

No. 82225-5

SUPREME COURT
OF THE STATE OF WASHINGTON

CITY OF PORT ANGELES, Respondent,

v.

OUR WATER-OUR CHOICE and PROTECT OUR WATERS,
Petitioners,

v.

WASHINGTON DENTAL SERVICE FOUNDATION, LLC,
Respondent.

RESPONDENTS' MOTION TO STRIKE:

- (1) AMICI CURIAE BRIEF OF WASHINGTON ACTION FOR SAFE WATER AND WHIDBEY ENVIRONMENTAL ACTION NETWORK;
 - (2) AMICI CURIAE BRIEF OF INTERNATIONAL ACADEMY OF ORAL MEDICINE AND TOXICOLOGY, OREGON CITIZENS NETWORK FOR SAFE DRINKING WATER, AND FLUORIDE ACTION NETWORK;
 - (3) AMICUS CURIAE BRIEF OF FLUORIDE CLASS ACTION
 - (4) AMICI CURIAE BRIEF OF AUDREY ADAMS AND LINDA MARTIN; and
 - (5) AMICUS CURIAE BRIEF OF REVEREND LYNN LOHR
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I. INTRODUCTION

The sole issue presented to and decided by the trial court was whether two initiatives submitted to the City of Port Angeles are within the local initiative power. On appeal to Division Two of the Court of Appeals, the only issues decided by that Court were whether the proposed initiatives were beyond the scope of the local initiative power. *City of Port Angeles v. Our Water-Our Choice*, 145 Wn. App. 869, 188 P.3d 533 (2008) The only assignments of error to the Court of Appeals were the trial court's conclusions of law regarding the scope of the local initiative power. Appellants' Opening Brief at 1-3.¹

Three years after the trial court decision in this case, and only 30 day before oral argument to this Court, a group of five amici who oppose drinking water fluoridation have attempted to raise major new issues and claims in this case. Those issues involve disputed facts and disputed scientific claims, which were not presented to the trial court, which affect parties not before this Court, and which Respondents had no ability to respond to in the trial court in order to make a factual record.

¹ The only issue other than the tests for the scope of the local initiative power involved a decision by the trial court not to accept evidence offered after trial. That evidence was unrelated to the issues that Respondents seek to strike in amici's briefs.

Amici attempt to support their new claims by attaching numerous documents to their briefs, including personal testimonials, highly selected pages from reports, Wikipedia articles on various subjects, and other articles from various opponents of fluoride from around the country. Respondents had no opportunity to respond and make a factual record before the trial court on these issues or to make a factual record on the issues in the attachments to amici's briefs. It is fundamentally unfair for Respondents to be required to litigate these new claims on contested factual issues before this Court, and it is outside the customary ambit of this Court to be a finder of fact.² Accordingly, Respondents, City of Port Angeles ("City") and Washington Dental Service Foundation ("WDSF"), respectfully request the Court to strike and not consider those portions of amici's briefs containing claims and arguments not presented to the trial court and to strike and not consider the attachments related to those claims and arguments.

II. RELIEF REQUESTED

Respondents request the Court to strike and not consider the portions of amici's briefs specified below because none of those issues

² Because of the inflammatory nature of many of amici's factual claims, WDSF will respond to those claims in an answer. WDSF's preference,

and attachments to amici's briefs were presented to the trial court and no factual record was made before the trial court. Respondents had no opportunity to develop any facts below regarding these issues; there are no factual findings of the trial court related to the new issues from amici; there are no assignments of error related to those amici issues; and the issues are being raised for the first time by amici in this Court.

III. FACTUAL BACKGROUND

In September 2006, two political action committees submitted proposed citizen initiatives to the City. RCP:220-223.³ Those initiatives proposed to regulate the method by which the City would operate its proprietary water system. In particular, the initiatives would require the City to do the following:

- establish that access to City water is a property right and requires compensation to any customer if the City water supply is fluoridated;
- make it unlawful to put any additive in public water that might affect bodily functions,
- set numeric limits on fluoride in water;
- repeal the City Council's 2003 decision to fluoridate the City's water supply;

however, is for the Court to strike and not consider the claims and issues not presented to the trial court.

³ Respondents' Clerks Papers ("RCP").

