

SUPREME COURT  
OF THE STATE OF WASHINGTON

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CITY OF PORT ANGELES, Respondent,

v.

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

v.

WASHINGTON DENTAL SERVICE FOUNDATION, LLC,  
Respondent.

AMICI CURIAE BRIEF  
IN SUPPORT OF PETITIONERS  
AUDREY ADAMS AND LINDA MARTIN

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### **I. IDENTITY AND INTEREST OF AMICI CURIAE**

The Amici Curiae are Audrey Adams and Linda Martin, who represent a subset of the population who are highly sensitive and have adverse reactions to fluoridated water and fluoride in any form. Their interest interests and personal adverse reactions to fluoridation are set forth in Appendix A hereto.

### **II. ISSUES ADDRESSED**

This Amicus Curiae Brief addresses Issues 2 and 5 presented in the Petition for Review.

### **III. BRIEF STATEMENT OF THE CASE**

This amicus adopts the Brief Statement of the Case of the Amici Curiae Brief of International Academy of Oral Medicine and Toxicology, Fluoride Action Network, and the Sierra Club in Support of Petitioners ("IAOMT Amici Brief").

### **IV. KAUL CASE IS TANGENTIALLY RELATED TO THIS CASE.**

The Kaul case was handed down in 1954. *Kaul v Chehalis*, 45 Wn.2d 616, P.2d 352.\* I will note the similarities and differences and how it applies to the case at bar.

Kaul dealt with a plaintiff who was suing to enjoy water fluoridation by a city, while the case at bar deals with plaintiffs who are suing to have an initiative put on the ballot which deals with adding medication, including fluoride, to water. In Kaul there is no debate over whether the issue is legislative or administrative because that debate applies only in the context of a ballot initiative and not in the context of a suit for injunction.

The Kaul Court agreed with the trial court's finding

That the addition of fluoride to the Chehalis water supply is intended solely for use in prevention of tooth decay primarily in children up to 14 years of age, and particularly between the ages of 6 and 14 and will prevent some tooth decay in some children. *Id.* at 618.

The Kaul Court agreed with the trial court's finding that ... fluoride is a deadly poison used commercially for the extermination of rats and other vermin." Id. 618.

The Kaul Court agreed with the trial court's finding that "Schlorine is added to water to affect either bacteria or plant life in the water, while fluoride has no effect upon the water or upon the plant life in the water but remains free in the water and is artificially added solely for the effect it has on the individual drinking the water. Id. 618.

The Kaul Court, apparently quoting from the trial court's findings stated: If the water is fluoridated, it will be necessary for appellant and all other users "to use it for domestic purposes including drinking, because there is no other practical source of supply." Id. 618.

The Kaul court stated: It is the duty of the city to furnish appellant with wholesome water, free from contamination. Id. 621.

The Kaul court endorsed the finding of the trial court regarding constitutional issues: The trial court did not err in concluding that the ordinance was a valid exercise of the police power and violated no constitutional rights guaranteed to appellant [Mr. Kaul]. Id. 625.

The Kaul court rejected Mr. Kaul's objection to the trial court's finding that the city is not engaged in selling drugs, practicing medicine, dentistry, or pharmacy as defined by statute. Id. 625

The Kaul court agreed with the trial court's finding that the addition to the municipal water supply of Chehalis of a source of fluoride ion, such as sodium silico fluoride, in the proportion of one part per million will not amount to a contamination and the water will continue to be wholesome. Id. 621.

The Merriam-Webster dictionary online defines "wholesome" as "promoting health or well-being of mind or spirit." The Cambridge Advanced Learner's Dictionary online defines "wholesome" as "conducive to sound health or well-being good for you, and likely to improve your life either physically, morally or emotionally."

In the Kaul case Mr. Arthur Kaul did not "Š question the findings of fact entered by the trial court." Id. 617. He therefore conceded that fluoridated water was not only not harmful but conversely was conducive to sound health. It seems that both parties were convinced that fluoride was both harmless and beneficial. The dissenters were bound by these findings but still expressed a suspicion regarding mass medication.

The only aspect of the Kaul case which might directly impact the case at bar is the agreement of the Kaul court with the trial court's finding that in fluoridating its water a city "is not engaged in selling drugs, practicing medicine, dentistry, or pharmacy as defined by statute." Id. 25. The IAOMT and WASW amicus briefs demonstrate that the City of Port Angeles is in fact engaged in the sale of drugs by fluoridating city water, in violation of numerous federal and state statutes and regulations which pertain to

drug and pharmacy.

