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Court of Appeals
Division II
State of Washington
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DIVISION II
OF THE STATE OF WASHINGTON

TACOMA PIERCE COUNTY DEPARTMENT OF HEALTH
AND HEALTH BOARD,

Petitioner

v.

ANTI SMOKING ALLIANCE, dba PINK LUNG BRIGADE,
a Washington Non-Profit Corporation

Respondent

**RESPONDENT'S MOTION FOR AN EXTENSION OF TIME;
PRELIMINARY OPPOSITION
TO MOTION FOR DISCRETIONARY REVIEW; AND,
REQUEST FOR ATTORNEY'S FEES**

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I. INTRODUCTION

Plaintiff/Respondent, Anti-Smoking Alliance of Washington, dba Pink Lung Brigade, hereinafter referred to as “PLB,” is a nonprofit organization who advocates the interests of Pierce County retail vapor shop owners. Defendant/Appellant, the Tacoma Pierce County Health Department, hereinafter referred to as “TPC“, is the local Tacoma/Pierce County Health Department whose duties and powers are, ultimately, granted and limited by Article 11, Section 11 of the Washington State Constitution.

On September 10, 2018, the Pierce County Superior Court permanently enjoined TPC from enforcing anti-vaping rules *to the extent those rules prohibit or regulate the sales, promotions or licensure of retail vapor shops in Pierce County.* (Conclusion #1 in the Order).

On appeal, TPC only challenges the Superior Court’s ruling that TPC’s regulations violated PLB’s clear legal rights. TPC does not address or dispute the other portions of the Superior Court’s Injunction, i.e., #2) reasonable reliance on the legal right at issue; #3) reasonable fear that the enjoined act will interfere with that right; #4) a finding that the Petitioner will suffer immediate and irreparable harm without the injunction; and, the optional #5) element, that it serves the interests of the general public. Tyler Pipe, 96 Wash.2d at 793, 638 P.2d 1213.

PLB argues that this Court should affirm the preliminary injunction because the Superior Court properly ruled that TPC’s adoption or enforcement of rules violate

PLB's (and its members') legal rights under RCW 70.234 or Article 11, Section 11 and the doctrine of conflict preemption. Specifically, PLB argues on appeal that the Superior Court properly granted PLB's permanent injunction on the basis that TPC's vapor product regulations constituted an impermissible: a) *prohibition* or; b) *regulation* of retail vapor product sales, promotions or licensure in Pierce County, in violation of RCW Chapter 70.345 "VAPOR PRODUCTS", of Article 11 Section 11 of the Washington Constitution, and the doctrine of conflict preemption.

TPC raises numerous arguments on appeal. To the extent they do not focus on the issues PLB has herein identified, they are no more than off point distractions.

II. RESPONSE TO TPC'S ASSIGNMENTS OF ERROR AND STATEMENT OF ISSUES

A. Response to TPC's Assignments of Error

TPC's "Assignments of Error" are excessive, redundant, contrary to the Court record and contrary to the law. Far from being in error, Judge Murphy's decision is on point with the law and facts and consistent with Judge Rumbaugh's prior denial of TPC's Motion for Summary Judgment and with this Court's subsequent rejection of TPC's Motion for Discretionary Review. The Trial Court committed no errors, other than refusing to grant PLB attorney's fees and costs.

B. Response to TPC's Statement of Issues

TPC's Statement of Issues are also excessively and redundantly stated and contrary to the law and Court Record. The issues before the Court are simple:

1. Whether the Trial Court properly granted PLB's permanent injunction on the basis that TPC's vapor product regulations constituted an

impermissible: a) *prohibition* or; b) *regulation* of retail vapor product sales, promotions or licensure in Pierce County, in violation of RCW Chapter 70.345 "VAPOR PRODUCTS" and in violation of Article 11 Section 11 of the Washington Constitution?

2. Whether PLB should be awarded attorney's fees and costs on appeal and for the proceedings below?

III. STATEMENT OF THE CASE AND RESPONSE

There are no issues of fact properly before the court on appeal.¹ As such, the only facts properly before the court are procedural background facts. The Trial Court's reiteration of the procedural background facts is succinct and accurate and incorporated herein as follows:

THIS MATTER having come on before this Court pursuant to a consolidated hearing on the merits under CR 65 on May 2, 2018. The Court, having considered the briefing filed by the parties, including briefing and declarations predating the filings pursuant to this Court's May 2, 2018, hearing in accord with CR 65(a)(2), having heard oral argument of counsel and deeming itself fully advised in the premises, now, therefore, makes the following Findings of Fact and Conclusions of Law with regards to the issues raised in this case.

FINDINGS OF FACT

1. Plaintiff Anti-Smoking Alliance dba Pink Lung Brigade ("PLB") is a Washington nonprofit corporation based in and operating in the State of Washington.

¹ TPC attempts to create issues of fact but these efforts should be ignored because: 1) TPC waived any issue of fact claims by successfully insisting on having this matter resolved pursuant to a CR 65 consolidation *which requires* a stipulation or finding that there are *NO* material issues of fact. 2) TPC failed to offer any admissible evidence related to the impact its regulations would have on retail Vape shops or that it even considered or evaluated this question when it created its rules. Conversely, PLB presented extensive admissible evidence on these questions.

