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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 27652-0-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III



LARRY MICHAELS, and DEBBIE MICHAELS, husband and wife
and the marital community comprised thereof;

DAN P. EVANS, a single person; and

KATHY D. CMOS, individually, and as Administratrix and
Representative of the Estate of Mike P. Cmos, Jr.;

Respondents,

v.

CH2M HILL, INC., a Florida corporation and KELLY IRVING,

Appellants.

REPLY OF CH2M & IRVING TO CMOS, MICHAELS & EVANS

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INTRODUCTION

The City and CH2M chose to allocate the risks and responsibilities of this project by contract. It is undisputed that neither party assumed contractual liability for the other's workers. The City is contractually responsible for its own workers' safety.

Similarly, it is undisputed that the City retained complete and unfettered control over its operators and their safety. CH2M did not assume any actual control over the operators at the place of injury (on top of and around the digesters) or anywhere else on the project. The City thus remains wholly responsible for its operators and their safety, in fact and by contract.

The plaintiffs wish to cast this legal arrangement as a bad thing, but it is not. Washington – like every other jurisdiction in this country – encourages parties to allocate the risks and responsibilities of a large project expressly by contract. This public policy makes for clear lines of command and control at the worksite and for clear legal responsibility when tragedy strikes. Blurring these lines can lead to injury, injustice, and irresponsibility.

CH2M and Irving are immune from the plaintiffs' suits, owed them no duties, and did not proximately cause their tragic injuries. This Court should reverse and dismiss.

REPLY RE STATEMENT OF THE CASE

The plaintiffs' interpretation of the record is not borne out by the record itself. But this appeal is about immunity, duty, and proximate cause (factual and legal), all but one of which are legal questions that do not turn on the facts, so there is no point in belaboring them here. Nonetheless, Michaels and Evans' response on the findings betrays a fair amount of confusion, so CH2M and Irving must briefly respond to them.

A. Mr. Irving did not have any power to "accept" or "authorize" the skillets.

Michaels & Evans discuss findings 33 and 34, arguing that Mr. Irving "accepted" and even "authorized" the skillets. MBR 4-7. This is directly contrary to all of the relevant evidence. See BA 27-35. Simply put, the City strictly limited Mr. Irving's participation. *Id.* These findings' implications that he had any authority to "approve" the skillets are unsupported by substantial evidence.

B. The "duty" findings have nothing to do with duty.

Michaels & Evans insist that findings 37 through 44 somehow "prove" (or factually support) the existence of a legal duty. MBR 7-11. The standard of care is not a source of a legal duty under any circumstances. CH2M and Irving challenge these

findings simply because they appear under the “duty” heading, but have nothing to do with duty.

C. The separation of flows did not affect the setting of the three-way valve, which was the immediate cause of the dome collapse.

Michaels & Evans discuss findings 42-43 and 48, defending the proposition that the separation of flows changed the valving configuration for transfers. MBR 12-14. But consistent with all of the pertinent testimony, the trial court found only that the three-way valve was incorrectly set (CP 3118, F/F 55):

In fact, the 3-way valve on the “17 level” had been set the wrong way, and turned the sludge back toward Digester 3 instead of toward Digester 2.

While the court also noted that a “01” level valve was unnecessarily closed, that “prevented sludge from re-entering the digester,” so it was purely a blessing. *Id.*

The key here – and it is the key to the causation issue – is that everyone agreed that the separation of flows (with skillets) did not affect the three-way valve at all. *See, e.g.*, BA 19-22. There is no testimony to the contrary. Since the separation of flows had no effect whatsoever on the three-way valve, it could not have been a source of “confusion” that “caused” this tragedy, as further discussed in the opening brief and below.

D. Finding 46 happened in the morning.

Michaels & Evans discuss finding 46, which notes Mr. Headley's concern that D3 was too full. MBR 14-15; CP 3116 (F/F 46). CH2M and Irving challenged this finding solely as to the timing: the concern that D3 was too full arose in the morning when the new shift came on, as explained at BA 13-15. The significance of this is that the City had overfilled the digesters and created the dangerous situation the night before the collapse, not just during that morning, and it is undisputed that the operators were worried about it first thing in the morning. *Id.* Seen in its true light, the City's failure to address the situation appears truly reckless.

E. Michaels & Evans continue their *post hoc* thinking.

Michaels & Evans' discussions of findings 56 through 58 nicely illustrate the entire basis of their case: the operators had never collapsed a dome before, so the separation of flows must have caused them to do so this time because it happened five days after the flow separation. MBR 15-17. It is undisputed that the operators had put enough sludge in all three domes to crack them in the past (BA 12), so they had been lucky in the past. As fully explained in the opening brief and below, coincidence is not causation, nor even evidence of causation.

REPLY

In addition to setting out the standards of review, CH2M and Irving raised three major issues on appeal: immunity, duty, and proximate cause. As to each of these three issues, this Reply responds in separate subsections to both the Cmos Brief of Respondents (CBR) and the Michaels & Evans Brief of Respondents (MBR).

A. Standards of Review.

CH2M and Irving set out the appropriate standards of review for immunity (*de novo*), duty (*de novo*), and proximate cause (substantial evidence for cause in fact, *de novo* for legal cause). BA 39-40. Cmos, Michaels and Evans do not respond to this argument. They thus tacitly concede *de novo* review on immunity, duty, and legal cause.

B. The design professional immunity statute bars these plaintiffs' claims.

CH2M first argued that the design professional immunity statute, RCW 51.24.035, bars these plaintiffs' claims. BA 40-48. CH2M specifically challenged F/F 94 & 95, which are actually legal conclusions and which are the only "findings" regarding the immunity statute in the trial court's Findings & Conclusions. *Id.*; BA App. A. Simply put, CH2M and Kelly Irving are (1) design

professionals, (2) who are third-persons (*vis-à-vis* these workers) retained to perform professional services on a 10-year construction project, (3) who did not assume responsibility for worker safety in any contract (but rather disclaimed it), and (4) did not “actually exercise[] control over that portion of the premises where the worker[s were] injured” (on top of and around the digester dome). BA 41-45; RCW 51.24.035(1). This worker’s compensation statute immunizes CH2M and Irving.

Moreover, the narrow exception for negligent preparation of design plans or specifications does not apply because (1) at the City’s request, CH2M did not prepare any design plans or specifications for the separation of flows; (2) the City chose to design, fabricate and install the skillets without design-professional assistance; (3) neither Mr. Irving’s rejected suggestion for a valve to separate the flows, nor the skillets themselves, injured anyone; and (4) the City specifically limited Mr. Irving’s role and rejected his offer of design assistance. BA 45-48. Since the immunity applies and the exception does not, this Court should reverse and dismiss on this independently sufficient legal ground.