- prohibit substances added to drinking water to affect physical or mental functions unless approved by the Federal Drug Administration (FDA);⁴
- specify local testing regimens for additives to drinking water;
- set numeric standards for fluoride in drinking water, and prohibit fluoridation unless approved by the FDA.⁵

RCP:220-223. The City filed a declaratory judgment action to determine whether the initiatives were beyond the scope of the local initiative power.

ACP:5-22.⁶ The political action committees filed a competing lawsuit seeking to have the initiatives declared valid and placed on the ballot.

ACP:150-156; 179-188.

The trial court, based on the uncontested facts in the case, entered detailed findings of fact and conclusions of law in January 2007.

ACP:25-35. The only issues presented to the trial court, and the only issues ruled on by the trial court, were whether the initiatives were within the scope of the local initiative power. *Id.* The trial court held that the initiatives were outside the scope of the local initiative power because they

⁴ Note that the FDA does not regulate additives to drinking water. Rather, Congress has given that responsibility to EPA in 42 U.S.C. 300g-1. The FDA and EPA have agreed that the Safe Drinking Water Act of 1974 repealed any FDA authority over water used for drinking water purposes and gave that authority to the EPA. *See* FDA MOU 225-79-2001 which is in the administrative record at RPC 180-183 and RPC 216-217.

⁵ *See* f.n. 4 *supra*.

⁶ Appellants' Clerks Papers ("ACP").

were administrative in nature (involving the operation of the City's water utility); because the power to operate local water utilities was specifically delegated to the City Council by the Washington Legislature; and because the local initiatives were not within the power of the City to enact. *Id.*

On appeal to Division Two, the political action committees did not challenge any of the factual findings of the trial court. The only assignments of error involved the trial court's legal conclusions. Opening Brief of Appellant at 1-3. The Court of Appeals upheld the trial court, and held that initiatives involved administrative matters related to the operation of the City's water utility and that the power to operate that water utility was delegated exclusively to the City Council of the City. *City of Port Angeles v. Our Water-Our Choice*, 145 Wn. App. 869, 188 P.3d 533 (2008). The Court of Appeals declined to decide whether the local initiatives were within the power of the City to enact. *Id.* at 879-880.

In the petition for review to this Court, the political action committees focus solely on the three reasons why the trial court determined the initiatives were beyond the scope of the local initiative power. Petition for Review at 1-2.

Only thirty days before oral argument to this Court, opponents of drinking water fluoridation have submitted five amici briefs with a number of attachments outside the record. The briefs raise numerous issues not

presented to the trial court, not decided by the trial court, and on which

Respondents had no opportunity to make a factual record below. The new

issues and claims from amici include the following:

- claims that the City is violating Washington drug laws by fluoridating City drinking water pursuant to the health-based regulations of the Washington Board of Health;
- claims that the federal Environmental Protection Agency (“EPA”) has made errors in the regulation of fluoride in drinking water; that the federal Food and Drug Administration (“FDA”) has violated its alleged duty to regulate fluoridated drinking water;
- claims that fluoridation of drinking water (which has been widely practiced in the United States since the 1960s and has been the policy of the United States Public Health Service since the 1950s) is a significant public health risk;
- claims that a significant portion of the population is hypersensitive to fluoride;
- claims that the Court of Appeals should have considered Washington drug laws;
- claims that fluoridation is not a legitimate purpose of government; and
- claims that fluoridation is a conspiracy of several industrial manufacturing groups.

These claims and issues, and their supporting attachments, are the subject of this motion to strike.

IV. LEGAL ARGUMENT

A. Issues Not Presented to the Trial Court Should Not Be Considered on Appeal.

The appellate court generally refuses to review any claim of error not raised in the trial court. RAP 2.5(a); *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 524 n.9, 210 P.3d 318 (2009) (issues not raised below would not be considered on appeal); *State v. R.J. Reynolds Tobacco Co.*, 151 Wn. App. 775, 787 n.30, 211 P.3d 448 (2009) (claim that defendant acted in concert with another party was raised for the first time on appeal and, therefore, not addressed by the appellate court).

