

ORIGINAL

NO. 80771-0

THE SUPREME COURT OF THE STATE OF WASHINGTON

JOHN L. HALE AND ROBBIN HALE,
Petitioners

v.

WELLPINIT SCHOOL DISTRICT NO. 49,
Respondent

RESPONDENT'S RESPONSE BRIEF

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A. RESPONDENT'S STATEMENT OF THE CASE

For the purposes of this argument the Wellpinit School District adopts certain of the Factual Background stated at pp. 3-6 of the *Appellants' Opening Brief*. Wellpinit does not adopt the argumentative nature of those "facts" which might in any way admit that Mr. Hale was disabled at any time or that the Wellpinit School District might have done anything that would expose it to liability under RCW 49.60. Wellpinit merely acknowledges the nature of the claim made, the proceedings in the Trial Court and the fact that this Court accepted review of one narrow issue: whether the Trial Court erred when it refused to consider the Hales' disability claim by the retroactive application of the revised definition of "disability" under RCW 49.60. CP 412-414, 415-418, 419-421.

Mr. and Mrs. Hale brought this lawsuit against the District alleging three causes of action: (1) negligent infliction of emotional distress; (2) disability discrimination under the WLAD; and (3) breach of contract. The District moved for partial summary judgment regarding Mr. Hale's claim of disability discrimination. In pursuit of the same, the District argued that Mr. Hale did not have a disability under existing law as explained by the Court in *McClarty v. Totem Electric Int'l*, 157 Wash.2d 214, 137 P.3d 844 (2006). On May 3, 2007, the Stevens County Superior

Court entered an order granting the District's motion, and dismissing Mr. Hale's disability discrimination claim. CP 304-306.

Mr. Hale moved for reconsideration (CP 307-308) because intervening Senate Bill 5340 had amended RCW 49.60.040's definition of "disability" in April of 2007 (CP 309-311), which legislative action was in direct response to a decision of this Court. The Trial Court denied the Hales' motion, holding that the separation of powers doctrine precluded retroactive application of the revised definition. CP 417. The Trial Court never addressed the Hales' negligence or contract claims. Arguably, those claims are still alive in the Stevens County Superior Court.

The Hales were granted Discretionary Review by this Court on December 19, 2007.

As stated at section B.1. of this *Brief infra*, the Wellpinit School District submits that it is not the function of this Court on this Discretionary Review to make factual determinations regarding whether John Hale was indeed "disabled" either by his employment with the Wellpinit School District, or at the least whether he was disabled *during* that employment. Yet evidence supporting argument on either side of that question was submitted to the Trial Court. Since the Hales have argued that a disability determination should be made by this Court (*Appellants' Opening Brief*, Sections C., D. and E., pp. 23-34) Wellpinit has no choice

but to cite the record which demonstrates that Mr. Hale is not in fact “disabled” – evidence submitted to the Trial Court.

John Hale was hired by the Wellpinit School District on February 11, 2002 to provide student support services at the Wellpinit School, pursuant to a verbal agreement. *Statement of Undisputed Facts*, ¶¶ 1, 3; CP 25, 45-46, 49 (hereinafter “*Statement*”). From February to May of 2002, Mr. Hale worked solely at the Wellpinit School. *Statement*, ¶ 5; CP 26, 53.

Mr. Hale contends that he experienced “abusive” behavior from his supervisor at the Wellpinit School, Mr. Magne Kristiansen. *Statement*, ¶¶ 7, 9, 10; CP 26, 55, 58, 59-60. Mr. Hale considers that to be a result of Mr. Kristiansen’s “arrogant personality”. *Statement*, ¶ 13; CP 27, 64. Mr. Hale believes that Mr. Kristiansen does not consider Mr. Hale to be “an important person.” *Statement*, ¶ 14; CP 27, 64. Other than Mr. Kristiansen’s alleged arrogance, Mr. Hale considered his experience at Wellpinit to be “great.” *Statement*, ¶ 12; CP 27, 65-66.

