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No. 97630-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
IN

W.H., as guardian for her minor daughter, P.H.; W.H., individually; J.H.,
individually; B.M., as guardian for her minor daughter, S.A.; and B.M.,
individually,

Plaintiffs,

vs.

OLYMPIA SCHOOL DISTRICT, a public corporation; JENNIFER
PRIDDY, individually, FREDERICK DAVID STANLEY, individually,
BARBARA GREER, individually, WILLIAM V. LAHMANN,
individually, DOMINIC G. CVITANICH, individually,

Defendants.

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice. WSAJ Foundation operates an amicus program and has an interest in the proper application of RCW 49.60.215, the public accommodations provision of the Washington Law Against Discrimination, Ch. 49.60 RCW (WLAD), and whether public schools are entitled to an exception from its enforcement.

II. INTRODUCTION AND STATEMENT OF THE CASE

This action arises out of the sexual molestation of two young female students by their school bus driver, an employee of the Olympia School District (District). The facts are drawn from the federal court certification order and the briefing of the parties. *See W.H. v. Olympia Sch. Dist.*, No. C16-5273, 2019 WL 4247063, at *1-2 (W.D. Wash. Sep. 6, 2019); Plaintiffs Op. Br. at 4-6; Dist. Resp. at 2-4; Plaintiffs Reply at 1-4.

For purposes of this amicus brief, the following facts are relevant. Gary Shafer was hired by the District as a school bus driver in August of 2005. In the six years that followed, Shafer molested at least 25 four- and five-year old students, including Plaintiffs P.H. and S.A., while they rode the school bus. In 2010, a student disclosed that Shafer had abused her. An investigation confirmed that Shafer had molested the student. A subsequent psychological evaluation revealed that he had been molesting children since his hire and the total number of victims could be as high as 75.

Plaintiffs filed suit in federal district court for the Western District of Washington, asserting a number of state and federal causes of action against the District and its employees. While the action was pending, this Court issued its opinion in *Floeting v. Group Health Cooperative*, 192 Wn.2d 848, 434 P.3d 39 (2019), which interpreted RCW 49.60.215 to impose strict liability upon public accommodations for the discriminatory acts of their agents or employees committed in their place of public accommodation. *Floeting*, 192 Wn.2d at 856.

Plaintiffs thereafter sought to amend their complaint to add a claim against the District for public accommodations discrimination under RCW 49.60.215. The district court granted Plaintiffs' motion. Defendants then moved to certify questions of law to this Court. The district court granted the motion in part, certifying two questions for this Court's consideration.¹

III. ISSUE PRESENTED

May a school district be subject to strict liability for the discriminatory conduct of its employees in violation of the public accommodations provision of the WLAD, RCW 49.60.215?²

¹ The district court declined to certify a third question, which asked whether a plaintiff can establish a discrimination claim if the discriminatory conduct was directed at victims of both genders. The court found that genuine issues of material fact exist as to whether Shafer molested both girls and boys. It concluded that the question did "not appear ripe for a legal determination." *W.H. v. Olympia Sch. Dist.*, 2019 WL 4247063, at *5. When a federal court certifies questions for review, this Court treats them as pure questions of law and will "not determine facts." *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn.2d 83, 114, 285 P.3d 34 (2012).

² This brief does not address the second certified question – whether intentional sexual misconduct can constitute discrimination. The District ultimately does not dispute this. *See* Dist. Resp. Br. at 28 (conceding "physical assault or abuse could give rise to a claim under RCW 49.60.215 if a plaintiff can satisfy the [*Fell v. Spokane Transit Auth.*, 128 Wn.2d 618, 911 P.2d 1319 (1996)] factors"). This brief also does not address whether schools and buses are public accommodations. Plaintiffs thoroughly address this issue. *See* Plaintiffs Op. at 8-15; Reply at 1-15.

IV. SUMMARY OF ARGUMENT

Since the state's territorial days, the Legislature has waived the common law rule of sovereign immunity for school districts and other public corporations for their negligent acts or omissions. The current version of the statute, RCW 4.08.120, effectively unchanged from its original form, permits schools to be liable for negligence as are other similarly-situated defendants.

RCW 49.60.215 was enacted to eradicate discrimination in public accommodations. To effectuate this purpose, the Legislature imposed strict liability on "persons" whose employees or agents discriminate in their place of public accommodation. Public school districts qualify as both persons and public accommodations under the WLAD.

Statutes are related if they relate to the same parties or subject matter. Related statutes should be read as part of a unified whole and must be harmonized such that the integrity of each is preserved, unless to do so would require distortion of the statutory language. Only if there is an irreconcilable conflict will the Court turn to rules of statutory construction.