2. Defendant Tacoma Pierce County Health Department and Health Board ("TPCHD") is a jointly created political entity, created pursuant to Ch. 70.08 RCW, between Pierce County and the City of Tacoma, State of Washington, and operating therein.

A. Procedural Background

1. TPCHD enacted Chapter 9 of the Environmental Health Code (EHC) "Restrictions on Sale Use, and Availability of Vapor Products" ("Regulations"), effective January 1, 2016. These new Regulations created and imposed multiple restrictions and penalties on the retail vapor product industry and retail vapor product sales, promotions and licenses.

2 PLB objected to the portions of the Regulations that require vapor shops who offer sampling to: a) install a specific ventilation system; b) limit the number of patrons who can sample products; c) limit the locations of samplings; d) not offer samplings of any products containing nicotine; and e) penalize violations of these restrictions with administrative fines, criminal prosecution and inspection fees.

3, At the time TPCHD adopted its "Restrictions on Sale, Use and Availability of Vapor Products", there was no Washington statute that directly addressed vapor use or sales and promotions,

4. In early 2016, PLB filed this lawsuit seeking a permanent injunction enjoining enforcement of TPCHD's Regulations and the licensing and permitting requirements, to the extent they impacted the sales and operations of private vapor shops.

5. On or about April 8, 2016, this Court heard PLB's Motion for Preliminary Injunction and issued an Order denying the motion with respect to TPCHD's vapor sampling regulations but granted the preliminary injunction with respect to TPCHD's ventilations system requirements.

6. The State Legislature enacted into law RCW chapter 70.345 "VAPOR PRODUCTS", which became effective June 28, 2016.

7. Subsequently, and with an effective date of July 6, 2016, TPCHD revised its regulations in accord with the Legislature's newly enacted regulations on vaping; specifically eliminating the licensure requirements. The amended Regulations retain virtually all of the restrictions and penalties it had previously placed on retail vapor shops' sales and promotions of vapor products, including its ventilation system requirements, its restrictions on sampling and its penalty provisions.

8. On December 14, 2016, PLB filed an Amended Complaint seeking a permanent injunction enjoining TPCHD from enforcing the portions of the Regulations that impact the commercial/retail vapor industry. The Amended Complaint (as did the original Complaint) named in their individual capacity the current members of the Tacoma Pierce County Health Board.

9. On February 24, 2017, the Court entered an order dissolving the preliminary injunction entered on April 8, 2016, and granted an injunction restraining TPCHD from enforcing its restriction on limiting the number of sampling customers to three or fewer at a time and its requirement that samples be nicotine free.

10. On September 27, 2017, this Court denied TPCHD's Motion for Summary Judgment with respect to all matters except for the dismissal of the individual Board members. TPCHD sought discretionary review of the Court's order denying summary judgment from Division II of the Court of Appeals, which was denied,

11. Upon motion of TPCHD, which this Court granted, this matter was set for a hearing on the merits pursuant to CR 65 on May 2, 2018, and a briefing schedule established.

IV. ARGUMENT

The Superior Court's substantive Findings of Fact, Conclusions of Law and Order was thorough, well-reasoned and correct. It is herein incorporated, by reference, into PLB's Response. It reads, in its entirety:

B. Factual Background

1. TPCHD's regulations, namely EHC 9(6XB), require that all retail vapor shops that offer vapor sampling install a specific ventilation system, namely one that "meets the 'Smoking Lounge' standards for Retail Stores of Table 403.3, MINIMUM VENTILATION RATE of the 2012 international Mechanical Code ("IMC"), as now or hereafter amended, or the equivalent standards required by the jurisdictional Building Official."

2. There is a cost of complying with TPCHD's ventilation provisions. According to TPCHD, the cost is as much as \$40,000. According to PLB, the cost is \$145,000 or more. Some retail vapor shops can neither obtain their landlord's approval to install the system or the physical characteristics of their shop will not allow for the installation of the system.

3. The State law has no such requirement for a ventilation system.

4. EHC 9(6XFX2), TPCHD's three-person limit on the number of people who may sample vapor at a given time in a retail vapor shop, is inconsistent with the State law which has no such limitation. In fact, RCW 70.345.150 states, "The use of vapor products is permitted for tasting and sampling in indoor areas of retail outlets", and RCW 70.345.100, which restricts product tastings, does not place a limit on the number of people who may sample vapor at a given time in the retail vapor shop.

5. EHC 9(6XFX1), TPCHD's requirement that tastings are only allowed at the sales counter in retail vapor shops, is inconsistent with the State law which has no such limitation. RCW 70.345.100(1Xb) only limits the tastings to within the licensed premises and prohibits the removal of the products tasted from within the licensed premises.

6. EHC 9(6XD)(2) and (3), TPCHD's prohibition on sampling vapor containing nicotine in retail vapor shops, is inconsistent with the State law which has no such limitation. RCW 70.345.100(1Xd) allows the customer to explicitly consent to a tasting of a vapor product that contains nicotine. This restriction will harm retail vapor shops because approximately 90% or more of all sampling and sales are of e-liquid containing nicotine and nicotine-free vapor cannot replicate the taste.

