SUPREME COURT OF MISSOURI

STATE OF MISSOURI EX REL. BRYAN TRAVIS ROBISON

Relator/Appellant,

vs.

CHLORA LINDLEY-MYERS, DIRECTOR
Department of Insurance, Financial Institutions & Professional Registration,

Respondent.

Case No. SC96719

APPELLANT'S SUBSTITUTE REPLY BRIEF

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Introduction

Bryan Travis Robison's license as a general bail bond agent expired after the Director of the Department of Insurance, Financial Institutions and Professional Registration, then John Huff,[1] denied his renewal application. The denial decision was made, purportedly pursuant to § 374.750 RSMo., without any notice or opportunity to be heard being granted to Robison, in violation of previous decisions of this Court. The statute, at least as applied, violates the state and federal Constitutions in accord with the authorities cited in Robison's substitute brief. A writ of mandamus was sought in the circuit court where a preliminary writ was granted, but relief was ultimately denied.

The matter was appealed to the Supreme Court, which determined proper jurisdiction was in the Court of Appeals and transferred the cause. In its opinion the Court of Appeals disposed of the matter on grounds that had not been briefed by the parties, and contrary to its own precedent. After a motion for rehearing and an application for transfer was denied, the Supreme Court granted transfer.

The facts in this case are, for the most part, undisputed. Ant although the parties disagree on the meaning (or perhaps the significance) of the cases and statutes cited in their respective briefs, they are largely in agreement that the cases frame the issue this

[1] Chlora Lindley-Myers succeeded Mr. Huff and has been substituted as a party in her official capacity by operation of law. *See* Respondent's April 5, 2017, Notice of Substitution in Case No. 96031.

Court is asked to decide. Director's counsel is among the most experienced appellate advocates in this state. Respondent's counsel was the senior attorney for the state's primary licensing agency, the Division of Professional Registration, when the facts in *Gurley v. Missouri Bd. of Private Investigator Examiners*, 361 S.W.3d 406 (Mo. banc 2012) arose. And both counsel for the parties were supervised during their tenure at the Attorney General's Office by members of the Court of Appeals pannel that decided this case below, Judge Karen King Mitcheel and Judge Edward R. Ardini, Jr.

This case is about Robison's license as a general bail bond agent. But the decision in this case turns on matters of policy that will affect every holder of a professional license in this state.

Statement of Facts

The Director takes exception to Robison's statement of facts as it relates to his tenure in the profession and the date that he filed his application for renewal. Respondent's Substitute Brief at 1, fn. 1. The Director similarly denied these facts in her Answer to the Preliminary Writ. Robison provided the provenance of the facts – attempting to resolve this very dispute – in his Statement of Facts. In sum, they were findings made by the Director in her Order Denying Renewal, ¶¶ 2 (L.F. 10) and 33 (L.F. 15). The Director's claim that the trial court's cursory order quashing the writ makes them untrue borders on disingenuous. At the very least they are admissions. *Shockley v. Director, Div. of Child Support Enforcement, Mo. Dept. of Social Services*, 980 S.W.2d

173 (Mo. App. E.D. 1998), cited with approval in *State Bd. of Account. v. Integrated Fin.*, 256 S.W.3d 48 (Mo. banc 2008).

Robison also takes exception to the Director's citation of the Cesar Elias-Reyes and John Brooks forfeitures without frank admission that they have been set aside. The forfeitures were set aside after the trial court hearing, and although this Court has refused to permit the record to be supplemented with evidence thereof,[2] Robison respectfully suggests that Rule 4-3.3 has application to circumstances of this sort, notwithstanding the legal limitations on the record on appeal. Robison frankly admits that he is aware of no decision that requires the Director to do so; neither do the comments to Rule 4-3.3 address matters on appeal such as this one. Now that the record is fully developed Robison has asked the Court to reconsider its decision denying leave to supplement the record.[3]

Finally, as pointed out in Robison's Substitute Brief at 21, fn. 15, the other two forfeitures cited by the Director – those of Jacob Winkelman and Zachary Poelma – became final for licensure purposes after Robison's license expired. § 374.763 RSMo. (when final judgment ordering forfeiture not paid within six months the court shall extend the judgment date or notify the department of the failure). In other words, they were not yet ripe for any action by the Director.[4]

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[2] Order in Case No. SC96031 on February 28, 2017.