Washington law defines a drug as a substance "§ intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in human beings or animals. RCW 69.41.010(9)(b). This statute was passed in 1986. RCW 69.04.009 contains the same definition, and it was adopted in 1945 and may go back to 1907. The Food, Drug, and Cosmetics Act (FDCA) defines a drug as an article "§ intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animal. 21 U.S.C. 321 (g)(1)(B). The FDCA was first enacted in 1938, although this statutory definition of the term "drug" might be older. So the Court was clearly in error in saying that the city of Chehalis was not distributing a drug. Id. 625.

Even if a city chooses to administer the fluoride-water drug under its police powers in order to improve public health, it should dispense such a drug acting only through licensed practitioners. The drug dispensed should be manufactured by approved manufacturers, and issued to patients based on their age, weight, and health. Instructions should be given to patients as to how much of the drug they should consume each day, how long they should continue to take such drug, and under what circumstances they should return to their doctors for further consultation.

Not all patients have the same reactions to drugs. Patients are unique and while the majority may react favorably to a drug, a minority will have adverse reactions, and that minority should be protected. The practice of medicine is not a mechanical process, and the doctor cannot be dispensed with. Although a city has police powers to medicate people, the drug administered must be prescribed and dispensed by a licensed practitioner, and a city inserting concentrated fluoride into water and creating a new drug, fluoride-water, is neither a licensed practitioner nor operating under the license of a practitioner.

A city should not rely on its police powers to circumvent laws which require that drugs be dispensed through a licensed practitioner and according to law.

As to whether there was a constitutional violation that Mr. Kaul could claim was more debatable than it would be today because the parties in that case agreed fluoridation was not only not harmful but actually beneficial. This then set up a "pure" constitutional question: Was the forced administration of a harmless and even beneficial drug which was administered to prevent a non-contagious disease a violation of Mr. Kaul's constitutional rights?

Thus the declaration by the Kaul majority that fluoride was not a drug and by implication that it could be administered without the participation of a doctor and free of all other laws regulating drugs, created an out-law situation, with fluoride in a void all by itself, outside all regulatory drug laws. This aspect of Kaul at minimum should be overturned or distinguished by the current Court.

The Kaul dissenters expressed the opinion that even if fluoride were harmless and beneficial it still violated Mr. Kaul's rights. Judge Donworth asked what other drugs the city might add to its water. The city would "have the right to put into it any medicinal agent from patent medicines to antibiotics § which they may from time to time determine to be beneficial to the public health." Id. 635. Throughout the dissenting opinions there is evident a general distrust for medicines administered to all. What medicine does not have contraindications for some people and in some amounts?

The Kaul majority stated:

Dental caries is neither infectious nor contagious. This, however, does not detract from the fact that it is a common disease of mankind. As such, its prevention and extermination come within the police power of the state. Id. 620.

Judge Hamley argued that a city's police power to medicate people extends only to contagious diseases: [W]hether the police power is being exercised for the protection of public health or for any other reason, it may not extend to the point of impairing a constitutionally guaranteed personal right, unless justified by "conditions essential to the equal enjoyment of the same right by others" Š or by "pressure of great dangersŠ."

In 1954 evidence that questioned the safety and effectiveness of drinking water fluoridation had not yet been marshaled to the extent it is today. Times have changed. Noted authorities have amassed mountains of evidence that call the practice into question. Fluoridation is highly controversial, and those who oppose it speak with authority. The National Research Council, a branch of the National Academies of Science, the highest and most respected research group in the land, has stated bluntly that the EPA 4 ppm MCL is not protective of health and that a lower MCL should be set. This means that there is today no accepted safe level of fluoride in drinking water and thus no accepted safe amount which can be added to drinking water. Nor is it debatable that the EPA has been completely silent since 2006 and has failed to set a lower MCL. Nor is it debatable that the EPA scientists union, the people who do the actual work, as opposed to the political appointees, are adamantly opposed to water fluoridation. \* need citation.

Perhaps the best way to explain the majority decision in Kaul is to note that the majority was convinced that fluoride did no harm and provided great help, and therefore, the majority decided it should go forward. The majority could not come up with a legal justification for fluoridation, so they stretched the state and federal constitutions to allow it. Justice Hamley lamented the decision by asking:

"Can we, . . . withstand the insidious erosion [of our basic liberties] produced by a multiplicity of little instances where, as here, a guaranteed right is set aside because it interferes with what is said to be good for us?" Id. 641.

