at 445. The Board—unlike FSD in Garland—was a named, adversarial party represented by counsel at all material times. (L.F. 19-22, 23-28, 29-39, 46-53). The Board—that is, "Petitioner"—actively litigated its case for discipline against Carpenter; it pursued a "position asserted 'during such agency proceeding'" and before the Circuit Court upon judicial review. Garland, 455 S.W.3d at 448; (L.F. 19-28). After the AHC found cause existed under § 335.066(2), Respondent held a hearing before itself to determine what discipline—**if any**—to be imposed against Carpenter's nursing license. (L.F. 29). The Board continued to refer to itself as "Petitioner" and Carpenter as "Respondent." (L.F. 29). At this hearing, Respondent acted as an adversary **represented by counsel** and took a position, advocating for discipline to be imposed against Carpenter's nursing license by adducing evidence in support of its position, which included, *inter alia*, the AHC Decision. (L.F. 29-33). There was no other party in interest. Critically, Respondent specifically based its Disciplinary

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536.087 is correct, the Garland majority's distinction does not apply to the facts of this case. Here, Respondent's attorney(s) represented the Board not only in the judicial review proceeding before the Circuit Court, but also at all stages of its contested case against Carpenter, including but not limited to the disciplinary hearing.

Order on Carpenter's inability to "rebut" the allegations the Board brought against her.[4] (L.F. 32-33). Garland does not support Respondent's argument.

D. Garland Does Not Support Respondent's Argument That It Did Not Take An Adversarial Position.

Respondent further confuses the sole issue on appeal—that is, whether Carpenter prevailed under § 536.087—by conflating it with an analytically distinct question which follows *after* determination of prevailing party status—that is, whether the state was substantially justified in its position. (Resp. S. Br., pp. 8, 12-13). In particular, Respondent mixes the legal standard for assessing waiver of sovereign immunity (i.e., the "Garland test") with the legal standards for determining whether a party prevailed, and is entitled to a fee award, under § 536.087.

In Garland, this Court addressed whether FSD waived its sovereign immunity by adjudicating a dispute between a father and mother. This Court explained, in relevant part: "a court (or agency) may order a state agency to pay a non-governmental party's attorney fees only if the applicant shows: (1) that the applicant and the state agency were adversarial parties in an 'agency proceeding' brought by or against the state; (2) that the state agency asserted an erroneous position in that 'agency proceeding'; and (3) that the non-

[4] The Board not only determined the admissibility of evidence presented pursuant to the "legal advice" of one of its own attorneys (i.e., Ian Hauptli), but also ultimately decided the discipline to be imposed after presentation of evidence and argument from the Board's attorney and Carpenter. (See L.F. 29).

governmental party prevailed against the agency's position, either in the agency proceeding or in a civil action arising from it." 455 S.W.3d at 446-48.

As a threshold matter, Respondent's recitation of the Garland test ignores material distinctions and the sequence of steps in the appropriate analysis of whether a party is ultimately entitled to a fee award under § 536.087. A prevailing party under § 536.087 has no burden to demonstrate the state agency asserted an erroneous position in the agency proceeding; an individual need only demonstrate he or she prevailed, at which point the **state** must prove substantial justification or special circumstances making a fee award unjust. § 536.087(1) RSMo; Greenbriar Hills Country Club v. Director of Revenue, 47 S.W.3d 346, 354 (Mo. banc 2001) ("the burden is on the [state] to establish substantial justification"). Here, the Circuit Court did not reach the issue of substantial justification because it held Carpenter did not prevail. As a result, the Garland test—in its entirety—is not directly at issue in this appeal.[5]

Based on Garland, Respondent nonetheless appears to contend Carpenter cannot obtain a fee award because Respondent never took a position in the underlying disciplinary proceedings (i.e., "the Board's disciplinary decision does not constitute a 'position' as that term is used in §536.087"). (Resp. S. Br., p. 8). However, this argument, as explained in

[5] Even if this Court believes all three elements of the Garland test are at issue in this appeal, Respondent cannot demonstrate substantial justification for the Disciplinary Order, which the Circuit Court specifically found to be unreasonable under all of the circumstances, arbitrary and capricious, and an abuse of discretion. (L.F. 384-92).

detail above, has no merit because Respondent acted at all times as an adversary represented by counsel in agency proceedings in a contested case wherein it took a position seeking to discipline Carpenter's nursing license. (See supra Section I.B.; L.F. 19-22, 23-28, 29-39, 46-53).

