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Supreme Court No. 80393-5

BY RONALD R. CARPENTER

~~h~~ SUPREME COURT
CLERK OF THE STATE OF WASHINGTON

HONORABLE RICHARD B. SANDERS,

Plaintiff/Petitioner,

vs.

STATE OF WASHINGTON,

Defendant/Respondent.

**RESPONDENT'S SECOND STATEMENT OF ADDITIONAL
AUTHORITIES**

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FILED AS
ATTACHMENT TO EMAIL

Pursuant to RAP 10.8, respondent State of Washington (“the State”) identifies the following additional authorities:

- *Department of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 43 P.3d 4 (2002); and
- *Tingey v. Haisch*, 159 Wn.2d 652, 152 P.3d 1020 (2007).

A copy of the authorities are attached to this Statement. The State offers the additional authority on the subject of the Washington Supreme Court’s interpretation of the plain meaning rule.

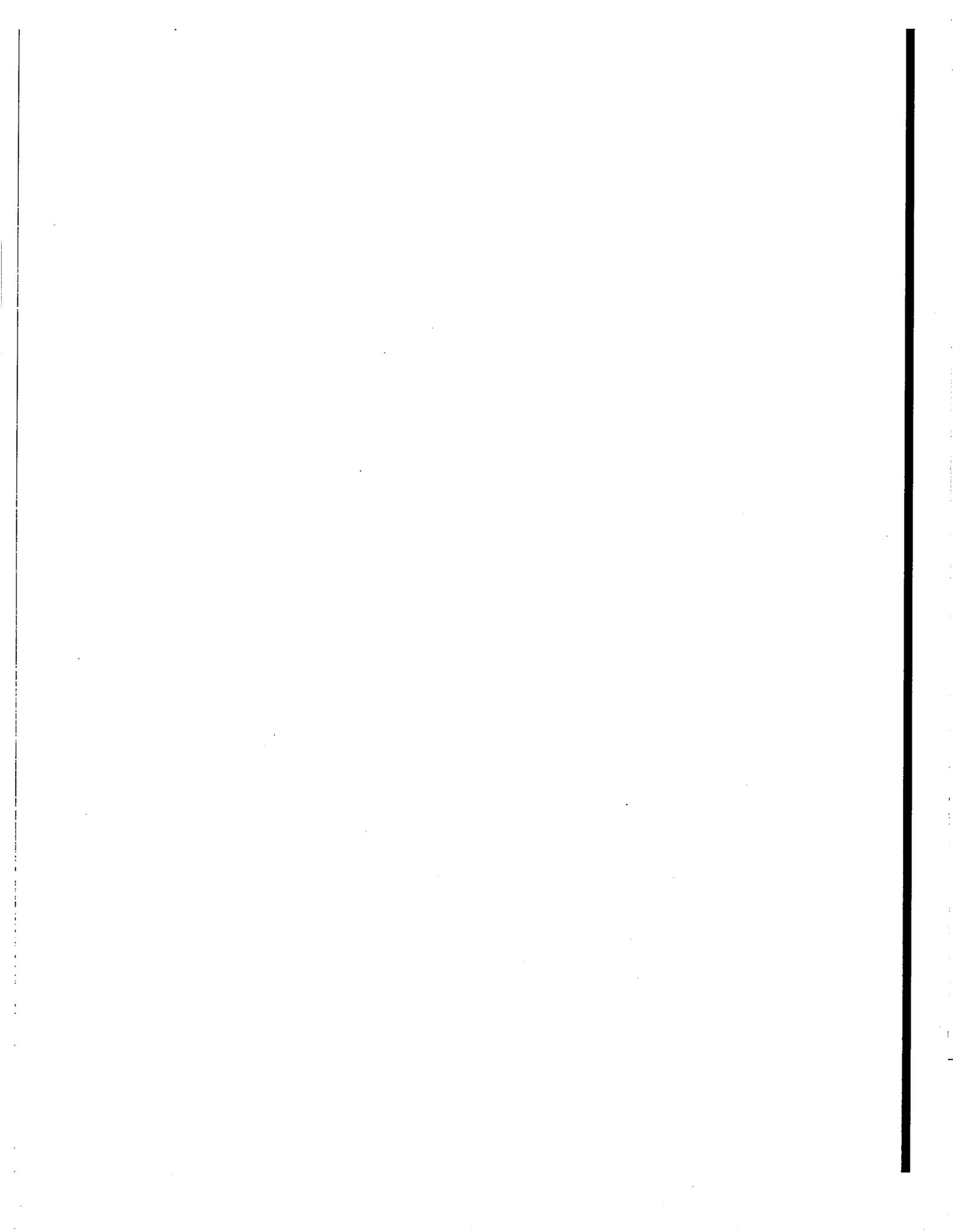
DATED this 10th day of December, 2008.

DANIELSON HARRIGAN LEYH & TOLLEFSON LLP

By



Timothy G. Leyh, WSBA #14853
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Special Assistant Attorney General for Respondent
State of Washington



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THE DEPARTMENT OF ECOLOGY, *Appellant*, v. CAMPBELL & GWINN,
L.L.C., ET AL., *Respondents*.

No. 70279-9

SUPREME COURT OF WASHINGTON

146 Wn.2d 1; 43 P.3d 4; 2002 Wash. LEXIS 188

October 16, 2001, Argued

March 28, 2002, Decided

SUMMARY:

Nature of Action: A state agency sought a declaration that several rural lots slated for development could not cumulatively withdraw groundwater from separate wells in excess of 5,000 gallons per day without first obtaining a permit or other formal authorization. The plaintiff also sought injunctive relief.

Superior Court: The Superior Court for Yakima County, No. 99-2-02859-6, C. James Lust, J., on September 26, 2000, entered a summary judgment in favor of the defendants, ruling that withdrawals from multiple wells, although within the same subdivision, constitute multiple withdrawals, not a single withdrawal, and that no permit is required to make withdrawals of less than 5,000 gallons per day from each well.

Supreme Court: Holding that the defendants may not circumvent the statutory requirement of a permit for groundwater withdrawals by providing water service to individual lots in the subdivision out of individual wells that would each withdraw less than 5,000 gallons of water per day, the court *reverses* the judgment and *grants* judgment in favor of the plaintiff.

HEADNOTES

WASHINGTON OFFICIAL REPORTS HEADNOTES

[1] **Statutes -- Construction -- Question of Law or Fact -- Standard of Review.** The meaning of a statute is a question of law that is reviewed *de novo*.

[2] **Statutes -- Construction -- Legislative Intent -- In General.** A court's fundamental objectives when construing a statute are to ascertain and carry out the Legislature's intent.

[3] **Statutes -- Construction -- Unambiguous Language -- Plain Meaning -- In General.** When a statute's meaning is plain on its face, a court will give effect to that plain meaning as an expression of the Legislature's intent.

[4] **Statutes -- Construction -- Statutory Language -- Considered as a Whole -- Context.** The plain meaning of a statute is discerned from the language of the statute itself, considered as a whole and in light of related statutes that disclose legislative intent about the provision in question.

[5] **Waters -- Groundwater -- Permit -- Exemptions -- Limited Domestic Use -- Residential Subdivision -- Multiple Exemptions -- Validity.** For purposes of the 5,000 gallons per day limitation on groundwater withdrawals exempt from the permit requirement of RCW 90.44.050, the development of a residential subdivision constitutes a group domestic use for which only one 5,000 gallon per day exemption may be taken. Where a developer of a residential subdivision proposes to use multiple wells that would, individually, withdraw less than 5,000 gallons per day but that would, collectively, exceed the 5,000 gallons per day limit, the exemption is unavailable.

[6] **Constitutional Law -- Separation of Powers -- Policy-Making Decisions.** Public policy issues are properly addressed to the Legislature, not the judiciary.

[7] **Administrative Law -- Agency Authority -- Enforcement of Statute -- Adoption of Rule -- Necessity.** An administrative agency may enforce a statutory requirement without first adopting a rule on the subject.

[8] **Estoppel -- Governments -- Elements -- In General.** A plaintiff's claim of equitable estoppel against the government requires clear, cogent, and convincing evi-

dence that (1) an admission, statement, or act by the government is inconsistent with a claim later asserted; (2) the plaintiff reasonably relied on the admission, statement, or act; (3) the plaintiff would be injured if the government were allowed to contradict or repudiate its prior admission, statement, or act; (4) estoppel is necessary to prevent a manifest injustice; and (5) estoppel would not impair the exercise of governmental functions.

[9] Estoppel -- Governments -- Disfavored Status. Equitable estoppel against the government is disfavored.

[10] Estoppel -- Elements -- Representation of Fact -- Issue of Law. The doctrine of equitable estoppel may not be applied if the representation allegedly relied upon is a matter of law rather than fact.

[11] Statutes -- Construction -- Question of Law or Fact -- In General. The meaning and scope of a statute are issues of law.

[12] Estoppel -- Governments -- Ultra Vires Act. Estoppel will not lie to compel a government agency to commit an ultra vires act.

COUNSEL: [***1] *Christine O. Gregoire, Attorney General, and Brian V. Faller, Assistant, for appellant.*

Patrick M. Andreotti and Charles C. Flower (of Flower & Andreotti) and Jerret E. Sale and Deborah L. Carstens (of Bullivant Houser Bailey), for respondents.

Jay J. Manning, Jennifer T. Barnett, and Mary E. McCrea on behalf of Center for Environmental Law and Policy and Washington Environmental Council, amici curiae.

Rick Weber, Prosecuting Attorney for Okanogan County, and Don Le Roy Anderson, Deputy; Fred A. Johnson, Prosecuting Attorney for Wahkiakum County; Kristopher I. Tefft; Larry D. Stout; and Greg Overstreet on behalf of Okanogan County, Wahkiakum County, Building Industry Association of Washington, Washington Association of Realtors, and Washington Ground Water Association, amici curiae.

JUDGES: Authored by Barbara A. Madsen. Concurring: Gerry L. Alexander, Charles Z. Smith, Faith E. Ireland, Tom Chambers. Dissenting: Susan J. Owens, Bobbe J. Bridge, Charles W. Johnson, Richard B. Sanders. Sanders, Owens, Johnson, and Bridge, JJ., dissent by separate opinions.

OPINION BY: Barbara A. Madsen

OPINION

[*4] [**6] En Banc. Madsen, [***2] J. -- RCW 90.44.050 provides an exemption from groundwater permit requirements for withdrawal of groundwater for domestic uses of 5,000 gallons or less per day. The Department of Ecology challenges the trial court's determination that the exemption applies where a developer of a residential subdivision proposes multiple wells that will individually serve each lot in the development. Each well is proposed to withdraw less than 5,000 gallons per day (gpd), but together the wells will withdraw more than 5,000 gpd. Because the statute limits the exemption to one 5,000 gpd withdrawal whether the water will be used for single or group domestic uses, and because the exemption is from permit requirements which otherwise apply prior to construction of wells or other works to withdraw water, we conclude that the exemption does not apply to permit 5,000 gpd to be withdrawn for domestic uses on each lot in respondents' 20-lot development. Accordingly, we reverse the trial court's grant of summary judgment in favor of the respondents.

Facts

In March 1999, respondent Campbell & Gwinn (C&G), a limited liability company, executed a real estate contract with respondents [***3] E. A. and Beverly White (the Whites) for the purchase of 20 vacant lots known as the Rambling Brooks Estates. The contract is based on the premise that the lots will be developed or sold by March 2002, at which time the total purchase price is due.

Each lot is subject to a single set of protective rules and covenants. The lots are on a dead-end road that provides the only access, and a sign saying "Rambling Brooks Estates" is at the entrance to the development.

The property lies in the Yakima River Basin, in Yakima County. It has Ahtanum [**7] Creek irrigation water rights, but a flood several years ago destroyed off-site diversion facilities. Also, in 1954, a previous owner of the land obtained a permit to appropriate groundwaters to supplement the [*5] Ahtanum Creek irrigation rights. That permit was canceled when the owner failed to file a notice of completion of construction of a well. Although the permit was canceled, the well was used for irrigation for many years while the land was farmed.