Mr. Hale was subsequently transferred to work at a satellite campus located at Fort Simcoe, in White Swan, Washington. *Statement*, ¶ 16; CP 27, 52-53. Mr. Hale was assigned to “classroom support,” where he was supervised by Principal Phyllis Magden. *Statement*, ¶ 18; CP 28, 61. During that period of employment, Mr. Hale’s relationship with

Principal Magden was initially good. *Statement*, ¶¶ 19, 20, 21; CP 28, 45-46, 67. He contends that he was eventually subjected to “abuse” by way of a conspiracy between Mr. Kristiansen and Ms. Magden. *Statement*, ¶¶ 22-27; CP 28-29, 68-73. That “abuse” took the form of: refusing to give Mr. Hale a password in order to make him fail, treating him as though he was incompetent, taking issue with his work product, and blaming him for perceived problems. *Id.* Mr. Hale alleges that Mr. Kristiansen, Ms. Magden, and Superintendent Riedlinger wanted him to fail so that they could succeed at their respective positions, “to keep [their] power.” *Statement*, ¶¶ 24, 27; CP 29, 70, 73.

On or about August 25, 2002, Mr. Hale sent a letter to Superintendent Reid Riedlinger informing him of the alleged abuse, and stating his belief that the abuse was causing issues with his health, specifically, anxiety. *Statement*, ¶ 29; CP 29, 74-76. Mr. Hale expected that Mr. Riedlinger would respond to his complaints in some manner or another. *Statement*, ¶¶ 29, 30; CP 29-30, 74-76, 111. Mr. Hale testified that Mr. Kristiansen’s “abusive” treatment of Mr. Hale ended in September 2002. *Statement*, ¶ 32; CP 30, 110. By letter to the Wellpinit School District Board dated January 3, 2003, Mr. Hale charged the “Wellpinit staff” with abusive behavior toward him, which caused health issues. *Statement*, ¶¶ 33, 34; CP 30, 78, 119-120. That “staff” was

Mr. Kristiansen and Principal Magden. *Statement*, ¶ 35; CP 30, 79. Mr. Hale met with Superintendent Reidlinger on January 9, 2003, contending that Principal Magden had “excommunicated” him from Wellpinit. *Statement*, ¶ 38; CP 31, 84-85. He believed that Principal Magden was hostile toward him as part of her effort to prevent him from running a successful vocational class, resulting in “more power” for Principal Magden. *Statement*, ¶¶ 39, 40; CP 31, 91. Mr. Hale felt Principal Magden was “aloof” and demanded that he perform certain tasks. *Statement*, ¶ 42; CP 31, 113-115. Mr. Hale felt that his meeting with Superintendent Reidlinger was “productive” (*Statement*, ¶ 41; CP 31, 86), but also felt that Reidlinger was “hostile” toward him (*Statement*, ¶ 43; CP 32, 82), that Reidlinger “could not handle” Mr. Hale’s “professionalism.” *Statement*, ¶ 45; CP 32, 92-93.

Mr. Hale was then assigned duties as a teacher for the two on-line classes between January and March 2003. *Statement*, ¶ 49; CP 33, 90. Mr. Hale considered himself “demoted” and perceived tasks assigned by Principal Magden to be “menial.” *Statement*, ¶¶ 50-52; CP 33, 95-97, 113-114. According to Mr. Hale, those tasks were intended to “belittle and degrade” him. *Statement*, ¶ 52; CP 33, 113-114. Again, Mr. Hale believed that Mr. Kristiansen, Principal Magden and Superintendent Reidlinger all wanted him to fail so that they each could succeed in their respective

positions with the District. *Statement*, ¶ 54; CP 33, 87-88. These contentions by Mr. Hale were consistent with issues he perceived in previous employments. *Statement*, ¶¶ 55-57; CP 33-34, 98-101.