RCW 4.08.120 is easily reconcilable with RCW 49.60.215. The text of § .120 is permissive and contains no restrictive or preemptive language. Its purpose, to eliminate the common law rule of sovereign immunity, suggests it was intended to permit the claims it references, and not to preclude those it does not. This is consistent with the larger body of statutory law evidencing legislative intent to hold public entities liable in tort to the same extent as private entities. RCW 4.08.120 may operate alongside RCW

49.60.215, such that each statute can be enforced according to its plain terms and to effectuate its unique statutory purpose.

In keeping with the Legislature's intent as expressed in RCW 4.08.120, as well as RCW 4.96.010 (waiving sovereign immunity for local government entities, including school districts), common law negligence doctrines applicable to other defendants have been equally applied to schools. These doctrines are not inconsistent with the strict liability standard of RCW 49.60.215; both may simultaneously be in force.

V. ARGUMENT

Under RCW 49.60.215, public accommodations are strictly liable for discriminatory acts perpetrated by their agents or employees in their place of public accommodation. The District suggests that recognized legal doctrines applicable to negligence claims against schools should be applied to limit discrimination in public accommodations claims against schools. However, the theories it cites derive from independent claims that can coexist with the strict liability standard applicable under § .215, and the District provides no basis for granting schools an exception from this statutory duty imposed on other public accommodations in Washington.

A. Overview Of Governing Law.

1. Brief overview of Washington statutory and common law governing the liability of public school districts.

Historically, the rule in the United States was that school districts were not subject to liability for injuries to students suffered in connection with attendance at school, because schools perform a governmental function

for the benefit of the public. *See Read v. Sch. Dist. No. 211 of Lewis Cty.*, 7 Wn.2d 502, 506, 110 P.2d 179 (1941); *Briscoe v. Sch. Dist. No. 123, Grays Harbor Cty.*, 32 Wn.2d 353, 360, 201 P.2d 697 (1949); *Sherwood v. Moxee Sch. Dist. No. 90*, 58 Wn.2d 351, 357, 363 P.2d 138 (1961).

In Washington, since the State's territorial days this rule of immunity has been abrogated by legislative enactment. *See Sherwood*, 58 Wn.2d at 357; *Snowden v. Sch. Dist. No. 401*, 38 Wn.2d 691, 693, 231 P.2d 621 (1951). In 1869, the territorial Legislature made schools and other public corporations subject to suit for actions arising out of a contract or for injuries resulting from an "act or omission." *See Wagenblast v. Odessa Sch. Dist. No. 105-157-166J, et al.*, 110 Wn.2d 845, 858 & n.29, 758 P.2d 968 (1988).

The current version of the statute, RCW 4.08.120, provides:³

An action may be maintained against a county or other of the public corporations mentioned or described in RCW 4.08.110,⁴ either upon a contract made by such county, or other public corporation in its corporate character and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or omission of such county or other public corporation.

Redfield v. Sch. Dist. No. 3 of Kittitas Cty., 48 Wash. 85, 92 P. 770 (1907), was the first Washington case in which a school district was held liable for negligence. *See Wagenblast*, 110 Wn.2d at 858, n.29. In *Redfield*,

³ While the citation form for this enactment has changed over the years, its operative language remains effectively unchanged. *See Wagenblast*, 110 Wn.2d at 858 n.29 (citing Laws of 1869, ch. 154, § 602, p. 154 "now codified as RCW 4.08.120"); *see also Coates v. Tacoma Sch. Dist. No. 10*, 55 Wn.2d 392, 395, 347 P.2d 1093 (1960) (examining RCW 4.08.120; Code 1881 § 662; 1869 p. 154, § 602).

⁴ School districts are included in the list of entities qualifying as "public corporations" under RCW 4.08.110. The full texts of the current versions of RCW 4.08.110 and RCW 4.08.120 are reproduced in the Appendix to this brief.

the school district argued that the plaintiff's allegations arose out of governmental functions, and "under the great weight of authority" schools are not liable under respondeat superior for the negligent acts or omissions of their officers or agents. *See Redfield*, 48 Wash. at 86-87. It maintained that the Legislature did not intend its enactment, the predecessor to RCW 4.08.120, to apply to governmental duties. *See id.* at 89.

The Supreme Court rejected the school district's argument. It held that the statute "is scarcely susceptible of construction," and that it was reasonable to conclude that the Legislature's intent was to "remove the limitations and restrictions" of the common law rule, "and make the district responsible generally for an omission of duty." *Id.* at 88-89; *see also Howard v. Tacoma School Dist. No. 10*, 88 Wash. 167, 175-76, 152 P. 1004 (1915) (reaffirming that the precursor to RCW 4.08.120 "could only be intended to abrogate the common law rule of nonliability for torts").