1. Cmos does not overcome the unambiguous statutory design-professional immunity.

Cmos begins the immunity argument with vague allusions to a “fundamental, substantial property right to seek indemnity through a lawsuit.” CBR 25 (citing *Hunter v. N. Mason High Sch.*, 85 Wn.2d 810, 814 P.2d 845 (1975), and *State v. Vance*, 29 Wash. 435, 70 P. 34 (1902)). These cases say no such thing, and no Washington court has ever held that plaintiffs have a “fundamental right” to sue any particular defendant. Cmos cannot seriously argue (and does not actually argue) that a statutory cause of action (RCW 51.24.030’s authorization to sue third parties despite the workers’ compensation bar) is a fundamental constitutional right.

Cmos next makes a series of assertions regarding the exception to the immunity statute (rather than first addressing the statute’s application): Cmos claims that if a statute is in derogation of common law, it is strictly construed, but no intent to derogate from the common law will be inferred, so “logically” an exception to a statute that derogates should be broadly construed. CBR 25-26. The main problem with all of this is that RCW 51.24.035 is not in derogation of common law, but rather codifies the common law as it existed in 1987. Cmos does not actually argue to the contrary. *Id.*

Indeed, Cmos cites no case holding that prior to this statute (part of the 1987 Tort Reform Act amendments) workers could sue design professionals who assumed no contractual or actual safety duties at the worksite. On the contrary, the cases discussed in the opening brief held that a worker may not sue a design professional who assumed neither contractual duties nor actual worksite control. See BA 55-58 (discussing *Riggins v. Bechtel Power Corp.*, 44 Wn. App. 244, 722 P.2d 819, *rev. denied*, 107 Wn.2d 1003 (1986); *Porter v. Stevens, Thompson & Runyan, Inc.*, 24 Wn. App. 624, 602 P.2d 1192 (1979), *rev. denied*, 93 Wn.2d 1010 (1980); and *Loyland v. Stone & Webster Eng'g Corp.*, 9 Wn. App. 682, 687, 514 P.2d 184 (1973), *rev. denied*, 83 Wn.2d 1007 (1974)). The 1987 Act apparently codifies the 1986 *Riggins* decision, limiting design-professional liability to contractual or actual duties. The immunity statute is not in derogation of common law and, as Cmos notes, this Court will not simply infer a legislative intent to change the common law. CBR 26 (citing *McNeal v. Allen*, 95 Wn.2d 265, 269, 621 P.2d 1285 (1980)).

Thus, “logically,” an exception to the immunity statute for negligent preparation of design plans should not be “broadly construed,” such that the exception swallows the rule. On the

contrary, unambiguous statutes are not subject to interpretation. See, e.g., **Waste Mgmt. of Seattle, Inc., v. Utils. & Transp. Comm'n**, 123 Wn.2d 621, 629, 869 P.2d 1034 (1994). Cmos fails even to argue that the statutory language is ambiguous. As one court noted in rejecting a similar attempt to evade the statutory immunity through post-contract conduct:

[The] common law theory of assumption of the duty by conduct would practically render meaningless the legislative enactment requiring that responsibility for safety practices be specifically assumed in the contract. See **Acosta v. Richter**, 671 So.2d 149, 153 (Fla.1996) (“[A] statute should be interpreted to give effect to every clause in it.”); **Palm Beach County Health Care Dist. v. Everglades Memorial Hosp., Inc.**, 658 So.2d 577, 580 (Fla. 4th DCA 1995) (“A statute must be construed to give effect to the plain meaning of its words.”).

Hatfield & Stoner, Inc. v. Malcolm, 687 So.2d 295 (Fla. 4th DCA 1997); accord **Estate of Reyes v. Parsons Brinkerhoff Constr. Servs.**, 784 So.2d 514 (Fla. 3rd DCA 2001). CH2M and Irving are immune under the Industrial Insurance Act (IIA).

Left with no favorable Washington law, Cmos next provides a lengthy, if misleading, description of an inapposite Kansas case. CBR 26-28 (discussing **Edwards v. Anderson Eng'g, Inc.**, 284 Kan. 892, 166 P.3d 1047 (2007)). There, the legal issue was whether a line an engineer painted on top of a very large pipe was

a “design plan or specification,” where the pipe split and rolled, killing the worker who cut along the line. 284 Kan. at 903. Cmos inaccurately claims that **Edwards** “held, as a matter of law, that the engineer’s markings . . . were ‘*negligent* preparation of design plans’” CBR 27 (emphasis added). Rather, the court held that “Anderson’s markings on the concrete pipe were design plans or specifications” (284 Kan. at 903-04); but the court remanded for trial as to negligence. 284 Kan. at 903, 905.

Cmos suggests that **Edwards** is analogous because Irving participated in painting a red mark where the City installed its skillets. But the trial court did not find that the location of that mark was negligent. It was not negligent, but rather effectively indicated where to separate the flows. Nor did the pipe on which the mark was painted crush the workers or otherwise injure them. Indeed, no injury whatsoever resulted from the non-negligent location of the red mark. **Edwards** is simply inapposite.

In any event, the plaintiffs’ real claim is not about anything so tangible as paint on a pipe. Rather, their claim is that not doing an analysis of the downstream operational effects of the flow separation – which the City neither requested nor wanted – is the “negligent preparation of design plans or specifications.” If the

plaintiffs are incorrect (*i.e.*, if the exception to the design-professional-immunity statute does not apply because not providing an analysis of downstream operations is not “the negligent preparation of design plans and specifications”), then CH2M and Irving are immune from liability, even assuming *arguendo* that they were negligent in failing to give the operational advice regarding downstream effects that the City neither sought nor wanted.

The plaintiffs’ claim simply stretches the statutory language, “preparation of design plans and specifications,” well beyond its breaking point. Even Cmos’ lead case, ***Edwards***, holds that the interpretation of this phrase is a legal question of statutory interpretation for the court. 284 Kan. at 900. On *de novo* review, this Court should hold that not providing unwanted operational analysis is not the same thing as negligently preparing design plans and specifications, as a matter of law. Otherwise, virtually everything a design professional does (or does not do) will be subsumed within the exception, and the immunity will disappear.

Cmos also fabricates tenuous associations between the City/CH2M contract, on one hand, and the workers’ injuries, on the other. CBR 28-29. A single paragraph covering more than a page culminates in the assertion, “CH2M and Irving’s liability arises out of

the 'negligent preparation of design plans' for the installation of valves/skillets [*sic*] in the digester piping, which was an interim measure in CH2M's ongoing recirculation redesign project, and is specifically excepted from the immunity statute under RCW 51.24.035(2)." CBR 29. This is incorrect for many reasons.

