

No. 80771-0

SUPREME COURT OF THE STATE OF WASHINGTON

JOHN HALE and ROBBIN HALE,

Petitioners,

v.

WELLPINIT SCHOOL DISTRICT NO. 49,

Respondent.

FILED
SUPREME COURT
STATE OF WASHINGTON
2008 SEP 30 P 4:21
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CLERK

**BRIEF OF AMICI CURIAE SENATORS ADAM KLINE,
DARLENE FAIRLEY, ROSA FRANKLIN, KAREN KEISER,
JEANNE KOHL-WELLES, AND PAULL H. SHIN**

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IDENTITY AND INTEREST OF AMICI

Amici comprise six Washington State Senators who were the prime sponsor and co-sponsors of Senate Bill 5340. Amici, and the constituents they represent, have an interest in whether this Court upholds SB 5340 and the rights of Washingtonians to seek redress for discrimination in accordance with the definition of disability that applied when their claims accrued.

Senator Adam Kline represents the 37th Legislative District. He chairs the Judiciary Committee, and serves on the Government Operations and Elections Committee and the Rules Committee. Senator Kline was the prime sponsor of SB 5340.

Senator Darlene Fairley represents the 32nd Legislative District. She chairs the Government Operations and Elections Committee, and serves on the Health & Long-Term Care Committee and the Ways & Means Committee.

Senator Rosa Franklin represents the 29th Legislative District. She is Vice-Chair of the Health and Long-Term Care Committee, and serves on the Financial Institutions and Insurance Committee and the Labor, Commerce, Research and Development Committee.

Senator Karen Keiser represents the 33rd Legislative District. She is Chair of the Health and Long-Term Care Committee, Vice-Chair of the

Labor, Commerce, Research & Development Committee, and serves on the Ways and Means Committee and Rules Committee.

Senator Jeanne Kohl-Welles represents the 36th Legislative District. She chairs the Labor, Commerce, Research & Development Committee, and serves on the Health and Long-Term Care Committee, the Rules Committee, and the Ways & Means Committee.

Senator Paull H. Shin represents the 21st Legislative District. He is Vice-President Pro-Tempore of the Senate. He chairs the Higher Education Committee, and serves on the Agricultural & Rural Economic Development Committee, and Economic Development, Trade & Management Committee.

SUMMARY OF ARGUMENT

The issue in this case is whether the Washington Legislature has the constitutional authority to correct *McClarty v. Totem Electric's* erroneous foray into the realm of legislative policymaking and restore the preexisting definition of "disability" for discrimination claims accruing prior to the date of that decision. The Superior Court erroneously ruled that the doctrine of separation of powers precluded the Legislature from taking this remedial action through SB 5340. The cases upon which the Superior Court relied do not apply in this context. To preserve the constitutionally mandated demarcation between judicial adjudication and

legislative policymaking, the doctrine of separation of powers requires this Court to uphold SB 5340 in its entirety.

BACKGROUND

The Washington Law Against Discrimination (“WLAD”), RCW 49.60, has prohibited disability discrimination in private sector employment since 1973. At that time, a federal law prohibiting disability discrimination in private sector employment was still 17 years away. In 1975 the Washington Human Rights Commission (“HRC”) defined “disability” in an interpretive regulation. WAC 162-22-020 (1975). At the time the statute and the regulation both used the term “handicap” instead of “disability.” The Legislature was well aware of the HRC definition of “handicap” but undertook no steps to overrule or modify it. The Legislature was also aware that the federal Rehabilitation Act of 1973 had an entirely different definition of “handicap” than the HRC definition.

In 1990 Congress enacted the Americans with Disabilities Act (“ADA”). The ADA contained a much more restrictive definition of “disability” than the HRC definition of “handicap.” *See* 42 U.S.C. § 12102(2). When Congress enacted the ADA, it amended the terminology and definitions in the Rehabilitation Act to conform to the ADA. The definition of “disability” currently found in the ADA and the Rehabilitation Act did not come into existence until 1990.