Mr. Campbell, a co-owner of C&G, states that a few days after C&G executed the purchase contract with the Whites, he went to Ecology's Central Regional Office in Yakima and spoke [***4] with an Ecology employee who advised Campbell that the property had Ahtatum Creek irrigation rights, but that because of the well permit cancellation, water could not be withdrawn from the existing well. Campbell states that the employee also told

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him that domestic water could be provided without a permit through the use of one well for each one or two parcels. C&G investigated costs, and decided to provide domestic and irrigation water to the lots by constructing individual wells on each lot. Mr. Campbell has stated, though, that he would prefer to use fewer wells if he could do so without a permit.

On April 1, 1999, C&G executed an agreement to sell one of the lots to a contractor. C&G also began work on two "spec" (speculation) houses, and entered into an agreement with a well drilling company, which drilled wells on the "spec" house lots and on the parcel being sold to the contractor. By the first week in August, C&G had entered into an agreement to construct a house on and sell a fourth parcel, and had substantially completed work on the two "spec" houses. The contractor was also nearing construction on the residence he was building.

In the meantime, early in April 1999, an [***5] Ecology employee in Yakima charged with enforcing well construction regulations received the notice forms of C&G's intent to drill 20 individual wells. He believed, after reviewing the notices, that they were in violation of a 1997 attorney general opinion that concluded that the permit exemption for groundwater withdrawals for domestic uses of 5,000 gpd or less does not apply to a group of wells constructed as part [*6] of a single development if withdrawal from the wells would exceed 5000 gpd.

In August, Ecology employees relayed concerns to C&G about the applicability of the exemption,¹ and on August 25, 1999, C&G and its attorney and Ecology representatives and an assistant attorney general met to address the problem. Ecology maintained that the 20 lots which C&G owned or was purchasing was a single project for which only one exempt withdrawal was available under RCW 90.44.050, and that any withdrawal in excess of 5,000 gpd for the project would be subject to the permitting and certification requirements of chapter 90.44 RCW. C&G and the Whites disagreed. C&G, the Whites, and Ecology reached a settlement agreement that C&G would diligently and [***6] vigorously pursue water rights or water services for four lots then under contract for sale or sold. If C&G were unsuccessful in this attempt, Ecology agreed that it would not take enforcement action against those four lots. As to the remaining undeveloped 16 lots, the parties agreed to submit the exemption issue in a declaratory judgment action in Yakima County Superior Court.

1 On August 6, 1999, one Ecology employee issued an oral "cease and desist" order to Campbell & Gwinn (C&G) and to C&G's well driller, prohibiting any further well construction. Three days later, another Ecology employee advised C&G

that this oral order was being withdrawn. The next day, this employee advised C&G's attorney that C&G would proceed at its own risk if it constructed wells, and that Ecology might in the future assert the wells could not be used without permits.

Meanwhile, as the parties note, on August 12, 1999, Ecology entered a "Memorandum of Agreement" with the Yakama Nation and the United States Bureau of Reclamation, [***7] under which Ecology agreed to impose a five-year moratorium on the issuance of any groundwater permits in the Yakima River Basin. Clerk's Papers (CP) at 672. Ecology has not, in fact, issued any new groundwater permits in the Yakima River Basin since 1993.

[**8] On October 29, 1999, Ecology filed this action against C&G and the Whites, seeking declaratory and injunctive relief. Ecology asked the court to declare that the 16 lots [*7] may not cumulatively withdraw in excess of 5,000 gpd without first obtaining a permit or other formal authorization, and to enjoin C&G from any further well drilling on the lots.

The parties filed cross-motions for summary judgment. On September 26, 2000, the trial court granted C&G's and the Whites' motion for summary judgment. The court explained in oral comments and stated in its summary judgment order that the exemption is determined with reference to the person making the withdrawal and beneficially using the groundwater. The court ruled that "withdrawals from multiple wells within a subdivision, if each withdrawal is less than 5,000 gpd, are multiple withdrawals, not a single withdrawal. Each 5,000 gallon per day withdrawal is exempt from [***8] the permit requirement of RCW 90.44.050." CP at 10 (summary judgment order). The trial court alternatively ruled that Ecology is equitably estopped from requiring that C&G and the Whites comply with the permit process for any individual withdrawals in the development drawing less than 5,000 gpd.

Ecology appealed, seeking direct review of the appeal by this court, which was granted. Two joint amicus curiae briefs have been filed by (1) the Center for Environmental Law and Policy and the Washington Environmental Council and (2) Okanogan County, Wahkiakum County, the Building Industry Association of Washington, the Washington Association of Realtors, and the Washington Ground Water Association.

Analysis

RCW 90.44.050's exemption from groundwater permit requirements

Chapter 90.44 RCW, the groundwater code, is supplemental to the surface water code, chapter 90.03 RCW,

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and was enacted in 1945 to extend surface water statutes to the appropriation and beneficial use of groundwater. RCW 90.44.020. Both the surface water code and the groundwater [*8] code are premised on the doctrine of prior appropriation, [***9] which applies when an applicant seeks to obtain a water right in this state. RCW 90.03.010; *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 79, 11 P.3d 726 (2000); *Neubert v. Yakima-Tieton Irrigation Dist.*, 117 Wn.2d 232, 240-41, 814 P.2d 199 (1991). Under the prior appropriation doctrine, a water right may be acquired where available public water is appropriated for beneficial use, subject to existing rights. RCW 90.03.010. The same is true of groundwater. "Subject to existing rights, all natural ground waters of the state . . . are hereby declared to be public ground waters and to belong to the public and to be subject to appropriation for beneficial use under the terms of this chapter and not otherwise." RCW 90.44.040; see *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997). RCW 90.44.060 provides that groundwater applications shall be made in the same way as provided in the surface water code in RCW 90.03.250-340. Thus, before a groundwater permit may be issued [***10] to a private party seeking to appropriate groundwater, Ecology must investigate and affirmatively find (1) that water is available, (2) for a beneficial use, and that (3) an appropriation will not impair existing rights or (4) be detrimental to the public welfare. RCW 90.03.290.

An exemption to the groundwater permitting requirement exists, however, in RCW 90.44.050. RCW 90.44.050 states:

[N]o withdrawal of public ground waters of the state shall be begun, nor shall any well or other works for such withdrawal be constructed, unless an application to appropriate such waters has been made to the department and a permit has been granted by it as herein provided: EXCEPT, HOWEVER, That any withdrawal of public ground waters for stock-watering purposes, or for the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area, or for single or group domestic uses in an amount not exceeding five thousand gallons a day, or for an industrial purpose in an amount not exceeding five thousand gallons a day, is and shall be exempt from the provisions of this section, but, to the extent [***11] that it is [*9] regularly used beneficially, shall be entitled [**9] to a right equal to that established by a permit issued under the provisions of this

chapter: PROVIDED, HOWEVER, That the department from time to time may require the person or agency making any such small withdrawal to furnish information as to the means for and the quantity of that withdrawal: PROVIDED, FURTHER, That at the option of the party making withdrawals of ground waters of the state not exceeding five thousand gallons per day, applications under this section or declarations under RCW 90.44.090 may be filed and permits and certificates obtained in the same manner and under the same requirements as is in this chapter provided in the case of withdrawals in excess of five thousand gallons a day.

While the exemption in RCW 90.44.050 allows appropriation of groundwater and acquisition of a groundwater right without going through the permit or certification procedures of chapter 90.44 RCW, once the appropriator perfects the right by actual application of the water to beneficial use, the right is otherwise treated in the same way as other perfected [***12] water rights. RCW 90.44.050. Thus, it is subject to the basic principle of water rights acquired by prior appropriation that the first in time is the first in right. "The first appropriator is entitled to the quantity of water appropriated by him, to the exclusion of subsequent claimants" *Postema*, 142 Wn.2d at 79 (quoting *Longmire v. Smith*, 26 Wash. 439, 447, 67 P. 246 (1901)); see RCW 90.03.010 (codifying first in time, first in right principle).

The dispute in this case involves the scope of the exemption for "any withdrawal of public ground waters . . . for single or group domestic uses in an amount not exceeding five thousand gallons a day." RCW 90.44.050.

[1] [2] [3] [4] The meaning of a statute is a question of law reviewed de novo. *State v. Breazeale*, 144 Wn.2d 829, 837, 31 P.3d 1155 (2001); *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001). The court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on [***13] its face, then the court must give effect to that plain meaning as an expression of [*10] legislative intent. *J.M.*, 144 Wn.2d at 480. However, descriptions of the "plain meaning" rule have not been uniform in this court's cases. In some cases, the court has said that "[i]n an unambiguous statute, a word is given its plain and obvious meaning." *Addleman v. Bd. of Prison Terms & Paroles*, 107 Wn.2d 503, 509, 730 P.2d 1327 (1986); see *Young v. Estate of Snell*, 134 Wn.2d 267, 279, 948 P.2d 1291 (1997) (the meaning of a statute must be derived from the wording of the statute itself where the statutory

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language is plain and unambiguous); *Waggoner v. Ace Hardware Corp.*, 134 Wn.2d 748, 752, 953 P.2d 88 (1998) (same); *State ex rel. Royal v. Bd. of Yakima County Comm'rs*, 123 Wn.2d 451, 458, 869 P.2d 56 (1994) (same). If the meaning of the language is ambiguous or unclear, this line of cases directs that examining the statute as a whole, or a statutory scheme as a whole, is then appropriate as part of the inquiry into what the Legislature intended. *See, e.g., Addleman*, 107 Wn.2d at 509; [***14] *Sebastian v. Dep't of Labor & Indus.*, 142 Wn.2d 280, 285, 12 P.3d 594 (2000). Thus, some of our cases indicate that consideration of a statutory scheme as a whole, or related statutes, is part of the inquiry into legislative intent only if a court determines that the plain meaning cannot be derived from the statutory provision at issue and ambiguity necessitates further inquiry.

Other cases indicate, however, that under the "plain meaning" rule, examination of the statute in which the provision at issue is found, as well as related statutes or other provisions of the same act in which the provision is found, is appropriate as part of the determination whether a plain meaning can be ascertained. In *Estate of Lyons v. Sorenson*, 83 Wn.2d 105, 108, 515 P.2d 1293 (1973), for example, the court said that legislative intent is to be determined from what the Legislature said, if possible. The court then determined legislative intent from the "plain and unambiguous" language of a statute "in the context of the entire act" in which it appeared. *Id.*; *see also C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 708-09, [**10] 985 P.2d 262 (1999) [***15] (where statutory language is clear and [*11] unambiguous, its meaning is derived from its language alone; the court construes an act as a whole, giving effect to all the language used, with related statutory provisions interpreted in relation to one another); *ITT Rayonier, Inc. v. Dalman*, 122 Wn.2d 801, 807, 863 P.2d 64 (1993) (a term in a regulation should not be read in isolation but rather within the context of the regulatory and statutory scheme as a whole; statutory provisions must be read in their entirety and construed together, not by piecemeal).

As has been noted:

In the past, the plain meaning rule rested on theories of language and meaning, now discredited, which held that words have inherent or fixed meanings. These theories are unnecessary to the plain meaning rule, however, if the rule is interpreted to direct a court to construe and apply words according to the meaning that they are ordinarily given, taking into account the statutory context, basic rules of grammar, and any special usages stated by the legis-

lature on the face of the statute. So defined, the plain meaning rule requires courts to consider legislative purposes or policies appearing [***16] on the face of the statute as part of the statute's context. In addition, background facts of which judicial notice can be taken are properly considered as part of the statute's context because presumably the legislature also was familiar with them when it passed the statute. Reference to a statute's context to determine its plain meaning also includes examining closely related statutes, because legislators enact legislation in light of existing statutes.

2A NORMAN J. SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 48A: 16, at 809-10 (6th ed. 2000) (quoting R. Randall Kelso & C. Kevin Kelso, *Appeals in Federal Courts by Prosecuting Entities other than the United States: The Plain Meaning Rule Revisited*, 33 *Hastings L.J.* 187, 207-08 (1981)).