7. TPCHD's investigation and enforcement provision, including its penalty and criminal provisions, will make it completely untenable for retail vapor shops to stay in business. There is simply no way a retail vapor shop can stay in business if they have to follow the ventilation requirements, number restrictions, and nicotine prohibitions, nor is there any way they can stay in business violating these provisions in the face of the criminal prosecutions and escalating fines for violations.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the subject matter of this lawsuit and personal jurisdiction over the parties.

2. RCW 70.345 creates five overarching points of law that protect PLB and its members and that are violated by TPCHD's regulations. Those statutory protections and the TPCHD EHC Chapter 9 provisions that violate them, are as follows:

- a. Preemption. RCW 70.345.210 explicitly preempts local health departments and local governments from adopting or enforcing requirements for the regulation of vapor product promotions and sales at retail. As such, any provision of TPCHD EHC Chapter 9, or the enforcement of any such provision, that in any way relate to the sales

or promotions of vapor products in vapor establishments are, therefore, void as a matter of law under Article 1 1, Section 1 1 of the Washington State Constitution, under the plain meaning of the statute and under the doctrine of conflict preemption. These provisions of TPCHD EHC Chapter 9 cannot be harmonized with RCW 70.345.210's preemption language. Specifically, the Court finds that the adoption or enforcement of TPCHD EHC Chapter 9 provisions that are void under Article 11, Section 11 of the Washington State Constitution, the plain meaning of RCW 70.345.210, and the doctrine of conflict preemption include the following:

i. Section 5(A), Vaping is Prohibited in Public Places and Places of Employment: To the extent this provision, or its prospective enforcement, in any way relates to the sales or promotions of vapor products in Retail Vapor Shops, it is void as a matter of law.

ii. Section 6. Tastings. This section, and its prospective enforcement, is void in its entirety because it relates to the sales and promotions of vapor products by Retail Vapor Shops. Additionally, the following specific portions of this Section are void as a matter of law: (B) Ventilation. All portions of this subsection are void because they create an entirely new requirement that will impact Retail Vapor Shops sales or promotions via tastings; (C(2) Customers. This subsection is void because it creates an entirely new requirement that will impact Retail Vapor Shops sales or promotions via tastings; (F) Duration, This subsection is void because it creates an entirely new requirement that will impact Retail Vapor Shops or promotions via tastings; (G) Lounges. This subsection is void because it creates an entirely new requirement that will impact Retail Vapor Shops sales or promotions via tastings.

b. Samplings and Tastings. The Revised Code of Washington explicitly allows retail vape shops to offer samplings/tastings of vapor products to the public (over the age of 18). RCW 70.345.100, RCW 70.345.150(1Xb), and RCW 70.345.2j0. Furthermore such permitted samplings and tastings of vapor products includes the sampling/tasting of e-liquid that contains nicotine (but cannot contain tobacco or marijuana). RCW 70.345.010(19). In addition, the statute does not restrict the number of people who may sample or the location of the sampling in the retail vapor shop. Nor does the statute prohibit sampling in retail vapor shops that have not installed a ventilation system.

However, in direct violation of the plain meaning of these controlling statutes, TPCHD EHC Chapter 9(6)(D)(2) prohibits the sampling of e-liquid that contains nicotine, Additionally, TPCHD EHC Chapter 9(6) prohibits more than three people from sampling at a given time, requires

that all sampling be conducted in a specific location and requires that any retail vapor shop offering sampling must first install a very expensive specific ventilation system.

c. Licensure. Under RCW 70.345.210, no political subdivision may impose fees or license requirements on retail outlets for possessing or selling vapor products. The Revised Code of Washington explicitly grants the Liquor and Cannabis Board the exclusive power to issue retailer, distributor and delivery sales licenses (RCW 70.345.020(1)) and to adopt rules regarding regulation of those licenses including the rejection of applications, and the revocation and/or suspension of those licenses. RCW 70.345.020(2). The same statute provides that criminal convictions can result in the revocation, suspension, or denial of a license under RCW 70.345.020(2).

However, in direct violation of this plain meaning and statutory scheme, TPCHD has adopted multiple rules that impact the issuance, revocation and/or suspension of retail vapor shop licenses without State involvement. Specifically, TPCHD EHC 9(6X1) criminalizes vapor shop retailers' violations of TPCHD Chapter 9 even where those retailers are otherwise in compliance with the controlling statutory law, and TPCHD EHC 9(9) allows TPCHD to initiate criminal prosecution and issue administrative fines based solely on violations of the preempted TPCHD EHC Chapter 9 rules, which can trigger a statutory revocation of the retailer's license. This is clearly contrary to the legislative intent, plain meaning and statutory scheme of RCW 70.345.e1 seq. which vests the State with this exclusive authority.

d. Enforcement. Related to the licensing statutes, RCW 70.345 et seq. explicitly grants the Liquor and Cannabis Board the exclusive authority to enforce the State's "Vapor Product" statute (RCW 70.345.160) and to establish and issue penalties, including penalties impacting licenses (RCW 70.345.170). These statutes only allow limited local health board involvement where: a) the State has chosen to "work with" the local health departments to conduct inspections and ensure compliance with the State laws, or b) where the local jurisdiction determines that a specific vapor product may be injurious or pose a significant health risk and (i) the State Board, in consultation with the local board directs that the product be analyzed by an Analyst chosen by the State Board; and (ii) if the Analyst determines that the product contains a risk, the State Board may suspend the license unless the product is removed from sale.