The Legislature changed all references to “handicap” in the WLAD to “disability” in 1993. *See* SB 5474, Laws of 1993, ch. 510 (effective July 25, 1993). During this process, the House Committee on the Judiciary heard testimony from witnesses who advocated incorporating the definition of “disability” under the ADA into the WLAD. *See* House Bill Report HB 1300 at 3 (Feb. 9, 1993). Those witnesses argued “[t]he phrase ‘sensory, mental, or physical handicap’ should be changed to the definition of ‘disability’ under the federal Americans with Disabilities Act to reduce confusion and exposure of employers who try to comply with both acts.” *Id.* (testimony of Association of Washington Business and Association of Independent Business).

Despite this testimony, the Legislature decided not to adopt the ADA definition of “disability” as the WLAD definition of “disability” when it changed the operative concept under state law from “handicap” to “disability.” *See* House Bill Report HB 1300 at pp.1-2; House Bill Report SB 5474 at p. 2 (Apr. 17, 1993). Instead, the Legislature restricted the new WLAD definition of “disability” by incorporating the categorical exclusions under the ADA for “homosexuality, bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders, sexual behavior disorders, compulsive gambling, kleptomania, pyromania, psychoactive substance disorders resulting from illegal drug

use, and except in limited circumstances, anyone engaging in the illegal use of drugs.” House Bill Report, SB 5474, at 2. Governor Lowry, however, vetoed the section of SB 5474, adopting the ADA’s exclusions from the definition of “disability.” See SB 5474, Laws of 1993, ch. 510. He reasoned that “[t]he determination of disabilities under current law can be examined by the [HRC] on a case by case basis.” *Id.*

In *Pulcino v. Federal Express Corp.*, 141 Wn.2d 629, 641, 9 P.3d 787 (2000), this Court correctly concluded that the HRC definition of disability was unworkable in reasonable accommodation cases. By its terms, the HRC definition of disability was intended for disparate treatment cases only. See WAC 162-22-020. The *Pulcino* Court modified the HRC definition of disability so it could be used in reasonable accommodation cases. For reasonable accommodation cases a plaintiff had to prove (1) he or she had a sensory, mental, or physical abnormality and (2) that it had a substantially limiting effect on his or her ability to perform his or her job. *Id.* at 641. In *Pulcino* this Court explicitly held that the decision whether to import the federal definition of “disability” into the WLAD was for the Legislature to make. *Id.* at 642.

There the law stood for almost six years. The Legislature had numerous opportunities to reject the “dual definition” structure created by *Pulcino* and the HRC regulation, but did not do so. This Court granted

review in *McClarty v. Totem Electric* to decide whether the *Pulcino* definition of disability also applied in disparate treatment cases. Instead of answering that question, this Court by a 5-4 margin *sua sponte* (1) overruled *Pulcino*; (2) invalidated WAC 162-22-020; and (3) adopted the ADA definition of disability for all cases arising under the WLAD. *McClarty v. Totem Electric*, 157 Wn.2d 214, 137 P.3d 844 (2006).

The Legislature's response to *McClarty* was swift and definitive. By overwhelming bi-partisan majorities the Legislature enacted SB 5340, which provided "a comprehensive definition of disability" for the WLAD. *See* Ruling Granting Discretionary Review (Dec. 19, 2007). The final vote in the Senate was 46-2. The final vote in the House was 62-35. SB 5340 restored the *status quo* at the time of the *McClarty* decision. The bill essentially codified the prior HRC definition of disability for disparate treatment cases and the *Pulcino* definition of disability for reasonable accommodation cases. *See* RCW 49.60.040(25). The legislation provided that these definitions would apply to all causes of action for disability discrimination (1) occurring before the Court's July 6, 2006, decision in *McClarty* and (2) following the effective date of SB 5340 (which occurred on July 22, 2007), but not to claims accruing between those two dates.