Under this second approach, the plain meaning is still derived from what the Legislature has said in its enactments, but that meaning is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question. Upon reflection, we conclude that this formulation [*12] of the plain meaning rule provides the better approach because it is [***17] more likely to carry out legislative intent. Of course, if, after this inquiry, the statute remains susceptible to more than one reasonable meaning, the statute is ambiguous and it is appropriate to resort to aids to construction, including legislative history. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 808, 16 P.3d 583 (2001); *Timberline Air Serv., Inc. v. Bell Helicopter-Textron, Inc.*, 125 Wn.2d 305, 312, 884 P.2d 920 (1994).

[5] Here, the plain meaning of the domestic uses exemption is apparent from the language in RCW 90.44.050 and related statutes. RCW 90.44.050 plainly says that the exemption applies provided 5,000 gpd or less is used for domestic purposes. This is true, the statute provides, whether the use is to be a single use or group uses. That is, whether or not the use is a single use, by a single home, or a group use, by several homes or a multiunit residence, the exemption remains at one 5,000 gpd limit, according to the plain language of the statute. The developer of a subdivision is, necessarily, planning for adequate water for group uses, rather than a single [***18] use, and accordingly is entitled to only one 5,000 gpd exemption for the project.

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Secondly, where a permit is required, it is required *before* any wells are dug. Under the groundwater code, each applicant to withdraw groundwater must provide specified information, including the location of the proposed well or wells or other works for withdrawal of water, the amount of water proposed to be withdrawn, and the depth and type of construction *proposed* for the well or wells or other works. RCW 90.44.060. RCW 90.03.250 provides for the application procedure for surface water and, by virtue of RCW 90.44.060, for groundwater as well. RCW 90.03.250 states that any person may make application for a permit to make an appropriation of water for beneficial use,

and shall not use or divert such waters until he has received a permit from the department as in this chapter provided. [**11] The construction of any ditch, canal or works, or performing any work in connection with said construction or appropriation, or [*13] the use of any waters, shall not be an appropriation [***19] of such water nor an act for the purpose of appropriating water unless a permit to make said appropriation has first been granted by the department.

RCW 90.44.050 itself begins with the language "no withdrawal of public ground waters of the state shall be begun, *nor shall any well or other works for such withdrawal be constructed, unless*" a permit is issued, except as provided in the exemption. (Emphasis added.) Thus, RCW 90.44.050 plainly contemplates, as do related statutes, that a permit is required before any construction occurs and before any withdrawal of water is made. Withdrawal of water, alone, is not the activity that necessitates a permit. A permit is required earlier in the process, before any well is dug or other works constructed for withdrawal of groundwater.

Thus, two concepts, construction of works, or digging of wells in order to withdraw water, and the withdrawal of water and putting it to beneficial use are linked in the permitting process. Neither can occur absent a permit. The same two concepts must be linked for purposes of the exemption from the permitting process because that is precisely what [***20] the exemption is--an exemption excusing the applicant from permit requirements. The one seeking an exemption from permit requirements is necessarily the one planning the construction of wells or other works necessary for withdrawal of water and is the one who would otherwise have to have a permit before any construction commences or wells are dug. Thus, under RCW 90.44.050,

and related statutes, qualification for the exemption does not depend, as respondents claim, solely on who ultimately withdraws the water and puts it to beneficial use.² It also [*14] concerns the person planning the wells or other works, before any water is ever withdrawn. Moreover, we note that if the developer in this case dug one well to provide water for the domestic uses for the entire development, there is no question that more than 5,000 gpd would be withdrawn and a permit would be required. Insofar as beneficial use is concerned, however, the water would be put to the same purpose and actually beneficially used by the same homeowners who would withdraw from individual wells.

2 The Whites focus on the language of the statute respecting the uses to which the water may be put. The exemption is provided for "single or group domestic uses in an amount not exceeding five thousand gallons a day." RCW 90.44.050. They note that the statute also provides that to the extent water is "regularly used beneficially" the right is equal to that established by a permit issued under chapter 90.44 RCW. RCW 90.44.050. Here, they say, it is undisputed that the groundwater withdrawal will be made by the homeowners, not the developer, and the homeowners will be the ones putting the water to beneficial use for domestic purposes. This is the reading of the statute accepted by the trial court.

[***21] Because (1) the proposed use is group domestic uses, and (2) the exemption to the permit must be determined with regard to the same conditions necessitating compliance with permitting requirements if the exemption does not apply, the exemption does not apply here to allow a withdrawal for each lot in the residential subdivision under separate, individual 5,000 gpd exemptions.³ In this case it is the developer, not the homeowner, who is seeking the exemption in order to drill wells on the subdivision's lots and provide for group domestic uses in excess of 5,000 gpd. The developer may not claim multiple exemptions for the homeowners.⁴

3 Contrary to the dissenting opinion, there is nothing in this record that supports the dissent's claim that Ecology has, as a matter of agency policy, held the view for 50 years that the exemption allows the multiple wells sought in this case. The record indicates that the issue has arisen recently because developers have sought ways to obtain water in the face of a backlog on permit applications. Nor should Ecology be held to the view of some of its employees. On this record, it simply cannot be fairly said that Ecology has adopted any policy as to application of the exemption to multiple wells in residential developments. Thus,

even if one concluded the exemption is ambiguous, there is no agency interpretation of the statute binding the agency.

[***22]

4 Also contrary to the dissent's view, it does make a difference whether the exemption from the permitting requirements is sought by an individual homeowner or a developer. Aside from the statutory distinctions (the exemption is from permitting, which otherwise applies to the party who seeks to construct the well, and expressly applies prior to commencement of any construction of the well--thus applying to the developer), use of the exemption by developers will predictably and greatly expand unpermitted water use in this state. Individual, single family residential use of the exemption (or group uses not exceeding 5,000 gpd in total) is simply not comparable to what can occur if the exemption is rewritten to allow for multiple wells in large developments. If the Legislature had intended the exemption to apply to all residential domestic uses, it would have written the exemption that way.

[**12] C&G contends, though, that the plain meaning of RCW 90.44.050 [*15] flows from the words "any withdrawal" in the statute. C&G argues that the court should determine [***23] the meaning of the words "any withdrawal" from standard dictionary definitions, and that "any" means "every" and "all." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 97 (1986); see *State v. Smith*, 117 Wn.2d 263, 271, 814 P.2d 652 (1991); *State ex rel. Evans v. Bhd. of Friends*, 41 Wn.2d 133, 145, 247 P.2d 787 (1952). "Withdrawal," C&G urges, means "to remove or draw out from a place or position." WEBSTER'S at 2626 (1986) (defining "withdraw"). Thus, C&G reasons, the statute plainly provides that "every or all removals" of groundwater for domestic uses of less than 5,000 gpd⁵ is exempt from permitting requirements.

5 Although C&G says "less than" 5,000 gpd is exempt, the statute actually says in an amount not to exceed 5,000 gpd.

However, as Ecology urges, C&G's reading of "any withdrawal" in the exemption would necessarily mean that each well is a separate withdrawal because *every* and *all removals* of groundwater would fall within "any withdrawal." But, as Ecology [***24] points out, the groundwater code clearly contemplates that one withdrawal may be made from more than one well. RCW 90.44.060 refers to "each application to withdraw public ground water by means of a well *or wells*" shall set forth certain information. (Emphasis added.) RCW 90.44.100(1), allowing for amendment of groundwater

permits or certificates, states that "the holder of a valid right to withdraw public ground waters may . . . construct *wells* or other means of withdrawal at a new location" if the change is approved. (Emphasis added.) The same statute says that a permit or certificate may be amended to allow construction of "replacement or a new additional well *or wells*." RCW 90.44.100(2) (emphasis added). RCW 90.44.080(1), concerning the showing required to obtain a certificated water right, requires the permittee to show "the location of *each well* or other means of withdrawal constructed under the permit." (Emphasis added.) Thus, under a permit or water right certificate, one can, under appropriate circumstances, remove water using two or more wells.

[***25] [*16] The term "withdrawal" is, as Ecology urges, a term of art in water law, although Ecology does not go so far as to define it. In general, when one appropriates water one does so by means of diversion of surface water or by withdrawal of groundwater. The words "diversion" and "withdrawal" both relate to the actual physical acquisition of water to put to beneficial use, and both also relate to the type of right a water right holder has, i.e., diversionary and withdrawal rights. Neither term, in and of itself, defines the scope of the right, and the word "withdrawal" and the words "any withdrawal" do not establish the plain meaning of the exemption in RCW 90.44.050.

Other statutes in the surface and groundwater codes support our understanding of the plain meaning of RCW 90.44.050. As Ecology points out, the surface and groundwater codes generally require protection of existing rights and water resources. See RCW 90.03.290; RCW 90.44.030, .070; RCW 90.54.020. Of course, where the exemption in RCW 90.44.050 [***26] applies, Ecology does not engage in the usual review of a permit application under RCW 90.03.290, including review addressing impairment of existing rights and public interest review. Nevertheless, the Legislature's limits on the exemption, particularly the 5,000 gpd limit on the group uses exemption, establishes that the Legislature did not intend unlimited use of the exemption for domestic uses, and did not intend that water appropriation for such uses be wholly unregulated. The balance which the Legislature struck in RCW 90.44.050 allows small exempt withdrawals for domestic uses, but does not contemplate use of the [***13] exemption as a device to circumvent statutory review of permit applications generally.

The parties here dispute the potential impacts if RCW 90.44.050 is read to allow the exemption to apply to each individual well in a development such as Rambling Brooks Estates.⁶ The question is more basic, i.e., whether the [*17] Legislature even contemplated the possibility that developments of the size in this case, or

even larger, would be entitled to exempt withdrawals of 5,000 [***27] gpd for each of their lots. Given the limitation on single and group uses, and the overall goal of regulation to assure protection of existing rights and the public interest, it is clear that the Legislature did not intend that possibility when this statute was enacted.⁷

6 The record indicates that developers are interested in using the exemption in RCW 90.44.050 to provide water for new development. Clerk's Papers (CP) at 838-40 (Ecology staff person declaration describing recent developments which have been built or proposed using multiple wells). It is possible that to date use of the exemption for subdivisions has been discouraged by 1997 Op. Att'y Gen. No. 6.

7 Despite the drama of the dissent's opening line, the majority opinion does not "toll" any "bells." It has been abundantly clear for some time that growth can be and is affected by the Legislature's enactments respecting water allocation, permitting and management, as well as by funding decisions. One has only to look at *Hillis v. Department of Ecology*, 131 Wn.2d 373, 932 P.2d 139 (1997), involving the backlog of permit applications, to recognize that the Legislature's action or inaction has enormous impact in this area. The court's recent cases, and recent legislative efforts, show that water management is a huge issue in this state.

There is clearly controversy as to the best way to manage this state's water resources. However, policy decisions are the province of the Legislature, not of this court. The dissent would have this court write water policy by rewriting RCW 90.44.050. The chief problem with the dissent's rewrite of the statute is that the exemption will decimate the general rule, i.e., the permitting requirement. The role of this court is to preserve the general requirement of permitting, as the Legislature obviously intended.

[***28] [6] Respondents urge, however, that there are enforcement mechanisms in place to assure that existing rights and the public interest can be protected even if the exemption is applied as they request.⁸ Initially, the existence of enforcement statutes does not alter the plain meaning of RCW 90.44.050. Moreover, after-the-fact remedies will not serve legislative purposes as effectively as review before appropriation occurs. By the time they are invoked, particularly [*18] given that Ecology's resources are already spread too thin, *see Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 932 P.2d 139 (1997), damage will already have been done. While the Legislature has obviously discerned that this is an acceptable

risk for small exempt uses, the Legislature's limit on single and *group* domestic uses tells us that it is an impermissible result beyond the plain terms of the statute.⁹

8 RCW 90.44.050 itself provides that a right acquired under the exemption is to be treated as all other rights, and thus is subject to the prior appropriation doctrine's first in time first in right principle. The same statute authorizes Ecology to require a person making an exempt withdrawal to provide information about the means and quantity of withdrawal. RCW 90.44.130 authorizes Ecology to limit withdrawals by appropriators to maintain a safe sustaining yield from groundwater bodies. RCW 90.44.180 authorizes Ecology on its own motion or by water rights holders' petition to conduct hearings and determine whether the water supply in a designated area is adequate for current needs and to order withdrawals decreased. RCW 90.44.220 authorizes Ecology to apply to court for an adjudication of all rights in a particular groundwater body.

