

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:

AMICI CURIAE BRIEF OF INTERNATIONAL ACADEMY OF ORAL
MEDICINE AND TOXICOLOGY; OREGON CITIZENS NETWORK
FOR SAFE DRINKING WATER; FLUORIDE ACTION NETWORK;
WASHINGTON ACTION FOR SAFE WATER; WHIDBEY
ENVIRONMENTAL ACTION NETWORK; AUDREY ADAMS;
LINDA MARTIN; BILL OSMUNSON DDS, MPH;
GERALD H. SMITH MD; AND FLUORIDE CLASS ACTION

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I. INTRODUCTION

The merits of drinking water fluoridation are not an issue in this case. The sole issue presented to and decided by the trial court was whether two initiatives submitted to the City of Port Angeles were within the local initiative power.¹

A group of amici who oppose drinking water fluoridation has now attempted to raise new issues and claims in this case. Those issues and claims involve disputed facts and disputed scientific claims not relevant to the legal issues in the case. Those issues were not presented to the trial court, and Respondents have had no ability to respond and make a factual record.

Amici attempt to support their new claims by attaching numerous documents to their briefs, including personal testimony, selected pages from reports, Wikipedia articles on various subjects, and articles from various opponents of fluoridation. Respondents had no opportunity to respond and make a factual record before the trial court on these issues. It is unfair for Respondents to be required to respond to new claims on contested factual issues before this Court, and it is outside the customary

¹ App. Clerk's Papers at 25 – 35 (Trial Court Decision); *City of Port Angeles v. Our Water-Our Choice*, 145 Wn. App. 869, 188 P.3d 533 (2008).

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 the portions of amici’s brief containing claims and arguments not presented to the trial court (over 85% of amici’s brief) and the supporting attachments related to those claims. Respondents also request sanctions because amici’s brief violates the Chief Justice’s January 29, 2010, instructions.

II. RELIEF REQUESTED

Respondents request the Court to strike and not consider the portions of amici’s brief and attachments specified below because none of those issues and attachments to amici’s briefs were presented to the trial court, no factual record was made before the trial court; 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. The initiatives would regulate additives in public water supplies, set numeric limits on fluoride in water, repeal the City Council’s earlier

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, 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”).

decision to fluoridate the its drinking water utility, and specify local testing regimens for drinking water additives.

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:5-22.⁴ 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 agreed facts, 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 lawfulness of the City's original March 2005 decision to install a fluoridation system in its drinking water utility was not briefed in the case, was not raised before the trial court, and was not decided by the trial court. *Id.*; *see also* RCP 149; RCP 170-178. In fact, the City's decision to accept the fluoridation system was challenged in an earlier case and upheld by Division II of the Court of Appeals.⁵

On appeal to Division Two, the political action committees did not challenge any of the factual findings of the trial court. The only

⁴ Appellants' Clerks Papers ("ACP").

assignments of error involved the trial court's legal conclusions that the proposed initiatives were outside the local initiative power. Opening Brief of Appellant at 1-3. The Court of Appeals upheld the trial court, and addressed the issues in the case – whether the proposed initiatives were within 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).

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.

Rather than address the issues presented to and decided by the trial court, opponents of drinking water fluoridation have submitted an amici brief 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 committing an assault by fluoridating its drinking water;

⁵ *Clallam County Citizens for Safe Drinking Water v. City of Port Angeles*, 137 Wn. App. 214, 151 P.3d 1079 (2007)

- claims (unsupported by citation to authority) that the City’s decision to fluoridate its utility’s drinking water violates various constitutional provisions;
- claims that the federal Environmental Protection Agency (“EPA”) has unlawfully regulated 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 the City is violating Washington drug laws by fluoridating City drinking water pursuant to the health-based regulations of the Washington Board of Health; 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 that a *party* may raise the 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*, amici are not a party and may not raise any such issues. *Second*, there is no suggestion that the trial court did not have jurisdiction. *Third*, 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. *Fourth*, there is no showing that the trial court committed a *manifest* error affecting a constitutional right. The constitutional claims alleged by amici are merely listed,⁶ are not supported by any citation to authority, and were never presented to the trial court for development of any factual basis for the claims.

Even when considering whether to apply the exceptions in RAP 2.1, the appellate court will not address new issues unless the record is sufficiently developed below and the parties have had a full and fair

⁶ Amici Brief at 1, 3.