First, the statute does not create an exception to design-professional immunity for "liability [that] **arises out of** the 'negligent preparation of design plans'" *Id.* (emphasis added). Rather, the immunity "does not apply **to** the negligent preparation of design plans and specifications." RCW 51.24.035(2) (emphasis added). The statutory language is much too narrowly focused to admit of plaintiffs' proposed broad gloss on the statute.

Second, while there are no such things as "valves/skillets" (an obvious rhetorical ruse to minimize the City's rejection of Irving's valve suggestion), and while the trial court did "find" that the flow-separation suggestion was an interim fix during the overall recirculation redesign, the City did not ask for or receive any design plans or specifications regarding the interim fix. At most, an analysis of the downstream effects on valving operations would have been operational advice, not the "preparation of design plans and specifications." Again as in *Edwards*, this is a question of law,

so the plaintiffs' "expert opinions" are irrelevant. The trial court erred as a matter of law in ruling that a mere operational suggestion was the "preparation of design plans and specifications."

Third, even assuming *arguendo* that the nonexistent "design plans" had been prepared, Cmos admits that "no one was injured during the actual installation of the skillets in the digester piping." CBR 31. Similarly, no one testified (nor is there any finding) that the mere location of the skillets (the only thing in which Mr. Irving allegedly participated) was incorrect or was anything other than sound engineering that worked – it fixed the specific problem Mr. Pelton asked Mr. Irving to brainstorm about. Again, the narrow exception to the design-professional-immunity statute cannot admit such a broad interpretation without destroying the immunity itself.

Cmos next argues that the immunity statute itself cannot apply because the "closest construction was several hundred feet away from the skillet installation." CBR 30-31. As noted in the opening brief, however, a statute's scope is not measured in feet. And Cmos cites no supporting authority for this argument. Again, even *Edwards* held that a vacant lot set apart from an already completed construction project was still a construction site for purposes of the statute. 284 Kan. at 901-02.

The statute broadly reaches design professionals “*retained* to perform *professional services* on a construction *project*.” BA 42 (emphases added). The immunity is this broad because design professionals retained to work on a project often do their work (a) off-site, (b) over many years, and (c) before construction even commences. In each of these circumstances – covering a great deal of design-professional work – the plaintiffs’ “tape measure” interpretation would simply eliminate the statutory immunity. This Court should reject interpretations that are so directly contrary to the express statutory intent: to grant immunity.

Indeed, in order for the plaintiffs’ interpretation to be correct, the statute would have to apply only to engineers “actually preparing design plans at the precise location of the construction work,” not to design professionals hired to work on a project. The unambiguous statutory language belies Cmos’ arguments.

Finally on this point, Cmos claims that the statutory immunity “does not apply where the plaintiffs’ claims are unrelated to the violation of any worksite safety practices and the injury did not occur at the time and at the place where the skillets were installed in the digester piping system.” CBR 31. Equal protection obviously does not permit the application of a general immunity statute to turn

on the very specific facts of one case. Be that as it may, it is simply false to suggest that the plaintiffs' claims are "unrelated to the violation of any worksite safety practices." It remains undisputed that but for the City's staggering succession of safety violations, this tragedy could never have occurred. See, e.g, Exs 578-80 (Request for Admission No. 47, where plaintiffs admit that the City was cited for violating a great many safety regulations).

Moreover, the fact that "the injury did not occur at the time and . . . place where the skillets were installed" has no bearing on whether CH2M and Irving were "retained to perform professional services on a construction project." They indisputably were so retained. The Court should reverse and dismiss because CH2M and Irving are immune from liability to these workers.

2. Michaels & Evans do not overcome design professional immunity.

Michaels & Evans argue in a footnote that the trial court's "finding" that the immunity statute does not apply is supported by "substantial evidence." MBR 26 n.7. Interpretation of the immunity statute is a question of law, subject to *de novo* review. For all of the reasons stated above and in the opening brief, the

unambiguous immunity statute applies here. Michaels & Evans offer no substantial argument to the contrary.

They do claim that the immunity statute is narrowly construed, yet the exception is liberally construed. MBR 26-28. But their assertion that the statute “limits the normal right to file a third-party action . . . under RCW 51.24.030(1)” turns the statutory scheme on its head. A third-party action is itself an exception to the general workers’ compensation scheme, in which workers gave up their right to sue in return for sure and speedy compensation from a fund – which these plaintiffs have received and are receiving. The immunity statute merely gives design professionals parity with the City – which is only fair when, as here, the design professionals are not contractually responsible for worker safety and assumed no actual control over the workers’ day-to-day activities.

While it is true that non-employer third parties were initially left out of the “great compromise” of worker’s compensation, the Legislature subsequently extended immunity to design professionals, ensuring that they do not face liability for no better reason than that they are the deepest pocket available. The injustice of this liability is manifest where, as here, plaintiffs’ injuries unarguably were caused by their employer’s negligence and

recklessness, for which the employer is immune and its workers have received compensation. This Court should uphold the Legislature's unequivocal intent to immunize CH2M and Irving.

The remainder of Michaels & Evans' argument on this issue is a series of bald assertions that Mr. Irving's suggestion to separate the flows was a "negligent design plan," so the exception applies. MBR 29-32. But as noted above, the findings on which they rely (F/F 24 & 28) do not say that. BA App. A (CP 3112). The immediate cause of this incident was that "experienced operators . . . were confused **by the installation of the skillets** and because **they had not been given any training or instruction** regarding the proper valving for sludge transfers after the skillet installation." *Id.*, CP 3118 (F/F 56) (emphases added). It is undisputed that CH2M and Irving did not – and were never asked to – design the installation of the skillets. BA 32-34. It is equally undisputed that CH2M and Irving had no responsibility for training the City's employees on valving transfers. BA 27-29. Since they had no "design" responsibilities and made no "designs" regarding the cause found by the trial court, there was no "negligent design plan."

Finally, even assuming *arguendo* that CH2M and Irving could have had a responsibility for "training or instruction regarding

the proper valving for sludge transfers after the skillet installation,” any such instructions would be purely operational training, not “design plans or specifications”. The exception to design-professional immunity for negligent plans or specifications thus would not apply. The immunity statute therefore bars the plaintiffs from suing CH2M and Irving for damages sustained in operating the City’s wastewater treatment plant. This Court should reverse and dismiss on this independently sufficient legal ground.

