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STATE OF WASHINGTON
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SUPREME COURT OF THE STATE OF WASHINGTON

JOHN L. HALE AND ROBBIN HALE,

Appellants,

v.

WELLPINT SCHOOL DISTRICT NO. 49,

Respondent.

**AMICUS CURIAE BRIEF OF THE STATE OF WASHINGTON
AND STATE HUMAN RIGHTS COMMISSION**

ROBERT M. MCKENNA
Attorney General

CHRISTINA BEUSCH, WSBA #18226
Senior Counsel
Attorney General's Office
1125 Washington St SE
PO Box 40100
Olympia, WA 98504

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BY RONALD R. CARPENTER
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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The State of Washington through the Washington State Human Rights Commission (Commission) is charged by the Legislature with oversight and enforcement of Washington's Law Against Discrimination (WLAD), chapter 49.60 RCW. Since the WLAD was enacted over 50 years ago, the Commission has focused on the "elimination and prevention of discrimination" against all protected classes in this state, including those with "the presence of any sensory, mental, or physical disability." RCW 49.60.010. The right to be free of discrimination includes the "right to obtain and hold employment" despite the presence of a mental or physical disability. RCW 49.60.030(1)(a). Based on this legislative direction and responsibility, the Commission has a significant interest in ensuring that the residents of this state receive the full protection that the WLAD provides. In addition, where, as in this case, a court is interpreting the scope and constitutionality of a law intended to provide protection from discrimination, the State of Washington through the Commission has a significant interest in offering its expertise and legal analysis, consistent with its duty to carry out the legislative mandate of enforcing the law against discrimination.

II. ISSUE PRESENTED BY AMICUS

On July 6, 2006, this Court issued its decision in *McClarty v.*

Totem Electric, 157 Wn.2d 214, 137 P.3d 844 (2006), adopting the federal definition of “disability” under the Americans with Disabilities Act as the definition of “disability” under the WLAD. At the time of the *McClarty* decision, the term “disability” was not defined by the WLAD. In the session following *McClarty*, the Legislature amended the WLAD to include for the first time a statutory definition of “disability.” RCW 49.60.040(25)(a), Substitute Senate Bill (SSB) 5340. See Appendix 1 and 2. Mindful of the Court’s decision in *McClarty*, the Legislature expressly limited the statutory amendment defining “disability” to causes of action that arose prior to *McClarty*, and to those that arose as of the statute’s post-*McClarty* effective date, July 22, 2007.¹ Thus, the amendment defining “disability” for the first time does not purport to apply to causes of action that arose between the date of the *McClarty* decision (July 6, 2006) and July 22, 2007, the effective date of SSB 5340.

Do separation of powers principles preclude the Legislature from amending the WLAD to include for the first time a statutory definition of “disability” that applies retroactively to cases arising before the *McClarty* decision?

¹ See *Delaplaine v. United Airlines, Inc.*, 518 F.Supp.2d 1275, 19 A.D. Cases 1343 (W.D. Wash. 2007). In *Delaplaine*, the court observed that the Legislature expressly avoided contravening *McClarty* by making the law retroactive only as to cases arising before the *McClarty* decision. *Id.* at 1278-79 (“Senate Bill No. 5340 does not actually contravene *McClarty*. The legislature appears to have carefully selected the effective dates for the new definition of disability”).

III. STATEMENT OF THE CASE

A. The Washington Supreme Court's Decision in *McClarty*

In *McClarty*, in the absence of a statutory definition of the term in the WLAD, the Court adopted the definition of “disability” from the federal ADA. *Id.* at 220; *see also McClarty*, 157 Wn.2d at 221 (“We have concluded that the use of the term ‘disability’ has evolved to the point that its definition in the federal statute and in Washington’s should be the same”). The *McClarty* majority declared that a then-existing Commission regulation defining “disability” was at odds with the plain meaning of the term.” *Id.* at 225. The majority concluded that the “plain meaning” of “disability” requires that the plaintiff show that the condition that is the basis of the disability substantially limits the ability to perform “*something* before he is deemed disabled under the WLAD.” *Id.* at 226. Under the regulatory definition, it was not necessary to show that the condition affected performance, but only that the condition existed or was perceived to exist and that the plaintiff was discriminated against because of the condition.