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The Superior Court in this case ruled that the Legislature's attempt to restore the preexisting definition of "disability" to claims of discrimination accruing prior to the date of this Court's decision in *McClarty* violated the doctrine of separation of powers. This Court granted discretionary review.

ARGUMENT OF COUNSEL

"One of the fundamental principles of the American constitutional system is that the governmental powers are divided among three departments—the legislative, the executive, and the judicial—and that each is separate from the other." *Carrick v. Locke*, 125 Wn.2d 129, 134, 882 P.2d 173 (1994) (internal quotation omitted). The Constitution's tripartite division of governmental authority among three branches requires a "vital separation of powers doctrine." *Id.* at 135. Separation of powers is "the dominant principle of the American political system." *In re Salary of the Juvenile Director*, 87 Wn.2d 232, 240, 552 P.2d 163 (1976) (quoting Gordon Wood, *The Creation of the American Republic, 1776-1787*, 448 (Norton Library ed. 1969)).

[T]he division of governmental powers into executive, legislative, and judicial represents probably the most important principle of government declaring and guaranteeing the liberties of the people, and preventing the exercise of autocratic power, . . . is a matter of fundamental necessity, and is essential to the maintenance of a republican form of government.

Washington State Motorcycle Dealers Ass'n v. State, 111 Wn.2d

667, 674-75, 763 P.2d 442 (1988) (internal quotation omitted).¹

Separation of powers does not mean that each branch of government must be hermetically sealed off from the other two. Instead, a partial intertwining of branches is necessary to provide an effective system of checks and balances among the three branches. *Carrick*, 125 Wn.2d at 135. The *raison d'être* of the separation of powers doctrine is to ensure that the fundamental functions of each branch of government remain inviolate. *Id.* The doctrine prohibits the activities of one branch from threatening the independence or integrity of another, or invading another branch's prerogatives. *Id.* Maintaining the separation of powers among the branches of government protects fundamental institutional interests. *Id.* at 136 (citing *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851, 106 S. Ct. 3245, 92 L. Ed. 2d 675 (1986)). A separation of powers violation occurs when the judicial branch assumes "tasks that are more properly accomplished by [other] branches." *Id.* (quoting *Mistretta v. United States*, 488 U.S. 361, 388, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989)). The damage caused by a separation of powers violation "accrues

¹ "All would be lost if the same man or the same body of leaders, either of the nobles or the people, exercised these three powers: that of making laws, that of executing the public resolutions, and that of judging criminal and civil cases." *In re Juvenile Director*, 87 Wn.2d at 238 (quoting Montesquieu in William B. Gwyn, *The Meaning of Separation of Powers*, 110 (1965)).

directly to the branch invaded.” *Id.*

The quintessential judicial function is adjudication. *See In re Juvenile Director*, 87 Wn.2d at 242. The powers of the judiciary also include the ancillary functions of rule-making and judicial administration. *Id.* While judicial power includes the authority to declare acts of the Legislature unconstitutional, the judiciary has no power to legislate. *See id.* at 241-43. Courts must be “constantly wary not to trench upon the prerogatives of other departments of government or to arrogate to themselves any undue powers, lest they disturb the balance of power.” *Washington Motorcycle Dealers*, 111 Wn.2d at 675 (internal quotation omitted). The “success of the American system of government and . . . the strength of the judiciary itself” depends on adherence to this principle. *Id.*

“[T]he drafting of a statute is a legislative, not a judicial, function.” *Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001) (quoting *State v. Jackson*, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999)); *McClarty*, 157 Wn.2d at 236 (Owens, J., dissenting). A court may not “create legislation under the guise of interpreting a statute.” *State v. Watson*, 146 Wn.2d 947, 956, 53 P.3d 1 (2002); *accord Washington Motorcycle Dealers*, 111 Wn.2d at 675. “The specter of judicial activism is unloosed and roams free when a court declares, ‘This is what the Legislature meant to do or should have done.’” *Sedlacek*, 145 Wn.2d at 390 (internal

quotation omitted). A court may not rewrite existing law based on its “notions of what is good public policy.” *Jackson*, 137 Wn.2d at 725. If a court does so, it engages in a legislative rather than a judicial act. *See id.*