C. CH2M and Irving owed no legal duty to these plaintiffs.

CH2M and Irving next argued that the trial court erred as a matter of law by skipping over the duty question and purporting to “find” a duty in the standard of care. BA 48-50 (quoting the trial court’s Memorandum Opinion at CP 3041, incorporated into the Findings & Conclusions at CP 3107). It further erred in relying on RCW 18.43 and related WACs, which establish no duty as a matter of law under *Burg v. Shannon & Wilson*, 110 Wn. App. 798, 43 P.3d 526 (2002) and other authorities. BA 51-55. And the Washington authorities cited to the trial court, including *Riggins*, *Loyland* and *Porter*, *supra*, also established that CH2M and Irving owed no duty to these plaintiffs. BA 55-60 (also discussing *Folsom v. Burger King*, 135 Wn.2d 658, 671, 958 P.2d 301 (1998)).

Indeed, these cases – and the immunity statute itself – are founded on the fundamental principle that a design professional should not be held liable for safety lapses unless it has expressly accepted responsibility for those safety practices. On the contrary, design professionals should be entitled to rely on an employer's compliance with safety regulations intended to protect its own employees. Here, the City tragically failed to meet its duties to its operators. No contract, statute, or common law policy or precedent deflects those duties onto CH2M and Irving. This Court should reverse and dismiss.

Somewhat surprisingly, both Cmos and Michaels & Evans essentially walk away from the trial court's actual rulings, attempting instead to come up with new, after-the-fact rationalizations for this unjust decision. If this Court decides this issue based on what the trial judge actually ruled after the bench trial, there is no question that CH2M and Irving should prevail. But the plaintiffs' new theories are no stronger than the trial court rulings that the plaintiffs solicited, but now eschew. No legal duty runs from these defendants to these plaintiffs as a matter of law.

1. Cmos established no legal duty.

Ignoring appellants' initial challenge to the trial court's actual rulings, Cmos commits the same error as the trial court, skipping over duty and going straight to the standard of care: "CH2M was found negligent in failing to comply with the standard of care for an engineer designing an upgrade to a complicated piping system." CBR 31-32. This is simply not true: while the trial court mentions the digester redesign in a section of findings called "Whether Defendants CH2M and Irving owed a legal duty to these Plaintiffs," the trial court did not enter any finding or conclusion that CH2M and Irving did anything wrong (or fell below the standard of care) regarding that redesign, nor did it find that the digester redesign (which was only 50% finished) actually caused these plaintiffs any damage. BA App. A, CP 3108-14.

Rather, the trial court found that the plaintiffs' injuries were caused by confusion about the skillet installation because the City's operators were not properly trained, albeit implying that CH2M and Irving had a duty to train the City's operators:

These experienced operators failed to valve the transfer correctly **because they were confused by the installation of the skillets and because they had not been given any training or instruction** regarding proper valving for sludge transfers after the skillet installation.

If CH2M and Irving had complied with the standard of care **by providing a written analysis regarding the effects of the skillet installation on valving operations**, it is more probable than not that the operators would have known how to properly valve the attempted pumped transfer

App. A, CP 3118 (F/F 56 & 57) (emphases added). The trial court's (and plaintiffs') error was in failing to explain why CH2M and Irving had a **legal duty** to provide a written analysis regarding the effect of the skillet installation on valving operations, where the contract eschews such a duty and CH2M assumed no actual control.

After setting forth the standard of a care for an engineer (still bypassing the duty issue), Cmos next discusses two inapposite Iowa cases in which negligent written design plans and specifications actually caused injuries. CBR 32-34 (citing **Evans v. Howard R. Green Co.**, 231 N.W.2d 907 (Iowa 1975); **McCarthy v. J.P. Cullen & Son Corp.**, 199 N.W.2d 362 (Iowa 1972)). As an initial matter, this Court should not follow Iowa law, which materially conflicts with Washington law, as the **McCarthy** decision (quoted in **Evans**) makes clear. There, an architect furnished defective and inadequate plans and specifications, negligently failing to provide for surface water drainage. **McCarthy**, 199 N.W.2d at 370. A neighboring owner suffered water damage during construction. *Id.*

In rejecting the architect's claim that his liability could not arise until work was completed, the **McCarthy** court stated, "[w]e cannot agree defendant architect can so easily wish off **his duty to the public generally**" *Id.* (emphasis added). While **McCarthy** enforced a duty owed to the general public, Washington courts have rejected the claim that a duty owed to the general public is a duty owed to a specific plaintiff absent a special relation, as explained in the opening brief. See BA 51-53 (discussing **Burg**, *supra*; RESTATEMENT (SECOND) OF TORTS § 314; **Taylor v. Stevens County**, 111 Wn.2d 159, 163, 759 P.2d 447 (1988); and **Hertog v. City of Seattle**, 138 Wn.2d 265, 275-76, 979 P.2d 400 (1999)). This public duty doctrine pervades Washington tort law, and many more cases could be cited here. This Court should not follow Iowa law that is so fundamentally inconsistent with Washington law.¹

In any event, **McCarthy** and **Evans** are inapposite. As in **McCarthy**, in **Evans** the architect prepared defective plans and specifications: "The jury could and obviously did find Green was negligent in designing the final sludge pumping station by failing to

¹ Of course, Washington also follows the "common enemy" doctrine regarding surface waters, so the outcome in **McCarthy** likely would also be different for that reason under Washington law. See, e.g., **Halverson v. Skagit County**, 139 Wn.2d 1, 14-15, 983 P.2d 643 (1999).

completely separate the wet and dry wells and to thereby permit lethal gas to seep from one well to the other.” *Evans*, 231 N.W.2d at 913. This negligent design directly violated state safety standards. *Id.* These violations killed two workers. *Id.* at 912.

But here, unlike in *McCarthy* and *Evans*, the trial court did not find that CH2M and Irving prepared any written plans or specifications that caused these plaintiffs’ injuries. Mr. Irving’s mere suggestion to separate the flows did not kill or injure these plaintiffs. Nor were the skillets themselves defective in any way. *McCarthy* and *Evans* have no application here.