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. Amici's Request for Judicial Notice of the Alleged Harmful Effects of Drinking Water Fluoridation Should Be Rejected.

A court will take judicial notice of adjudicative facts only when the fact is not subject to reasonable dispute either because (1) it is generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. ER 201(b); *In re Marriage of Meredith*,

148 Wn. App. 887, 904, 201 P.3d 1056 (2009) (factual information on special interest website was not a proper subject for judicial notice).

Amici invite the Court to take judicial notice of alleged facts from a welter of publications regarding drinking water fluoridation, including a lengthy book by a New Zealand anti-fluoride activist. None of these materials fit the restrictive requirements for judicial notice of adjudicative facts. Washington courts have routinely refused to take judicial notice of adjudicative facts that are not certain and incontrovertible, including facts regarding health effects and publications that are not shown to be standard authorities. *State v. Way*, 88 Wn. App. 830, 946 P.2d 1209 (1997) (court refused to take judicial notice of the nature of post-traumatic stress syndrome and its similarity to trauma suffered by a witness); *State v. Karsunky*, 197 Wash. 87, 84 P.2d 3900 (1938) (facts stated in a pamphlet could not be judicially noticed because pamphlet was not shown to be a standard authority).

The only authority cited by amici is *Houser v. State*, 85 Wn.2d 803, 540 P.2d 412 (1975). Amici's argument is flawed for two reasons. *First*, amici fail to inform the Court that *Houser* was overturned by *State v. Smith*, 93 Wn.2d 329, 610 P.2d 869 (1980). *Second*, and most important, amici fail to distinguish between notice of *legislative* facts, which was the issue in *Houser*, and judicial notice of *adjudicative* facts,

which is what amici is requesting. In *Houser*, the Court was concerned solely with judicial notice of legislative facts – whether the Legislature could have determined there was a rational relationship between statutory classifications for purposes of equal protection. *Houser*, 85 Wn.2d at 807. The *Houser* court itself distinguished this type of notice of legislative facts from the “restrictive rules” governing judicial notice of adjudicative facts.

The restrictive rules governing judicial notice are not applicable to factual findings that simply supply premises in the process of legal reasoning.

Id. citing to Fed. R. Evid. 201).

In this case, the attachments to amici fail to satisfy the requirements for judicial notice of adjudicative facts, because those facts are neither generally known nor capable of ready determination from sources of unquestioned accuracy. Amici’s request for judicial notice should be denied.

C. 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 only issues presented to and ruled on by the trial court were whether the proposed initiatives were within the scope of the local initiative power.⁷ Likewise, the only issues appealed to and decided by

⁷ App. Clerk’s Papers at 25 – 35.

the Court of Appeals were whether the proposed initiatives were within 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); Appellants' Opening Brief at 1-3.

Amici's brief is primarily focused on claims and issues that were not presented to or decided by the trial court and the Court of Appeals. In particular, amici attacks the City of Port Angeles' prior decision to fluoridate the drinking water supply of its water utility, a decision that was not before the trial court or the Court of Appeals. Amici variously claim that the City's provision of fluoridated drinking water is an assault; that the City's provision of fluoridated drinking water violates constitutional provisions (for which claims amici provide no citations to authority); that fluoridated drinking water has various alleged health effects; that federal law preempts the City from providing fluoridated drinking water; that the U.S. EPA and FDA violated their statutory duties; that the City's provision of fluoridated drinking water is a prescription drug and the City is violating Washington regulations regarding dispensing prescription drugs; that drinking water fluoridation is a connivance promoted by the aluminum and fertilizer industries; and that the trial court should have entered factual findings on all of these issues even though none of them were presented to the trial court.

None of the new claims and issues raised by amici is properly within the scope of appellate review. The only conceivable justification for amici bringing these new claims for the first time on appeal is if the trial court committed a manifest error affecting a constitutional right. The trial court committed no such error, and amici have not even alleged that the trial court committed any such error. The only supposed constitutional issues are directed at the City of Port Angeles. Far from showing any manifest error, amici fails to support any of its constitutional allegations with citations to authority.

Accordingly, respondents respectfully request the Court to strike and not consider the following portions of the amici brief, which are new claims and issues that amici attempt to raise on appeal. Respondents also request the Court to strike and not consider the following described attachments to the amici brief that support those new claims and issues.

Text requested to be stricken and not considered.