The *McClarty* Court then concluded that in order to “provide a single definition of the term ‘disability’ that can be applied consistently throughout WLAD, we adopt the definition of disability set forth in the

federal ADA.” *Id.* at 228. The federal ADA requires a plaintiff to establish (1) a physical or mental impairment that substantially limits one or more major life activities, (2) a record of such impairment, or (3) that he is regarded as having such impairment. *Id.* The Court supported this decision by stating that the federal definition is consistent with the plain meaning of the term “disability”, federal law is instructive in the area of discrimination, and the narrower federal definition will avoid trivial claims. *Id.* at 229-30.

B. Post-*McClarty* Legislative Action

During the 2007 session, the Washington Legislature amended the WLAD to include a statutory definition of “disability”. SSB 5340, RCW 49.60.040(25)(a). Although the statutory definition is substantially consistent with the Commission’s prior regulatory definition, it is not identical to it.

The Legislature expressly limited application of the new statutory definition to any cause of action that arose prior to the *McClarty* decision, or after the effective date of the new law. The bill was passed on May 4, 2007, and went into effect on July 22, 2007. Thus, the *McClarty* definition of “disability” applies to all causes of action arising from the date of that decision, July 6, 2006, to the effective date of the statute, July 22, 2007.

C. Facts Relevant to Amicus Brief

The Commission takes no position with respect to the underlying facts presented by the parties. The undisputed fact that Mr. Hale's claims arose prior to July 6, 2006, the date of the *McClarty* decision, is the only fact relevant to the State's position.

IV. ARGUMENT

A. The Legislature Did Not Invade The Province Of The Judicial Branch By Amending The WLAD To Define "Disability" For The First Time, And Applying The New Definition Of "Disability" To Pre-*McClarty* Causes Of Action.

The separation of powers doctrine is not specifically enunciated in either the Washington or federal constitutions. Rather, "it is universally recognized as deriving from the tripartite system of government established in both constitutions." *State v. Wadsworth*, 139 Wn.2d 724, 735, 991 P.2d 80 (2000) (quoting *State v. Blilie*, 132 Wn.2d 484, 489, 939 P.2d 691 (1997)). Under the doctrine of separation of powers, the constitution separates "the legislative power to make general law from the judicial power to apply that law in particular cases...." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 224, 115 S. Ct. 1447, 131 L.Ed.2d 328 (1995); *State v. Werner*, 129 Wn.2d 485, 493, 918 P.2d 916 (1996) (courts are "authorized to hear and determine a cause or proceeding"). In Washington, the Legislature possesses plenary power to enact laws except as limited by the state or federal constitutions.

See, e.g., Belas v. Kiga, 135 Wn.2d 913, 919-20, 959 P.2d 1037 (1998). Courts, on the other hand, possess the power to decide the cases before them. *See, e.g., Plaut*, 514 U.S. at 219-20; *Werner*, 129 Wn.2d at 493.

A separation of powers violation occurs when “the activity of one branch threatens the independence or integrity or invades the prerogatives of another.” *Zylstra v. Piva*, 85 Wn.2d 743, 750, 539 P.2d 823 (1975). As the United States Supreme Court has noted:

The essential balance created by this allocation of authority was a simple one. The Legislature would be possessed of power to “prescribe[e] the rules by which the duties and rights of every citizen are to be regulated,” but the power of “[t]he interpretation of the laws” would be “the proper and peculiar province of the courts.” *The Federalist No.78*, pp. 523, 525.

Plaut, 514 U.S. at 222. Thus, the Legislature does not violate separation of powers as long as it respects a court’s power to apply the current law to the case presented to it.

By the same token, a court must give deference to the state Legislature and presume the constitutionality of its enactments. *Wadsworth*, 139 Wn.2d at 734; *Island County v. State*, 135 Wn.2d 141, 146-47, 955 P.2d 377 (1998). Consequently, the burden is on the party challenging a statute to prove that it is unconstitutional beyond a reasonable doubt. *Id.* This “high standard is based on the [court’s] respect for the legislative branch of government as a co-equal branch of

government, which like the court, is sworn to uphold the constitution.” *Island County*, 135 Wn.2d at 147. Because “the Legislature speaks for the people,” the court is “hesitant to strike a duly enacted statute unless fully convinced, after a searching legal analysis, that the statute violates the constitution.” *Id.*

As will be discussed in more detail below, the Washington Legislature has not impermissibly infringed upon the role of the Washington judiciary; therefore, the definition of “disability” provided in SSB 5340 applies to Mr. Hale’s claims.