[3] Substitute Brief at 21, fn. 15.

[4] This point illustrates the conflict between this Court's rules for sureties and the

Argument

Although Robison respectfully disagrees with the Director's Argument, response would simply be reargument of the points covered in his principle brief, in violation of Rule 84.04(g). There are three exceptions.

1. The Form of Robison's Point Relied On

Drafting points relied on should be a straight-forward exercise. Rule 84.04(d) sets out not only the requirement for points relied on, but also provides forms for various types of cases. But the difficulty the bar has had with drafting points is notorious. *Thummel v. King*, 570 S.W.2d 679 (Mo. banc 1978) (it is counsel's recollection that the Court added the forms of points to the rule after *Thummel*).

The Director's exception to the form of Robison's original point (in his now superseded original brief) raising a constitutional issue, as set out in *J.A.D. v. F.J.D.*, 978 S.W.2d 336 (Mo. banc 1998), was well taken. He regrets whatever shortcomings persist in the restated point in his substitute brief. But if there are shortcomings they do not

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Professional Bail Bondsman and Surety Recovery Agent Licensure Act, glossed over in the Director's Substitute Brief at 55-56. While it makes sense that an individual who is a surety under Rule 33.17 ought not to be allowed to post bonds until a forfeiture is satisfied, a professional bondsman with any book of business will almost always have an absconder on the run. And his resources have deeper pockets – the liability of most professional bondspeople are secured by insurance, the very reason that the Professional Bail Bondsman and Surety Recovery Agent Licensure Act is part of insurance law.

seem to have impeded the Director's understanding of what he is seeking. At the very least the Director's response seems to Robison to fairly address the issues he wishes to raise. Robison thus relies on the, "Court's policy . . . to decide a case on its merits rather than on technical deficiencies in the brief." *Id*. at 338.

2. Bail Bond Licensing

The Director claims, "Appellant glosses over license renewal . . . and impairment of an existing license, so he does not engage in any analysis differentiating the two." Respondent's Substitute Brief at 41, fn. 21 (citation omitted). In so claiming the Director demonstrates that she has missed the point of *Gurley v. Missouri Bd. of Private Investigator Examiners*, 361 S.W.3d 406 (Mo. banc 2012). The issue is renewal of a license extant.[5] The decision to terminate the license, whether at some random point in time or refusing to renew it at expiration, must involve notice and an opportunity to be heard. In default of a notice and opportunity to be heard a renewal should have issued. *Stone v. Missouri Dept. of Health and Senior Services*, 350 S.W.3d 14 (Mo. banc 2011).

To contradict Robison's point the Director reaches back more than 25 years, to a federal court decision, for the proposition that Missouri law is less than clear about the

[5] The surprising point in *Gurley* was not that there was an interest in a professional license that raised Constitutional issues, but that the right might exist in the right to practice a profession transitioning from local to state licensing. *Gurley*, 361 S.W. 3d at 414. This case squarely raises the issue of the procedural due process due an ongoing business.

right to renew one's professional license. *Zenco Dev. Corp. v. City of Overland*, 843 F.2d 1117, 1118–19 (8th Cir. 1988). *Gurley* and *Stone* make it clear that the law has developed in the intervening years. *Zenco* is cited in the Director's lead case on the issue, *Austell v. Sprenger*, 690 F.3d 929 (8th Cir. 2012). The problem with that case, however, is that it was prosecuted by Rufus Tate, a well-known Missouri civil rights attorney, for damages under 42 U.S.C. § 1983 and unspecified state law claims. The 8th Circuit cursorily described the underlying administrative law proceedings, apparently abandoned in pursuit of civil rights damages. The *Austell* decision makes no mention of *Stone v. Missouri Dept. of Health and Senior Services*, 350 S.W.3d 14 (Mo. banc 2011) or *Gurley v. Missouri Bd. of Private Investigator Examiners*, 361 S.W.3d 406 (Mo. banc 2012). It sought a different form of relief at both the administrative and trial court levels. They cannot rationally be conflated.