[***29]

9 Amici Okanogan County, Wahkiakum County, the Building Industry Association of Washington, the Washington Association of Realtors, and the Washington Ground Water Association argue that multiple exempt wells are crucial to rural development where municipal or private water purveyor water is not available and new water rights are extremely difficult to obtain because of the backlog of applications. Amici say that development will be paralyzed in rural areas under Ecology's position. They also urge that Growth Management Act (chapter 36.70A RCW) planning duties will be hindered if the exempt well provision does not apply to multiple wells in a development.

It is no secret that water availability is a crucial issue in this state, and will become even more so as time passes. The policy issues raised by amici should be directed to the Legislature, however, which is in the best position to determine how this increasingly scarce resource should be managed. It is inappropriate for this court to rewrite statutes.

We add, though, that developers may have other avenues of available water, including existing water purveyors, transfer of existing water rights, and, where proper, condemnation.

[***30] [**14] Finally, on this issue, it seems apparent that developers seek to use the exemption in an attempt to bypass the permit system because obtaining new permits to appropriate water within a reasonable

time has become virtually impossible. The backlog of unprocessed permits is due in part, it appears, to inadequate funding for Ecology to carry out its statutory duties. The problems faced by developers and others seeking to appropriate water could be ameliorated to a degree if the Legislature would provide adequate funding for studies, resources, and personnel necessary to carry out the water resource laws and regulations.

Rule making

C&G argues that Ecology failed to engage in required rule making when it "changed" its interpretation of the exempt well provision. C&G reasons that Ecology asserts "developer intent" (that the intent of the developer determines [*19] whether the exemption applies) as a limitation on the exemption. This limitation, C&G reasons, is of general applicability and clearly establishes or alters qualifications for the enjoyment of benefits or privileges conferred by law, and thus is a rule subject to the Administrative Procedure Act (chapter 34.05 [***31] RCW) rule-making requirements. *See generally Hillis*, 131 Wn.2d at 398-400.

[7] As a matter of the plain meaning of the statute, the exemption in RCW 90.44.050 does not apply where a developer proposes to use multiple wells collectively withdrawing over 5,000 gpd to serve a subdivision. Accordingly, the issue is not one of agency policy subject to rule making. "Administrative rules or regulations cannot amend or change legislative enactments." *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 600, 957 P.2d 1241 (1998) (citing *Pannell v. Thompson*, 91 Wn.2d 591, 601, 589 P.2d 1235 (1979)).

Equitable Estoppel

The trial court held on alternate grounds that RCW 90.44.030's exemption must be applied in this case because Ecology is equitably estopped by its actions from requiring a permit to withdraw groundwater. Respondents have claimed that (1) Ecology did not appeal a 1986 county short plat determination which indicated that the lots in C&G's development would be served by individual wells; (2) an Ecology employee told Mr. Campbell that C&G would be able to place a well [***32] on every one to two lots without a permit provided the 5,000 gpd limit was met; and (3) Ecology did not take enforcement action until four months after it received from C&G notices to construct exempt water wells on the lots in Rambling Brooks Estates.

[8] [9] Equitable estoppel may apply where there has been an admission, statement or act which has been justifiably relied upon to the detriment of another party. *Lybbert v. Grant County*, 141 Wn.2d 29, 35, 1 P.3d 1124 (2000); *Beggs v. City of Pasco*, 93 Wn.2d 682, 689, 611 P.2d 1252 [*20] (1980). Establishment of equitable

estoppel requires proof of (1) an admission, act or statement inconsistent with a later claim; (2) another party's reasonable reliance on the admission, act or statement; and (3) injury to the other party which would result if the first party is allowed to contradict or repudiate the earlier admission, act or statement. *Theodoratus*, 135 Wn.2d at 599. Equitable estoppel against the government is not favored. *Id.* Accordingly, when the doctrine is asserted against the government, it must be necessary to prevent a manifest injustice and applying [***33] estoppel must not impair the exercise of government functions. *Id.* Proof of the elements of estoppel must be by clear, cogent and convincing evidence. *Id.*

[10] [11] [12] Ecology maintains that the doctrine does not apply because the issue of statutory construction involved here is a matter of law, rather than an issue of fact. *See Theodoratus*, 135 Wn.2d at 599-600.¹⁰ We agree. Although the Whites urge that the issue is whether the withdrawal or withdrawals fall within the exemption, and therefore is a question of fact, the issue is the [**15] meaning and scope of the exemption, not whether a particular set of circumstances brings a case within that scope.¹¹

10 Equitable estoppel does not apply when the acts of a governmental body are ultra vires and void. *State v. Adams*, 107 Wn.2d 611, 615, 732 P.2d 149 (1987).

11 C&G maintains that if the meaning of a statute is uncertain, the doctrine may be applied even where a question of statutory meaning is involved. It relies on *Hitchcock v. Washington State Retirement Systems*, 39 Wn. App. 67, 72-73, 692 P.2d 834 (1984). *Hitchcock* does not stand for the proposition, however. There, the court noted the doctrine would not be applied to frustrate the clear purpose of state laws. *Id.* It observed that while the applicant for retirement benefits in that case was employed, no statute provided that compensation for personal services could not include payments to defray expenses in performing services. After the applicant applied for retirement benefits, a statutory enactment provided that an employee's salary could not be increased by a payment in lieu of a fringe benefit, and further provided that the statute would not apply to any contracts in force on March 27, 1982. The court reasoned that allowing payments in lieu of fringe benefits (an automobile in that case) included in contracts prior to the enactment of the statute to be included within earnable compensation for purposes of retirement calculations would not frustrate the purpose of the law. *Hitchcock* does not support C&G's claim that equitable estoppel applies here.

[***34] As in *Theodoratus*, the doctrine of equitable estoppel does [*21] not apply in this case because the meaning of a statutory provision is at issue.

Conclusion

Once again this court must decide an issue involving appropriation of this state's public waters, at a time when existing applications to appropriate water are severely backlogged. It is understandable that the developer in this case wants to use the domestic uses exemption in RCW 90.44.050 as a way to obtain water. However, the statute's plain language directs that the exemption is not intended for use by a developer to provide water for group uses by multiple homes each withdrawing up to 5,000 gpd. Moreover, whether the exemption applies must be determined with regard to who is planning the construction of wells or other works to withdraw water, because the permit process, and thus necessarily an exemption from that process, must be determined prior to construction of wells or other works. The developer, in this case, seeks the exemption and, under RCW 90.44.050 and related statutes, is not entitled to use the exemption to withdraw more than 5,000 gpd, whether [***35] for single or group domestic uses.

The summary judgment in favor of respondents is reversed, and this case is remanded for entry of summary judgment in favor of the Department of Ecology.

Alexander, C.J., and Smith, Ireland, and Chambers, JJ., concur.

CONCUR BY: Sanders

CONCUR

Sanders, J. (concurring in dissent) -- I agree with the majority that the "plain language" of RCW 90.44.050 *should* control the disposition of this case, and I agree with the dissent that it *does*.

This statute plainly requires a permit prior to the construction of a well and withdrawal of public groundwaters

EXCEPT, HOWEVER, That any withdrawal of public ground waters . . . for single or group domestic uses in an amount not [*22] exceeding five thousand gallons a day . . . is and shall be exempt from the provisions of this section . . .

RCW 90.44.050.

From a facial reading of the text it seems apparent that drilling a well to withdraw less than five thousand

gpd for domestic uses, whether single or group domestic uses, is categorically exempt.

Notwithstanding, the majority finds it necessary [***36] to turn this simple exemption statute on its head through pages of extralegal contortions to conclude:

The developer of a subdivision is, necessarily, planning for adequate water for group uses, rather than a single use, and accordingly is entitled to only one 5,000 gpd exemption for the project.

Majority at 12. For this statement to make sense the majority must be assuming the statute limits exempt wells to one per customer. But the statute doesn't say that.

Not that it matters, but by the majority's logic a developer could drill only one exempt well to service 16 lots whereas after sale of these lots to individual purchasers, each of the 16 could drill their own wells. What reason could the legislature have in mind to make such a distinction? I can think of none. Nor can I find such a distinction in the clear language at issue.

The majority's rationale for a distinction between single homeowners and developers (who usually make single home acquisition possible) is buried in footnote number 4 on page 14:

[I]t does make a difference whether the exemption from the permitting requirements is sought by an individual homeowner or a developer. Aside from the [***37] statutory distinctions (the exemption is from permitting, which otherwise applies to the party who seeks to construct the well, and expressly applies prior to commencement of any construction of the well--thus applying to the developer), use of the exemption by developers will predictably and greatly expand unpermitted water use in this state. Individual, single family residential use [*23] of the exemption (or group uses not exceeding 5,000 gpd in total) is simply not comparable to what can occur if the exemption is rewritten to allow for multiple wells in large developments.

In summary, the majority prefers fewer exempt wells to more exempt wells; therefore the majority rewrites the statute to disallow construction of exempt wells by developers.

But if it is true "developers will predictably and greatly expand unpermitted water use in this state," it is so only because developers may find it expedient to do so under the exception which the legislature has created which allows exactly that. Apparently the majority would prefer to eliminate or narrow statutory exemptions so as to prevent citizens (who happen to be engaged in development of land) from withdrawing groundwater [***38] for beneficial domestic purposes--because that will allow people to develop their land. The inevitable result of the majority's public policy (which supplants the legislature's public policy) is to stifle economically efficient development, create an artificial scarcity of building lots, and "dry up" affordable housing for lack of available water and/or making it more costly to acquire. Whatever benefits there may be to the majority's public policy, and my imagination is too challenged to conceive of any, it is a matter for the legislature, not our majority, to enact it. And it hasn't.

Accordingly I would affirm the learned trial court: Wells withdrawing less than 5,000 gpd for domestic uses are categorically exempt, because the legislature says they are.

I join the dissent.

DISSENT BY: Susan J. Owens, Richard B. Sanders

DISSENT

[**18] Owens, J. (dissenting) -- The decision today tolls the bell for growth and growth management in rural Washington. Until now, growth management plans in rural counties have depended on the availability of the domestic well exemption to promote sensible growth because large [***39] water supply installations are often not feasible. The result the majority hopes to achieve--preventing developers from [*24] using the domestic [**19] well exemption--may (or may not) be environmentally laudable. But it will upset rural development. The majority cannot foresee whether the effect will be for better or worse. In any event, the majority's foray into lawmaking rests on a tortured interpretation of the domestic well exemption. Because I subscribe to the old-fashioned notion that statutes mean what they say, I dissent.

The heart of the majority's reasoning is that Campbell & Gwinn's proposal to use individual wells to supply water to a development is an abuse of the exemption. What cannot be done with 1 well, the majority tells us, cannot be done with 16. The flaw in the majority's reasoning is that 16 homeowners could do just what Campbell & Gwinn proposes. The majority's construction of RCW 90.44.050 forgets the point of the domestic well exemption. Each well would serve one family's domestic

needs, and draw less than 5,000 gallons per day (gpd). This use in this amount is exactly what the domestic well exemption is meant to allow, [***40] and these are the only conditions for its applicability.

[**16] RCW 90.44.050 clearly creates an exemption from the permit requirement for the taking of groundwater for domestic use and the exemption is clearly limited to 5,000 gpd. But the difficulty of this case comes from the vagueness inherent in this statute. It does not explain when one 5,000 gpd exemption is available, instead of 2 or 16. There are two possibilities in the statute: either 5,000 gpd may be taken for every "withdrawal" or for every "single or group domestic use." The majority deals with neither satisfactorily.

The majority observes that one withdrawal may be made by multiple wells. Majority at 15. Obviously one person can drink from two straws. But multiple wells can make multiple withdrawals too. No rhyme or reason is apparent why these wells make just one. The majority observes that multiple wells can make 1 withdrawal only to rebut the notion that merely drilling 16 wells is by definition 16 withdrawals. Granted 16 wells do not necessarily make 16 [*25] withdrawals, the majority does not explain why they *in fact* do not here.