The only exceptions to this rule are lack of trial court jurisdiction; failure to establish facts upon which relief may be granted; and manifest error affecting a constitutional right. RAP 2.5(a). None of those exceptions apply in this case. First, there is no suggestion that the trial court did not have jurisdiction. Second, there is no claim from any party that the facts before the trial court were not sufficient to determine whether the initiatives were within the scope of the initiative power. In fact, appellants did not assign error to any of the trial court's findings of fact. Third, there is no claim by any party, including amici, that the trial court committed a manifest error affecting a constitutional right. Even when considering whether to apply one of these exceptions, the appellate

court will not do so unless the record is sufficiently developed below and the parties have had a full and fair opportunity to develop the facts related to the issue. *Plein v. Lackey*, 149 Wn.2d 214, 222, 67 P.3d 1061 (2003); *Bernal v. Am. Honda Motor Co.*, 87 Wn.2d 406, 414, 553 P.2d 107 (1976).

This Court has been especially strict on amici attempting to raise new issues that were not tried to the trial court. *Noble Manor Co. v. Pierce County*, 133 Wn.2d 269, 272 n.1, 943 P.2d 1378 (1997) (court would not address issue raised only by amicus); *Coburn v. Seda*, 101 Wn.2d 270, 279, 677 P.2d 173 (1984) (argument raised only by amici would not be considered).

The reasons for this prohibition are fundamental fairness, ripeness, and the need for the trial court to develop the facts upon which the appellate court may make its decision. *Plein*, 149 Wn.2d at 222; *Bernal*, 87 Wn.2d at 414; *Coburn*, 101 Wn.2d at 279 (issue raised by amici was not ripe because it required a factual determination by the trial court).

B. The New Issues Raised by Amici are Beyond Those Presented to the Trial Court, Involve Disputed Facts, and Should be Stricken and Not Considered.

The following arguments and issues and supporting attachments from the anti-fluoridation amici curiae were not presented to the trial court and involve disputed factual issues:

Amici Brief Of Washington Action For Safe Water And Whidbey
Environmental Action Network

Text requested to be stricken:

- Page 11 line 12 – page 13 line 13 (This section argues that drinking water fluoridation causes significant harm to people);
- Page 15 line 6 – page 16 line 2 (This section argues that City fluoridated water is an illegally dispensed drug).

Attachments requested to be stricken:

- A-1 (Excerpt from study regarding health effects of EPA standards on fluoride in drinking water);
- A-12 (Excerpt from FDA new drug compliance fact sheet);
- B (Law journal article sympathetic to fluoridation litigation alleging harmful health effects of fluoridation).

Amici Curiae Brief Of International Academy Of Oral Medicine And
Toxicology, Oregon Citizens Network For Safe Drinking Water, And
Fluoride Action Network

Text requested to be stricken:

- Page 2 lines 1 – 17 (This section argues that the Court of Appeals should have considered the constitutional right to liberty and should have considered the dangers of dispensing City fluoridated water as a drug);
- Page 5 line 3 – page 7 line 9 (This section argues that the Court of Appeals should have applied laws regulating drug manufacture and prescription; and argues that the City is manufacturing a drug in violation of state and federal law);
- Page 8 line 7 – page 11 line 7 (This section argues that fluoridated water is an illegal prescription drug, and argues that the City has no authority to dispense fluoridated water);

- Page 12 line 10 – page 14 line 9 (This section argues that City is illegally dispensing a prescription drug);
- Page 16 line 3 – page 18 line 16 (This section claims that scientists oppose fluoridation; that the City was required to submit a new drug application to FDA in order to fluoridate drinking water; and that the City is engaged in pharmacy without a license).

Attachments requested to be stricken:

- A-4 (Letter from Pharmacy Board re request to designate fluoride as a poison);
- A-10 (FDA email about sodium-fluoride containing products);
- A-11 (Excerpt from Drug Therapy publication);
- A-12 (Washington Board of Pharmacy newsletter re drug approval process);
- A-25 (Excerpts from NRC article reviewing EPA fluoride standards);
- A-32 (Letter re purported fluoridation risks);
- A-34 (FDA response to congressperson re FDA regulation of certain fluoride products);
- A-37 (Excerpts from FDA new drug application form).