Ultimately, Mr. Hale concluded that the working conditions at the District were “so unprofessional and unfair” that it was causing him health problems (*Statement*, ¶¶ 58-60; CP 34, 123-124); therefore, on March 3, 2003, he submitted a Voluntary Quit Statement to the Washington Employment Security Department. *Statement*, ¶ 61; CP 34, 129, 144-146. Therein Mr. Hale alleged he was capable of working anywhere that had “reasonable management.” *Statement*, ¶ 63, 64; CP 35, 145. In that Quit Statement Mr. Hale stated that he had no “injuries, illnesses, or other conditions” which prevented him from returning to work in his “main occupation.” *Statement*, ¶ 65; CP 35, 136. He expected his health to improve after leaving Wellpinit SD because he would no longer be working under “unreasonable management” (*Statement*, ¶ 66; CP 35, 130-131), specifically the way he was treated by Superintendent Reidlinger, Principal Magden and Mr. Kristiansen. *Statement*, ¶¶ 67-68; CP 35, 131-132, 133. He believed he could work anywhere but Wellpinit SD. *Statement*, ¶ 69; CP 36, 134.

Mr. Hale submitted an Activities of Daily Living and Socialization statement to the Division of Disability Determination Services, in which

he noted problems in “getting along with bosses, police, teachers, landlords, or other people in authority.” *Statement*, ¶ 71; CP 36, 137-138, 148-153. He explained: “I have to stay away from most people. Authority figures make me sick very quickly. I have to limit business contacts to one hour per day.” *Statement*, ¶ 72; CP 36, 151. Mr. Hale considers it “especially sickening” when he loses “control” to an employer. *Statement*, ¶ 73; CP 36, 139-141.

Mr. Hale found employment as a substitute teacher in the Plummer-Worley (Idaho) School District. *Statement*, ¶ 77; CP 38, 127-128.

B. ARGUMENT IN RESPONSE

1. This Court Is Not The Appropriate Forum Within Which To Resolve Specific Factual Disputes.

The *Order Granting Defendant’s Motion for Partial Summary Judgment* states only “that no genuine issues of material fact exist which preclude the granting of Defendant’s Motion for Partial Summary Judgment dismissing Plaintiffs’ WLAD claim with prejudice.” CP 305. *The Order Denying Plaintiffs’ Motion For Reconsideration* CP 419-421) merely states that the motion was denied. CP 420. There was no finding or any other type of indication by the Trial Court regarding what influenced that decision. In those *Orders*, the Trail Court did not address

specifically any of the evidence of disability. The only issue with regard to supporting or reversing those *Orders* is whether the Trial Court considered the appropriate definition of “disability” under those facts. CP 412-414. There is no basis for this Court to actually dissect the evidence presented and make a finding that Mr. Hale is in fact disabled, under any statutory definition. This Court is not a “trier of fact” in that sense.

To give proper deference on factual issues, the analysis begins with whether the tribunal below had original or appellate jurisdiction. A tribunal with original jurisdiction has the authority to make factual findings, *see Berger Engineering Co. v. Hopkins*, 54 Wash.2d 300, 308, 340 P.2d 777 (1959) (an appellate court “is not a fact-finding branch of the judicial system of this state”), and the appellate court will defer to those findings in order to recognize that deference. A tribunal with only appellate jurisdiction is not permitted or required to make its own findings. *Berger Engineering Co. v. Hopkins*, 54 Wash.2d at 308, 340 P.2d 777 (1959). See also *Maranatha Mining, Inc. v. Pierce Cy.*, 59 Wash.App. 795, 802, 801 P.2d 985 (1990). Such findings, if entered by the appellate court, are surplusage. *Grader v. Lynnwood*, 45 Wash.App. 876, 879, 728 P.2d 1057 (1986). See also *State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, 65 Wash.App. 614, 618, 829 P.2d 217, 219-220 (Div.2, 1992).