B. A Legislature May Amend A Statute And Expressly Make The Amendment Retroactive.

Generally, statutory amendments are presumed to operate prospectively. *See Densley v. Dep’t of Retirement Systems*, 162 Wn.2d 210, 223, 173 P.3d 885 (2007); *In re Personal Restraint of Stewart*, 115 Wn. App. 319, 332, 75 P.3d 521 (2003). However, the Legislature may provide for an amendment to be applied retroactively if such retroactive application does not run afoul of a constitutional prohibition. *See McGee Guest Home, Inc. v. Dep’t of Social & Health Services of State of Washington*, 142 Wn.2d 316, 324-25, 12 P.3d 144 (2000); *see also American Discount Corp. v. Shepherd*, 129 Wn. App. 345, 354, 120 P.3d 95 (2005), citing *Stewart*, 115 Wn. App. at 333.

SSB 5340 expressly includes a retroactivity clause. The new statutory definition is specifically limited to the period of time prior to the *McClarty* decision, and after the statute's effective date. Additionally, the Legislature's definition is an amendment to existing state law and, as such, may be made retroactive.

Wellpinit School District argues that the Legislature's enactment constitutes a violation of the separation of powers doctrine, because the legislative branch of government has usurped the power of the judicial branch. Such usurpation occurs only if the law either overrules or contravenes a Supreme Court decision. *See Marine Power & Equipment Co. v. Washington State Human Rights Comm'n Hearing Tribunal*, 39 Wn. App. 609, 615, 694 P.2d 697 (1985), citing *Johnson v. Morris*, 87 Wn.2d 922, 926-27, 557 P.2d 1299 (1976); *State v. Posey*, 130 Wn. App. 262, 274, 122 P.3d 914 (2005) (statute that clarified previous judicial interpretation of a statute could not be applied retroactively); *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 584, 146 P.3d 423 (2006) (an amendment will not be retroactive if it clarifies a statute in contravention to judicial construction). The law here does not disturb the construction given to the law by the *McClarty* Court.

“Separation of powers principles are violated only when the legislature infringes on a judicial function.”

Haberman v. Wash. Public Power Supply Sys., 109 Wn.2d 107, 143, 750 P.2d 254 (1988). Retroactive legislation that amends a statute, rather than merely clarifying it, does not violate the separation of powers doctrine because it changes the underlying law rather than merely interpreting the law differently. *Marine Power*, 39 Wn. App. at 615, citing *Johnson*, 87 Wn.2d at 926-27. Similarly, courts may apply current law to a pending case so long as no substantive or vested rights are violated. *See Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 625-26, 90 P.3d 659 (2004).

A new legislative enactment is presumed to amend, rather than clarify, existing law. *Marine Power*, 39 Wn. App. at 615. This presumption can only be rebutted by showing that the Legislature intended to clarify the law, rather than change it. *Id.* Legislation that addresses an ambiguity in the law is most likely a clarification; enactments that respond to judicial interpretations of a prior statute, and which materially and affirmatively change the prior statute, are amendments. *Marine Power*, 39 Wn. App. at 615, citing *Overton v. Economic Assistance Auth.*, 96 Wn.2d 552, 557, 637 P.2d 652 (1981). In *Marine Power*, the court held that, because the law was not ambiguous once the Supreme Court had construed it, the subsequent legislative change was an amendment, not a

clarification. *Marine Power*, 39 Wn. App. at 615. Here, SSB 5340 is an amendment and thus, proper.

While Washington state law on separation of powers draws some distinction between the retroactive clarification and the retroactive amendment of a statute, federal jurisprudence on the subject does not. *See Plaut*, 514 U.S. at 226 (“When a new law makes clear that it is retroactive, an appellate court must apply the law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly”).² In principle, the separation of powers analysis should be the same under Washington law as federal law because the structures of the federal and state governments are the same. *See, e.g., Haberman*, 109 Wn. 2d at 143-44. In light of United States Supreme Court precedent, this Court could consider that there should be no distinction between clarifications and amendments in order to determine whether retroactive application is valid under the separation of powers doctrine. *Plaut*, 514 U.S. at 226-27. However, to the extent such a distinction exists in state law, it is not determinative in this case, as the

² In *Plaut v. Spendthrift Farm*, the Supreme Court held that the separation of powers “prohibition is violated when an individual final judgment is legislatively rescinded....” *Id.* at 228. That is, “Congress may not declare by retroactive legislation that the law applicable to that very case was something other than what the courts said it was.” *Id.* at 227 (emphasis in original). Though the Supreme Court partially invalidated that amendment in *Plaut*, the Supreme Court nonetheless expressly approved of Congress retroactively amending the statute after the Supreme Court had construed the original act.

addition of a definition of “disability” in SSB 5340 is clearly an amendment that the Legislature could expressly make retroactive.