Subsequent cases recognized that the intent and effect of § .120 and its predecessors were to "render a school district liable for the tortious acts or omissions of its officers, agents or servants, according to the normal rules of tort law." *Briscoe*, 32 Wn.2d at 361; *see also McLeod v. Grant Cty. Sch. Dist. No. 128*, 42 Wn.2d 316, 318-19, 255 P.2d 360 (1953). Like the broader waivers of sovereign immunity that later followed, *see* RCW 4.92.090 and RCW 4.96.010, "[t]he purpose of [RCW 4.08.120 was] to make the school district liable upon precisely the same basis as an individual or corporation is responsible." *Sherwood*, 58 Wn.2d at 357 (brackets added).

In 1917, a bill extending absolute immunity to school districts was proposed. The bill that was ultimately enacted, former RCW 28.58.030, afforded limited immunity to schools for their negligence related to playground equipment. *See Wagenblast*, 110 Wn.2d at 858 & n.30; *Sherwood*, 58 Wn.2d at 355 & n.6. RCW 28.58.030 was repealed in 1967.

Whether and to what degree schools are subject to suit is generally a legislative question. *See Wagenblast*, 110 Wn.2d at 859; *see also* Wash. Const. Art. 2, § 26 (providing “[t]he legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state” (brackets added)). In *Wagenblast*, the Court noted that since 1869 the Legislature has generally held schools accountable for negligence, and observed:

Legislative policies may, of course, change with changing conditions. This opinion is not to be construed as precluding school districts from attempting to convince the Legislature that their problems in this area require a legislative response of one kind or another. The Legislature through its hearing processes is well suited to making such inquiries and has tools and resources adequate to the task.

Id. at 859.

With immunity eliminated by RCW 4.08.120, negligence doctrines recognized under the common law of Washington have been applied to public corporations, including school districts, as they are to other defendants. These doctrines include, for instance, the duty to protect, *see, e.g., N.L. v. Bethel Sch. Dist.*, 186 Wn.2d 422, 429-30, 378 P.3d 162 (2016) (school) and *H.B.H. v. State*, 192 Wn.2d 154, 163-64, 429 P.3d 484 (2018) (DSHS in its capacity as caretaker of foster children); negligent training and supervision, *see, e.g., Christensen v. Royal Sch. Dist. No. 160*, 156 Wn.2d

62, 66-67, 69-71, 124 P.3d 283 (2005) (school) and *C.J.C. v. Corp. of Catholic Bishop*, 138 Wn.2d 699, 704-06, 985 P.2d 262 (1999) (church); and negligent hiring and retention, see *Anderson v. Soap Lake Sch. Dist.*, 191 Wn.2d 343, 356-59, 423 P.3d 197 (2018) (school) and *Niece v. Elmview Group Home*, 131 Wn.2d 39, 50, 929 P.2d 420 (1997) (nursing home).

2. Brief overview of claims of discrimination occurring in public accommodations under RCW 49.60.215.

In 1949, the Legislature enacted the WLAD “to prevent and eradicate discrimination on the basis of race, creed, color, national origin, sex or disability in public accommodations.” *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 237, 59 P.3d 655, 661 (2002). The WLAD originally targeted employment discrimination, but in 1957 was expanded to also prohibit discrimination in public accommodations. See Laws of 1957, ch. 37, § 14 (codified at RCW 49.60.215). Sex was added as a protected class in 1973. See Laws of 1973, 1st Ex.Sess., ch. 214. To effectuate its remedial purposes, WLAD provisions are to be liberally construed. See RCW 49.60.020.⁵

The WLAD declares that it is a civil right “to be free from discrimination because of...sex.” RCW 49.60.030(1). This includes “[t]he right to the full enjoyment of any place of public... accommodation.” RCW 49.60.030(1)(b) (brackets added). RCW 49.60.215 defines unfair practices

⁵ Whether an entity qualifies as a public accommodation must also be liberally construed. See *Fraternal Order of Eagles*, 148 Wn.2d at 255.

in public accommodations: “It shall be an unfair practice for any person or the person’s agent or employee to commit an act which directly or indirectly results in any... discrimination... in any place of public... accommodation.” “Persons” include “political...subdivisions” of the state, *see* RCW 49.60.040(19), which in turn include school districts. *See* RCW 28A.315.005(2). A place of public accommodation includes “any public...educational institution.” RCW 49.60.040(2).