Furthermore, the Supreme Court is not authorized by the constitution to make findings of fact where none has been made by the trial court. *State v. Marchand*, 62 Wash.2d 767, 770, 384 P.2d 865 (1963). Factual disputes are to be resolved by the trial court, in which the constitution (Const. art. 4, § 6) exclusively vests this power. *Stringfellow v. Stringfellow*, 56 Wash.2d 957, 959, 350 P.2d 1003, 353 P.2d 671 (1960). Irrespective of the constitution, however, even a modest sense of fairness would allow a factual hearing so the trial judge, who is the trier of fact, could make the initial determination as to whether plaintiff meets the requirements of the new rule. The proper remedy should be to remand this case to allow the trial court to make findings of fact. *State v. Marchand*, supra 62 Wash.2d at 770-71, 384 P.2d 865.

Martin v. Meier, 111 Wash.2d 471, 484-485, 760 P.2d 925, 931-932 (1988).

Therefore, where it appears that Mr. and Mrs. Hale request that this Court actually make findings of fact under their "Issues Related To Assignment Of Error" numbers 2 and 3 and the arguments made at *Appellants' Opening Brief* sections C., D. and E. (pp. 23-34), that (1) Mr. Hale was in fact "disabled" under RCW 49.60.040(25) and the definition of "disability" adopted in the previous *McClarty* decision, and (2) that the Wellpinit School District failed to reasonably accommodate Mr. Hale's disability. See Appellant's Opening Brief p. 31: "The evidence in the instant case demonstrates that Defendant Wellpinit simply ignored [Mr. Hale] and his physician when the provided clear notice of Mr. Hale's disability, and the effect of the workplace environment on his condition."

The argument presented by the Hales implores this Court to actually make that finding. That is not the role of this Court.

Therefore, if this Court determines that the Trial Court applied the correct definition of “disability” to this underlying case then the *Orders* must be affirmed. If this Court determines that the Trial Court relied upon an inapplicable definition of “disability” in reaching its *Orders*, then the course has to be remand for further proceedings on the merits of the Hales claims. It is not the function of this Court to usurp the fact-finding function of the Trial Court.

For those reasons, the Wellpinit School District respectfully submits that the Hales’ Issues Pertaining 2 and 3 should be either ignored or remanded – as the case may be upon decision on Issue No. 1 and the Assignment of Error, and the relief requested in Sections C, D, and E. of the Hales’ *Opening Brief* should be denied.

2. Statutory Revision Prompted By Case Law Applies Retroactively Only If The Revision “Amends” The Statute, But Not If It Clarifies The Statute.

The definition of a “disability” under the Washington Law Against Discrimination (“WLAD”) has changed twice in recent history: first, when the Supreme Court adopted the definition in *McClarty v. Totem Electric*, 157 Wash.2d 214, 137 P.2d 844 (2006); second, when the legislature rejected the *McClarty* decision by enacting legislation clarifying the

definition, effective July 1, 2007. Petitioners Hale seek retroactive application of the most recent definition of “disability” to their WLAD claim based upon events occurring nearly five years before that legislation. In support of their position, the Hales argue that retroactive application of the statute is proper because the legislature intended it to be so. However, the Hales’ proffered construction would violate the separation of powers doctrine of the Washington State and United States Constitutions, as was properly acknowledged by Judge Baker.

In *McClarty*, the Supreme Court pulled the WLAD definition of “disability” in line with the definition contained in the federal Americans with Disabilities Act: “(1) a physical or mental impairment that substantially limits one or more of his major life activities, (2) a record of such an impairment, or (3) is regarded as having such an impairment.” *McClarty*, 157 Wash.2d at 220. Petitioners find this construction of “disability” unfavorable to their case, in light of the fact that the legislature subsequently clarified the term in S.B. 5340:

- (a) “Disability” means the presence of a sensory, mental, or physical impairment that:
 - (i) Is medically cognizable or diagnosable; or
 - (ii) Exists as a record or history; or
 - (iii) Is perceived to exist whether or not it exists in fact.