Cmos next claims that “CH2M negligently performed duties assumed in CH2M’s contract with the City.” CBR 35-36 (citing *Leija v. Materne Bros., Inc.*, 34 Wn. App. 825, 664 P.2d 527 (1983)). It is difficult to understand the import of this incorrect assertion regarding duties owed to the City (not to these plaintiffs). The City never claimed, and the trial court never found, that CH2M breached any contractual duty owed to the City. Cmos never explains the relevance of the fact that CH2M assumed duties to the City to (a) defend negligence claims, (b) exercise professional care, or (c) design and manage the digester-recirculation redesign. CBR

36. CH2M and Irving did not assume any duties to these plaintiffs. Cmos' vague assertions lead nowhere.

Leija is obviously inapposite. There, Materne (a road construction company) contracted to repair a section of road in Yakima County. *Leija*, 34 Wn. App. at 826. The contract incorporated the State Highway Commission's standards for road construction, and specifically stated that Materne assumed liability for injuries to third-persons: Materne "shall be liable for injuries and damages to persons and property suffered by reason of [Materne's] operations or any negligence in connection therewith." *Id.* at 827. Plaintiff's decedent was killed when he ran into one of Materne's machines engaged in road construction. *Id.*

Plaintiff alleged that her decedent was a third-party beneficiary of the contract.² *Id.* at 828. This Court agreed, holding that Materne expressly assumed a contractual duty to provide for

² *Leija* was decided prior to *Burg*, *supra*, and before seminal contractual-third-party-beneficiary cases like *Del Guzzi Constr. Co. v. Global N.W., Ltd.*, 105 Wn.2d 878, 719 P.2d 120 (1986), and *Postlewait Constr., Inc. v. Great Am. Ins. Cos.*, 41 Wn. App. 763, 706 P.2d 636 (1985). Perhaps for this reason, it fails to note that third-party beneficiary status depends on whether the parties objectively manifest such an intent in the contract. *Burg*, 110 Wn. App. at 807-08; *Del Guzzi* at 886; *Postlewait* at 765. No intent to benefit these plaintiffs appears in the CH2M/City contract.

the safety of third-parties traveling on the roadway, so liability could follow if Materne breached that duty (*id.* at 829):

Viewing the contract as a whole, a correct interpretation would be that Materne was to provide safety devices and use precautions in its work as would be reasonably necessary to protect the State from liability to the traveling public. Leija, as a member of the traveling public, would be entitled to the benefit of that contract.

Here, by contrast, the contract does not say that CH2M and Irving will provide safety for third parties, and it provides precisely the opposite as to City employees. Thus, CH2M & Irving's presence and services on site shall not make them responsible for any safety precautions:

The presence or duties of Consultant's personnel at a construction site, whether as on site representatives or otherwise, do not make Consultant or Consultant's personnel in any way responsible for those duties that belong to the Agency . . . and do not relieve . . . any . . . entity of their obligations, duties, and responsibilities, including . . . any health or safety precautions required by such construction work.

Ex 1, Ex I (BA App. F). And CH2M and Irving had no authority to control the City's operators or their work, to control any safety precautions, or to correct any safety problems (*id.*):

Consultant and Consultant's personnel have no authority to exercise any control over any . . . entity or their employees in connection with their work or [any] health or safety precautions and have no duty for inspecting, noting, observing, correcting, or reporting on health or safety

deficiencies of the . . . entity or any other persons at the site except Consultant's own personnel.

As noted above, this is sound policy: the party directly in control of worker safety (the City) retains that responsibility under the contract. Unlike *Lieja*, in which the courts left the legal responsibility where the parties' contract wisely placed it, here the trial court's ruling tacitly placing a duty on CH2M and Irving to train the City's workers or to warn them of possible safety deficiencies flies in the face of the unambiguous contract. It is also bad policy.

The *Lieja* analysis – focusing on the terms of the contract – is also consistent with cases like *Folsom*, *Burg*, *Riggins* and *Loyland*, each of which examines the contract terms to determine whether a duty exists. Both the plaintiffs and the trial court failed to engage in this analysis of the whole contract, ignoring the provisions that undermine liability here. This Court should read the contract as a whole, reverse and dismiss.

Having failed to cite a single apposite case imposing a duty in circumstances like these – and thus failing in their burden to prove that a duty exists – Cmos takes on CH2M and Irving's no-duty arguments. CBR 36-39. Cmos first claims that the need to trace lines, double-check and be sure when valving a transfer was

not open and obvious, so CH2M had a duty to warn the operators. *Id.* at 36-37. Yet the operators that day (Headley, Fletcher and Thain) had a combined transfer-operation experience of nearly 50 years. See BA 13. They were unequivocally trained to always trace lines, double-check and be sure:

CAUTION: Because of the complexity of the digester sludge lines and valving, it is easy to, inadvertently, transfer a large amount of sludge to some place other than intended in a short period of time or to cause damage to equipment or danger to personnel. Also, be aware that piping color codes may change when passing through the ceiling/floor from the 01 to 17 levels. Therefore, be scrupulously careful in these operations. **BE SURE! TRACE LINES! CHECK IT OUT AND THEN DOUBLE-CHECK! IF THERE IS ANY DOUBT, CHECK WITH THE CHIEF OPERATOR BEFORE PROCEEDING!**

Ex 508, DT-20 (emphases in original). They were also strongly cautioned never to attempt any procedure for which they were not specifically trained (Ex 508, DT-3):

WARNING: Because of the complexity of the DT area and its systems, there is the danger that improper operation could result in injury to personnel or damage to the plant. Operators must not attempt any procedure or operation for which they have not been trained and/or cleared to do by the Chief Operator or Senior Operator. Any unusual operation or change from normal procedure – as described in this chapter – **MUST** be approved by the Chief Operator before proceeding.

No contractual or statutory provision, and no Washington case imposes a legal duty on CH2M or Irving to warn City

employees of dangers that might arise if they attempted an operational procedure with which they were unfamiliar. Such extensive hands-on operational experience and clear and unequivocal direction from the City regarding valving transfers makes it indisputable that the dangers were open and obvious to the operators. It was simply uniquely within their expertise to valve transfers. No public policy reason exists to impose such an onerous legal duty on CH2M or Irving.

Cmos next argues that the cases cited in the opening brief do not bar a duty here because they involved protecting workers from others' negligence, while Cmos alleges that CH2M and Irving's "own negligence" created a "hazard to the workers" "by designing an upgrade to the digester recirculation system." CBR 37-39. Again, the trial court nowhere found or concluded that CH2M's design of an upgrade to the digester recirculation system was negligent or that it caused any harm to anyone. Rather, the trial court found that the operators were confused by the skillet installation and were not properly trained about it, improperly attributing that City negligence to CH2M and Irving. CP 3118.

Under these findings, CH2M and Irving can be liable only if they had a legal duty (a) to somehow preclude operator confusion

during day-to-day operations, or (b) to train the operators on new valving procedures. No contractual, statutory or common law basis exists supporting the imposition of either duty. Cmos fails to establish any legal duty. This Court should reverse and dismiss on this independently sufficient ground.