A fair reading of *McClarty* reveals the Court did not resolve that case by engaging in traditional judicial adjudication. The majority began by noting that the Legislature had not defined “handicap” or disability” for the purposes of the WLAD. 157 Wn.2d at 222. The majority, however, failed to give appropriate weight to the fact that the HRC definition of “disability” had existed for over 30 years without modification by the Legislature. The majority did not mention that the Legislature had been asked in 1993 to adopt the ADA definition of disability, but had declined to do so. The majority also failed to give full significance to the lack of any action by the Legislature following *Pulcino* to indicate dissatisfaction with having one definition of disability in the context of disparate treatment claims and another for reasonable accommodation claims. In *Pulcino* this Court had all but invited the Legislature to adopt the federal definition of disability (or one from another state) if it did not agree with HRC’s definition of disability or the Court’s modification of it for reasonable accommodation cases.

Despite the Legislature’s evident endorsement of *Pulcino* and the essential features of the HRC’s definition, the *McClarty* majority *sua*

sponte decided to “provide for a single definition of ‘disability’ that can be applied consistently throughout the WLAD,” and adopted the ADA definition of disability for all cases arising under the WLAD. 157 Wn.2d at 220. In doing so, this Court crossed the line between judicial adjudication and legislative policymaking. See *McClarty*, 157 Wn.2d at 232 (Alexander, C.J., dissenting); 157 Wn.2d at 236-37, 245-46 (Owens, Fairhurst and Chambers, J.J., dissenting). *McClarty* is truly a case where the Court decided: “This is what the Legislature meant to do or should have done,” *Sedlacek*, 145 Wn.2d at 390 (internal quotation omitted), instead of attempting to ascertain what the Legislature actually did.

One of the hallmarks of the American judicial system is the adversarial process. The debate between adversaries provides an “essential truth-seeking function” critical to the integrity and fairness of our legal system. *Lankford v. Idaho*, 500 U.S. 110, 126, 111 S. Ct. 1723, 114 L. Ed. 2d 173 (1991) (quoting *Gardner v. Florida*, 430 U.S. 349, 360, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977)). Notice of the issues to be resolved by the judicial process is a fundamental characteristic of fair procedure. *Id.* For this reason, an appellate court will not ordinarily decide a case based on a theory the parties did not argue. *Gerrard v. Craig*, 67 Wn. App. 394, 402 n.8, 836 P.2d 837 (1992), *rev'd*, 122 Wn.2d 288, 857 P.2d 1033 (1993); accord *Lankford*, 500 U.S. at 126 n.22

(emphasizing the importance of giving the parties sufficient notice to enable them to identify the issues on which a decision may turn).

None of the parties or amici curiae who participated in *McClarty* had any inkling that the Court was contemplating the importation of the ADA definition of disability into the WLAD. None of the parties or amici curiae suggested the Court should undertake such a course. *See McClarty*, 157 Wn.2d at 855 (Owens, J., dissenting). The Court did not call for supplemental briefing on whether the ADA definition of disability should be applied to the WLAD. As a result of this failure, the Court was apparently unaware of the fact that in 1993 the Legislature had been asked to adopt the ADA definition of disability into the WLAD, but had rejected the idea. Therefore, the majority's importation of the federal definition of disability under the ADA into the WLAD was not a construction or interpretation of the actual language of RCW 49.60 or its statutory history, but rather an act of policymaking contrary to the Legislature's intent.

The Legislature's immediate and definitive rejection of *McClarty's* rewrite of RCW 49.60 shows that the Court's assessment of the competing public policies involved directly conflicted with the Legislature's. The Legislature disagreed with all of the grounds the majority had asserted as justifying the use of the ADA definition of "disability" as a unitary standard for all cases under the WLAD. *See McClarty*, 157 Wn.2d at 229-

30. In enacting SB 5340, the Legislature told the Court in no uncertain terms that *McClarty* was a fundamentally flawed decision. The Legislature restored the *status quo ante* and the right to legal redress that *McClarty* had taken away from many disabled Washingtonians who had been discriminated against in violation of previously existing law.