C. Washington Courts Have Consistently Held That The Retroactive Application Of Statutory Amendments Does Not Violate The Doctrine Of Separation Of Powers.

In Washington, retroactive amendments do not violate the separation of powers doctrine, just because the state Supreme Court has construed the original statute differently. An example is *American Nat'l Can Corp. v. State Dep't of Rev.*, 114 Wn.2d 236, 787 P.2d 545 (1990). Prior to the *American Nat'l Can* case, the United States Supreme Court invalidated one particular provision in Washington's Business & Occupation (B&O) tax. *Tyler Pipe Indus., Inc. v. Washington State Dep't of Rev.*, 483 U.S. 232, 253, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987). In response to the decision, the Legislature amended the B&O statute to provide for a specific retroactive remedy. *American Nat'l Can*, 114 Wn.2d at 240. Among other issues, the Court was then faced with the question of whether the Legislature's retroactive amendment violated separation of powers. The Court held that it did not, explaining that a “statute prescribing new rules to be applied to pending litigation is generally constitutional. . . . Separation of powers principles are violated only when the Legislature infringes on a judicial function.” *Id.* at 252, quoting *Haberman*, 109 Wn.2d at 143.

The reason the Legislature did not violate separation of powers principles in that case is because the Legislature did not infringe on the Court's prerogative to apply the new retroactive law to the facts of the case before it. As the *Haberman* Court stated:

[T]he Legislature's retroactive amendment . . . does not impede upon the court's right and duty to apply new law to the facts of this case. It does not dictate how the court should decide a factual issue, nor does it affect a final judgment. Instead, the amendment is a legislative enactment of a facially neutral law for the court to apply to the facts before it. We find no violation of separation of powers principles.

Haberman, 109 Wn.2d at 144.

Another example is the Court's decision in *McGee Guest Home, Inc. v. Dep't of Social & Health Services of State of Washington*, 142 Wn.2d 316, 12 P.3d 144 (2000). Several years before that decision, the Court decided *Failor's Pharmacy v. Dep't of Soc. & Health Serv.*, 125 Wn.2d 488, 886 P.2d 147 (1994), holding that the Department of Social and Health Services (DSHS) violated the state Administrative Procedure Act (APA) when it established a Medicaid payment system without going through the proper rule-making procedures. Between the trial court and the Supreme Court's decisions in *Failor's*, the Legislature enacted a 1994 statute that retroactively exempted the Medicaid payment system from APA rule-making procedures. *McGee*, 142 Wn.2d at 323-24.

Then in 2000, the *McGee* court faced the question of whether the 1994 retroactive amendments were valid. *Id.* at 324-25. The Court let stand the retroactive 1994 amendment to the APA, although the Court had previously construed the APA as requiring DSHS to promulgate rules following the proper rule-making procedures. The Court did not specifically address separation of powers but simply stated that the “authority of the legislature to clarify its own enactments and apply such clarifications retroactively has long been upheld in our law.” *Id.* at 326.

Yet another example in which a court upheld a retroactive amendment is *Marine Power*. In that case, the appeals court was faced with an earlier Washington Supreme Court decision which held that Human Rights Commission hearing tribunals did not have statutory authority to award damages for humiliation and mental suffering caused by unlawful age discrimination. *Id.* at 614 (citing to *Washington State Human Rights Comm’n ex rel. Spangenberg v. Cheney Sch. Dist. No. 30*, 97 Wn.2d 118, 641 P.2d 163 (1982)). Following that decision, in 1983, the Legislature amended the relevant statute to authorize the Commission hearing tribunals to award limited damages for humiliation and mental suffering. The question before the court in *Marine Power* was whether the amendment allowing damages applied retroactively, particularly where the Supreme Court had construed the original statute differently. Relying on

the distinction between a retroactive clarification and a retroactive amendment, the court held:

The Legislature may not, under the guise of clarification, overrule by legislative enactment a prior authoritative Supreme Court opinion construing a statute. However, direct confrontation of this issue may be avoided in this case if the 1983 amendment amends, rather than clarifies, an existing statute.

Id. at 615 (citation omitted).

The court held that the 1983 amendment was indeed an amendment and not merely a clarification. Thus, the court upheld the retroactive application of the amendment:

Separation of powers problems arise when the Legislature attempts to perform a judicial function. The function of the Legislature is to make laws, not to construe them. Nor can the Legislature construe the intent of other legislatures. The latter functions are primarily judicial. Thus, legislative clarifications construing or interpreting existing statutes are unconstitutional when they contravene prior judicial interpretations of a statute. However, the Legislature is empowered to change or amend existing laws and may, in certain situations, apply such amendments retroactively.