But the majority does not say that [***41] Campbell & Gwinn is limited to one 5,000 gpd exemption on account of its 16 wells being 1 withdrawal. Instead, the majority concludes that Campbell & Gwinn's proposed wells are one group domestic "use" entitled to one exemption. Majority at 12. I agree that we should focus our attention on the intended use of the water, in keeping with our historical adherence to "beneficial use" as the fundamental measure of water rights. *Dep't of [**17] Ecology v. Acquavella*, 131 Wn.2d 746, 755, 935 P.2d 595 (1997) (citing 1 WELLS A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 9 (1971); *Ickes v. Fox*, 300 U.S. 82, 94, 57 S. Ct. 412, 81 L. Ed. 525 (1937); *Neubert v. Yakima-Tieton Irrigation Dist.*, 117 Wn.2d 232, 237, 814 P.2d 199 (1991)). If each *use*, single or group, is entitled to one exemption, the issue becomes how to tell the two apart.

"Group domestic use" is not defined by the statute; and even though the majority relies on the term, it is not defined by the majority either. The majority says that "several homes" or a "multiunit residence," majority at 12, may be a group use. The majority reasons that an exempt withdrawal [***42] is limited to 5,000 gpd no matter whether it is for single or group uses. The trouble comes in assuming that what is proposed is 1 group use, not 16 single uses. I take it for granted that some nexus must be found between two well users to call their uses a "group use" legitimately. The problem of defining "group domestic use" is a matter of indicating when two

uses become so connected that they become "group use," and cease to be "single uses" qualifying for two exemptions. Obviously two homeowners both entitled to drill an exempt well could drill one between them and agree to make a group use. In any event, simply declaring that this case involves a group use does not convince me that it is so.

The water to be taken in this case would be used by homeowners for their domestic needs. At best the record is [*26] vague on the nexus between their uses. A Department of Ecology employee states that the subterranean "zones" from which the water would be drawn are "hydraulically connected." Clerk's Papers (CP) at 903-04. It is not clear whether he is referring to the well works or the aquifers. The neighborhood covenants contain references to a common "irrigation" plan. [***43] CP at 742. However, covenant 15 says that a lot may instead use its domestic well for irrigation, suggesting that the irrigation plan is separate from the wells. *Id.* Otherwise, the only connection between the intended water users in this case, as the majority notes, is the presence of a sign at the entrance to the development. I cannot see how, with so little discussion of the evidence, the majority reaches its conclusion that this case deals with a group use, instead of single uses. The majority does not explain how to tell the difference.

The majority does not talk adequately about group use because of its reliance on the fact that Campbell & Gwinn will construct the wells. Because a permit is required both to construct a well and to withdraw water, the majority concludes at page 13 that construction and withdrawal are linked for purposes of a permit exemption. I do not understand its logic when it says that well construction and water withdrawal are "linked" for purposes of the exemption. The majority appears to confuse the *tasks* which are exempted with the *conditions* making the exemption available. The conditions triggering this exemption are the purpose of the appropriation [***44] and the amount appropriated. The only sense I can make of the majority's argument is that it means that the availability of the exemption depends on who constructs the well. I can see how this question could be relevant, but only insofar as it relates to the conditions announced by the legislature--proper *use* in a proper *amount*. But since the majority seems to say that the fact that Campbell & Gwinn will construct the wells is an independent reason why these wells are not exempt, the majority seems to attach a condition to the domestic well exemption that is not expressed in the statute.

[*27] Even stranger than the majority's position is that espoused by Ecology at oral argument, that even if Campbell & Gwinn were to sell the lots to individuals who built their own homes and drilled their own wells, the wells would still not fall under the domestic well

exemption. According to Ecology, "the legislature plainly chose not to allow each household in a group of households to have a separate 5,000 gpd exemption." Opening Br. of Appellant at 24. As far as I can tell, Ecology believes that a developer who purchases a tract somehow taints it, fixing the whole tract's right to [***45] exempt well use at 5,000 gpd. The majority implies that this position is not correct, since it relies, at page 13, on the fact that the developer sought the exemption in this case, *not the homeowner*. But Ecology's angle is not so different from the majority's: the real bone of contention is that we are talking about a *developer*. But the domestic well exemption simply does not depend on who drills the well. It depends on who uses the water, and how much gets used. Because of my difference of opinion with the majority, I would find 16 single domestic uses here and affirm the trial court.

I have only one *technical* criticism of the majority. The majority's method of statutory construction in this case is to look at related statutes governing the taking of groundwater. That's fine. However, the majority should consider all the statutory provisions accompanying RCW 90.44.050, not merely a select few. Even though the majority says that we should construe RCW 90.44.050 in its statutory context, majority at 10-11, it also says that "the existence of enforcement statutes does not alter the plain meaning of RCW 90.44.050 [***46] ," majority at 17. The majority ignores remedial and regulatory powers given to Ecology to prevent the "unlimited use," majority at 16, that it fears. Even though the exemption is for withdrawals up to 5,000 gpd, under the prior appropriations doctrine it does not follow that each homeowner will in fact be allowed to take that much from Yakima's rambling brooks.

RCW 90.44.050 itself permits Ecology to monitor the method and amount of exempt withdrawals. RCW 90.44.130 [*28] permits it to limit subsequent withdrawals to "an amount that will maintain and provide a *safe sustaining yield* in the amount of the prior appropriation" (emphasis added). RCW 90.44.180 and RCW 90.44.220 permit Ecology to conduct hearings or bring actions in superior court to control excessive withdrawals. These statutes may not be as effective enforcement tools as the power to deny a permit outright, but the court is not here considering the wisest methods for Ecology's allocation of groundwater. We are interpreting the meaning of a statute. If the statutes requiring Ecology to protect existing [***47] water rights are relevant in interpreting the "balance" struck in RCW 90.44.050, majority at 16, then surely these remedial statutes are too.

Lastly I note that although the majority says the exemption "plainly" means something different from what I believe it does, for over 50 years Ecology used the same interpretation I use today. In its brief Campbell & Gwinn

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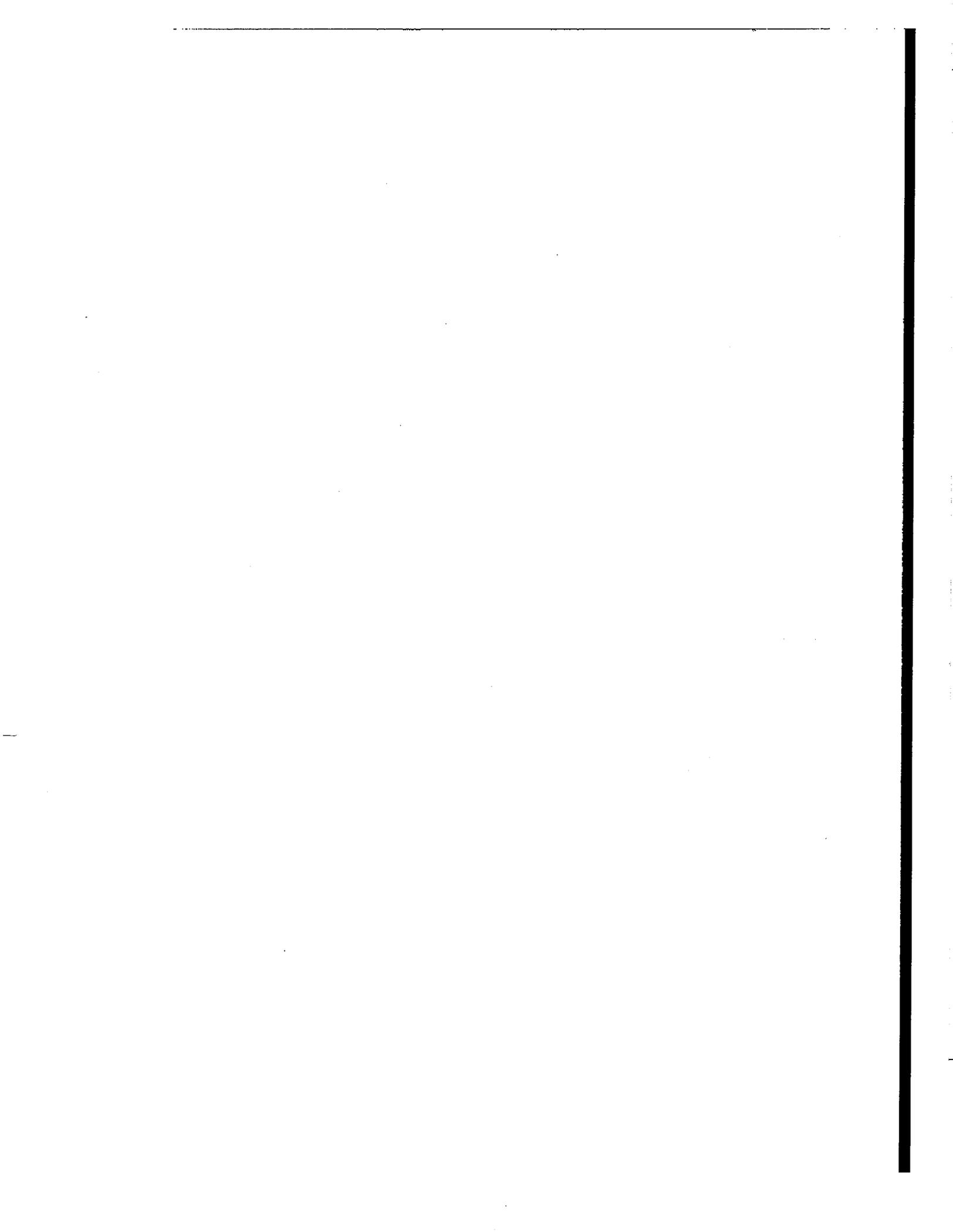
cites several occasions on which Ecology allowed projects similar to Campbell & Gwinn's to go forward, based on the domestic well exemption. Br. of Resp't Campbell & Gwinn at 17 n.2. Even more compelling is the fact that an Ecology employee *told* Robert Campbell when his firm bought the lots that individual wells falling under the domestic well exemption could be used to water this development in lieu of obtaining a water permit. Apparently, Ecology's late epiphany about what RCW 90.44.050 "plainly" means had not yet circulated to the Yakima office. The result is that the newly adopted

Ecology interpretation "ignore[s] the express language of the statute, the statute's legislative history, and [Ecology's] own prior, consistent interpretation and application of [***48] the statute." Br. of Resp't Campbell & Gwinn at 50.

I respectfully dissent.

Johnson and Bridge, JJ., concur with Owens, J.

Reconsideration denied August 21, 2002.



LEXSEE 159 WN.2D 652

David L. Tingey, *Petitioner*, v. Lloyd Haisch et al., *Respondents*.

No. 77689-0

SUPREME COURT OF WASHINGTON

159 Wn.2d 652; 152 P.3d 1020; 2007 Wash. LEXIS 130

September 19, 2006, Argued
February 15, 2007, Filed

PRIOR HISTORY: [***1]

Tingey v. Haisch, 129 Wn. App. 109, 117 P.3d 1189, 2005 Wash. App. LEXIS 2088 (2005).

SUMMARY:

Madsen, J., concurs in the result only; Chambers and C. Johnson, JJ., dissent by separate opinion.

Nature of Action: An attorney sought to recover unpaid attorney fees from a former client. The action was filed more than three years after the last day the attorney performed legal services for the client.

Superior Court: The Superior Court for Grant County, No. 99-2-01248-4, Evan E. Sperline, J., on September 22, 2003, entered a partial summary judgment, ruling that the statutory time limitation applicable to the action was six years. Following a bench trial on the merits, Kenneth L. Jorgensen, J., on July 14, 2004, entered judgment in favor of the attorney.

Court of Appeals: The court *reversed* the judgment at 129 Wn. App. 109, 117 P.3d 1189 (2005), holding that the transaction between the attorney and the client did not involve an open account with ongoing debit and credit entries and a fluctuating balance left open until either party finds it convenient to settle and close, and that, therefore, the claim for attorney fees was not an account receivable subject to a six-year limitation period.

Supreme Court: Holding that the balance owed by the defendant to the plaintiff constituted an account receivable incurred in the ordinary course of business and that the action is subject to the six-year limitation period applicable to actions upon accounts receivable, the court *reverses* the decision of the Court of Appeals and *reinstates* the ruling on summary judgment that the six-year limitation period applies to the action.