In *Floeting*, this Court had the opportunity to examine the standard of liability applicable under RCW 49.60.215. The Court observed that the language of § .215 is distinct from that of the other discrimination statutes, prohibiting discrimination perpetrated “by any person or the person’s agent or employee” in a public accommodation. *See id.* at 855. It found compelling the reasoning from the court of appeals decision below:

It is an unfair practice for “any person or the person’s agent or employee” to commit a forbidden act. RCW 49.60.215(1). This language attributes responsibility for the agent’s or employee’s discriminatory act to the “person” (employer) without mention of the doctrines of vicarious liability or respondeat superior. In this way, the legislature chose to fight discrimination in public accommodations by making employers directly responsible for their agents’ and employees’ conduct.

Floeting, 192 Wn.2d at 856. Based on its distinct text and purposes, the Court concluded the Legislature intended RCW 49.60.215 to impose strict liability on public accommodations for discriminatory acts of agents or employees.

B. Under RCW 49.60.215, Public Accommodations Are Strictly Liable For The Discriminatory Acts Of Their Agents Or Employees, And Neither Statutory Nor Common Law Permitting Negligence Claims Against Schools Provides A Basis For Granting An Exception From The Reach Of This Rule.

Citing statutory law and common law permitting causes of action against schools for their negligent acts or omissions, the District contends that the Court should grant school districts an exception from the strict liability standard applicable under § .215. The Court should decline the District's invitation to grant schools the functional immunity it seeks.⁶

1. RCW 4.08.120 and RCW 49.60.215 are easily harmonized as each has distinct purposes and neither contains language evidencing legislative intent to preempt other claims, and under Washington's plain meaning rule, the statutes should be read as constituting a unified whole such that the integrity of each statute is preserved.

The District argues schools should be relieved from the strict liability standard applicable under § .215 because to do otherwise would be "in direct conflict with RCW 4.08.120."⁷ See Dist. Resp. Br. at 15. However, the asserted "conflict" between § .120 and the strict liability standard of § .215 is easily reconciled if § .120 is read in accordance with its plain terms and construed under Washington's plain meaning rule.

In Washington, the fundamental inquiry in statutory construction is determining legislative intent, see *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010), and the "surest indication of legislative intent is the

⁶ An immunity is "an exemption from liability." *Washington State Dep't of Transp. v. Mullen Trucking*, __ Wn.2d __, 451 P.3d 312, 321 (2019); see also *Black's Law Online Dictionary* (2nd Ed.) (available at <https://thelawdictionary.org/immunity/>; viewed Jan. 21, 2020) (defining "immunity," as an "exemption from performing duties which the law generally requires other citizens to perform").

⁷ There appears to be no limit to the District's argument regarding the preemptive effect of § .120. While it focuses on special solicitude it asserts should be extended to schools, the statute itself would include public corporations more broadly, including cities, towns, public utility districts, etc. Were the Court to exempt schools, there is no apparent reason to deny this protection to the other entities that qualify as a "public corporation" under § .120.

language enacted by the legislature.” *Id.* This analysis begins by “attempting to discern the statute’s plain meaning.” *Bank of Am., N.A. v. Owens*, 173 Wn.2d 40, 53, 266 P.3d 211 (2011). Plain meaning is determined by “the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007). The Court will “harmonize apparently contradictory statutes prior to resorting to canons of construction that give preference to one statute over another.” *Owens*, 173 Wn.2d at 53 (citing *Wark v. Wash. Nat’l Guard*, 87 Wn.2d 864, 867, 557 P.2d 844 (1976)). Only if the statute is susceptible to more than one reasonable meaning after application of these rules will the Court turn to aids of construction, including legislative history. *See Dep’t of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 12, 43 P.3d 4 (2002).

Where related statutes may conflict, Washington law requires that they be harmonized where possible. *See In re Estate of Kerr*, 134 Wn.2d 328, 335, 949 P.2d 810, 814 (1998) (recognizing that “[i]t is the duty of the court to reconcile apparently conflicting statutes and to give effect to each of them, if this can be achieved without distortion of the language used” (brackets added)). Related statutes should be read “as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes.” *State v. Williams*, 94 Wn.2d 531, 547, 617 P.2d 1012 (1980) (citation omitted).

RCW 4.08.120 provides that “[a]n action *may be maintained* against a . . . public corporation[] . . . either upon a contract made by such . . . public corporation . . . or for an injury to the rights of the plaintiff arising from some act or omission of [the] public corporation.” (Emphasis and brackets added). Section .120 eliminated sovereign immunity and permits liability claims in precisely two situations: 1) where the claim arises out of a contract, or 2) where a party is injured by a public corporation’s “act or omission.” The text contains no restrictive language, and nothing in that statute addresses other, independent theories of recovery. The most reasonable reading of the text of § .120 is that it permits the two types of claims it expressly identifies and does not speak to other theories of recovery not referenced.