Here, even after Respondent obtained a decision from the AHC finding cause for discipline, discipline was not a guaranteed outcome prior to the disciplinary hearing. (L.F. 29) ("[t]he Board convened a hearing on December 5, 2012…to determine what discipline, **if any**, should be imposed on Respondent's nursing license") (emphasis added). Instead, Respondent—before itself and through counsel—took a clear adversarial position: Carpenter's license should be disciplined. (L.F. 29-33).[6] This procedural reality is one of the many reasons why meaningful access to judicial review of disciplinary orders is critical: Respondent—acting concomitantly as an adversary, judge and jury—exercises wide and immense discretion over the lives of licensed professionals throughout this State.

If accepted, the Board's distinction between "position" and "decision" (based on an unsound extension of Garland to the distinct facts of this case and most other professional licensure cases) would eviscerate the rights and protections afforded by § 536.087, contrary

[6] On or around December 7, 2009, Respondent sent Carpenter a settlement offer, stating in detail its position: "I have enclosed a proposed settlement agreement for you to review. It sets forth the reasons why the Board believes it should discipline your license, the statutes or rules that it believes you have violated, and the discipline that it believes is appropriate in this situation." (L.F. 56).

to its legislative purpose, and would ignore the adversarial reality of administrative licensure disciplinary proceedings. Section 536.087 provides a critical avenue for impecunious parties—e.g., Carpenter—who seek to hold agencies—e.g., the Board—accountable when such agencies, represented by counsel at all material times, initiate and prosecute disciplinary cases against professional licensees and, *inter alia*, abuse their discretion in doing so.

In sum, Respondent did not act as FSD acted in Garland—that is, as a position-less, neutral decision-maker adjudicating a dispute between two adverse private parties represented (or not) by counsel of their own choosing. Instead, Respondent acted—and continues to act—concomitantly as an adversary, judge and jury in administrative licensure disciplinary proceedings. Respondent's argument takes Garland too far. Although the state does not necessarily waive sovereign immunity under § 536.087 when denominated a party to an administrative proceeding, Respondent cannot deny its adversarial position in administrative licensure disciplinary proceedings. Accordingly, this Court should reject Respondent's attempt to ignore the adversarial reality of administrative licensure disciplinary proceedings by straining the principles of a factually and procedurally inapposite case—Garland—to reach a result which would vitiate the undisputed legislative purpose of § 536.087.

II.

CARPENTER PLEADED AND ESTABLISHED SHE WAS A "PARTY" AS DEFINED IN § 536.085(2) RSMO IN THAT SHE ALLEGED AND PROVED SHE WAS AN INDIVIDUAL WHOSE NET WORTH DID NOT EXCEED TWO MILLION DOLLARS AT THE TIME THE CIVIL ACTION OR AGENCY PROCEEDING WAS INITIATED, WHICH RESPONDENT FAILED TO DENY OR REBUT. (REPLY TO RESPONDENT'S POINT II).

Respondent erroneously contends Carpenter failed to allege or prove that her net worth did not exceed two million dollars. (Resp. S. Br., p. 14). Section 536.087(1) provides, in relevant part, "[a] party who prevails in an agency proceeding or civil action arising therefrom, brought by or against the state, shall be awarded those reasonable fees and expenses incurred by that party in the civil action of agency proceeding." Section 536.085(2) defines a "party" as "an individual whose net worth did not exceed two million dollars at the time the civil action or agency proceeding was initiated."

Here, Carpenter specifically alleged she qualified as a party under § 536.085(2) when, on November 12, 2014, she moved for her attorneys' fees after the Circuit Court's entry of an Order and Judgment on November 5, 2014. (L.F. 354). On September 26, 2014, the Circuit Court issued an "Order and Remand," concluding the Disciplinary Order was unreasonable under all of the circumstances, arbitrary and capricious, and an abuse of discretion. (L.F. 211-23). On October 24, 2014, Carpenter moved, first, for entry of an Order and Judgment pursuant to Rule 75.01 and, then, for an award of attorneys' fees as a prevailing party pursuant to § 536.087. (L.F. 224-333). On November 4, 2014, the Board

submitted its response to Carpenter's Motion for Attorneys' Fees, alleging in relevant part that Carpenter failed to *plead* her net worth. (L.F. 334-39).