However, in direct violation of this plain meaning and statutory scheme, TPCHD has enacted numerous rules that allow it to engage in regulation of licenses and retail operations, and to issue penalties, without the

required State involvement and far outside of the limitations placed on TPCHD by RCW 70.345.

e. Penalties. The Revised Code of Washington explicitly sets forth the penalty provisions and procedures for addressing violations of the State law under RCW 70.345 et seq. RCW 70.345.170 states that a vapor license may not be revoke without notice and a hearing as prescribed by the State Board, and RCW 70,345.180 states that only the State Board may impose money penalties for violations. RCW 70.345.et seq. does not extend this power to local government. However, in direct violation of this statutory scheme, the TPCHD regulations set forth numerous provisions that allow the TPCHD to issue financial penalties and to even initiate criminal proceedings. These provisions include TPCHD Chapter 9(6XI): "A violation of this section is a misdemeanor."

Having made these Findings of Fact and Conclusions of Law, the Court hereby concludes as a matter of fact and/or law that it is appropriate and proper to GRANT PLB's request for a permanent injunction in its entirety, i.e., to grant a permanent injunction protecting PLB against TPCHD EHC Chapter 9's rules and regulations, and enforcement thereof, that in any way impact or affect the sales, promotions or licensure of retail vapor shops in Pierce County. Specifically:

1. TPCHD EHC Chapter 9(5)A), as it relates only to retail vapor shops, TPCHD EHC Chapter 9(6), and TPCHD EHC Chapter 9(9) as it relates only to the enforcement of TPCHD EHC Chapter 9(6) are preempted by the general laws of the State of Washington under Article 1 1, Section 1 1 of the Washington Constitution, RCW 70.345 et seq. and the doctrine of conflict preemption which establish clear legal and/or equitable rights conferred on PLB and its members, as retail vapor shop owners.
2. It is more than reasonable for these retailers to rely on controlling State law without the fear of local government interference which criminalizes, fines and collects fees for law abiding behavior.
3. Given the adoption of TPCHD EHC Chapter 9 et seq. and TPCHD's position in this litigation, PLB clearly and indisputably has a reasonable fear of imminent violation of its rights under the general laws of Washington.
4. Given the criminal sanctions, administrative fines and enforcement fees that TPCHD may issue under its invalid rules, PLB and its membership will unequivocally suffer immediate, substantial and irreparable harm if the injunction is not granted. Lastly, the Court denies PLB's request that the Court order TPCHD to reimburse PLB for all of its attorney's fees and costs incurred in this litigation. The Court find that TPCHD's actions were not in bad faith or

frivolous, and do not support a recognized ground in equity that would authorize an award of fees and costs.

The Superior Court's Order granting PLB a permanent injunction should be affirmed on appeal because: A) There is no dispute that TPC's regulations violate RCW Chapter 70.345 "VAPOR PRODUCTS" which preempts local governmental entities from passing or enforcing regulations that serve to *prohibit* retail vapor shop owners' sales, promotions or licensure, much less that run such retailers out of business; and, B) The Superior Court was correct, as a matter of law when it interpreted RCW Chapter 70.345 "VAPOR PRODUCTS" as preempting TPC from "adopting or enforcing" rules that *regulate* the sales, promotions or licensure of vapor products being sold by retail vapor shop owners, much less where there is no basis for doing so.

A. The Evidence Unequivocally Established that TPC's Regulations Illegally Prohibit Retail Vapor Shops Sales and Promotions and Impact Licenses.

The Superior Court explicitly found, in background fact #7, that the TPC regulations constitute a *prohibition* on vapor shop retailers (and, this finding was implicit throughout the Court's entire Order). Finding #7 states:

7. TPC's investigation and enforcement provision, including its penalty and criminal provisions, will make it completely untenable for retail vapor shops to stay in business. There is simply no way a retail vapor shop can stay in business if they have to follow the ventilation requirements, number restrictions, and nicotine prohibitions, nor is there any way they can stay in business violating these provisions in the face of the criminal prosecutions and escalating fines for violations.

This basis for the Superior Court's permanent injunction must be upheld on appeal because it is supported by the *undisputed* plain meaning of RCW Chapter 70.345 and the only relevant or admissible facts presented to the Superior Court.

1. It is Undisputed that RCW 70.345 Plainly Preempts Local Prohibitions on Sales or Promotions and Local Regulation of Licenses.