I conclude my remarks regarding Kaul by saying first that the standard for deciding whether fluoridation or medication via the public water system can be enjoined and can be voted are different. Second, the definition of a "drug" has not changed since 1954, so the Kaul holding that fluoridated water was not a drug was wrong from the beginning. Third, Mr. Kaul was not allowed to enjoin fluoridation because it was good for all and harmful to none. Today both these points are debated. Because they are debated, this issue is legislative and not merely administrative. Thus, citizens of Port Angeles have the right to vote on it.

**V. RCW 57.08.012 MAKES FLUORIDATION AND BY IMPLICATION ADDITION OF ALL DRUGS TO WATER A LEGISLATIVE AND NOT AN ADMINISTRATIVE ISSUE.**

RCW 57.08.012 reads as follows:

A water district by a majority vote of its board of commissioners may fluoridate the water supply system of the water district. The commissioners may cause the proposition of fluoridation of the water supply to be submitted to the electors of the water district at any general election or special election to be called for the purpose of voting on the proposition. The proposition must be approved by a majority of the electors voting on the proposition to become effective.

According to this statute, the issue of whether or not water will be fluoridated is of the type or kind that is suitable to being submitted to a vote of the electorate. It serves as a clear indication that the legislature regards this as an issue of substance and not mere procedure.

In the City's Answer to Amicus Curiae Memorandum of Fluoride Class Action at page 12, the City tried

to undercut this analysis by arguing that RCW 57.08.012 applied to water districts only, that it merely allowed water district commissioners to submit a fluoridation issue to a vote, and that the commissioners were not required to submit the issue to a vote if a vote was requested by the electors. The City missed the point. Although the water commissioners are not required by this statute to put water fluoridation to a vote, the matter is nevertheless of the kind or type which can be submitted to voters.

We know much more about the health problems associated with fluoridation than we did back when the legislature passed RCW 57.08.012. However, even then there was controversy about whether fluoridation was safe and appropriate. The Legislature acknowledged this by making the issue one which could be put to a public vote, at least with regard to water districts. Fluoridation was a policy issue at the time RCW 57.08.012 was passed, and it remains a policy issue today.

There was opposition to fluoridation at the time RCW 57.08.012 was passed, and safety issues were raised then. Whether fluoridation should be considered safe is a policy issue. It is because it is a policy issue that the Legislature left the question ultimately to the voters of each water district. This confirms that this issue is legislative and not merely administrative.

## **VI. THE SAFE WATER DRINKING ACT FORBIDS ENACTING LAWS WHICH REQUIRE ADDING MEDICATION TO DRINKING WATER AND THIS RESTRICTION MAY FLOW DOWN TO THE STATES AND MUNICIPALITIES**

Note that RCW 70.119A.080 provides:

- (1) The department [Department of Health] shall administer a drinking water program which includes, but is not limited to, those program elements necessary to assume primary enforcement responsibility for part B, and section 1428 of part C of the federal safe drinking water act. Š
- (2) The department shall enter into an agreement of administration with the department of ecology and any other appropriate agencies, to administer the federal safe drinking water act.
- (3) The department is authorized to accept federal grants for the administration of a primary program.

Note also that RCW 43.21A.445 provides:

The department of ecology, the department of natural resources, the department of health, and the oil and gas conservation committee are authorized to participate fully in and are empowered to administer all programs of Part C of the federal Safe Drinking Water Act (42 U.S.C. Sec. 300h et seq.), as it exists on June 19, 1986, contemplated for state participation in administration under the act.

As noted by the Court of Appeals in its Opinion, p. 7, the EPA has granted primacy to the state of Washington to implement the Safe Water Drinking Act [SDWA]. 40 CFR 142.10 provides as follows: A State has primary enforcement responsibility for public water systems in the State during any period for which the Administrator determines Š that such State, pursuant to appropriate State legal authority:

- (a) Has adopted drinking water regulations which are no less stringent than the national primary drinking water regulations (NPDWRs) in effect under part 141 of this chapterŠ.

In RCW 43.21A.445 several Washington agencies led by the Department of Health are "Š authorized to participate fully in and are empowered to administer Š" the [SDWA].

Next, note that the [SDWA] specifically states at 42 USC 300g-1(b)(11):  
No national primary drinking water regulation may require the addition of any substance for preventive

health care purposes unrelated to contamination of drinking water.

The only substances which the SDWA may require that states and municipalities subject to the SDWA add to drinking water are those which remove contaminants. Substances for preventive health care may not be added. That would include drugs, medicine, and § fluoride.

It comes as a surprise to those studying this area of the law to learn that the SDWA, which is administered by the EPA, regulates only the removal of contaminants which naturally appear in water or which have been added through pollution. It does not authorize adding chemicals, but only those which will remove contaminants.

