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STATE OF WASHINGTON

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NO. 80644-6

SUPREME COURT OF THE STATE OF WASHINGTON

GEOFFREY S. AMES, M.D.,

Petitioner,

v.

WASHINGTON STATE, DEPARTMENT OF HEALTH, MEDICAL
QUALITY ASSURANCE COMMISSION,

Respondent.

**RESPONDENT STATE OF WASHINGTON, DEPARTMENT OF
HEALTH, MEDICAL QUALITY ASSURANCE COMMISSION'S
ANSWER TO BRIEF OF AMICI CURIAE: AMERICAN
ASSOCIATION OF HEALTH FREEDOM; CITIZENS FOR
HEALTH; AND WA CHOICE**

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ORIGINAL

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ER 702 8

RAP 10.2(g) 1

I. INTRODUCTION

This is Respondent State of Washington, Department of Health (Department), Medical Quality Assurance Commission's (Commission) Answer to Brief of Amici Curiae filed pursuant to RAP 10.2(g). Amici argue that the burden of proof in this matter inappropriately shifted to Dr. Ames to prove that his use of the LISTEN device was efficacious and safe. They further contend that such burden shifting has broad implications for all "complementary" healthcare providers to defend themselves against "orthodox" medicine. Neither argument is correct or supported by the record in this case. The Department established by clear and convincing evidence that Dr. Ames' use of the LISTEN device fell below the standard of care and created an unreasonable risk of harm to his patient. In addition, there is no evidence that the outcome of this case will affect any medical provider other than Dr. Ames and his use of the LISTEN device. For these reasons, the Commission requests that this Court affirm the Final Order.

II. ARGUMENT

A. **Amici Failed To Establish Any Hostility To Complementary Medicine In This Case.**

Amici argues without factual or legal support that "millions of important healing relationships between citizens and their complementary

holistic healthcare providers” will be affected by the outcome of Dr. Ames’ case. *See* Amici Br. at 1. It also alleges that the tension between “orthodox” medicine and “complementary” healthcare in this case requires thorough judicial scrutiny. *See* Amici Br. at 5. Nothing in the record supports these allegations. This case is not about a dispute between separate schools of thought in the healthcare field. This is a disciplinary case regarding one doctor’s treatment of one patient, which was decided by a regulatory panel composed of the doctor’s peers. Nothing in the record supports amici’s allegation that the Commission members were in competition with complementary healthcare providers, or were affected by such considerations in deliberations. Further, as will be established below, the Commission’s proceedings do not threaten the due process rights of complementary healthcare practitioners. The Commission applied settled law to the specific facts concerning Dr. Ames’ treatment of Patient One with the LISTEN device. Only Dr. Ames is affected by the decision of the Commission, and only his use of the LISTEN device is proscribed by the Commission’s decision. Amici have not shown any broader impact.

B. The Burden Of Proof Did Not Shift To Dr. Ames To Prove The Validity Of The LISTEN Device.

Amici have erred in their accusation that the Department improperly shifted the burden of proof to Dr. Ames when it did not put forth specific expert evidence regarding complementary medicine. In its brief, amici appear to have confused the distinction between burden of proof and burden of production. In comparison, the burden of proof defines how certain the trier of fact must be before resolving an issue of fact in favor of the party having the burden of proof. *In re the Dependency of C. B.*, 61 Wn. App. 280, 282, 810 P.2d 518 (1991). In comparison, the burden of production is the duty of producing enough evidence to make a prima facie case. *Id.* However, making a prima facie case does not shift the burden of proof or require the opposing party to prove the negative. *Gillingham v. Phelps*, 11 Wn.2d 492, 501-02, 119 P.2d 914 (1941). It means only that sufficient evidence must be presented so that the case can proceed to the decision maker for consideration. *See Smith Sand & Gravel Co. v. Corbin*, 75 Wn. 635, 638-39, 135 P. 472 (1913).

If the opposing party, however, chooses to present its defense after moving to dismiss for lack of a prima facie case, that party waives any future objections to the lack of sufficient evidence in the initial prima facie case.

Hume v. American Disposal Co., 124 Wn.2d 656, 666, 880 P.2d 988 (1994), *cert. denied*, 513 U.S. 1112, 115 S. Ct. 905, 130 L. Ed. 2d 788 (1995). That party would retain the right under the Administrative Procedure Act to challenge the sufficiency of the evidence in the administrative record as a whole. The defending party also assumes the risk of supplying proof without which the case would otherwise be deficient. *Pryal v. Mardesich*, 51 Wn.2d 663, 668, 321 P.2d 269 (1958). “By putting in a defense, one risks supplying any existing deficiency. All parties benefit or suffer from the testimony of all witnesses. The theory that a party calling a witness has a proprietary interest in the testimony such that the adverse party cannot benefit from it, is both novel and unsound.” *Peterson v. Dep’t of Labor & Indus.*, 40 Wn.2d 635, 641, 245 P.2d 1161 (1952) (internal citations omitted).

The record in this case shows that at the close of the Department’s case, Dr. Ames moved to dismiss all of the charges. AR 2436. The Commission, after hearing extensive argument, found that the Department had not met its burden for two of the alleged violations. AR 2436-2680. The Commission, therefore, dismissed those charges. AR 2680. The case proceeded on the remaining charges. *Id.* At that time, Dr. Ames had a choice to remain silent or continue with his defense. By proceeding, Dr. Ames waived objection as to whether his motion to dismiss should

have been granted. The Commission was entitled and required to consider all of the evidence that was presented in the administrative hearing to reach its ultimate findings.