Page 1 lines 13 through 18; and Page 2 line 10 through Page 4 line 13:

These portions of amici's brief contains claims that the City's provision of fluoridated water constitutes an assault, a violation of due process, a taking, an infringement on the practice of religion, and a violation of the right to free speech – as well as a claim that the trial court should have made factual findings on these claims. None of these claims were presented to or decided by the trial court. No objections to the trial courts failure to make findings has been made until amici's brief.

Page 4 line 17 through Page 5 line 2:

This portion of amici's brief alleges that the proposed initiatives themselves raised purported constitutional issues. This is a new issue not presented to or ruled on by the trial court.

Page 5 lines 9 through 15:

This portion of amici's brief requests remand to the trial court to make findings of fact on unspecified "material issues." This is raised for the first time by amici.

Page 6 line 7 through Page 9 line 2:

This portion of amici's brief contains factual allegations about the health effects of drinking water fluoridation and allegations regarding the efficacy of EPA drinking water regulations.

Page 10 line 13 through Page 13 line 6:

This portion of amici's brief argues that the federal Safe Drinking Water Act preempts and forbids state and local decisions to fluoridate drinking water.

Page 14 lines 1 through 12; and Page 14 line 19 through Page 19 line 23:

These portions of amici's brief argue that FDA should have jurisdiction over fluoride of drinking water, that EPA and FDA have entered into illegal agreements, that EPA has illegally delegated standard-setting to a private organization (NSF), that EPA has no authority to regulate fluoridation of drinking water, and that NSF's standards are inadequate to protect public health.

Page 20 line 9 through Page 22 line 14:

This portion of amici's brief argues that NSF's standards are inadequate,⁸ that EPA contaminant level goals should be utilized rather than the regulatory maximum contaminant levels in regulating drinking water, and that EPA and NSF have conspired to adopt a "bogus" drinking water standard and give it legitimacy.

Page 23 line 3 through Page 25 line 6:

⁸ Note that the Washington Board of Health and Department of Health have adopted the ANSI/NSF Standard 60 (additives to drinking water) and ANSI/NSF Standard 61 (materials with substantial contact to drinking water) at WAC 246-290-220.

This portion of amici's brief argues that City fluoridated drinking water is a prescription drug and claims that the City is violating Washington laws regarding prescription drugs.

Page 25 line 7 through Page 29 line 3; and Page 29 lines 5 through 9:

This portion of amici's brief contains unsupported allegations about the phosphate fertilizer industry and production of fluoride and argues that opposition to drinking water fluoridation has been silenced by certain industrial groups which are producing toxic wastes.

Appendices requested to be stricken and not considered:

App. A at Page 4, line 3 through Page 6, line 17.

Letter of Audrey Adams with unsubstantiated allegations about hypersensitivity to fluoridated drinking water.⁹

Page 6, line 18 through Page 7, line 26.

Letter of Linda Martin with unsubstantiated allegations about hypersensitivity to fluoridated drinking water.

App. B:

Book by New Zealand author Bruce Spittle entitled *Fluoride Fatigue* regarding alleged health effects of fluoride from drinking water and other sources.

App. D at D-1 through D-2:

Pages from article about EPA drinking water standards and potential health effects.

App. D at D-26 through D-36:

⁹ 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 was considered and decided by the trial court and Court of Appeals in this case. Those issues before this Court are solely whether the proposed initiatives are within the scope of the local initiative power.

Selected pages and selectively quoted material from article about EPA drinking water standards and potential health effects.

App. D at D-37 through D-38:
Center for Disease Control fact sheet re bottled water and fluoride.

App. D at D-43 through D-52:
Letter to Congressman Calvert from Stan Hazen of NSF Water Additives Certification Program re 43 states with regulations in place requiring compliance with ANSI/NSF Standard 60.

App D at D-53:
Selected page from article about EPA drinking water standards and potential health effects.

App. D at D-54:
Article from Environmental Working Group criticizing EPA drinking water standards.

App. D at D-55:
Page from article about EPA drinking water standards and potential health effects.

App. D at D-56 through D-58:
Wikipedia article re sulfuryl fluoride.

App. D at D-67:
Email to James Deal from Blake Stark, NSF, re additive testing.

App. D at D-68 through D-70:
Wikipedia article re hexafluorosilicic acid.

App. D at D-73:
Chart comparing fluoride relative toxicity.

App. D at D-74:
FDA article about role of community pharmacy technician.

App. D at D-77 through D-80:
FDA handout re new drug applications.

App. D at D-81 through D-85:
Wikipedia article re phosphate fertilizer industry in central Florida.