2. Michaels & Evans established no legal duty.

Like Cmos, Michaels & Evans attempt to build a duty argument from whole cloth. MBR 32-37. The trial court unequivocally stated where it “found” a duty:

The duty owed to Plaintiffs, if any, is found in the standard of care of a professional engineer in Defendant’s contract with the City, Exhibit I to PI Exhibit 1; “Standard of Care”, PI Exhibit 4, #6 “On Call Assistance” with plant operations; and PI Exhibit #3 Scope of Services for Digester Recirculation, Pumping, Heating and Mixing Systems, together with RCW 18.43 *et seq.*, and 196 WAC-27A &29. [*sic*]

CP 3041. The court expressly incorporated this ruling into the Findings and Conclusions. CP 3107. CH2M and Irving did not “mischaracterize” the record on this issue (or others).

Michaels & Evans are correct, however, to concede trial-court error in relying on RCW 18.43, *et seq.*, and the related WACs. MBR 37 n.13. This leaves only the trial court’s reliance on isolated portions of the contract, while failing to read the contract as a whole and ignoring the provisions allocating safety issues to the City.

Since the trial court's actual ruling on legal duty is wholly in error, this Court should reverse and dismiss for the lack of a duty.

Michaels & Evans deny that the trial court based its liability ruling on CH2M and Irving's failure to train the City's operators. MBR 32-33. But as discussed above, the trial court found that the immediate cause of the plaintiffs' injuries was operator confusion due to a lack of training (CP 3118), so it must have concluded that CH2M and Irving had some duty to train the operators in order to hold them liable for that negligence. By contrast, the trial court's so-called "duty" findings (CP 3108-14) never state a duty, never say that the redesign plans for the entire digester recirculation system were negligent, never say that those incomplete design plans injured anyone, never say that CH2M and Irving designed the skillets, and never even say that the skillets injured anyone.

Michaels & Evans again beg the duty question, arguing that engineers have a standard of care, so CH2M and Irving owed them a duty. MBR 33-35. While repeatedly claiming that CH2M and

Irving “overlook” various aspects of the inapposite cases they cite,³ Michaels & Evans fail to confront CH2M and Irving’s actual argument: each of the authorities they cite involves a suit by a client directly against an engineer for preparing negligent design plans or specifications. Those cases do not apply here.

Michaels & Evans finally engage the real issue at MBR 35-37, listing what they claim are six “sources of CH2M’s and Irving’s duty” “to these Plaintiffs.” MBR 36. Perhaps ironically, they cite absolutely no legal authority for any of these so-called “sources of . . . duty.” *Id.* None of them is a source of duty here.

First, like the licensing statutes and regulations rejected in **Burg**, *supra*, CH2M and Irving’s “status and licensure as professional engineers” (MBR 36) are not sources of any duty owed to these plaintiffs. These plaintiffs did not employ CH2M and Irving. Their concession at MBR 37 n.13 that **Burg** bars reliance on mere professional status and licensure belies this “source” of a duty.

³ **Seattle Western Indus., Inc. v. Mowat Co.**, 110 Wn.2d 1, 750 P.2d 245 (1988); **Shoffner Indus. Inc. v. W.B. Lloyd Constr. Co.**, 257 S.E.2d 50 (N.C. App. 1979); Note, *Architectural Malpractice: A Contract-Based Approach*, 92 HARV. L. REV. 1075 (1979); **Hull v. Enger Const. Co.**, 15 Wn. App. 511, 550 P.2d 692, *rev. denied*, 87 Wn.2d 1012 (1976).

Second, “CH2M’s contract with the City” (MBR 36) is no source of duty to the plaintiffs, who are neither parties to nor third-party beneficiaries of that contract. As thoroughly discussed above and in the opening brief, the contract rejects this theory of duty.

Third, the “foreseeable risks and harms of CH2M’s and Irving’s activities” (MBR 36) are no source of duty. Our Supreme Court has made clear that “the foreseeability of injury does not give rise to a duty in the first instance but sets the parameters of the duty once imposed.” *Simonetta v. Viad Corp.*, 165 Wn.2d 341, 349 n.4, 197 P.3d 127 (2008); accord *Rikstad v. Holmberg*, 76 Wn.2d 265, 456 P.2d 355 (1969) (source of duty is legal question, scope of duty (foreseeability) is fact question). Foreseeability never creates a legal duty. See also *Halleran v. Nu West, Inc.*, 123 Wn. App. 701, 717, 98 P.3d 52 (2004) (“Foreseeability limits the scope of a duty, but it does not independently create a duty”) (citing *Hansen v. Friend*, 118 Wn.2d 476, 483, 824 P.2d 483 (1992)), rev. denied, 154 Wn.2d 1005 (2005).

Fourth, although Michaels & Evans again accuse defendants of “mischaracterizing” the record by saying that the “trial court essentially found that CH2M had to analyze the skillet’s effects in writing because Work Modification 7 said the consultants would

provide on-call services” (MBR 35, quoting BA 50) on the next page they list as a possible “source” of a duty, “Work Modification No. 7 . . . which provided not only for the on-call services . . . but also provided for redesign of the recirculation and heating system.” MBR 36. Plaintiffs cannot have it both ways. The incomplete redesign of the recirculation system (which did not include skillets) caused no harm to anyone. Nor can plaintiffs rely on Work Modification 7, but ignore the entire rest of the contract, which (as discussed at length above and in the opening brief) expressly provided that CH2M assumed no safety duties *vis-à-vis* the City’s employees. If this contract is a possible source of duty, then it must be read as a whole. The whole contract rejects a duty here.

Fifth, Michaels and Evans list “CH2M’s and Irving’s separation-of-flows design” as a “source” of duty. MBR 37. As discussed above, there was no such “design,” and the real claim is that Mr. Irving failed to analyze the downstream effects on valving operations – operational advice, not the “preparation of design plans and specifications,” so immunity would apply in any event.

In fact, Michaels and Evans simply do not explain (or cite authority on) how this operational suggestion to the City “creates” a

duty to them. If they are arguing that the design professionals owed a duty to the City, nothing extends that duty to these plaintiffs.

On the other hand, if Michaels and Evans are implying that CH2M and Irving owed them a direct duty arising out of the flow-separation suggestion, then they do not explain how it could be a duty of design-professional care. The plaintiffs did not retain CH2M and Irving to provide professional services, nor do they even claim third-party beneficiary status under the CH2M/City contract, so they are not entitled to a professional standard of care. If this was the theory – and it is impossible to tell – the trial court erred in applying the professional standard of care.