There has never been any dispute in this case that RCW Chapter 70.345 "VAPOR PRODUCTS" preempts local government from adopting or enforcing rules that serve to *prohibit* retail vapor shop sales or promotions *or* that in any way impact their licenses. In fact, TPC has consistently acknowledged that RCW Chapter 70.345 preempts such prohibitions and licensing. There is good reason. RCW 70.345.100 "Product Tastings" explicitly allows retail vapor shops to offer product tastings to the public, provided those retailers comply with the specific requirements of the statute; RCW 70.345.150. Use of products in public places—When prohibited, provides that "(b) The use of vapor products is permitted for tasting and sampling in indoor areas of retail outlets" (obviously provided that the use complies with sub-section 100); RCW 70.345.210 "State Preemption – Exceptions" states that "this chapter preempts political subdivisions from adopting or enforcing requirements for the licensure and regulation of vapor product promotions and sales at retail..."; Finally, [RCW 70.345.020 – 060 present multiple licensing provisions and clearly state that *only the State LCB is authorized to issue retail vapor shop licenses, regulate such licenses, penalize licensees, or revoke such licenses.*]

Based on these statutes, there can be no question that RCW Chapter 70.345 preempts local governments from passing or enforcing rules that serve to *prohibit* retail vapor sales and promotions or in any way impact State issued retail vapor shop licenses issued by the State.

2. The Superior Court's Ruling That TPC's Rules Prohibit Retail Vapor Shop Sales and Promotions and Impact Licenses Was Supported by the Only Substantial and Competent Evidence Offered.

The Superior Court properly exercised its discretion in ruling that TPC's rules constituted illegal *prohibitions* on retail vapor shops and illegal impacts on vapor shop licenses because: a) PLB offered substantial and competent evidence on these issues; and, b) TPC failed to offer any evidence on these issues.

a) PLB provided substantial and competent evidence that TPC's rules would *prohibit* retailer sales and promotions and impact their licenses. Specifically, TPC provided this evidence in the form of multiple admissible declarations, that were signed by multiple vapor shop retail owners and managers, who declared under oath, that based on their own personal knowledge and opinions:

1) That they had personal knowledge of the TPC rules and the Washington statutes regulating retail vapor shops and that their declarations were based on that knowledge;

2) That TPC's ventilation system requirement would force them out of business because they either could not afford the cost [even at TPC's irrelevant, incorrect and unsupported estimate of \$40,000] or they could not install it in their building because of physical structure limitations;

3) TPC's restrictions on the numbers of patrons who can sample at one time would either put us out of business or greatly damage our business.

4) TPC's rules that prohibit offering e-liquid samples containing nicotine would have an even worse impact on their business than the numbers limit.

5) The TPC penalty provisions would put them out of business.

6) None of the defendants had received *any* LCB complaints.

7) No one from TPC had visited their shops or asked them about the impact the TPC regulations would have on their businesses. (See PLB's brief and reply filed in the CR 65 motion that is the subject of this appeal).

b) TPC waived and otherwise utterly failed to offer *any* evidence regarding the impact its regulations would have on local retail vapor shops.

First, by pursuing a CR 65 consolidated hearing, TPC implicitly admitted, as a matter of law, that it believed there were no factual issues. (See CR 65). TPC did this with full knowledge that TPC had failed to offer any evidence. TPC also did this knowing that PLB had argued, from the time of the summary judgment, that TPC's regulations would *prohibit* retail vapor shop operations in Pierce County.

Second, TPC waived any argument related to the prohibitive effect of its regulations, by failing to offer *any* evidence of their *purpose*, beyond the declaration of Steven Baldrige. As PLB thoroughly argued at the 2017 summary judgment, the motion for discretionary review and at the CR 65 hearing now on appeal, the Baldrige declaration was the *only evidence* TPC ever offered – or even identified – in response to PLB's discovery requests asking for all evidence in support of TPC's regulations, *and it offered no testimony* on the impact TPC's regulations would have on retail vapor shops, nor on the health effects of e-juice vapor. (See PLB's prior briefings and the Baldrige declaration).

TPC now attempts to cover its fatal deficiencies below by arguing that PLB's evidence should not have been admitted. These arguments have no merit. It is obvious that PLB's declarations are admissible because they are: signed, and have

sufficient foundation (as they are all based on the declarants' personal knowledge or even Baldrige's incorrect ventilation system cost estimate) (ER 401 and 602); and because they constitute admissible opinion evidence under ER 701 and, in the case of Marc Jarret and Kim Thompson, even ER 702.

TPC even attempts to circumvent its failure to offer any evidence below, by now incorrectly arguing that this Court should apply a free review standard to the Trial Court's Findings of Fact. Not only is this argument wrong, under the very law TPC cites, it is inconsequential because, no matter how TPC attempts to characterize the standard of review, two inescapable facts remain: a) TPC has always *correctly* agreed that RCW Chapter 70.345 preempts local governmental *prohibitions* on retail vapor shops and preempts local governmental regulations of retail vapor shop licenses; and, b) TPC did not offer any evidence on the question of whether its regulations would serve to prohibit retail vapor shop operations or impact retailer licenses, whereas PLB offered substantial and competent evidence on these issues.