HEADNOTES

[1]**Judgment--Summary Judgment--Issues of Law--Review--Standard of Review.** A trial court's rulings on summary judgment are reviewed de novo.

[2]**Statutes--Construction--Review--Standard of Review.** Issues of statutory interpretation are reviewed de novo.

[3]**Statutes--Construction--Legislative Intent--Statutory Language--Plain Meaning--Context.** A court's objective in construing a statute is to determine the legislature's intent. If the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. A statutory provision's plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole. A court may appropriately employ tools of statutory construction, such as legislative history, to discern the provision's meaning only if the provision is ambiguous. A statutory provision is ambiguous if, after a plain language analysis, it remains susceptible to more than one reasonable interpretation.

[4]**Statutes--Construction--Meaning of Words--Absence of Statutory Definition--Resort to Dictionary.** When a statutory term that the statute does not define has a well-accepted, ordinary meaning, a regular dictionary may be consulted to ascertain the term's definition.

[5]**Statutes--Construction--Meaning of Words--Technical Language--Resort to Technical Dictionary.** When a technical term in a statute is used in its technical field, the term should be given its technical meaning by using a technical rather than a general purpose dictionary to resolve the term's definition.

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[6]Limitation of Actions--Account Receivable--What Constitutes--Test. For purposes of RCW 4.16.040(2), which provides that an action upon an account receivable incurred in the ordinary course of business is subject to a six-year limitation period, an "account receivable" is an amount due a business on account from a customer who has bought merchandise or received services.

[7]Limitation of Actions--Account Receivable--What Constitutes--Past Due Attorney Fees for Legal Services Rendered. The balance owed by a client to an attorney for legal services performed on behalf of the client on an hourly fee basis without a written fee agreement, but regularly invoiced in accordance with ordinary business practice, is an "account receivable" within the meaning of RCW 4.16.040(2), which provides that an action upon an account receivable incurred in the ordinary course of business is subject to a six-year limitation period.

[8]Limitation of Actions--Attorney and Client--Compensation--Collection--Limitation Period--Oral Agreement. Absent a written fee agreement, a claim for past due attorney fees for legal services rendered on an hourly fee basis and regularly invoiced in accordance with ordinary business practice is subject to the six-year limitation period of RCW 4.16.040(2) for actions upon accounts receivable.

[9]Statutes--Construction--Meaning of Words--Absence of Statutory Definition--Avoiding Absurdity. Where the legislature provides no statutory definition and a court gives a term its plain and ordinary meaning by reference to a dictionary, the court will avoid a literal reading of the statute which would result in unlikely, absurd, or strained consequences. A reading that produces absurd results must be avoided because it will not be presumed that the legislature intended absurd results.

[10]Statutes--Construction--Legislative Intent--Statutory Language--Plain Meaning--Corroboration--Absence of Absurd Result. The outcome of a plain language analysis of a statutory provision may be corroborated by validating the absence of an absurd result. Where an absurd result is produced, further inquiry may be appropriate.

COUNSEL: *David L. Tingey*, pro se.

Harold J. Moberg, for respondents.

Philip A. Talmadge on behalf of ACA International, amicus curiae.

JUDGES: Justice Mary E. Fairhurst. WE CONCUR: Chief Justice Gerry L. Alexander, Justice Susan Owens, Justice Barbara A. Madsen, result only, Justice Richard B. Sanders, Justice James M. Johnson, Justice Bobbe J. Bridge. Justice Tom Chambers. WE CONCUR: Justice Charles W. Johnson.

OPINION BY: Mary E. Fairhurst

OPINION

En Banc

¶1 [**1021] [*654] Fairhurst, J. -- Petitioner attorney David Tingey performed legal services for respondents Lloyd and Lucy Haisch (hereinafter Haisch) on an hourly fee basis without [*655] a written fee agreement. Tingey challenges a Court of Appeals decision holding that his action to collect those fees is not governed by the RCW 4.16.040(2) six-year limitation for "an account receivable incurred in the ordinary course of business."¹ Tingey argues that [**1022] the term "account receivable" has a plain meaning in Washington law and that the Court of Appeals, after improperly finding the term to be ambiguous, derived for the term an inappropriately narrow meaning that excluded his action. Haisch argues that the applicable statute of limitation for Tingey's action is the RCW 4.16.080(3) three-year limitation for oral contracts.²

1 RCW 4.16.040(2) provides that "[a]n action upon an account receivable incurred in the ordinary course of business" shall commence within six years.

[**2]

2 RCW 4.16.080(3) provides that "[e]xcept as provided in RCW 4.16.040(2), an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument" shall commence within three years.

¶2 We hold that the plain meaning of "account receivable" as used in RCW 4.16.040(2) is an amount due a business on account from a customer who has bought merchandise or received services. This meaning encompasses a balance owed by a client to an attorney for legal services performed on behalf of the client on an hourly fee basis without a written fee agreement. Thus, the six-year limitation for "[a]n action upon an account receivable incurred in the ordinary course of business" applies to Tingey's action to collect attorney fees from Haisch. RCW 4.16.040(2). We reverse the Court of Appeals and reinstate the trial court's ruling on summary judgment that the six-year limitation applies.

I. FACTUAL AND PROCEDURAL HISTORY

¶3 Neither Tingey nor Haisch [***3] disputes the material facts of this case. In 1994, Tingey represented Haisch in a Grant County Superior Court lawsuit. They did not enter into a written fee agreement. Tingey regularly invoiced Haisch for legal services on an hourly fee basis and Haisch paid the invoices through June 1994. Tingey completed legal representation of Haisch in December 1994.

¶4 [*656] More than three years later, Tingey initiated a collection action against Haisch, alleging Haisch owed him in excess of \$20,000 for legal services rendered plus interest accrued.³ The trial court denied Haisch's motion to dismiss the action as time-barred by the three-year oral contract limitation of RCW 4.16.080(3). The trial court granted partial summary judgment to Tingey, ruling that the applicable statute of limitation for the action was six years. After Tingey prevailed on the merits in a bench trial, Haisch appealed the summary judgment ruling only.

3 United Collection Services, Inc. (United) initially filed suit against Haisch on Tingey's behalf. Following mandatory arbitration, which resulted in an award to Haisch, United requested a trial de novo and Tingey was substituted as real party in interest.

¶5 [***4] The Court of Appeals Division Three reversed. *Tingey v. Haisch*, 129 Wn. App. 109, 117 P.3d 1189 (2005). After finding the term "account receivable" to be ambiguous, the Court of Appeals held that "'account receivable' in RCW 4.16.040(2) refers to an 'open account,' that is '[a]n account that is left open for ongoing debit and credit entries by two parties and that has a fluctuating balance until either party finds it convenient to settle and close.'" *Tingey*, 129 Wn. App. at 117, P 18 (quoting Black's Law Dictionary 20 (8th ed. 2004) (defining "open account," a subdefinition within the definition of "account")). Based on this definition, the Court of Appeals held that the six-year limitation for accounts receivable did not apply to Tingey's claim for attorney fees. *Id.* We granted Tingey's petition for review. *Tingey v. Haisch*, 156 Wn.2d 1035, 134 P.3d 1171 (2006).

II. ISSUE

¶6 Does the RCW 4.16.040(2) six-year limitation for an "action upon an account receivable incurred in the ordinary course of business" provide the limitation in an action to collect a balance owed by a [***5] client to an attorney for legal services performed on behalf of the client on an hourly fee basis without a written fee agreement?

[*657] III. ANALYSIS

[1, 2]¶7 The trial court ruled on summary judgment that the RCW 4.16.040(2) six-year account receivable limitation governed Tingey's action to recover attorney fees. This court reviews rulings on summary judgment de novo. *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, P 5, [**1023] 121 P.3d 82 (2005). To resolve this matter, we must ascertain the meaning of "account receivable" as used in RCW 4.16.040(2). We also review issues of statutory interpretation de novo. *Berrocal*, 155 Wn.2d at 590, P 5.

A. Plain language analysis supplies the meaning of "account receivable" as used in RCW 4.16.040(2).

[3]¶8 A court's objective in construing a statute is to determine the legislature's intent. *State v. Jacobs*, 154 Wn.2d 596, 600, P 7, 115 P.3d 281 (2005). "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Id.* (alteration in original) (quoting *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)). [***6] A statutory provision's plain meaning is to be discerned from 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. *Id.* A provision that remains susceptible to more than one reasonable interpretation after such an inquiry is ambiguous, and a court may then appropriately employ tools of statutory construction, including legislative history, to discern its meaning. *Campbell & Gwinn*, 146 Wn.2d at 12.

¶9 Prior to 1989, an action upon an oral contract was subject to the former RCW 4.16.080(3) (1937) three-year statute of limitations.⁴ This limitation encompassed a claim for attorney fees where there was no written fee agreement. [*658] *Hart v. Day*, 17 Wn. App. 407, 413, 563 P.2d 227 (1977). In 1989, the legislature amended RCW 4.16.040, the six-year statute of limitations, adding as a new category, "action[s] upon an account receivable incurred in the ordinary course of business."⁵ Laws of 1989, ch. 38, § 1. The legislature simultaneously amended RCW 4.16.080(3), creating [***7] an exception to the three-year limitation on oral contracts for actions upon accounts receivable.⁶ Laws of 1989, ch. 38, § 2. In making these changes, the legislature did not define "account receivable."

4 Former RCW 4.16.080(3) provided that "an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument" shall be commenced within three years.

5 RCW 4.16.040 provides: The following actions shall be commenced within six years: (1) An action upon a contract in writing, or liability

express or implied arising out of a written agreement. (2) An action upon an account receivable incurred in the ordinary course of business. (3) An action for the rents and profits or for the use and occupation of real estate.

6 As revised, RCW 4.16.080(3) provides that "[e]xcept as provided in RCW 4.16.040(2), an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument" shall be commenced within three years. (Emphasis added.)

[***8]

7 The dissent announces its preference for statutory definitions, dissent at 667, and "appeal[s] to the legislature to ... clearly define account receivable for RCW 4.16.040(2)." Dissent at 674. Greater statutory clarity is always preferable. However, this court's duty does not stop at merely requesting remedial legislative action. We must discern what the legislature intended by the statutory language that it did enact.

[4, 5]¶10 When a term has a well-accepted, ordinary meaning, a regular dictionary may be consulted to ascertain the term's definition. *City of Spokane ex rel. Waste-water Mgmt. Dep't v. Dep't of Revenue*, 145 Wn.2d 445, 454, 38 P.3d 1010 (2002). When a technical term is used in its technical field, the term should be given its technical meaning by using a "technical rather than a general purpose dictionary" to resolve the term's definition. *Id.*

[6-8]¶11 The legislature modified account receivable with "incurred in the ordinary course of business." RCW 4.16.040(2). This statutory [***9] context suggests that the legislature intended to use the term in a technical business sense. Used as a term of art in the accounting and finance [*659] sectors, "accounts receivable" means "amounts due [a business] on account from customers who have bought merchandise or received services." Joel G. Seigel & Jae K. Shim, *Dictionary of Accounting Terms* 11 (3d ed. 2000). Consistent with the legislature's usage, the *Dictionary* [**1024] of *Accounting Terms*' technical definition of "accounts receivable" is likewise restricted to a business setting.

¶12 The term "account receivable" appears elsewhere in the Revised Code of Washington more than 10 times and is nowhere defined.⁸ The legislature makes it apparent through this pattern of use that it considers the term "account receivable" to have a plain meaning. Obtaining the definition of "account receivable" from a technical business dictionary is consistent with plain meaning analysis. The technical definition for "account receivable," as "an amount due a business on account from a customer who has bought merchandise or received services," is the appropriate definition to read into RCW 4.16.040(2). The attorney fees owed [***10] to

Tingey, for which he regularly invoiced Haisch, satisfy this meaning of "account receivable."