RCW 49.60.215 targets the specific evil of discrimination in public accommodations, prohibiting “any person or the person's agent or employee” from committing an act of discrimination in public accommodations on the basis of membership in a protected class. As recognized in *Floeting*, the statutory language indicates that the Legislature intended that in that narrow context, the standard imposed on public accommodations is one of strict liability. “RCW 49.60.215 is not a negligence statute where foreseeability matters; it imposes direct liability for discriminatory acts, regardless of the culpability of the actor.” *Floeting*, 192 Wn.2d at 856.

The initial inquiry is whether the statutes are “related,” and, if so, whether they conflict. “Related” statutes “relate to the same person or thing, or the same class of persons or things.” *See In re Yim*, 139 Wn.2d 581, 592,

989 P.2d 512 (1999). RCW 4.08.120 abolishes common law immunity for public corporations, including school districts, and permits claims of negligence; RCW 49.60.215 prohibits discrimination in public accommodations, which include schools. Generally, statutes modify or inform the interpretation of other statutes “*only* if the two statutes deal with the same subject matter and they have an apparent conflict.” *Leonard v. City of Spokane*, 127 Wn.2d 194, 200, 897 P.2d 358 (1995).

If the Court concludes the statutes are related, RCW 4.08.120 and RCW 49.60.215 can clearly be harmonized, as they have different purposes, involve distinct claims, and neither evidences legislative intent to preclude application of the other. *In re Estate of Kerr, supra*, presented similar questions and is instructive. There, the personal representative of an estate successfully opposed an action to remove her and she sought fees incurred in the removal action. Two statutes from different chapters addressed the availability of attorney fees in probate proceedings. RCW 11.68.070 provided fees where a personal representative was successfully removed; RCW 11.96.140 generally permitted courts to award fees as justice required. To the argument that RCW 11.68.070 should be read to preclude awards of fees not mentioned, and thus to conflict with the general fee provision in RCW 11.96.140, the Court stated: “The statutes in this case are not in conflict because RCW 11.68.070 does not prohibit award of attorneys’ fees to a successful personal representative.” *Kerr*, 134 Wn.2d at 343.

Similar guidance is found in *O.S.T. v. Regence BlueShield*, 181 Wn.2d 691, 335 P.3d 416 (2014). There, the plaintiffs sought coverage under their plans with Regence for mental health treatment for their children, who were over the age of seven. Regence's policy contained an exclusion for neurodevelopmental therapies and denied coverage on that basis. The plaintiffs argued the exclusion was void because it was inconsistent with the Mental Health Parity Act, RCW 48.44.341 (MHPA), which requires that all health plans providing medical and surgical services shall also provide equivalent mental health services. Regence argued that the MHPA conflicted with a previously-enacted statute, the Neurodevelopmental Therapies Mandate, RCW 48.44.450 (NDT), which mandates coverage for children under the age of seven, and that this provision implied that coverage for children over seven was not mandatory, thereby conflicting with the MHPA.

The Court examined the purposes of each statute. The NDT, it observed, "changed common law" by setting a floor for required coverage for children under seven. *O.S.T.*, 181 Wn.2d at 702. When the Legislature subsequently enacted the MHPA, its goal was to require parity for mental health services and it "created a different floor for medically necessary treatments for mental disorders." *Id.* The Court concluded that "the statutes may stand side by side and fulfill their respective purposes." *Id.*

Here, similar to the statutes in *O.S.T.*, RCW 4.08.120 and RCW 49.60.215 are wholly reconcilable as they have different purposes and speak to different issues. The purpose of § .120 was to change the common law

rule of immunity and to permit causes of action against public corporations in two situations – claims arising out of contract and claims arising out of negligent acts or omissions. Section .215 was enacted for the purpose of eliminating discrimination, a “policy of the highest order.” *Fraternal Order of Eagles*, 148 Wn.2d at 246. To achieve this goal, the Legislature imposed strict liability on persons whose employees or agents discriminate in their place of public accommodation. Each of these statutes may “stand side by side and fulfill their respective purposes.” *O.S.T.*, 181 Wn.2d at 702.