B. The Superior Court's Ruling that RCW Chapter 70.345 "VAPOR PRODUCTS" Preempts Local *Regulations* of Retail Vapor Shop Sales or Promotions of Vapor Products, Was Correct as a Matter of Law.

In addition to its *prohibition* ruling, the Superior Court held that TPC's rules constitute illegal *regulations* of retail vapor shops. This decision was compelled by the language of RCW 70.345 "VAPOR PRODUCTS," the language of TPC's regulations, and by application of the rules of statutory construction, the laws of preemption and Washington Constitution Article 11, Section 11.

Support for PLB's argument, and the Superior Court's decision, can best be found in the Court of Appeals' decision denying TPC's motion for Discretionary

Review. As the Court of Appeals noted, Article 11, Section 11 “POLICE AND SANITARY REGULATIONS” provides that: “Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.”² The Court of Appeals further noted that:

“Local governments have considerable latitude in exercising their police powers, and a regulation is reasonable if it promotes *public safety, health or welfare* and bears a reasonable and substantial relation to accomplishing the *purpose pursued*.” *Kitsap Cty vs. Kitsap Rifle and Revolver Club*, 1 Wn App. 2d 393, 404, 405 P.3d 1026 (2017) (quoting *City of Seattle vs. Montana*, 129 Wn.2d 583, 591-92 919 P.2d 1218 (1996)). But, under Article 11, Section 11, the legislature may “preempt an ordinance on the same subject if the statute *occupies the field*, leaving no room for concurrent jurisdiction, *or* if a conflict exists such that the statute and the ordinance *cannot be harmonized*.” *Lawson v. City of Pasco*, 168 Wn.2d 675, 679, 230 P.3d 1038 (2010) (citing *Brown v. City of Yakima*, 116 Wn.2d 556, 559, 807 P.2d 353 (1991)). “A statute preempts the field and invalidates a local ordinance within that field “if there *is express legislative intent to preempt* the field *or* if such intent is necessarily *implied... from the purpose of the statute and the facts and circumstances under which it was intended to operate*.” *Cannabis Action Coal. v. City of Kent*, 183 Wn.2d 219, 226, 351 P.3d 151 (2015) (quoting *Lawson* 168 Wn.2d at 679). (emphasis added).

In this case, the TPC rules in question do not meet a single one of the legal principles cited by the Court of Appeals and highlighted in the above quote.

First, as noted previously herein, there is no evidence that TPC’s regulations “*promote the public safety, health or welfare*” because the only evidence they offered was in the declaration of Steven Baldrige and it is inadmissible on this issue.

Second, there is no evidence in the record that the TPC rules in question accomplish the “*purpose pursued*.” When evaluating this legal requirement, one

² PLB understands that the Court of Appeal’s standard of review on appeal is different than the standard of review on a motion for discretionary review. The law governing preemption is, however, the same.

must view TPC's statutory purpose of preserving the public's health, safety and welfare through the lens of RCW 70.345 and how it addresses the public's health safety and welfare **and** *how it addresses the other obvious purpose of the statute which is to allow retail vapor shops to promote and sell vapor products via by offering tastings and samplings as long as they meet the statutory requirements.* TPC offered no admissible evidence that e-juice vapor is harmful, no evidence of what is in e-juice vapor, no evidence that the specific ventilation system it requires is affordable or is any more efficacious than other more affordable options, and no evidence that its other restrictions would in any way serve the public's health, safety or welfare beyond the statutory requirements of RCW 70.345.100 or relative to their impact on Retail Vape Shops. (See PLB's briefing below and Baldrige declaration)

Third, the fact that RCW 70.345 "**occupies the field**" is most readily seen by the fact that it: vests the State LCB with exclusive power to take action that in any way impacts the licenses of retail vapor shop owners, including fines, fees and misdemeanor prosecutions, which may result in license revocation; and, that it explicitly limits local governmental power to impact retail vapor shops to situations where the local government works with the LCB. RCW 70.345.020 – 060.

Fourth, RCW 70.345 "**cannot be "harmonized"** with the TPC rules because the TPC rules allow TPC to take actions that impact licenses, and this is not only banned under the RCW, *but TPC has admitted that it is banned.*

Fifth, the TPC regulations that impact sales, promotions and licenses of retail vapor shops are preempted under RCW 70.345 via "**express legislative intent to preempt the field.**" One need look no further than the title of RCW 70.345.210 which

explicitly states “State preemption—Exceptions” Subsection (1) clearly states that preemption as: “

(1) This chapter preempts political subdivisions from adopting or enforcing requirements for the licensure and regulation of vapor product promotions and sales at retail. No political subdivision may impose fees or license requirements on retail outlets for possessing or selling vapor products, other than general business taxes or license fees not primarily levied on such products.”

Subsection (3) states the relevant exception to preemption as follows:

Subject to RCW 70.345.150, political subdivisions may regulate the use of vapor products in indoor public places.

Multiple rules of statutory construction govern the interpretation of this *express* language in RCW 70.345.210 (1) and (3).