State ex rel. Seigh v. McFarland, 532 S.W.2d 206 (Mo. banc 1976) arises under completely different circumstances. Seigh complained that the clerk did what he was bound to do – issue arrest warrants upon the filing of a complaint. Mandamus cannot be the proper writ in the circumstance because the official did what he was bound to do. But in this case the director did not issue the document that she should have – the renewed license. As argued in the principle brief, that is what she should have done under *Gurley v. Missouri Bd. of Private Investigator Examiners*, 361 S.W.3d 406 (Mo. banc 2012) and *Stone v. Missouri Dept. of Health and Senior Services*, 350 S.W.3d 14 (Mo. banc 2011).

The Director's citation to *Gilbert v. Homar*, 520 U.S. 924 (1997) is simply puzzling. The dispute in that case was whether a police officer, arrested and charged

with a felony offense, could be suspended without pay pending disposition of the allegations. The question was not whether is employment could be terminated without a hearing (it could not), but whether the state had to pay him between his arrest/suspension and the determination of his ultimate employment status. There is nothing temporary about the Director's refusal to renew the license. It was a final decision, never to be revisited.

The Director's final case citation, *State v. Michael R. Thomas Bail Bond Co.*, 367 S.W.3d 632 (Mo. App. W.D. 2012), is critical to understand how she erred in refusing renewal in this cause. The case makes it perfectly clear that a final judgment in a bail bond forfeiture case is like a final judgment in any other civil case. And with that proposition Robison has no dispute. But the tension between legal and equitable jurisprudence survives in our unified courts. *Thomas Bail Bond* did not consider equitable remedies to final judgments. This Court's Rules are not so narrow. Rule 74.06 allows what are essentially time-limited equitable assaults on final judgments – and recognizes that equitable remedies against unjust judgments have not been extinguished.

Robison's motion to supplement the record in this case, opposed by the Director and rebuffed by this Court, was made to show the Court such decisions in this case.[6] Be that as it may, the fact remains that a court in equity can prevent enforcement of an unjust legal judgment. A factor that the Director would have heard about if she had granted Robison an opportunity to be heard before precipitously denying renewal of his license.

[6] See the discussion at fn. 3, ante.

3. Contested and Non-Contested Cases

The Director's complaint that the issue of the inability of the Administrative Hearing Commission's to grant relief has not been preserved is wholly without merit. It was raised in ¶18 of the Petition in Mandamus:

> c. Notwithstanding the right to a hearing before the Administrative Hearing Commission, the Director retains plenipotentiary power to refuse to issue a license in this case;

L.F. at 7. That authority to avoid Robison's rights to due process secured by § 621.120 RSMo. are granted the Director by § 374.051.1 RSMo., which provides, in relevant part:

> **Notwithstanding section 621.120, the director shall retain discretion in refusing a license or renewal and such discretion shall not transfer to the administrative hearing commission.**

The issue was not argued before the circuit court or the court of appeals. It was lost in the maelstrom of the Constitutional arguments.[7] It only came up again when the Court of Appeals violated its own precedent, without explanation. *Sanders v. City of Columbia*, 481 S.W.3d 136, 143-44 (Mo. App. W.D. 2016) and *Nowden v. Div. of Alcohol & Tobacco Control*, No. WD79897 (Mo. App. W.D. 2017) (application for transfer granted by the S. Ct. 10/31/17). Robison brought this oversight to the attention of the Court of Appeals in the motion for rehearing and in the application for the Court of

[7] As argued in § II of Robison's Substitute Brief, pp. 16-18.