App. D at D-86 through D-87:
Photographs of gypsum stacks re phosphate fertilizer industry.

App. D at D-88 through D-96:
Article re phosphate fertilizer industry.

App. D at D-97:
Wikipedia article re phosphate rich organic manure.

App. D at D-99:
Letter to Leslie Russell from Rebecca Hammer, EPA, re EPA endorsement of fluoridation.

App. D at D-100:
Invoice to City of Port Angeles from Lucier Chemical Industries.

App. D at D-101 through D-103:
Letter to Congressman Calvert from Melinda Plaisier, DHHS, re federal regulation of fluoride.

Exhibit E:
Non-certified “rough transcript” of 2004 deposition testimony of Stan Hazen, NSF, about NSF drinking water additive standards.

None of the foregoing arguments, factual allegations, or attachments was submitted to the trial court. None of these arguments, materials and issues was the subject of any factual findings by the trial court. None of the foregoing claims, issues or materials is the subject of assignments of error. Rater, all these issues are raised for the first time 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 unfair for the Court to consider these factual and legal issues raised solely by amici and never presented to the trial court.

D. Respondents Request Sanctions for Being Required to Respond to a Brief Violative of the Instructions from This Court.

James R. Deal, the attorney for amici, earlier filed five separate briefs with this Court on behalf of several proposed amici. In a letter (copy attached) dated January 29, 2009, the Chief Justice denied the motions to file those amici briefs. The Chief Justice denied outright motions to file amicus briefs on behalf of Fluoride Action Network,¹⁰ Reverend Lynn Lohr, Ms. Audrey Adams, and Ms. Linda Martin. The Chief Justice granted leave to file a single amicus brief on behalf of International Academy of Oral Medicine and Toxicology, Oregon Citizens for Safe Drinking Water, Fluoride Action Network, Washington Action for Safe Water, and Whidbey Environmental Action Network.

In violation of that instruction from the Court, Mr. Deal has filed the present amici brief on behalf of Ms. Audrey Adams and Ms. Linda Martin. The present amici brief is also filed on behalf of both Fluoride

¹⁰ Respondents believe the Court meant Fluoride Class Action.

Class Action, which was not approved by the Court. Finally, Mr. Deal has added proposed amici Bill Osmunson DDS and Gerald H. Smith MD, whose participation was not approved by the Chief Justice. No motion was granted allowing Fluoride Class Action, Bill Osmunson DDS or Gerald Smith MD to file an amicus brief.

Respondents request the Court to strike the amici brief to the extent it is filed on behalf of the entities and persons denied amici status or not approved by the Chief Justice. Respondents have been required to file this motion to strike the brief submitted in violation of this Court's order, and requests the Court to assess sanctions pursuant to RAP 18.9.

V. CONCLUSION

Respondents, City and WDSF, respectfully request the Court to strike and not consider the portions of the amici brief and the attachments to the amici briefs set forth in the motion above.

DATED this 9th day of February 2010.

WILLIAM E. BLOOR, PORT
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THE SUPREME COURT

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January 29, 2010

RECEIVED

FEB 01 2010

FOSTER PEPPER PLLC

James R. Deal, II
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4130 166th Place SW
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RE: *City of Port Angeles v. Our Water-Our Choice and Protect Our Waters*,
Cause No. 82225-5

Dear Mr. Deal:

The Chief Justice has denied your motions to file amicus curiae briefs in this case on behalf of Fluoride Action Network, Reverend Lynn Lohr, and Audrey Adams and Linda Martin.

The Chief Justice has also denied your motions to file separate amicus curiae briefs on behalf of International Academy of Oral Medicine and Toxicology, Oregon Citizens for Safe Drinking Water, and Fluoride Action Network, and on behalf of Washington Action for Safe Water and Whidbey Environmental Action Network. But as to these entities jointly, the Chief Justice grants you permission to file a single amicus curiae brief, not to exceed 30 pages. The deadline for filing this brief is February 5, 2010. Counsel for the parties are informed by this letter that February 12, 2010, will be the due date for any answer to this brief. No extensions of time will be granted.

The case will be heard on February 23, 2010, as currently scheduled.

Yours very truly,

Walter M. Burton
Deputy Commissioner

WMB:aw

cc: Gerald Barclay Steel
William E. Bloor
William R. Fleck
✓ P. Stephen DiJulio
Roger A. Pearce
Sheila M. Gall
Clerk