First, with respect to RCW 70.345.210 (1), one must give this preemption language its *plain meaning* because this language is plain on its face and not subject to construction. *Auto. Drivers & Demonstrators Union Local 882 v. Dep't of Ret. Sys.*, 92 Wash. 2d 415, 421, 598 P.2d 379, 382-83 (1979) (citations omitted) (holding “court cannot read into a statute that which it may believe the legislature has omitted, be it an intentional or inadvertent omission.”).

In this case, the plain meaning of 70.345.210(1) is that it creates a clear and sweeping preemption of any local adoption or enforcement of rules affecting licensure or regulation of vapor product promotions or sales at retail.

Second, with respect to RCW 70.345.210(3), in addition to applying the *plain meaning* doctrine, one must read this *exception language*: a) *narrowly* (*Welch v. Southland Corp.*, 134 Wash. 2d 629, 636, 952 P.2d 162, 166 (1998); b) in *pari materia* with the rest of RCW Chapter 70.345 (particularly 70.345.150 and

100) (*Washington State Republican Party v. Washington State Pub. Disclosure Comm'n*, 141 Wash. 2d 245, 280-81, 4 P.3d 808, 827-28 (2000)); and, c) in *Ejusdem Generis*, giving the more specific language precedence over the more general language (*Simpson inv. Co. v. State*, 141 Wash. 2d 139 (2000)).

When one applies these rules of statutory construction to TPC's argument, it is clear that the 70.345.210(3) exception does NOT extend to *tastings and samplings in retail vapor shops*. TPC's argument requires reading the exception broadly; it requires giving precedence to the general statement in RCW 70.345.210(3) over the specific tasting and sampling language of RCW 70.345.210(1), 70.345.100 and 70.345.150; it requires ignoring the doctrine of *pari materia*; and, it requires ignoring the basic tenant of the plain meaning doctrine that prohibits reading into a statute language that is simply not there. Regarding this last point, TPC's argument requires reading language into RCW 70.345.210(1), 70.345.100 and 70.345.150. that simply is not there. Specifically, it requires reading in the language "including any other limitations or regulations that any given local governmental entity may want to add this this statute.

More particularly, the RCW 70.345.210(3) exception to preemption is explicitly made "subject to" the provisions of RCW 70.345.150. This plainly means that local government regulation of indoor vape "use" is limited by subsection 150. Subsection 150 clearly states that indoor "use" is "permitted for tasting and sampling in indoor areas of retail outlets". This permit is without limitation. Therefore, the rule that prohibits inserting unwritten language into a statute prohibits writing in language allowing local government to restrict this

permit in ways that the language has left unrestricted. However, this is exactly what TPC advocates. It advocates inserting the following language into subsection 150 “subject to any and all local government regulations.”

Sixth, the TPC regulations that impact sales, promotions and licenses of retail vapor shops are preempted under RCW 70.345 via *the necessary implication of the legislative intent to preempt the field as discerned from the purpose of the statute and the facts and circumstances under which it was intended to operate.*”

The purpose of RCW Chapter 70.345, read as a whole and in light of the facts and circumstances under which it is intended to operate, all lead to the inescapable conclusion that the local governmental entities are preempted from adopting or enforcing any regulations that impact sales, promotions or licenses of retail vapor shops. This interpretation is supported by: a) The plain language meaning of RCW 70.345.210(1); b) The plain meaning of RCW 70.345.210(3) read subject to the plain meaning of the limitations of RCW 70.345.150 (as dictated); c) The plain meaning of RCW 70.345.100 which places explicit statutory requirements on tastings and samplings in retail vapor shops *and do so with no reference to allowing local governments to add to the requirements*; d) The licensing and enforcement provisions of RCW 70.345.020 – 060 which vest the State LCB with the explicit power to issue, regulate *and revoke* retail vapor licenses and which provides the only explicit mechanism for local government to get involved in retail vapor sales or promotions; and, e) The policy of uniform application of State statutes.³

³ It would allow every local health department in the State could engage in unlimited *and inconsistent regulation of* retail vapor shops’ sales, promotions and licenses contrary to clear legislative intent and with no rational basis in fact.

Finally, PLB urges this Court to also consider the negative impact the TPC regulations and TPC's interpretation of the statutes will have on Washington's citizens in general. (See Tyler Pipe, at 792, 638 P.2d 1213 holding that impact on the general public is also often a valid consideration in injunction cases). Such negative impact is fully illustrated herein above.

C. PLB's Request for Attorney's Fees and Costs.

PLB requests that, pursuant to RCW 4.84.185, Rule 11, RAP 18.1 and recognized principles of equity, this Court Order that PLB be reimbursed all of its attorney's fees and costs that were incurred from the time of the September 2017 summary judgment through this appeal.

Under Washington law, attorney fees and costs may be awarded when authorized by a contract, a statute, *or a recognized ground in equity*, or pursuant to the inherent discretion of the Court. *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 106 Wash.2d 826, 849-50, 726 P.2d 8 (1986). In this case, PLB submits that should be awarded attorneys' fees and costs as authorized by statute (and court rule) or as a matter of equity.

