

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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DEPUTY

NO. 39290-9-II

COURT OF APPEALS STATE OF WASHINGTON
DIVISION II

KENNETH AND NONNA NEWMAN,

Appellants.

v.

VETERINARY BOARD OF GOVERNORS and WASHINGTON
STATE DEPARTMENT OF HEALTH,

Respondents.

KOBI JOHNSON, DVM & MICHAEL HARRINGTON, DVM

Intervenors.

FILED
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STATE OF WASHINGTON
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RESPONSE BRIEF OF INTERVENORS JOHNSON & HARRINGTON

By: [Signature]

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Intervention

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I. INTRODUCTION

The government has ably introduced and argued its position on the issues under appeal. The intervenors concur.

The intervenors only note that the Newmans lack standing to bring action regardless of the merits of the issues they raise.

II. RESTATEMENT OF ISSUES

1. Do the Newmans have legal standing in this proceeding?
(No.)
2. Were the decisions taken by the Veterinary Board of Governors prosecutorial or judicial in nature? (Prosecutorial)
3. Should a court overrule a judgment within the Board's professional competence and exclusive jurisdiction? (No)

III. STATEMENT OF THE CASE

Drs. Johnson and Harrington concur with the government's Statement of the Case.

It must be noted, however, that Drs. Johnson and Harrington have never conceded the issue of standing, and so remain at liberty to argue it here. CP 70, ln. 4-10; ln. 12. VRP, 4/17/09. p.3, ln 11-19.¹

¹ MR. SCHEDLER: And I think the Court may have misunderstood our position which disagrees with the other parties. It's our position that under the law the Newmans cannot be an aggrieved party under the Administrative Procedure Act and do not have standing to seek a writ in this case. I just want the record clear so if it goes up on review that issue is alive.

IV. ARGUMENT

A. The Newmans lack standing to bring this proceeding and, hence, the trial court should be sustained.

The government also raised and argued the law of standing in its brief. Response Brief VBOG, pp. 25-31. What must be emphasized on behalf of Drs. Johnson and Harrington is the distinction between the constitutional property and liberty interests they hold as licensed veterinarians and the complete absence of any such interest held by the Newmans.

Professionals licensed by the state of Washington hold a property right and a liberty interest in their licenses that cannot be attenuated without due process of law. *Ongom v. Dep't. of Health*, 159 Wn.2d 132, 148 P.2d 1029 (2006). “The licenses may be different, but nurses and medical doctors have an identical property interest in licenses that authorize them to practice their respective professions.” *Ongom*, at 139. *Nims v. WA Bd. Reg.* 113 Wn. App. 499, 53 P.3d 52 (2002). (Professional engineers). Licensed veterinarians hold the identical property right and liberty interest. *Ongom*, at 139; *Nguyen v. Dep't. of Health*, 144 Wn.2d 516, 527, 29 P.3d 689 (2001).

In contradistinction to Drs. Johnson and Harrington, the appellants hold no property right or liberty interest that the Board would have jurisdiction to adjudicate.

The relationship between the Newmans and their veterinarians was defined by the professional services contract in force between them. The subject of that contract, a Pekinese dog, is personal property. *Sherman v. Kissinger*, 146 Wn. App. 855, 871, 195 P.3d 539 (2008) “It is well established, and Sherman does not dispute that **as a matter of law pets are characterized as personal property.**” *Sherman*, at 807 (emphasis added). The remedies for property owners who have a complaint about professional services rendered to their property lie solely in the law of contract. *Berschauer/Phillips v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 881 P.2d 986 (1994). There is no injury-in-fact to the Newmans the Board can redress. RCW 34.05.530; *Wash. Independent Tel. Ass’n v. Wash. Utils. & Transp. Comm’n*, 110 Wn. App. 498, 41 P.3d 1212 (2002).

B. Declining to act by closing an investigation is not a judicial act. It is a purely prosecutorial decision.

Washington’s system of regulating healthcare professions merges executive, legislative, and judicial functions into a single agency of the executive. That agency, the Department of Health, is purely a creature of the executive. The Governor can overrule a Board’s action with which she disagrees. Indeed, the Governor has recently overruled decisions of the Board of Pharmacy and imposed her will against its wishes. *Storman’s v Selecky*, 524 F. Supp. 2d 1245 (2007). Perhaps because of this rather strange deviation from the normal constitutional separation of

powers, the Newmans conflate a purely executive function (*i.e.*, the Board deciding whether or not to prosecute) with a purely judicial function (*i.e.*, the Board adjudicating already filed charges). Brief of VBOG, p. 16. Just because judgment has been taken, does not mean a judicial act has occurred. By way of example, a prosecuting attorney's decision to decline to file an Information is not a judicial act — and for that reason such a decision is not subject to judicial review. *Cf. Jones v. State*, 140 Wn. App 476, 166 P.3d 1219 (2007).

C. The Board's decision was an exercise of professional judgment by members whose status and expertise was prescribed by statute.

As to the persuasiveness and credibility of the evidence before it, the Board is the ultimate decision-maker. The Board is composed of veterinarians who are themselves “experts.” After consideration of the record, including the opinions of Dr. Harrington (CP 93), Dr. Johnson (CP 96), *and* the experts offered by the appellants, the Board concluded it lacked sufficient reason to believe that these veterinarians had not met the standard of care. CP 103. The gist of the appellants' argument is that the Board must set aside the collective training and expertise in veterinary medicine of its members in favor of accepting the opinions of the appellants' experts as conclusive on a question squarely and exclusively within the Board's professional expertise and jurisdictional competence.

The Board's enacting statute does not permit usurpation of this function, and nor should the Court.

Moreover, the expert opinions the appellants offer fail to make their case even on their own terms. The experts offered do not practice in Washington and therefore lack the necessary foundation on which to opine Washington's standards of care. It is not enough for an out-of-state expert to *assert*, without more, that there is a "national" standard of care. The expert must also show, by admissible evidence, that the purported "national" standard of care is actually adhered to in the state of Washington.² This cannot be done by mere assertion or assumption. *Winkler v. Giddings*, 146 Wn. App. 387, 190 P.3d 117 (2008). Whether Washington adheres to a national standard would be a question within the expertise of the Board. The Board, like any fact finder, is free to accept or reject the expert opinions offered to it.

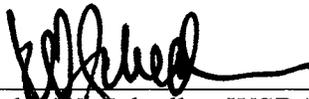
V. CONCLUSION

The decisions of the trial court should be sustained. The Newmans lack standing to bring this action. Drs. Johnson and Harrington join in the arguments offered by the Board as to the reasons why judicial review should be denied and the writs prayed for should not issue.

² Appellants are mistaken when they assert the "locality rule" no longer pertains in Washington. In fact, for healthcare professionals, the Legislature has re-adopted the "locality" rule. RCW 7.70.040.

RESPECTFULLY SUBMITTED this 23^d day of November,
2009.

LEE SMART, P.S., INC.

By: 

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CERTIFICATE OF SERVICE

I, the undersigned, certify under penalty of perjury and the laws of the State of Washington that on November 23, 2009, I caused service of the foregoing on each and every attorney of record herein:

VIA E-Mail

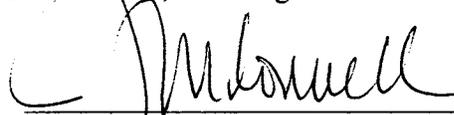
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Legal Assistant

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