- (b) A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other work activity within the scope of this chapter.
- (c) For purposes of this definition, "impairment" includes, but is not limited to:
 - (i) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine; or
 - (ii) Any mental, developmental, traumatic, or psychological disorder, including but not limited to cognitive limitation, organic brain syndrome, emotion or mental illness, and specific learning disabilities.
- (d) Only for the purposes of qualifying for reasonable accommodation in employment, an impairment must be known or shown through an interactive process to exist in fact and:
 - (i) The impairment must have a substantially limiting effect upon the individual's ability to perform his or her job, the individual's ability to apply or be considered for a job, or the individual's access to equal benefits, privileges, or terms or conditions of employment; or
 - (ii) The employee must have put the employer on notice of the existence of an impairment, and medical documentation must establish a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect.

- (e) For purposes of (d) of this subsection, a limitation is not substantial if it has only a trivial effect.

Statutes in the State of Washington are presumed to apply prospectively. *In re Pers. Restraint of Stewart*, 115 Wash.App. 319, 332, 75 P.3d 521 (Div.1, 2003). There are three exceptions to the general rule: (1) if the legislature intends the statute to apply retrospectively; (2) if the legislation is curative; or (3) if the legislation is remedial. *Id.* In the present case, the Legislature specifically stated that S.B. 5430 was intended to apply retroactively: “The act is remedial and retroactive, and applies to all causes of action occurring before July 6, 2006, and to all causes of action occurring on or after July 22, 2007.” 2007 ch. 317, § 3.

However, the mere desire of the Legislature cannot single-handedly make a statute retroactive. Instead, even if the statute meets one of the aforementioned grounds, it can apply retrospectively “only if such retroactive application does not violate any constitutional prohibition.” *Id. citing, McGee Guest Home, Inc. v. Dep’t of Soc. and Health Serv.*, 142 Wash.2d 316, 324, 12 P.3d 144 (2000); *State v. Cruz*, 139 Wash.2d 186, 191, 985 P.2d 384 (1999); *In re F.D. Processing, Inc.*, 119 Wash.2d 452, 460, 832 P.2d 1303 (1992). The separation of powers doctrine is one such constitutional prohibition.

The separation of powers doctrine is a “fundamental principal” of our constitutional system which separates the powers of each of the three branches

from one another. *City of Spokane v. County of Spokane*, 158 Wash.2d 661, 678, 146 P.3d 893 (2006). “Like the United States Constitution, the Washington Constitution does not contain a formal separation of powers clause, but the very division of our government has been deemed to give rise to a vital separation of powers doctrine.” *Id.*

The separation of powers doctrine is violated by retrospective application of a statute if it “contravenes a previous [appellate] judicial construction of the statute.” *State v. Posey*, 130 Wash.App. 262, 274, (2005) *aff’d in part, rev’d on other grounds*, 167 P.3d 560 (2007). See Also, *1000 Virginia Ltd. P’ship v. Vertecs Corp.*, 158 Wash.2d 566, 146 P.3d 423 (2006) (An amendment will not be retroactive if it contravenes a judicial construction of the statute that is clarified or corrected because of separation of powers considerations.). In *Posey*, the Legislature revised a statute while an appeal of the case was pending. The amendment resulted in a clarification of the statute. However, the Court of Appeals found that the amendment clarified a previous judicial interpretation of the statute, and as a result retroactive application was not permitted. *Id.* at 275.

In *Marine Power & Equip. Co. v. WA State Human Rights Comm’n Hearing Tribunal*, the Court of Appeals held that if the statute “amends,” as opposed to “clarifies” the statute, the new statute is permitted to apply retroactively. *Marine Power*, 39 Wash.App. 609, 615 (1985). However,

Marine Power involved a situation wherein the Legislature amended a statute with additional protections. In the present case, the WLAD was clarified by S.B. 5340 because the Legislature expressly stated that the Court in *McClarty* “failed to recognize [the WLAD] affords to state residents protections that are wholly independent of those afforded by the federal Americans with Disabilities Act of 1990.” S.B. 5340 § 1.

The Legislature attempted to make RCW 49.60.040 retroactive. When explaining its intent the Legislature confirmed that it was *clarifying* the definition solely because the Washington Supreme Court had (in the collective opinion of the Legislature) erroneously interpreted the statute.