Specifically, under RCW 4.84.185, the prevailing party *shall* recover all costs and fees, including attorneys' fees, where the opposing position is frivolous. Webster's Dictionary defines "frivolous" as, "1 b: having no sound basis (as in fact or law) a *frivolous* lawsuit..." Consistent with RCW 4.84.185, Court Rule 11 awards attorneys' fees for presentation of frivolous claims or defenses that have no basis in law, fact or the good faith argument of an extension of the law.

The distinction between RCW 4.84.185 and Rule 11 is that the RCW 4.84.185 fees are awarded against a party and the Rule 11 sanctions are normally awarded against the attorney or law firm. In *Biggs v. Vail*, 119 Wn.2d 129 (1992), the Washington Supreme Court offered valuable guidance on the application of the and the rule, holding that:

The intent of the Legislature is clear. The action or lawsuit [or defense] is to be interpreted as a whole. If that action [or defense] as a whole, or in its entirety, is determined to be frivolous and advanced without reasonable cause, then fees and costs may be awarded to the prevailing party. Under RCW 4.84.185, the trial court is not empowered to sort through the lawsuit, search for abandoned frivolous claims and then award fees based solely on such isolated claims. (119 Wn.2d 137).

The frivolous lawsuit statute has a very particular purpose: that purpose is to discourage frivolous lawsuits [or defenses] and to compensate the targets of such lawsuits [or defenses] for fees and expenses incurred in fighting meritless cases. The statute is not to be used in lieu of more appropriate pretrial motions, CR 11 sanctions or complaints to the bar association. The statute provides for the nonprevailing party, not that party's attorney, to pay attorneys' fees and costs.”

Recognized grounds in equity include restitution for unrequested intervention and for *wrongs* (including intentional fraud and mistake). *Restatement of Restitution*, §39.

Additionally, attorneys' fees and costs may be awarded against the State or local government in the same manner they may be awarded against private parties. RCW §4.84.170.

A simple overview of this case substantiates PLB's entitlement to an award of attorneys' fees and costs under either RCW 4.84.185 or CR 11. TPC has continued to Defend its anti-vaping regulations for nearly two years and through four separate unsuccessful proceedings – and now this one: a) knowing *and admitting* that RCW Chapter 70.345 preempts local government *prohibitions* on retail vapor shops and

their sales and promotions; and, b) knowing that it has *no admissible evidence to support its opposition to PLB's well supported evidence that* the PLB regulations will constitute a prohibition on retail vapor shops in Pierce County. In short, based on these two facts alone, TPC has pursued nearly two years-worth of extensive litigation knowing that its position is, ultimately, frivolous because it has no basis in law or fact. If ever there was a case that justifies an award of attorneys' fees or costs under the *Biggs* recitation of the RCW 4.84.185 legislative "purpose to discourage frivolous lawsuits [or defenses] and to compensate the targets of such lawsuits [or defenses] for fees and expenses incurred in fighting meritless cases," this is the case. TPC's defense, in its entirety, has been frivolous because the prohibitions created by its rules are determinative and unquestioned.⁴

At the very least, PLB should be awarded attorneys' fees as a matter of equity. PLB is a non-profit organization that has been forced to endure five legal proceedings and nearly two years of a heretofore successful effort to prevent TPC's *illegal governmental conduct from violating the legal rights of statutorily protected retail vapor shop owners and the citizens of this State*. It would be highly inequitable, indeed, to force PLB to have to foot the bill for advocating these legally protected rights and preventing such egregious government action. Under the equitable doctrine of restitution, equity requires that the wrong doer be ordered to reimburse the

⁴ Not that it matters to the attorneys' fees analysis, but it is worth noting that the deficiencies in TPC's evidence also invalidate any regulatory affect of its rules because there is no basis in fact for such regulations and, thereby, no rational basis for them and no possible way they can be found to comply with RCW Chapter 345. As noted, however, this does not matter to the attorneys' fees analysis because the TPC regulations are invalid, in their entirety, because it is undisputed that they constitute illegal prohibitions on retail vapor shops.

reasonable attorney's fees and costs Plaintiff incurred.

Finally, the Superior Court's ruling, now on appeal, was consistent with the law and the *undisputed* facts. Conversely, as proven by the Court record, TPC has had no legal or factual basis for opposing a permanent injunction from the time of: a) its September, 2017 Summary Judgment; b) through its subsequent motion for Discretionary Review; c) through its subsequent CR 65 motion to consolidate (wherein it waived any claim contrary to the critical facts regarding the prohibitive impact of its rules); d) its CR 65 motion appealed herein; and, e) through this appeal. This is because TPC has consistently admitted that the law preempts local government prohibitions on retail vapor shop sales and promotions and impacts on licenses, but TPC has completely failed to offer one bit of evidence to refute PLB's assertion – and the Superior Court's conclusion – that TPC's regulations create such illegal prohibitions.

V. CONCLUSION

Based on the foregoing points and authorities, PLB respectfully requests that this Court affirm the Superior Court's permanent injunction and award PLB fees and costs for the below proceedings and on appeal.

Dated April 17 2019

/s/ Eric T Krening
WSBA# 27533
Atty for Respondent

OSINSKI LAW OFFICES PLLC

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