C. Washington Law Does Not Require Specific Expert Testimony Regarding Complementary Medicine or Modalities.

In health discipline cases, the Commission must find, with clear and convincing evidence, that the practitioner violated the standard of care. *Ongom v. Dep't of Health*, 159 Wn.2d 132, 148 P.3d 1029 (2006). Contrary to amici's argument, such a heightened burden of proof, however, does not mean that the agency must set forth expert testimony for every issue. Nor does it mean that the agency must put forth specialized testimony if the case involves complementary or alternative medicine. Instead, when making its evaluation, the Commission must consider the evidence presented and from that record determine whether it was "highly probable" that the standard of care was breached. *Ongom*, 159 Wn.2d at 136.

There is no evidence in the record to support the assertion that the hearing panel members lacked relevant professional expertise to evaluate the evidence presented in this case. There is also no statute or case law that says the Commission or the witnesses must be "specialists" in complementary medicine in order to determine whether the standard of care has been met. Physicians are licensed as physicians in Washington state. Specialty licenses

or credentials are not recognized or required. Amici's assertion that this principle takes on a different significance when complementary medicine allegedly is involved is unfounded. Quotations from out-of-state courts or constitutional scholars do not support such a claim. The same standard of care applies to all healthcare practitioners – regardless of whether they practice traditional or complementary medicine.

D. The Commission's Determination That Dr. Ames' Use Of The LISTEN Device Was Inefficacious And Created An Unreasonable Risk Of Harm Was Based On The Evidence Presented At Hearing.

The record in this case was not devoid of evidence that Dr. Ames' use of the LISTEN device was inefficacious or created an unreasonable risk of harm. Substantial evidence led to the Commission's findings. Contrary to amici's argument, the Commission's Order shows that it considered all of the evidence, and took account of the testimony presented by both the Department and Dr. Ames. Nor did the Commission substitute its expertise and opinions for that of "qualified experts". *See* Amici Br. at 14. Instead, it used its statutory and legal authority to use its specialized knowledge, experience and expertise to evaluate the evidence presented.

Furthermore, there was not a "complete lack of expert evidence." *See* Amici Br. at 14. Expert testimony was presented in this case. *See* AR 2388-2434, AR 2282-2353, AR 2937-2997, AR 2838-2933, AR 2997-

3014. For instance, the creator of the LISTEN device testified about its technology and FDA-cleared capabilities. AR 2870-72. He also testified that the machine could not diagnose, cure, or prevent any disease. AR 2906-07. In addition, the Department put forth expert testimony regarding the function and purpose of biofeedback machines, including that such machines cannot be used to treat, diagnose, or cure. AR 2318-19. The Commission members were entitled to rely upon these experts' testimony, as well as the other evidence in the record to make their determination that the machine was inefficacious as Dr. Ames was using it, and that its use posed an unreasonable risk of harm to patients.

Amici argue that Washington case law authorizing the Commission to use its expertise is based on the *Jaffe* case from Connecticut, which has been modified. *Jaffe v. State Dep't of Health*, 64 A.2d 330 (Conn. 1949). Amicus Br. at 15. Connecticut still recognizes *Jaffe* as controlling law. *Levinson v. Connecticut Board of Chiropractic Examiners*, 560 A.2d 403, 413-16 (Conn. 1989); *Pet v. Dep't of Health Services*, 638 A.2d 6, 16-18 (Conn. 1994). The Connecticut court has thoroughly analyzed the effect of including public members on professional disciplinary bodies where the state's administrative procedures act directs such bodies to use their expertise in evaluating evidence. *Levinson*, 560 A.2d at 411-12. That court concluded that the

Jaffe rationale is still correct and controlling as long as a majority of the decisionmaking panel are professional members, as they were in this case. *Levinson*, 560 A.2d at 413-16; *Pet*, 638 A.2d at 16-18; *Jutkowitz v. Dep't of Health*, 596 A.2d 374, 387 (Conn. 1991).

Amici go on to argue based upon WSMA guidelines for expert witnesses that expert testimony is required and must be from practitioners of complementary medicine. Amicus Br. at 16, and Appendix B. The WSMA guidelines do not discuss when expert testimony is required and have no application to professional licensing disciplinary proceedings. The WSMA guidelines presume a civil trial heard by a jury, not the equivalent of a bench trial heard by professionals. Amici cite no legal authority for their argument that any expert testimony must come from practitioners of complementary medicine, because neither ER 702, nor any case law, supports such an assertion.

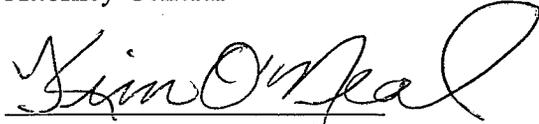
III. CONCLUSION

For these, the Medical Quality Assurance Commission's Final Order determining that Dr. Ames' use of the LISTEN device was

negligent and created an unreasonable risk of harm to his patients should
be affirmed.

RESPECTFULLY SUBMITTED this 27th day of February, 2009.

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Attorney General

A handwritten signature in cursive script, appearing to read "Kim O'Neal", written in black ink.

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