Amicus Curiae Brief Of Fluoride Class Action

Text requested to be stricken:

- Page 2 line 5 – page 3 line 2 (This section argues that City fluoridation is not related to a legitimate government purpose; factually speculates on how members of the public can avoid fluoridated drinking water and its health effects; and makes allegations about the percentage of the population with fluoride sensitivity);

- Page 15 line 12 – page 20 line 2 (This section contains factual statements about fluoride production and how fluoridation of drinking water is the result of a conspiracy among certain industrial groups – “it is an aluminum, steel, uranium and fertilizer conspiracy” Page 10 lines 1-2).

Attachments requested to be stricken:

- B-1 (Wikipedia article re water purification systems);
- B-6 (Appendix to NRC report about EPA health-based fluoridation standards);
- B-8 (Price list for reverse osmosis water systems);
- B-10 (Article criticizing EPA drinking water fluoridation standards);
- B-26 (Excerpts from an NRC report on EPA health-based water fluoridation standards);
- B-43 (Wikipedia article on hexafluorosilicic acid);
- B-49 (Wikipedia article phosphate mining in Florida);
- B-54 [misabeled B-58 in brief] (Photographs of gypsum mining);
- B-56 (Article from Fluoride Action Network re phosphate fertilizer industry);
- B-68 (Wikipedia article re phosphate rich organic manure);
- B-71 (Fluoride Action Network article re alleged health effects of fluoride).

Amicus Curiae Brief Of Audrey Adams And Linda Martin

Text requested to be stricken:

- Page 4 line 6 – page 6 line 10 (This section argues that the City is engaged in sale of drugs by fluoridating water; alleges facts about how patients react differently to drugs; claims the City is circumventing drug laws; and asks the Court to overturn language in *Kaul v. Chehalis* that fluoride is not a drug);
- Page 7 line 11 – page 8 line 20 (This section alleges that fluoridated drinking water is unsafe and ineffective).

Attachments requested to be stricken:

- A (Factual statements from lay witnesses about the medical effects of fluoridated drinking water);⁷
- B (Statement of William Hirzy to Congress re safety and effectiveness of fluoridated drinking water).

Amicus Curiae Brief Of Reverend Lynn Lohr

Text requested to be stricken:

- Page 1 line 19 – page 2 line 26 (Factual statements from a lay witness about the medical effects of fluoridated drinking water);⁸

⁷ Respondents appreciate the personal importance to Ms. Adams and Ms. Martin of the health problems they describe experiencing. Respondents' point, however, is that the alleged health effects of drinking water fluoridation at the levels approved by the Washington Board of Health is not relevant to the issues in this case that were considered and decided by the trial court. Those issues are solely whether the proposed initiatives are within the scope of the local initiative power.

⁸ Respondents also appreciate the personal importance to Rev. Lohr of the health problems she states that she has experienced. But the alleged health effects of drinking water fluoridation are not relevant to the issues considered and decided by the trial court. Those issues are solely whether the proposed initiatives are within the scope of the local initiative power.

- Page 3 line 5 – page 7 line 13 (This section contains factual allegations about effects of fluoridated drinking water; factual allegations about fluoride hypersensitivity in the general population; and a request for Court to take judicial notice of the contested facts regarding the extent of fluoride hypersensitivity in the population).

Attachments requested to be stricken:

- A-1 (Review of an article regarding alleged health effects of water fluoridation);
- A-3 (Excerpts from a report re EPA health-based standards for fluoride in drinking water);
- B (Book length article from New Zealand re supposed health effects of fluoridated drinking water systems).

None of the foregoing arguments, factual allegations, or attachments were submitted to the trial court. None of these arguments, materials and issues were the subject of any factual findings by the trial court. None of the foregoing issues or materials are the subject of assignments of error allegedly committed by the trial court. Instead, all these issues are new issues raised by amici. Respondents dispute amici's legal arguments and dispute the key factual underpinnings of those arguments. However, Respondents had no opportunity to make any factual record on any of these issues before the trial court. It would violate RAP 2.5 and would be fundamentally unfair for the Court to consider these factual and legal issues raised solely by amici and never presented to the trial court.

V. CONCLUSION

Respondents, City and WDSF, respectfully request the Court to strike and not consider the portions of the amici curiae briefs and the attachments to the amici curiae briefs listed in the foregoing section.

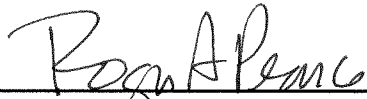
DATED this 29th day of January 2010.

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