But the plaintiffs' real claim seems to be that in suggesting that the City separate the flows, Mr. Irving assumed a common-law duty to these plaintiffs. That would be a duty of ordinary care, however, and no reasonable person could conclude that CH2M and Irving failed to exercise ordinary care in these circumstances (unlike the City). In any event, CH2M and Irving would be immune from liability under this theory, as the plaintiffs certainly cannot (and did not) argue that the design professionals owed them a "common-law duty" of "ordinary care" to prepare professional design plans

and specifications. No such duty exists, and the plaintiffs never cited any legal authority or reason to create one.

A simple analogy might be helpful here. Tim, who owns a delivery service, has a problem with the windshield wipers on his delivery van. The van has 10 different wiper settings, fast, medium, slow, and seven intermittent settings, but the wipers are not doing a good job of cleaning the water off the windows, so Tim goes to his mechanic, Irving. Tim doesn't hire Irving to fix the wipers, but just asks him for a suggestion.

Irving suggests a fancy new wiper mechanism, graduating the wiper speed between the fast and slow settings. But that will take more time to manufacture and cost a lot more money. Tim's employees have an older, three-way wiper mechanism that works just fine, so they install that instead.

The next day during deliveries, it starts to rain very, very hard, making it difficult to see out of the windshield. Realizing the hazard, drivers Terry, Rick and Fletcher decide to use the high-speed wiper setting to see if that will help. They normally don't use the high-speed setting in this van, although Rick has used it. They turn it on, but mistakenly turn it to the low speed and fail to notice.

Seeing little improvement, they tell Mike to hang out the passenger window and wipe off the windshield. Unable to see out the window, and without reducing their driving speed as a result of the visibility issues, they hit the car in front of them, ejecting and killing Mike, and injuring Dan (who was holding onto Mike) and Larry (who was not buckled in, but was looking around the back of the van for towels to wipe the windshield).

Is mechanic Irving liable to Mike, Dan and Larry? Did he even owe them a duty? What was it? Could the plaintiffs argue that the operators were confused by the new wiper mechanism, so Irving should be liable? Why? A mere suggestion to separate the flows should not give rise to the onerous duty to warn about downstream effects. Michaels & Evans proved no duty.

Michaels & Evans' sixth and final "source" of duty is "Irving's participation in deciding the physical location of the valves/skillets [*sic*] used in the separation-of-flows design." MBR 37. This assertion suffers from many problems identified above (e.g., there are no such things as "valves/skillets"; operational suggestions are not "design"). But even assuming that Mr. Irving participated in locating the skillets, there is no finding that the skillets were negligently or dangerously located. Their location successfully

separated the flows, curing the digester's "sickness." Since there is no finding that the location of the skillets was negligent or caused any harm, Mr. Irving's participation in locating them (which plaintiff Michaels called "common sense" – RP 1252) is irrelevant. Michaels & Evans failed to establish a duty.⁴

D. Plaintiffs failed to establish proximate cause.

CH2M and Irving also argued that the plaintiffs failed to establish proximate cause (both cause in fact and legal cause) and that the City's negligence was the superseding cause of plaintiffs' damages. BA 60-75. As to cause in fact, not writing down some unspecified analysis about downstream effects of separating the flows (which really would have had to be just, "trace lines, double-check, be sure") could not physically cause an operator to turn a valve the wrong way where, as here, the positioning of that valve was completely unaffected by the flow separation (*i.e.*, it is undisputed that the three-way transfer valve position had to be the same both before and after the flow separation).

⁴ Michaels & Evans rehash the same arguments again in responding to the opening brief. MBR 37-45. The answers to these arguments are the same as above, so it serves no purpose to repeat them again.

As to legal cause, the “connection” between the unspecified analysis and the dome collapse is far too attenuated to impose liability as a matter of policy, precedent and common sense. And the immense and multifarious negligence of the City is so extreme as to be wholly beyond the range of expectability, causing a tragedy that would have occurred regardless of any writing regarding the downstream effects of the separation of flows.

1. Cmos did not prove proximate cause.

Cmos begins with a false statement of the standard of review: it is not true that “the cause in fact element in a negligence action is to be determined by the trier of fact,” nor does *Schooley* say that. CBR 39 (citing *Schooley v. Pinch’s Deli Mkt.*, 134 Wn.2d 468, 478, 951 P.2d 749 (1998)). Rather, cause in fact is for the factfinder only if reasonable minds might differ on the existence of cause in fact (*i.e.*, on the physical connection between the act and the injury). *Schooley*, 134 Wn.2d at 478; *Kim v. Budget Rent A Car Sys., Inc.*, 143 Wn.2d 190, 203, 15 P.3d 1283 (2001). Cmos fails to squarely face the defendants’ actual argument: no reasonable person could conclude that failing to write some unspecified analysis of the downstream operational effects of separating the flows physically caused the plaintiffs’ damages.

Rather than directly face this argument, Cmos mischaracterizes the argument, CBR 40 (first paragraph), and then proceeds to attack that straw man. CBR 40-43. Cmos also makes numerous factual assertions that are unsupported by the record cited. In a paragraph covering more than a page intended to prove that the operators were "confused" (CBR 40-42) Cmos sows more confusion than Cmos discovers. While much of what is said there is insupportable, the key point is that when the operators went to turn the three-way valve, they simply turned it the wrong way. It is undisputed that the way they positioned the three-way valve was wrong both before and after the separation of flows. Nothing CH2M and Irving might have written down about the downstream operational effect of the separation of flows could possibly have prevented those operators from setting that valve the wrong way.

Indeed, no analysis of the downstream effects of the flow separation would have even included this crucial three-way valve. As Mr. Hetnar testified, operators had the option to use the three-way valve to make this transfer both before and after the separation of flows. The correct positioning of that valve to make a transfer from D3 to D2 did not change due to the separation of flows. Since the flow separation had no effect on the three-way transfer valve,

that valve would not have been included in an analysis of the downstream effects of the flow separation. There was no effect on that valve setting. CH2M and Irving could not be “a” physical cause of the dome collapse under plaintiffs’ theory.

Cmos also implies that the skillets confused the operators about whether to use this three-way valve, so had CH2M clearly identified the valves affected by the skillets, the operators would have known not to touch this valve. But it is undisputed that the use of the three-way valve was within the operator’s discretion. There was nothing inherently wrong in selecting the three-way valve to perform a transfer: it would have worked if they turned it the right way. Thus, even telling operators “you don’t need to use the three-way valve” would not have prevented this tragedy because the operators could have chosen to use it anyway.