Appeals to transfer this case, which are part of the application for transfer granted by this Court.

Robison has not changed his position – the Court of Appeals avoided the arguments of the parties by resolving the case in an extraordinary opinion that conflicted with its own precedent. The Court of Appeals' decision that disposition of this matter hung on the availability of review by the Administrative Hearing Commission, notwithstanding the fact that the Director is not bound by the Commission's decision, in direct contravention of the opinions in *Sanders v. City of Columbia*, 481 S.W.3d 136, 143-44 (Mo. App. W.D. 2016) and *Nowden v. Div. of Alcohol & Tobacco Control*, No. WD79897 (Mo. App. W.D. 2017) (application for transfer granted by the S. Ct. 10/31/17), is no doubt why this Court brought the matter back.

The fact remains that the Administrative Hearing Commission is powerless to grant Robison any relief. It cannot consider the Constitutional issues and it cannot issue a decision binding on the Director. Forcing Robison to submit to its limited jurisdiction offers no hope of relief. And as argued in Robison's Substitute Brief at this is the very reason that the Director's position is so dangerous to licensees. If this Court accepts the Director's position, by merely denying renewal any licensing agency can put a professional out of business indefinitely. And in the case of the Director, without any hope of relief from the Administrative Hearing Commission. That is why *Gurley v. Missouri Bd. of Private Investigator Examiners*, 361 S.W.3d 406 (Mo. banc 2012) and *Stone v. Missouri Dept. of Health and Senior Services*, 350 S.W.3d 14 (Mo. banc 2011) are so important.

Robison has no dispute with the Director's analysis of the cases underlying *Sanders v. City of Columbia*, 481 S.W.3d 136, 143-44 (Mo. App. W.D. 2016) and *Nowden v. Div. of Alcohol & Tobacco Control*, No. WD79897 (Mo. App. W.D. 2017) (application for transfer granted by the S. Ct. 10/31/17), as set out on pages 32-39 of her Substitute Brief. Where the parties differ is the result. Officer Sanders and Mr. Nowden were granted procedural protection – but it made no difference. Robison faces a conundrum even worse: the ultimate decision maker has already made the decision.

Any argument to the contrary notwithstanding, the fact remains that the forfeitures that led to the Director's peremptory decision have been vacated. But because of that peremptory decision other forfeitures have arisen **that Robison cannot cure because he was stripped of his license.** There is no difference between what happened to Robison and what happened in *Gurley v. Missouri Bd. of Private Investigator Examiners*, 361 S.W.3d 406 (Mo. banc 2012). It should not be allowed. The difference is that the Administrative Hearing Commission was able to cure the issue for *Gurley*. Section 374.051.1 RSMo. unconstitutionally prevents it from doing so for Robison by violating the 14th Amendment of the United States Constitution and Article I § 10 of the Missouri Constitution.

CONCLUSION

The circuit court's judgment quashing the preliminary order in mandamus and denying relator relief should be reversed, and the cause remanded for issuance of a permanent order in mandamus directing renewal of Robison's license as a general bail bond agent, for the reasons set out in Robison's substitute brief as supplemented by this reply.

Respectfully submitted,

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RULE 84.06 CERTIFICATION

The undersigned counsel certifies that this brief complies in all respects with Rule 84.06, in that he has signed it, above, in accordance with Rule 55.03, and that this brief complies with the limitations contained in Rule 84.06(b), to wit: according to MS Word it contains 3,164 words.

Respectfully submitted,

David F. Barrett

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CERTIFICATE OF SERVICE

A copy of this brief, together with its appendix, was served upon the Director's attorney, Cheryl Nield, through the Court's e-filing system on January 16, 2018.

Respectfully submitted,

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