The Superior Court ruled the Legislature had no power to restore the pre-*McClarty* definition for claims such as Mr. Hale's that accrued prior to July 6, 2006. In doing so, it relied on a line of Washington cases holding that retroactive legislation that "contravenes" a prior judicial decision violates the separation of powers doctrine under the Washington Constitution. However, those cases are inapposite here because they all involve legislative enactments overruling or undoing a judicial decision actually construing or interpreting a statute. None of those cases involved a decision that overturned long-standing prior judicial and administrative definitions of a statutory term to which the Legislature had given its blessing. In short, none of those cases involved a judicial rewrite of a statute amounting to a violation of the doctrine of separation of powers.

Furthermore, SB 5340 does not actually "contravene" or overrule the *McClarty* decision. An initial draft of that bill would have restored the pre-*McClarty* definitions of disability to all pending cases. As a result of a political compromise, the legislation only applies to claims that arose

before this Court decided *McClarty*. Conduct that took place after *McClarty* and before the effective date of SB 5340 will be judged according to the *McClarty* definition. No employer will be held liable for conduct that was lawful at the time it was committed. No plaintiff will be denied redress for conduct that was unlawful when it occurred. Far from presenting a violation of the separation of powers, SB 5340 represents a compromise between the branches of government with regard to retroactivity and stands as a hallmark of the constitutional system of checks and balances.

A decision by this Court striking down SB 5340's restoration of the pre-*McClarty* *status quo* for claims of disability discrimination that had already accrued would mean there is no remedy available for an erroneous judicial transgression into the legislative policymaking arena. Moreover, if this Court were to uphold the Superior Court's decision, the Court would bestow upon the judiciary essentially unfettered authority to rewrite the law. Under the logic of the Superior Court's order, five future members of this Court could decide to rewrite any or all of the provisions of the WLAD based upon their own public policy predilections. According to the Superior Court, the Legislature would have no authority to enact a remedy for the people whose legal claims or legal defenses were improperly blotted out of existence by judicial fiat. Such an outcome

would be antithetical to the very purposes of the separation of powers doctrine and the notion of checks and balances.

In short, a decision upholding the Superior Court would upset the constitutional system of checks and balances and would give the judiciary the final word on issues of legislative public policy. A decision striking down the careful compromise the Legislature and the Executive crafted in SB 5340 would render the other two branches of government powerless to correct judicial decisions that were themselves violative of separation of powers. Contrary to what the Superior Court held, the constitutional doctrines of separation of powers and checks and balances require this Court to uphold SB 5340 and not invalidate its restoration of the pre-*McClarty status quo*.

CONCLUSION

This Court should hold that the doctrine of separation of powers supports rather than prohibits the application of SB 5340 to Mr. Hale's claims of disability discrimination.

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Respectfully submitted this 22nd day of September, 2008

FRANK FREED SUBIT & THOMAS LLP

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2008 SEP 22 P 4: 39

BY RONALD R. CARPENTER

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CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2008, pursuant to agreement among the parties, I caused to be served the following documents:

1. MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE SENATORS ADAM KLINE, DARLENE FAIRLEY, ROSA FRANKLIN, KAREN KEISER, JEANNE KOHL-WELLES, AND PAULL H. SHIN
2. BRIEF OF AMICI CURIAE SENATORS
3. this CERTIFICATE OF SERVICE,

on the following individuals in the manner indicated:

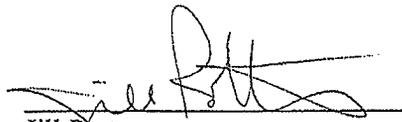
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Dated this 22nd day of September, 2008.



Jill Potter

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