8 See, e.g., RCW 7.60.100; RCW 13.40.060; RCW 28A.320.080; RCW 41.50.160; Title 60 RCW; RCW 70.105D.020; Title 82 RCW.

¶13 The dissent states that under our definition "all oral contracts for goods and services in the ordinary course of business have a six-year statute of limitation." Dissent at 669. The dissent suggests, therefore, that our definition renders the term account receivable superfluous, contrary to established principles of statutory interpretation. *Id.* However, our definition of "account receivable" is considerably more narrow than the dissent represents. Our definition identifies the parties to the contract (a customer and a business) and the character of the transaction (a purchase by the customer). It requires the business to have completed performance [***11] (customer has bought or received the merchandise or services). It specifies the monetary nature of the remaining obligation (an amount due). Only oral [*660] contracts exhibiting all of these characteristics garner the account receivable six-year limitation.⁹

9 These characteristics likewise would determine whether the hypothetical transactions of the dissent's imaginary dairy farmer would constitute accounts receivable. Dissent at 667.

¶14 Both the Court of Appeals and the dissent deem the term "account receivable" to be ambiguous. *Tingey*, 129 Wn. App. at 114-15, P 11; dissent at 668. The Court of Appeals based its determination in part on the fact that "account receivable" appears in a variety of contexts, from which it concluded that the term "has different meanings depending upon the context."¹⁰ *Tingey*, 129 Wn. App. at 114, P 10. However, while "account receivable" is used in a wide variety of settings, close examination reveals that our definition encompasses the meaning of the term [***12] in those contexts.¹¹ Moreover, the use of "account receivable" in a broad range of business-related contexts supports the term having a well-accepted technical meaning.

10 The dissent agrees. Dissent at 668.

11 For instance, examining illustrations advanced by the Court of Appeals, in the "sale and valuation of businesses," *Tingey*, 129 Wn. App. at 114, P 10, "account receivable" referred to the outstanding fees owed to a law firm for professional services rendered. *In re Marriage of Nichols*, 27 Cal. App. 4th 661, 33 Cal.Rptr.2d 13, 17-18 (1994). In "priority disputes between secured parties," *Tingey*, 129 Wn. App. at 114, P 10, "account receivable" is defined as "any right to

payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper.' *Rocky Mountain Ass'n of Credit Mgmt. v. Hessler Mfg. Co.*, 37 Colo. App. 551, 553 P.2d 840, 843 (1976) (quoting Colo. Rev. Stat. § 4-9-106 (1973)). Where an "account receivable" is the "balance owed on ... an unsettled account," *Tingey*, 129 Wn. App. at 114, P 10, "account" is "generally defined as an unsettled claim or demand, by one person against another, which creates a debtor-creditor relationship between them." 1 Am. Jur. 2d *Accounts & Accounting* § 1 at 620-21 (2005). These usages are not inconsistent with an account receivable being an amount due a business on account from a customer who has bought merchandise or received services.

¶15 [***13] The Court of Appeals also identified that "whether or not a particular debt constitutes an account receivable may be a factual question." *Id.* at 114, P 10. While accurate, this observation is not relevant to a plain language analysis of "account receivable." The meaning of "account receivable" as used in RCW 4.16.040 is a question of law. It must be resolved before applying the definition to a particular set of facts to determine whether a specific debt constitutes an "account receivable."

[*661] [**1025] ¶16 Having found "account receivable" to be ambiguous, the Court of Appeals and the dissent resort to legislative history, from which they determine the intended meaning of "account receivable" to be an "open account." *Tingey*, 129 Wn. App. at 117, P 18; dissent at 669-71. Although we do not find "account receivable" to be ambiguous, we examine the legislative history of RCW 4.16.040(2)¹² to demonstrate that it is inconsistent with the legislature's intending the term "account receivable" to mean "open account."

¹² RCW 4.16.040(2) was amended in the 1989 legislative session. Laws of 1989, ch. 38, § 1. For consistency, we adopt the dissent's practice of referring to this legislation, introduced as Senate Bill 5213 and later revised as "the bill." See S.B. 5213, 51st Leg., Reg. Sess. (Wash. 1989); Substitute S.B. 5213, 51st Leg., Reg. Sess. (Wash. 1989).

¶17 [***14] The dissent derives from the legislative history that "the bill was passed with the intent of limiting the definition of account receivable to open accounts." Dissent at 671. This assertion is inconsistent with revision of the bill's language from "balance due upon a mutual, open, and current account, the items of which are in writing," S.B. 5213, 51st Leg., Reg. Sess. (Wash. 1989), to "[a]n action upon an account receivable

incurred in the ordinary course of business." Substitute S.B. 5213, 51st Leg., Reg. Sess. (Wash. 1989). We agree with the dissent that by replacing "the items of which are in writing" with "in the ordinary course of business," "the legislature intended to expand the scope ... to instances where a business' ordinary practices may not include writing down the terms of the account." Dissent at 671 (quoting S.B. 5213, *supra*; Substitute S.B. 5213, *supra*). But we find implausible the dissent's contention that substituting "account receivable" for "mutual, open, and current account" "do[es] not suggest ... inten[t] to expand the six-year statute of limitations beyond open accounts." Dissent at 671 (quoting S.B. 5213, *supra*). Retaining the [***15] open account language would be consistent with intending to limit the statute's scope to open accounts. Replacing that language with "account receivable" indicates intent to expand the scope of the statute beyond open accounts.

¶18 [*662] The dissent, relying on a floor debate excerpt, additionally states, "Senator Bill Smitherman explained the term account receivable meant just an open account, and the bill passed following his explanation."¹³ Dissent at 670. However, the full context of the exchange reveals that after Senator Bill Smitherman provided his definition of account receivable, Senator Philip A. Talmadge proceeded to make further remarks. See dissent at 670 n.17; see also Senate Journal, 51st Leg., Reg. Sess., at 509 (Wash. 1989). Subsequently, "[f]urther debate ensued." Senate Journal, *supra*, at 509. That the bill was not put directly to a vote following Senator Smitherman's definition undermines the dissent's implication that the Senate responded to Senator Smitherman's definition by passing the bill. One senator's eight words during floor debate form a thin thread upon which to hang a legislative history analysis.

¹³ Senator Smitherman: "I believe it's just an open account, Senator." Senate Journal, 51st Leg., Reg. Sess., at 509 (Wash. 1989).

¶19 [***16] The bill's revision supports the conclusion that the legislature intended the bill to broaden the circumstances under which business debt was subject to a six-year statute of limitations. Senator Talmadge expounded on how the "account receivable" language would affect oral contracts to which businesses were a party, and the bill nevertheless passed the Senate later that day.^{14, 15} The [**1026] legislature's intent is further evidenced by the evolution of the Senate [*663] bill report language.¹⁶ The legislative history supports the legislature's intending "account receivable" to have a broader meaning than open account.

¹⁴ Senator Talmadge remarked, in part: "[T]he problem is, if I enter into an oral contract with

you, that's something that's a three year statute of limitations now and a three year statute of limitations under this bill. If I enter into an oral contract with you and you go back to your business and you say, ' "Well, I think I will carry that on my books," ' and you treat it as an account receivable, then it's something that would carry with it a six year statute of limitations." Senate Journal, *supra*, at 509.

[***17]

15 The dissent suggests that, upon hearing Senator Smitherman's definition, Senator Talmadge "offered a more expansive definition similar to the definition the majority adopts [and t]hat expansive definition lost." Dissent at 672. Close reading of Senator Talmadge's remarks reveals that, rather than proposing a definition, he was warning the Senate that the problem with the bill was its broader definition of account receivable. Despite Senator Talmadge's warning, as the dissent notes, no changes were made and the bill was passed. *Id.*

16 The Senate Bill Report that initially accompanied the bill when it failed to pass the Senate on March 2, 1989, Senate Journal, *supra*, at 488, stated "that the statute of limitations should be extended to six years for all actions based on an open and current account, which is in writing." S.B. Rep. on S.B. 5213, *supra* (emphasis added). Upon reconsideration the following day, the bill passed, Senate Journal, *supra*, at 509, accompanied by a revised Senate Bill Report that "suggested that the statute of limitations should be extended to six years for all actions based on an account receivable." S.B. Rep. on Substitute S.B. 5213, *supra* (emphasis added). The House Bill Report indicated that "[t]he statute of limitations is set at six years for an account receivable incurred in the ordinary course of business. This six-year period applies whether or not the account receivable is based on a written contract." H.B. Rep. on Substitute S.B. 5213, *supra* (emphasis added).

¶20 [***18] The plain meaning of "account receivable" in RCW 4.16.040(2) is an amount due a business on account from a customer who has bought merchandise or received services. Tingey seeks to collect a balance owed to his legal business by a client for legal services performed on behalf of that client. Tingey performed the services on an hourly fee basis at the request of the client, and the client was regularly invoiced for the amount owed in accordance with ordinary business practice. The term "account receivable" encompasses the balance which Tingey seeks to collect, an amount owed to him for legal services performed in the ordinary

course of his business. The six-year limitation of RCW 4.16.040(2) for "[a]n action upon an account receivable incurred in the ordinary course of business" provides the statute of limitations in this action.

B. The plain meaning of "account receivable" is corroborated by the absence of an absurd result produced in RCW 4.16.040(2).

¶9, 10]¶21 The Court of Appeals supported its finding that "account receivable" was ambiguous with the assertion that defining the term broadly produced an [***19] absurd result. Where the legislature provides no statutory definition and a court gives a term its plain and ordinary meaning by reference to a dictionary, the court "will avoid literal reading [*664] of a statute which would result in unlikely, absurd, or strained consequences." *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002). A reading that produces absurd results must be avoided because "it will not be presumed that the legislature intended absurd results." *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (quoting *State v. Delgado*, 148 Wn.2d 723, 733, 63 P.3d 792 (2003) (Madsen, J., dissenting)). The outcome of plain language analysis may be corroborated by validating the absence of an absurd result. Where an absurd result is produced, further inquiry may be appropriate.

¶22 The Court of Appeals concluded that interpreting "account receivable" "to encompass all business debt" produced absurd results. *Tingey*, 129 Wn. App. at 115, P 12. The court suggested that the "account receivable" exception to the RCW 4.16.080(3) [***20] three-year limitation on oral contracts would "swallow [] the remainder of the statute. Business owners would no longer need to enter into written contracts to benefit from a six-year statute of limitations because RCW 4.16.040(2) would essentially convert all of their business debt into accounts receivable." *Id.*

¶23 As the Court of Appeals noted, the impact on actions to collect business debt is significant, but substantial effect is not equivalent to an absurd result. Incorporating the technical definition of "account receivable" does except from the three-year limitation any action brought by a business to collect an amount due on account from a customer who [**1027] has bought merchandise or received services, in the ordinary course of business. The exception does not swallow the rule, however, because oral contracts between two private parties are still governed by the three-year limitation of RCW 4.16.080(3). Moreover, it is clear that the legislature considered the impact of the "account receivable" provision on the oral contract limitation because it amended that provision of former RCW 4.16.080(3) when [***21] it amended RCW 4.16.040(2).

159 Wn.2d 652, *; 152 P.3d 1020, **;
2007 Wash. LEXIS 130, ***

¶24 [*665] By contrast, as noted by Tingey, a more narrow definition of "account receivable" would produce a truly absurd, unworkable result. The appropriate statute of limitation in a collection action for attorney fees cannot reasonably turn on a fact-specific inquiry into the accounting and billing practices of the attorney, the transactional characterization of the legal services provided, and the client's history of payments on the account. Such a definition would produce a significant volume of litigation as parties attempted to determine precisely what accounting practices were required to benefit from the six-year limitation. The ramifications would extend well beyond attorney-client fee collection actions to other professional service providers, as well as general businesses.

¶25 Defining "account receivable" as "an amount due a business on account from a customer who has bought merchandise or received services" does not produce an absurd result. A more limiting definition of "account receivable" would. The absurd result test corroborates the meaning of "account receivable" arrived at through plain meaning analysis.

IV. CONCLUSION

¶26 [***22] We hold that the plain meaning of "account receivable" as used in RCW 4.16.040(2) is "an amount due a business on account from a customer who has bought merchandise or received services." This meaning encompasses a balance owed by a client to an attorney for legal services performed on behalf of the client on an hourly fee basis without a written fee agreement. RCW 4.16.040(2)'s six-year limitation for an action upon an account receivable incurred in the ordinary course of business applies to Tingey's action to collect attorney fees from Haisch. We reverse the Court of Appeals and reinstate the trial court's [*666] ruling on summary judgment that the six-year limitation applies.

Alexander, C.J., and Sanders, Bridge, Owens, and J.M. Johnson, JJ., concur. Madsen, J., concurs in result.