Other statutes related to § .120 offer further support for the interpretation urged here. The Legislature’s waiver of sovereign immunity in RCW 4.96.010 mandates that local government entities, including school districts, shall be liable in tort “to the same extent” as private entities. *See* RCW 4.96.010(1), (2) (waiver statute); RCW 39.50.010(3) (defining “municipal corporation” referenced in the waiver statute to include school districts); *see also* RCW 4.92.090.⁸ The principle reflected in this mandate is that the Legislature did not intend public entities to be given special immunities under the law and instead should be subject to the same tort liability imposed on private parties.⁹ An interpretation of § .120 as implicitly

⁸ The current version of the full texts of RCW 4.92.090 and RCW 4.96.010 are reproduced in the Appendix to this brief.

⁹ Of course, the Legislature could elect to grant immunity to school districts as a matter of statute. When the Legislature has intended to extend immunity to school districts, it has done so explicitly. *See* former RCW 28.58.030 (affording school districts circumscribed immunity); *see also* *Wagenblast*, 110 Wn.2d at 858 & n. 30.

exempting schools (and presumably all other public corporations) from the application of RCW 49.60.215 would undermine this legislative aim.

The conclusion that § .120 was enacted to permit negligence claims against schools and not to preclude other claims based on independent theories of recovery is consistent with case law examining its history and purpose. Section .120 was adopted “in contemplation of the common law rule [of sovereign immunity].” *Redfield*, 48 Wash. at 89 (brackets added). Its purpose was “to remove the limitations and restrictions of such rule and make the district responsible generally for an omission of duty.” *Id.* Similar to the broader waivers of immunity that followed, “[t]he purpose of [RCW 4.08.120] is to make [school districts] liable upon precisely the same basis as an individual or corporation.” *Sherwood*, 58 Wn.2d at 357 (brackets added). Understood in this way, .120 was enacted to *eliminate* the bar of immunity for liability claims against school districts, not to *operate* as a bar to liability where a cognizable cause of action otherwise exists.

In sum, the meaning of RCW 4.08.120 is plain. By its terms, § .120 permits claims in two situations and does not address other independent causes of action, and is easily reconcilable with the strict liability standard for claims of discrimination in public accommodation under RCW 49.60.215. A necessary corollary of this argument is that § .120 is not reasonably susceptible to the District’s restrictive interpretation. An interpretation of § .120 as preempting the claims it does not reference would *force* a conflict with RCW 49.60.215 – a conflict that is both unnecessary

and unwarranted in light of the text, history and purpose of § .120. Because § .120 is not reasonably susceptible to different interpretations, it is unambiguous and the Court need not resort to canons of construction or other indicia of legislative intent. *See O.S.T.*, 181 Wn.2d at 701 (recognizing canons of construction apply “only if, after attempting to read statutes governing the same subject matter in pari materia, we conclude that the statutes conflict to the extent they cannot be harmonized”).¹⁰

2. There is no indication the Legislature intended to exempt schools from the reach of RCW 49.60.215 based on the common law doctrines cited by the District.

The District cites early common law cases applying a negligence standard to schools, including *Briscoe v. Sch. Dist. No. 123, Grays Harbor Cty.*, *supra*, and *McLeod v. Grant Cty. Sch. Dist. No. 128, supra*, as well as more recent Supreme Court and court of appeals decisions reflecting similar jurisprudence, including *N.L. v. Bethel Sch. Dist.*, *supra*, *Evans v. Tacoma Sch. Dist. No. 10*, 195 Wn. App. 25, 380 P.3d 553, *review denied*, 186 Wn.2d 1028 (2016) and *J.N. v. Bellingham Sch. Dist. No. 501*, 74 Wn. App. 49, 871 P.2d 1106 (1994). Based on these authorities, it maintains that “a school district, like any employer, may not be strictly liable for an employee’s intentional criminal conduct. School districts may be liable for criminal

¹⁰ Were the Court to deem the statute ambiguous, the same result would follow. Where related statutes cannot be harmonized, “courts generally give preference to the more specific and more recently enacted statute.” *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 210, 118 P.3d 311, 318 (2005) (citation omitted). RCW 49.60.215 is the more specific, as it speaks to the particular context of discrimination in public accommodations. It is also the later-enacted, as RCW 49.60.215 was enacted 1957, while RCW 4.08.120 has existed in essentially the same form since 1869.

sexual abuse of children only if the district was negligent and the conduct was foreseeable.” District Resp. Br. at 21.

Yet this argument ignores that under RCW 49.60.215, employers *are* strictly liable, at least where the “employee’s intentional criminal conduct” constitutes discrimination in public accommodations and otherwise satisfies the elements of a claim under § .215 as articulated in this Court’s decision in *Fell v. Spokane Transit Auth.*, 128 Wn.2d 618, 637-42, 911 P.2d 1319 (1996).¹¹ The fact that a common law doctrine and a statutory duty may in certain circumstances and to some degree overlap provides no warrant for limiting or restricting the reach of a duty recognized under a duly-enacted statute that has distinct elements and purposes. To the extent the District is correct that *common law* liability has historically been predicated on a negligence standard, this is unrelated to whether a public accommodation, like a school, is strictly liable for discrimination as a matter of *statute*.