On November 5, 2014, the Circuit Court granted Carpenter's motion to enter an order and judgment pursuant to Rule 75.01 and entered a "Order and Judgment" so as to permit Carpenter to move for an award of attorneys' fees based thereon. (L.F. 340). On November 12, 2014, Carpenter filed her Motion to Amend or Modify November 5, 2014 Order and Judgment To Include An Award of Attorneys' Fees and Costs. (L.F. 354-56). In this motion, Carpenter fully adopted and incorporated by reference her Motion for Attorneys' Fees filed on October 24, 2014, and specifically alleged in the third paragraph: "**Petitioner is a party entitled to an award of attorneys' fees and costs because she is an individual whose net worth did not exceed two million dollars at the time the civil action or agency proceeding was initiated**." (L.F. 354) (citing to § 536.085(2)(a)) (emphasis added).

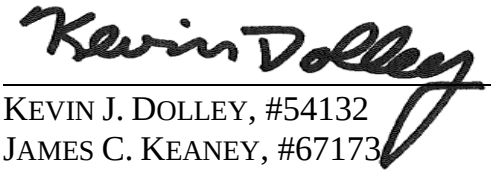
The Board thereafter failed to deny such allegation, file an oppositional response, or submit any evidence or argument rebutting Carpenter's status as a party under § 536.085(2)(a). (L.F. 6-7, 372-76). Per the Circuit Court's order from January 12, 2015, the Board and Carpenter submitted proposed orders and judgments on Carpenter's motion for fees. (L.F. 357-76). Nowhere within the Board's proposed order and judgment is there any objection or argument, express or implied, that Carpenter failed to plead or prove her status as a party under § 536.085(2)(a). (L.F. 372-76). Moreover, the absence of this issue in the Circuit Court's Final Judgment demonstrates Respondent failed to deny or contest Carpenter's status as a "party" under § 536.085(2)(a). (L.F. 377-94).

Assuming *arguendo* Respondent did deny Carpenter's status as a "party" under § 536.085(2), Carpenter's Verified Petition contains sworn statements directly relevant to, and probative of, her net worth. (L.F. 8-16). In her Verified Petition, Carpenter stated under oath, *inter alia*, she lost her job and had been unemployed for more than four (4) weeks due to the Disciplinary Order, had not worked in any profession other than nursing, and would be homeless without the Court's intervention. (L.F. 10-12). Respondent presented no evidence or argument to contest these statements, and denied them solely on the basis of lacking sufficient information thereon. (L.F. 46-49). One may reasonably find, based on the above sworn statements (and Respondent's failure to produce any evidence to the contrary), Carpenter—an individual on the verge of homelessness—was more likely than not "an individual whose net worth did not exceed two million dollars at the time" she filed for judicial review. (L.F. 12-13).

In sum, Carpenter adequately pleaded and proved her status as a party in her Verified Petition and Motion to Amend or Modify November 5, 2014 Order and Judgment to Include An Award of Attorneys' Fees, and the Board thereafter failed to deny it, or present any evidence or argument disputing such status. The Board's argument under Point II fails.

CONCLUSION

Respondent failed to address controlling Missouri law on the determination of "prevailing party" status under § 536.087. Respondent conflates the narrow issue on appeal—whether Carpenter is a prevailing party—with other issues not raised for purposes of appellate review. Respondent further misapplies inapposite Missouri case law to assert Carpenter cannot recover under § 536.087. Finally, Respondent contends Carpenter failed to plead her status as a "party" where no such failure existed. All of Respondent's arguments lack merit. Carpenter respectfully prays this Court reverse the Circuit Court's holding that Carpenter did not prevail, and remand this case for additional proceedings.

By: 

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent to counsel of record via electronic filing on April 20, 2016.

CERTIFICATE OF COMPLIANCE

Pursuant to Supreme Court Rule 84.06(c), I certify that this reply brief is typed in Times New Roman, 13 point type, Microsoft Word. This reply brief contains 4,103 words, which is in compliance with the 7,750 word count allowed. This brief is otherwise in compliance with Rule 84.06(b).