The legislature finds that the supreme court, in its opinion in *McClarty v. Totem Electric*, 157 Wn.2d 214, 137 P.3d 844 (2006), failed to recognize that the law against discrimination affords to state residents protections that are wholly independent of those afforded by the federal Americans with disabilities act of 1990, and that the law against discrimination has provided such protections for many years prior to passage of the federal act.

2007 ch. 317, § 1. This is critical to the present analysis: the Legislature stated that this Court “failed to recognize” rights that the Legislature already regarded as existing; the Legislature determined that this Court was failing to protect those rights. As a result of the perceived failure, the Legislature *clarified* (*i.e.*, did not “amend”) the statute. Therefore, the statute cannot be applied retroactively.

Here, the legislative clarification of the term “disability” under the WLAD was a direct response to the Supreme Court’s decision in *McClarty v. Totem Electric*, 157 Wash.2d 214, 137 P.2d 844 (2006), expressly making Senate Bill No. 5340 retroactive to all causes of action accruing before July 6, 2006, the date of this Court’s decision in *McClarty*. The separation of powers doctrine forbids such retroactive application of legislation and that law is clear.

For those reasons, the Trial Court’s *Order Granting Defendant’s Motion For Summary Judgment* and its *Order Denying Plaintiffs’ Motion For Reconsideration* should be affirmed. The basis of the Trial Court’s decisions was clear, fully supported by existing and well reasoned Washington precedent and that precedent and the Trial Court decisions should not be disturbed. Alternatively, if this Court determines that the Trial Court committed error, logic dictates that the issue of whether Mr. Hale was indeed “disabled” under the Senate Bill 5340 definition should be remanded to the Trial Court for trial.

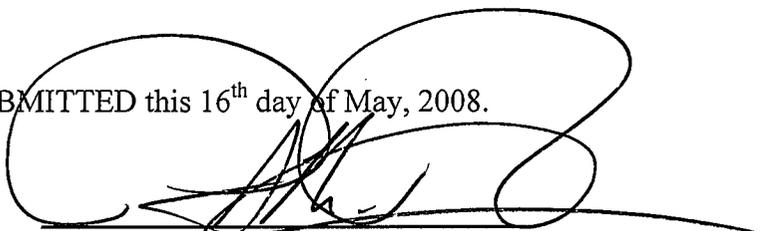
C. CONCLUSION

The law regarding retrospective application of statutes in the State of Washington is clear: retroactive statutes violate the separation of powers doctrine if the revision clarifies a judicial decision. There are no substantial grounds for difference of opinion regarding the issues

presented by Petitioners. The Wellpinit School District respectfully submits that *McClarty v. Totem Electric*, 157 Wash.2d 214, 137 P.2d 844 (2006), must be continued as precedent in this state and should not be overruled or nullified. The Trial Court's *Order Granting Defendant's Motion For Summary Judgment* and its *Order Denying Plaintiffs' Motion For Reconsideration* should be affirmed.

Alternatively, if this Court finds that it's recent decision in *McClarty v. Totem Electric*, 157 Wash.2d 214, 137 P.2d 844 (2006), must be overruled, then the only course for this case is a remand to the Trial Court for trial on the disputed issues of fact regarding the Hales' claims, including whether Mr. Hale was indeed "disabled". It would be entirely beyond the scope of this Discretionary Review for this Court to usurp the role of the Trial Court and dictate the results of those disputed claims and issues of fact.

RESPECTFULLY SUBMITTED this 16th day of May, 2008.



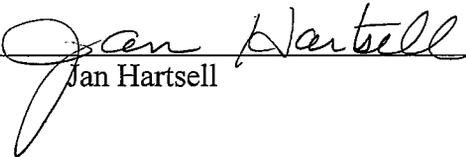
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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 16th day of May, 2008, a true and correct copy of the foregoing ***Respondent's Response Brief***, was served upon the following parties and their counsel of record in the manner indicated below:

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