The Legislature may “supersede, abrogate, or modify the common law by statute.” *State v. Farnworth*, 192 Wn.2d 468, 430 P.3d 1127 (2018).¹²

¹¹ A claim of discrimination in public accommodation requires proof that 1) plaintiff is a member of a protected class, 2) defendant’s establishment is a place of public accommodation, 3) defendant discriminated against the plaintiff, and 4) plaintiff’s protected status was a substantial factor that caused the discrimination. *See Fell*, 128 Wn.2d at 637; *see also Floeting*, 192 Wn.2d at 853-54.

¹² While it is true that statutes in derogation of common law are strictly construed, the Court in *Floeting* considered the body of common law within which § .215 operates and concluded that the statute imposed strict liability, notwithstanding common law principles of vicarious liability that apply in related contexts. *See Floeting*, 192 Wn.2d at 856-57 (concluding “Group Health suggests we should apply an agency or vicarious liability lens to employer liability for employee conduct under RCW 49.60.215. . . . This would require us to ignore both the plain language of the statute and the larger statutory scheme. RCW 49.60.215 is not a

If there is a conflict, common law must yield. However, statutory law and common law that are not inconsistent may easily coexist. *Cf. King Cty. v. Vinci Constr. Grands Projets/Parsons RCI/Frontier-Kemper, JV*, 188 Wn.2d 618, 628, 398 P.3d 1093, 1098 (2017) (recognizing that unless a statute is “so inconsistent with and repugnant to the prior common law,” they may “simultaneously apply”).

Litigants routinely assert multiple theories of recovery arising out of the same or a similar set of facts, and the law recognizes their right to do so. *See* CR 8(e)(2); *see also Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 546, 442 P.3d 608 (2019) (recognizing parties’ right to assert alternative, even inconsistent, theories). Here, the Legislature elected to impose strict liability on employers for statutory claims of discrimination in public accommodations. The elements of a claim under that statute as outlined by this Court in *Fell*, *see* 128 Wn.2d at 637, are distinct from the negligence doctrines referenced by the District.¹³ Each of these doctrines remain intact. These doctrines are wholly consistent, and may “simultaneously apply,” alongside the strict liability standard under § .215.

negligence statute where foreseeability matters; it imposes direct liability for discriminatory acts, regardless of the culpability of the actor”).

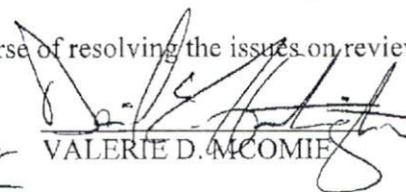
¹³ For instance, a claim for breach of the duty to protect, requires proof of 1) a special relationship between the defendant and a vulnerable victim, like a school to its students, 2) failure to use reasonable care within the context of the relationship to prevent foreseeable harm, 3) resulting injury, and 4) proximate cause. *See N.L.*, 186 Wn.2d at 429-30. While these elements may overlap with a claim under RCW 49.60.215, they are distinct. *See Fell*, 128 Wn.2d at 637.

The District is correct that the law presumes “the Legislature does not change existing law without stating its intent to do so.” Dist. Resp. Br. at 15-16. But Plaintiffs do not argue that by enacting RCW 49.60.215, the Legislature intended to change existing common law doctrines. What the Legislature plainly intended to do instead was to *supplement* existing common law to target the particular evil of discrimination in public accommodations as a matter of statute.

Ultimately, the District’s argument is not unique to schools, but is equally applicable to other defendants. The cases cited by the District involve common law theories that apply to schools and non-schools alike, and do not impose strict liability on *any* defendant. Were this body of common law read to relieve schools from the reach of the strict liability standard under § .215, there is no principled reason to deny the same protection to other public corporations. The Court should reject the expansive and unwarranted exception urged by the District and permit these separate claims to operate simultaneously, as intended.

VI. CONCLUSION

The Court should adopt the analysis advanced in this brief in the course of resolving the issues on review.

for

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DANIEL E. HUNTINGTON

On behalf of
Washington State Association for Justice Foundation

APPENDIX

A-1:	RCW 49.60.215
A-2:	RCW 4.08.110
A-3:	RCW 4.08.120
A-4:	RCW 4.92.090
A-5:	RCW 4.96.010

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RCW 49.60.215

Unfair practices of places of public resort, accommodation, assemblage, amusement—Trained dog guides and service animals.