On legal cause, Cmos makes the telling argument that (a) CH2M had a contract with the City to upgrade the plant; (b) CH2M had a duty to comply with the standard of care as to those upgrades; (c) “As a proximate result of CH2M’s negligent failure to comply with its duty, City employees suffered injuries and death”; and, therefore, (d) “There is absolutely no remoteness or attenuation between CH2M’s fault and the plaintiffs’ injuries”

CBR 45. This is precisely what is wrong with the trial court's ruling: it simply begs the crucial questions (1) how can CH2M and Irving owe these plaintiffs a contractual duty of professional care?; and (2) how can a duty owed to the City extend so far that even though CH2M met the standard of care as to the City (*i.e.*, it accurately answered the City's only question, correctly advising it that separating the flows would cure the digesters) yet CH2M somehow breached a professional duty allegedly owed to the City's employees? As noted above, Cmos never answers these questions, so these conclusory causation assertions are baseless.

Cmos next complains that defendants' "real" complaint is with the IIA. CBR 45. No, it is with the trial court's incorrect rulings and "interpretations" of unambiguous statutes. The IIA immunizes CH2M and Irving, so they have no complaint with the statutes.

Attempting to minimize the City's negligence and exaggerate CH2M's actions, Cmos claims that CH2M "distorts" the City's negligence. *Id.* Yet the testimony of the plaintiffs' own experts makes that practically impossible: the City's torrential negligence was overwhelming, from welding shut the overflow pipes, to ignoring a series of alarms, to allowing workers to go on top of an overpressurized tank. The City was grossly negligent and even

reckless, as any reasonable person would agree. Indeed, its negligence alone would – and did – cause these injuries. Thus, Cmos' claim that "the negligence of the City, without the negligence of CH2M, would not have caused the digester dome collapse" is nonsense. CBR 45.

This point also answers Cmos' arguments regarding superseding cause. CBR 46-50. But after citing and discussing a host of inapposite superseding-cause cases – none of which involved the overwhelming negligence the City displayed in this case – Cmos finally admits the truth about the plaintiffs' claims:

Regardless of the City's negligence, had CH2M analyzed the effects of its modification to the recirculation system **and properly advised the City employees regarding the necessary change to valve transfers between digesters**, D3 would not have been overfilled and the dome would not have collapsed. [Emphasis added.]

CBR 49-50.⁵ As the emphasized portion reflects, the plaintiffs' real claim is – and always has been – that CH2M and Irving had a duty to "properly advise[] the City employees" on how to run the plant –

⁵ As explained above and in the opening brief, nothing in the unemphasized portions is true – analyzing the effect of the separation of flows would not have included the unaffected three-way valve that the operators simply turned in the wrong direction; the City overfilled D3 the night before, completely independently from the separation of flows; and the dome collapse was inevitable when the operators failed to shut down the flow into D3 and turned the three-way valve in the wrong direction, neither of which was affected by the separation of flows.

i.e., they had a duty to train the City's employees. *Id.* This is directly contrary to the duty CH2M assumed in its contract with the City. It is directly contrary to the testimony of the Plant management, who did not want and would not allow CH2M or Irving to train their operators. Since all of the plaintiffs' claims turn on this contractual duty under the trial court's rulings, this Court should reverse and dismiss for lack of a duty and of proximate cause.

2. Michaels & Evans did not prove proximate cause.

Michaels & Evans also fail to ever address the real causation issue: no written analysis would have stopped the operators from turning the three-way valve in the wrong direction. Indeed, no analysis of downstream effects would even have mentioned the three-way valve because its positioning for a transfer was unaffected by the separation of flows. Their "response" is the same question-begging, *post hoc* rationalization: the operators must have been confused because they turned the valve the wrong way. Coincidence is not causation. No evidence remotely suggests that CH2M and Irving **caused** the operators to turn the valve the wrong way. Without cause in fact, there is no proximate cause.

Michaels & Evans, like Cmos, give extremely short shrift to legal cause, for good reason. An objective observer would not find

that these defendants legally caused the employees' damages where, as here, the City committed massive negligence toward its employees by disabling every life-saving safety device; the trial court found that the City's employees were confused by the City's skillet installation, and by its lack of training, when they negligently turned a valve in the wrong direction (a direction unaffected by the skillets, much less by the separation of flows); and the design professionals had no legal duty to train the City's employees. Michaels & Evans have no real response.

On superseding cause, Michaels & Evans (like Cmos) claim that superseding cause turns on foreseeability. MBR 48. While there is plainly more to it than that, assuming *arguendo* the point, there is no reasonable basis for a finding of foreseeability here. As Cmos notes, the question is really "whether the result of the act is within the ambit of the hazards covered by the duty imposed upon defendant." CBR 48 (quoting *Anderson v. Dreis & Krump Mfg. Corp.*, 48 Wn. App. 432, 443, 739 P.2d 1177, *rev. denied*, 109 Wn.2d 1066 (1987)). Here, the result – a dome collapse caused by negligently removing all safety devices, negligently failing to stop filling an already overfilled digester, and negligently turning a transfer valve in the wrong direction – was not within the ambit of

the hazards covered by a duty to analyze the downstream effects of the separation of flows. This is particularly so where, as here, the trial court found a lack of training causal, but plaintiffs agree that CH2M and Irving had no duty to train the operators.

Moreover, assuming that CH2M and Irving had analyzed the downstream operational effects of the skillets, they would not have identified as one of those effects a change in the position of the three-way valve: it did not change. These downstream effects did not include the three-way valve. The dome collapse was not within the ambit of the hazards covered by even the nebulous duty apparently imposed by the trial court. This Court should reverse and dismiss for lack of proximate cause.

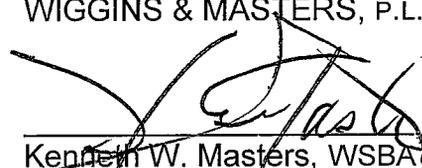
CONCLUSION

For the reasons stated above and in the opening brief, this Court should reverse and dismiss due to design-professional immunity, and the plaintiffs' failure to establish a duty and proximate cause.

RESPECTFULLY SUBMITTED this 11th day of September, 2009.

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I certify that I mailed, or caused to be mailed, a copy of the foregoing **REPLY BRIEF TO CMOS, MICHAELS AND EVANS** postage prepaid, via U.S. mail on the 11th day of September, 2009, to the following counsel of record at the following addresses:

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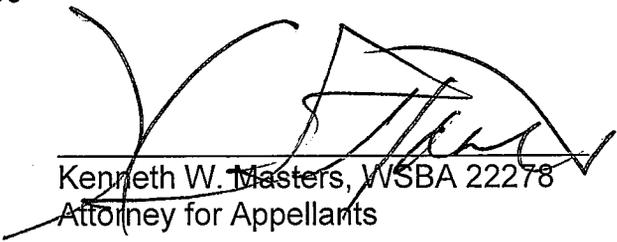
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