

No. 82225-5

SUPREME COURT  
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SUPREME COURT  
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 PORTIONS OF:

OUR WATER-OUR CHOICE AND PROTECT OUR WATERS'  
ANSWER TO AMICI CURIAE BRIEF OF ASSOCIATION OF  
WASHINGTON CITIES AND CITY OF FORKS.

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ORIGINAL

## I. INTRODUCTION

The only issue addressed in the Amici Curiae Brief of Association of Washington Cities and City of Forks (“AWC/Forks Amici Brief”) was whether the proposed initiatives submitted to the City of Port Angeles (“City”) addressed administrative, rather than legislative, matters and were therefore outside the scope of the local initiative power. Appellants, Our Water-Our Choice (“OWOC”) and Protect Our Waters (“POW”), have filed an answer that goes well beyond answering the issue in the AWC/Forks Amici Brief, and raises new issues on appeal that were not presented to the trial court.<sup>1</sup> Those portions of the OWOC and POW answer violate both RAP 10.3(f) and RAP 2.5 and should be stricken and not considered by this Court.

## II. RELIEF REQUESTED

Respondents, City of Port Angeles (“City”) and Washington Dental Service Foundation (“WDSF”), request the Court to strike and not consider the portions of the OWOC and POW answer to the AWC/Forks Amici Brief that do not answer the issues raised by amici AWC and Forks, and that raise new issues not presented to the trial court, including

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<sup>1</sup> The OWOC and POW answer is dated February 11, 2010, but was not received by attorneys for Respondents until February 16, 2010.

appendices supporting the issues not presented to the trial court and outside the record in this case.

### III. FACTUAL BACKGROUND

The factual statement in Brief of Respondents provides a factual background for this motion.

### IV. LEGAL ARGUMENT

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

The appellate court 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). 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 to the OWOC and POW answer. There is no suggestion that the trial court did not have jurisdiction. 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. There is no claim that the trial court committed a manifest error affecting a constitutional right.

In their answer to the AWC/Forks Amici Brief, appellants, OWOC and POW, raise a number of new issues never presented to the trial court. Because these issues, arguments and documents were never presented to the trial court, respondents were never provided an opportunity to make a record on those issues. The portions of the OWOC and POW answer with these new issues on appeal, and the appendices allegedly supporting those arguments are as follows:

- OWOC/POW Answer pg.7 line 4 through pg. 8 line 10  
(arguing that drinking water fluoridation is harmful)
- OWOC/POW Answer pg. 16 line 18 through pg. 19.  
(arguing that the City's fluoridated water supply is a prescription drug, that the City is violating Washington laws related to pharmaceuticals, and that the trial court should have considered laws related to dispensing drugs, even though that issue was never presented to the trial court).
- Appendix A-4  
(letter from Department of Health re classification of prescription drugs and refusing request to designate fluoride as a poison)
- Appendix A-10  
(email from U. S. Food and Drug Administration re regulation of pre-1962 sodium-fluoride-containing products)

- Appendix A-11  
(1975 magazine article re new drug applications for certain combination vitamin and fluoride products)
- Appendix A-12  
(Board of Pharmacy newsletter re FDA concerns about unapproved drugs – unrelated to community drinking water fluoridation)
- Appendix A-32  
(Newsletter alleging concerns about fluoridation systems)
- Appendix A-34  
(Letter to Congressman Calvert re federal regulation of fluoride-containing products)
- Appendix A-37  
(leaflet regarding new drug applications)
- Appendix B  
(anti-fluoridation journal article)

None of the foregoing arguments or attachments were submitted to the trial court. None of these arguments, materials or 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 on appeal and should, accordingly, be stricken and not considered by the Court.

**B. Issues Not Responding to the Issues in the AWC/Forks Amici Brief Should be Stricken.**

Pursuant to Rules of Appellate Procedure, any brief in answer to a brief of amicus curiae should be limited “solely to the new matters raised in the brief of amicus curiae.” RAP 10.3(f).. Here, the AWC/Forks Amici Brief addressed only whether the proposed initiatives addressed administrative rather than legislative matters. The OWOC and POW answer briefly responds to that issue on pages 1 through 6, but then goes on to address a number of the new issues on appeal (listed above) and to reiterate other issues not addressed by the AWC/Forks Amici Brief, including the following:

- OWOC/POW Answer pg. 9 line 13 through pg. 14 line 5  
(addressing whether the City had the substantive authority to enact the initiative in question, whether the initiatives were “substantive invalid,” which is an issue not raised in the AWC/Forks Amici Brief)
- OWOC/POW Answer pg. 15 line 15 through pg. 16 line 17  
(addressing whether the authority to operate a water utility and perform the actions required by the initiatives is expressly delegated to the City Council of the City, which is an issue not raised in the AWC/Forks Amici Brief)

These issues are not in response to the AWC/Forks Amici Brief and should be stricken pursuant to RAP 10.3(f).

#### V. CONCLUSION

Respondents, City and WDSF, respectfully request the Court to strike and not consider the portions of the OWOC and POW answer to the AWC/Forks Amici Brief that attempt to raise new issues on appeal not presented to the trial court and that are not responsive to the narrow issues raised in the AWC/Forks Amici Brief

DATED this 18<sup>th</sup> day of February 2010.

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ANGELES CITY ATTORNEY

  
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*per permission*

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Attached for filing today in the referenced case are (1) Respondents' Motion to Strike Portions of: Our Water-Our Choice and Protect Our Waters' Answer to Amici Curiae Brief of Association of Washington Cities and City of Forks; and (2) Declaration of Service.

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