2018 c 176 § 3; 2011 c 237 § 1; 2009 c 164 § 2; 2007 c 187 § 12; 2006 c 4 § 13; 1997 c 271 § 13; 1993 c 510 § 16. 1985 c 203 § 1; 1985 c 90 § 6; 1979 c 127 § 7; 1957 c 37 § 14.

NOTES:

Declaration—Finding—Purpose—2018 c 176:

same places of public accommodation face a dilemma when someone enters the premises and intentionally misrepresents his or her animal as a service animal. The legislature finds that the misrepresentation of an animal as a service animal trained to perform specific work or tasks constitutes a disservice both to persons who rely on the use of legitimate service animals, as well as places of public accommodation and their patrons. The purpose of this act is to penalize the intentional misrepresentation of a service animal, which delegitimizes the genuine need for the use of service animals and makes it harder for persons with disabilities to gain unquestioned acceptance of their legitimate, properly trained, and essential service animals." [2018 c 176 § 1.]

Effective date—2018 c 176: "This act takes effect January 1, 2019." [2018 c 176 § 7.]

Severability—1993 c 510: See note following RCW 49.60.010.

Denial of civil rights: RCW 9.91.010.

RCW 4.08.110

Action by public corporations.

An action at law may be maintained by any county, incorporated town, school district or other public corporation of like character, in its corporate name, and upon a cause of action accruing to it, in its corporate character and not otherwise, in any of the following cases:

- (1) Upon a contract made with such public corporation;
- (2) Upon a liability prescribed by law in favor of such public corporation;
- (3) To recover a penalty or forfeiture given to such public corporation;
- (4) To recover damages for an injury to the corporate rights or property of such public corporation.

[1953 c 118 § 1. Prior: Code 1881 § 661; 1869 p 154 § 601; RRS § 950.]

RCW 4.08.120

Action against public corporations.

An action may be maintained against a county or other of the public corporations mentioned or described in RCW **4.08.110**, either upon a contract made by such county, or other public corporation in its corporate character and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or omission of such county or other public corporation.

[**1953 c 118 § 2**. Prior: Code 1881 § 662; **1869 p 154 § 602**; RRS § 951.]

RCW 4.92.090

Tortious conduct of state—Liability for damages.

The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

[1963 c 159 § 2; 1961 c 136 § 1.]

RCW 4.96.010

Tortious conduct of local governmental entities—Liability for damages.

(1) All local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation. Filing a claim for damages within the time allowed by law shall be a condition precedent to the commencement of any action claiming damages. The laws specifying the content for such claims shall be liberally construed so that substantial compliance therewith will be deemed satisfactory.

(2) Unless the context clearly requires otherwise, for the purposes of this chapter, "local governmental entity" means a county, city, town, special district, municipal corporation as defined in RCW **39.50.010**, quasi-municipal corporation, any joint municipal utility services authority, any entity created by public agencies under RCW **39.34.030**, or public hospital.

(3) For the purposes of this chapter, "volunteer" is defined according to RCW **51.12.035**.

[2011 c 258 § 10; 2001 c 119 § 1; 1993 c 449 § 2; 1967 c 164 § 1.]

NOTES:

Short title—Purpose—Intent—2011 c 258: See RCW **39.106.010**.

Purpose—1993 c 449: "This act is designed to provide a single, uniform procedure for bringing a claim for damages against a local governmental entity. The existing procedures, contained in chapter **36.45** RCW, counties, chapter **35.31** RCW, cities and towns, chapter **35A.31** RCW, optional municipal code, and chapter **4.96** RCW, other political subdivisions, municipal corporations, and quasi-municipal corporations, are revised and consolidated into chapter **4.96** RCW." [**1993 c 449 § 1.**]

Severability—1993 c 449: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not

affected." [1993 c 449 § 15.]

Purpose—1967 c 164: "It is the purpose of this act to extend the doctrine established in chapter 136, Laws of 1961, as amended, to all political subdivisions, municipal corporations and quasi municipal corporations of the state." [1967 c 164 § 17.]

Severability—1967 c 164: "If any provision of this act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected." [1967 c 164 § 18.]

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury, under the laws of the State of Washington, that on the 27th day of January, 2020, I served the foregoing document by email to the following persons:

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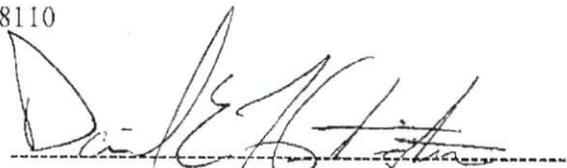
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