Many think that because the SDWA has a 4 ppm MCL maximum contaminant level (MCL) of 4 ppm that it authorizes the insertion of fluoride up to a 4 ppm maximum. This is not so. The EPA and the SDWA only requires removal of fluoride if it exceeds 4 ppm.

The Department of Health is the lead agency empowered to administer the SDWA in Washington.

Because the SDWA prohibits requiring "the addition of any substance for preventive health care purposes" and because the SDWA requires that state "§ drinking water regulations" be "no less stringent than the national primary drinking water regulations," Washington regulations likewise must be so limited. The Department and Board of Health may not authorize or require municipalities to add fluoride or any other medication intended for "preventive health care purposes."

The Department of Health agrees that it does not require fluoridation. See the attached e-mail written by Victor Coleman, senior policy advisor for the Department of Health, to Dr. Bill Osmunson, labeled as Appendix \*, which makes this clear. Likewise, Fluoride In Drinking Water: A Scientific Review Of EPA's Standards (2006 NRC Report) also makes this clear:

In 1986, EPA established an MCLG and MCL for fluoride at a concentration of 4 milligrams per liter (mg/L) and an SMCL of 2 mg/L. These guidelines are restrictions on the total amount of fluoride allowed in drinking water. § EPA's drinking-water guidelines are not recommendations about adding fluoride to drinking water to protect the public from dental caries. § Instead, EPA's guidelines are maximum allowable concentrations in drinking water intended to prevent toxic or other adverse effects that could result from exposure to fluoride.

This limitation on "the addition of any substance for preventive health care purposes" flows down to the states, but does it flow down further to municipalities? 40 CFR 142.3 provides:

"§ [T]his part [40 CFR. Part 142-National Primary Drinking Water Regulations Implementation] applies to each public water system in each State.

40 CFR 142.2 defines a "public water system:"

Public water system or PWS means a system for the provision to the public of water for human consumption through pipes or, after August 5, 1998, other constructed conveyances, if such system has at least fifteen service connections or regularly serves an average of at least twenty-five individuals daily at least 60 days out of the year.

Using the wording of this federal regulation, it would appear that the Port Angeles city council enacted a "drinking water regulation" which requires "the addition of" a "substance for preventive health care purposes unrelated to contamination of drinking water," namely fluoride. It could be argued that this

would make the City's current fluoridation ordinance ultra vires. If it is ultra vires on these grounds, this is one more justification for categorizing this decision as legislative and giving the electorate the right to vote on it.

The Court of Appeals looks at RCW 70.119A.080 and regulations such as WAC 246-290, goes off in an entirely different direction, stating:

Under the Department of Health's regulatory scheme, the test here is whether the only decisions left are administrative in nature. . . . Decisions by local water companies about which chemicals to add Š are administrative Š because those decisions merely implement plans already adopted and supervised by the HealthDepartmentŠ. The standard is Š whether a plan has already been adopted Š. Since the initiatives seem to pursue/affect a plan already in place, they are administrative in nature and therefore invalid. Opinion at 7-8 (Petition for Review at A-7 and A-8).

The Court of Appeals considers the field to be fully occupied by state statutes and regulations. If this is true, then the corporate City would, like the state, be prohibited by the SDWA from adding a "substance for preventive health care purposes." If the limitations imposed by the SDWA do flow down to the City, then the City's decision to fluoridate was ultra vires, and for that reason too the electorate should have the right to vote to reverse an ultra vires decision.

On its face WAC 246-290-460 does not regulate the decision to fluoridate but only sets out procedures to follow if a municipality decides to fluoridate. Thus state law has not occupied the fluoridation field and as well says nothing about adding other medicines to city water.

If the state has not occupied the field, there is room for the corporate City, and thus the electors acting through an initiative, to make fluoridation decisions - assuming that the SWDA does not prohibit the City from adding "substance for preventive health care purposes" to city water. If the field is not occupied, then the decision by the City would legislative, and thus the electorate again would have the right to vote on the issue.

## **VII. CONCLUSION**

Amici Audrey Adams And Linda Martin oppose putting medications in public water supplies. They ask this Court to allow the Initiatives to be put on the ballot in Port Angeles so the citizens can decide if they want to have their public water supplies free of drugs and similar substances.

Dated this 22th day of January, 2010.

Respectfully submitted,

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By: \_\_\_\_\_

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\*harm benefit analysis. The first step for the EPA is to set a MCLG goal. What case does a harm and

benefit analysis. The cost of cleanup goes into the MCL calculation. The constitutional issue includes harm/benefit analysis.

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