Id. at 615, n. 2. Thus, Washington courts have held that the Legislature does not violate separation of powers by retroactively amending a statute after a court has construed it. This is because the Legislature is not infringing on the judiciary's power to decide cases properly before it.

Haberman, 109 Wn.2d at 144.

D. The Retroactivity Clause Of The Disability Definition Does Not Violate The Separation Of Powers Doctrine Because It Is An Amendment To The State Discrimination Laws And Does Not Contravene A Supreme Court Decision.

SSB 5340, as enacted, is an appropriate exercise of the state Legislature's authority, i.e., the Legislature did not violate the separation of powers doctrine by retroactively amending Ch. 49.60 RCW. The parties do not dispute that the Legislature intended for SSB 5340 to apply retroactively. An analysis of whether this statutory change is consistent with the principle of separation of powers begins with a review of the *McClarty* decision.

In *McClarty*, the Court concluded that "the use of the term 'disability' *has evolved* to the point that the definition in the federal statute and in Washington should be the same." *McClarty*, 157 Wn.2d at 221 (emphasis added). The Court chose to discard the Commission's regulatory definition of "disability" that had been in existence for 30 years, instead opting to adopt the federal ADA definition. The Court held that 1) the rule was "circular" and placed a higher burden on a plaintiff to make out a prima facie case for disability discrimination than would be required in other types of discrimination cases and 2) the regulatory "definition of 'disability' was at odds with the plain meaning of the term." *Id.* at 224-225. The Court then concluded that in order "to provide a

single definition of the term ‘disability’ that can be applied consistently throughout WLAD, we adopt the definition of disability set forth in the federal ADA.” *Id.* at 228.

The Legislature subsequently substantively amended RCW 49.60.040 to now include a definition of disability that did not previously exist in statute. The Legislature’s action was not an attempt to clarify the definition of disability provided by the Supreme Court for the first time in *McClarty*, but instead provided a statutory definition where none had previously existed. Providing a definition where none previously existed in response to a court decision has been held to be an amendment rather than a clarification of that law. *Fairley v. Dep’t of Labor & Indus.*, 29 Wn. App. 477, 627 P.2d 961 (1981), overruled on other grounds by *Marley v. Dep’t of Labor & Indus. of State*, 125 Wn.2d 533, 886 P.2d 189 (1994). In *Fairley*, the legislation at issue contained an intent section which stated that the act was to “clarify” the law. *Id.* at 483. The court correctly recognized that the enactment was an amendment because the newly defined term came about after a Supreme Court decision that, in construing the law, noted the Legislature had failed to provide a definition. *Id.* at 484. In this case, the Legislature added a statutory definition of disability and expressly made it retroactive to ensure that adequate protections against discrimination on the basis of a

disability would be afforded to Washington residents.
RCW 49.60.010.

By limiting the retroactive application of the statute, the Legislature did not threaten the judicial function of the Washington Supreme Court and its power to decide cases. It did not overrule the Court's judgment, because there was no statutory definition of disability for the Court to interpret in *McClarty*. The Legislature merely retroactively amended the law. In fact, the Legislature carefully crafted SSB 5340 so as not to impact any substantive or vested right that may have arisen from July 6, 2006 to July 22, 2007, as a result of the *McClarty* decision. Consequently, the Legislature did not violate the separation of powers doctrine when it made SSB 5340 retroactive.

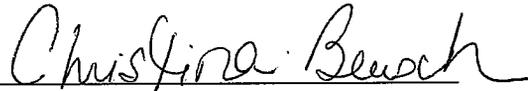
The Legislature expressly amended the WLAD to include a state law definition of disability that would apply retroactively. It did not reopen the *McClarty* decision; in fact, the Legislature specifically excluded any period of time during which anyone could have reasonably relied on *McClarty*. Thus, a statutory definition of disability was created, not merely clarified. The Legislature did not violate the separation of powers doctrine, and the definition of disability and its application to causes of action commencing before July 6, 2006, is constitutional.

V. CONCLUSION

Based on the foregoing, the State of Washington, including the Washington State Human Rights Commission, respectfully requests that this Court rule that the retroactive clause of SSB 5340 that applies to the definition of disability is constitutional.

DATED this 19th day of September, 2008.

ROBERT M. MCKENNA
Attorney General



CHRISTINA BEUSCH, WSBA #18226
Senior Counsel
Attorney General's Office
1125 Washington St SE
PO Box 40100
Olympia, WA 98504