DISSENT BY: Tom Chambers

DISSENT

¶27 Chambers, J. (dissenting) -- One fine spring day, a dairy farmer sold 200 gallons of milk to a customer, spent two hours repairing a neighbor's tractor at an agreed upon hourly rate, and loaned [***23] a utility trailer to another neighbor with the understanding that the trailer would be returned the next year when, in lieu of rent, the neighbor would install new wheels and tires on the trailer. Our farmer occasionally has similar transactions with both neighbors. That fine spring day, our industrious farmer also sold an old riding lawn mower,

which he used mostly to mow the lawn around the farm house but occasionally to trim the grass and weeds from his fields. The used riding lawn mower was sold to an acquaintance across the valley for some money up front and the buyer's promise to mow the farmer's lawn and trim grass and weeds from some farm areas all summer. All of the farmer's transactions were oral, but he considered each an account receivable. The question we must answer is, if the farmer sought to judicially enforce any of these oral agreements, which statute of limitations applies?

¶28 Historically, those who rely on such oral contracts instead of written ones have had less time to seek judicial enforcement. The reason is obvious. Courts have more confidence in their ability to find the intent of the parties if that intent has been written down. Further, misunderstandings between [***24] parties concerning specific terms are greatly reduced if the specific terms are in writing. Memories often do not withstand the force of time, while written terms are precisely preserved [**1028] indefinitely. In recognition of these principles, our legislature provided six years to enforce written contracts, RCW 4.16.040(1), but only three years for other contracts, RCW 4.16.080(3).

[*667] The Ambiguous Meaning of Account Receivable

¶29 "Account receivable" is not defined in chapter 4.16 RCW or any other statute. Petitioner David Tingey argues that the word "receivable" is clear and means "a thing that can be received." Pet. for Review at 5. Further, he argues that "account" is defined as a "right to payment of a monetary obligation, whether or not earned by performance ... for service rendered or to be rendered." Pet. for Review at 5 n.1 (quoting RCW 62A.9A-102(a)(2)(A)(ii)). Thus, Tingey concludes that account receivable means "any right to payment for ... services rendered which is not evidenced by an instrument or chattel paper ... that can be received." Pet. for Review at 6 [***25]. The majority has adopted Tingey's definition with the addition that the transaction must be in connection with a business. Majority at .660

¶30 According to the majority, "[t]he plain meaning of 'account receivable' in RCW 4.16.040(2) is an amount due a business on account from a customer who has bought merchandise or received services." Majority at 663. I believe that under the majority's holding, likely all of our dairy farmer's spring day transactions, including the sale of the milk and the lawn mower, the tractor repair, and the leased utility trailer resulted in accounts receivable and are subject to a six-year statute of limitations. Their status is, at least, very debatable. This court can, over the next several decades and at the cost of numerous appellate cases, define account receivable in the ordinary course of business by case law or, much more

preferably in my view, the legislature could define account receivable or account receivable in the ordinary course of business for us.

¶31 *Webster's Third New International Dictionary* defines an account receivable as "a balance due from a debtor on a current account." Webster's Third New International [***26] Dictionary 13 (2002). A "current account" is defined as "an account between two parties having a *series of transactions* not covered by evidences of indebtedness (as notes or [*668] certificates) and usu. *subject to settlements at stated intervals* (as monthly or quarterly)." *Id.* at 557 (emphasis added).

¶32 This definition is inconsistent with the definition derived from the accounting dictionary. At the very least, the difference suggests the term is ambiguous. Account receivable means different things based on the context. The Court of Appeals explored some of the different uses:

[T]he term "account receivable" as it appears in legal proceedings, or as it is defined in dictionaries, has different meanings depending upon the context. In litigation, the term is used in the context of: (1) the sale and valuation of businesses, (2) adversary proceedings during bankruptcy proceedings, and (3) priority disputes between secured parties. In a legal dictionary, any balance owed by a debtor is considered an "account receivable." Other times, an account receivable is the balance owed on (1) an unsettled account or (2) an open account. Finally, whether or not a particular debt constitutes [***27] an account receivable may be a factual question.

¶33 *Tingey v. Haisch*, 129 Wn. App. 109, 114, 117 P.3d 1189 (2005) (footnotes and citations omitted). The meaning of the term "account receivable," let alone the phrase "account receivable in the ordinary course of business," is not apparent from its face. A statute is unambiguous only "when the statutory language admits of only one meaning." *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). The variety of distinct definitions of account receivable demonstrates that the statutory language is susceptible to more than one interpretation. Faced with different reasonable definitions, we must examine the legislative history to determine which reasonable definition the legislature intended. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 12, 43 P.3d 4 (2002); see also majority at 657. The result of such an inquiry supports interpreting the statute

[**1029] as referring to open accounts. This interpretation, in addition to reflecting the legislature's intent, is in accord with the principles supporting shorter statutory periods limiting claims based on oral rather than written [***28] contracts.

¶34 [*669] If the legislature meant that all business contracts for goods and services should have a six-year statute of limitation, it would surely have said so. It did not. Instead, it added limiting language the majority would define to make meaningless. The legislature intended that an account receivable, not just any business contract, should be entitled to the same statute of limitations as written contracts.

¶35 Our goal is to determine the legislature's intent, and we will avoid absurd results. *J.P.*, 149 Wn.2d at 450 (citing *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wn.2d 9, 19, 978 P.2d 481 (1999)). I admire the majority's ability to see clearly through cloudy water, but sometimes the water itself distorts the object of scrutiny. The most basic problem with the majority's definition is that it is so broad that the exception swallows the general rule. It means that all oral contracts for goods and services in the ordinary course of business have a six-year statute of limitation. Again, the legislature could have but did not say that all oral contracts for goods and services would enjoy a long statute of limitations usually reserved for written [***29] agreements. The result of the majority's interpretation is that the term account receivable has no meaning, and an interpretation making a statute's term superfluous must be rejected. We have held, time and again, that "[s]tatutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.3d 1303 (1996) (citing *Stone v. Chelan County Sheriff's Dep't*, 110 Wn.2d 806, 810, 756 P.2d 736 (1988); *Tommy P. v. Bd. of County Comm'rs*, 97 Wn.2d 385, 391, 645 P.2d 697 (1982)).

Legislative History

¶36 Confusion over the meaning of account receivable in the ordinary course of business was apparent during the debate over its passage in the Senate. Even so, the legislature failed to define account receivable in the statute. [*670] However, the discussions held by the Senate before it passed the bill that became RCW 4.16.040(2), *Substitute S.B. 5213*, 51st Leg., Reg. Sess. (Wash. 1989), reveal that the legislature did not intend the definition we adopt today. Before the bill passed, then-Senator [***30] Philip A. Talmadge expressed his concerns that an account receivable is difficult to define, stating that the senate could simplify the bill to include all contracts, including oral ones. He said:

159 Wn.2d 652, *; 152 P.3d 1020, **;
2007 Wash. LEXIS 130, ***

"[T]he problem is, I think, that there is that difficulty in determining what is or is not an account receivable incurred in the ordinary course of business and an oral contract. It seems to me if we are going to reconsider this we may want to do it right and simply provide for a six year statute of limitations for all contracts."

¶37 Senate Journal, 51st Leg., Reg. Sess., at 509 (Wash. 1989). [***31] ¹⁷ The legislature declined and passed the bill "as is" despite Senator [**1030] Talmadge's concerns. ¹⁸ Senator Smitherman explained the term account receivable meant just an open account, and the bill passed following his explanation and over [*671] Senator Talmadge's dissenting vote. The legislative history suggests that the bill was passed with the intent of limiting the definition of account receivable to open accounts. An "open account" is, "[a]n account that is left open for ongoing debit and credit entries by two parties and that has a fluctuating balance until either party finds it convenient to settle and close." ¹⁹ Black's Law Dictionary 20 (8th ed. 2004).

17 The full context of that exchange:

Senator Talmadge: "Senator Smitherman, the problem with this bill is what the definition of an account receivable is when incurred in the ordinary course of business. Would you define what an account receivable incurred in the ordinary course of business might be and maybe the difference between that and somebody just entering into an oral contract?"

Senator Smitherman: "I believe it's just an open account, Senator."

Senator Talmadge: "Well, the problem is, if I enter into an oral contract with you, that's something that's a three year statute of limitations now and a three year statute of limitations under this bill. If I enter into an oral contract with you and you go back to your business and you say, 'Well, I think I will carry that on my books,' and you treat it as an account receivable, then it's something that would carry with it a six year statute of limitations. The problem is, I think, that there is that difficulty in determining what is or is not an account receivable incurred in the ordinary course of business and an oral contract. It seems to me if we are going to reconsider this we may want to do it right and simply provide for a six year statute of limitations for all contracts."

Senate Journal, 51st Leg., Reg. Sess., at 509 (Wash. 1989)

[***32]

18 Senator Lee: "Senator Smitherman, is your reason for asking for reconsideration so that it can be returned to second reading for purposes of an amendment or just simply to pass it as is?"

Senator Smitherman: "To pass it as is, Senator."

Id.

19 An "open account" is also defined as occurring "where the parties intend that the individual transactions in the account be considered as a connected series, rather than as independent of each other." 1 Am. Jur. 2d *Accounts & Accounting* § 4, at 624 (2005).

¶38 Tingey and the majority contend that the legislative history tells a different story, pointing out that the bill was amended before it passed. The original version, which did not pass, read: "A balance due upon a mutual, open, and current account, the items of which are in writing." S.B. 5213, 51st Leg., Reg. Sess. (Wash. 1989). Although the legislature's rejection of this language is noteworthy, the subsequent comments by Senator Smitherman suggest account receivable was intended to encapsulate the open account language used in the first [***33] version. Apparently "receivable" modified account in the same way "open" did, making the phrase "open account receivable" redundant. The significant change was not the deletion of the open account language, it was the deletion of "the items of which are in writing," and the addition of "in the ordinary course of business." This suggests the legislature intended to expand the scope of the six-year statute of limitations to instances where a business' ordinary practices may not include writing down the terms of the account. It appears the legislature wanted to include in the six-year statute of limitations open accounts that were established without a written agreement. In such cases, bills are sent and paid without a formal contract. The changes suggest the legislature did not want to exclude such open accounts. They do not suggest the legislature intended to expand the six-year statute of limitations beyond open accounts.

¶39 The majority describes this reading of the legislative history as "implausible." Majority at 661. In a vacuum, the [*672] majority may have a point. But we examine the legislative history in its full context and must reconcile the Senate's decision to change the language of the bill with [***34] the definition of the term given before its passage. Senator Smitherman was of the view that an account receivable meant an open account; the

change in language could not have been intended to expand the term accounts receivable beyond the definition the legislative history provides.

¶40 The majority argues that attention should be paid to the fact that "[f]urther debate ensued" following Senator Smitherman's definition. Majority at 662 (alteration in original) (quoting Senate Journal, 51st Leg., Reg. Sess., at 509 (Wash. 1989)). The majority argues that the fact the bill was not put "directly to a vote" following Senator Smitherman's definition of the term "undermines" my view that the "Senate responded to Senator Smitherman's definition by passing the bill." *Id.* at . It is correct that debate ensued, but what was its result? The Senate was divided with respect this bill. Senator Talmadge heard Smitherman's definition and offered a more expansive definition similar to the definition the majority adopts today. That expansive definition lost. No changes were made, and Senator Talmadge did not vote for the bill. Yes, there was debate. And there was an alternative position articulated by Senator Talmadge. But Smitherman's position won the day. We have in the legislative history [***35] an articulation of a definition of account receivable. The majority has chosen to ignore the legislative history and instead adopt a technical definition from an accounting dictionary.

CONCLUSION

¶41 I have observed that when I receive goods and services based upon verbal agreements [**1031] from businesses, the businesses often provide me with an invoice and regular statements showing the status of my account. I know that such an account is an account payable for me and an [*673] "account receivable" for the business. Such accounts, which benefit from regular written statements, have many of the merits of a written contract. Although there is no written agreement, the balance owing and many of the terms are memorialized in writing and, generally, may be enforced with confidence by a court of law. I am of the view and agree with the Court of Appeals that such "open" accounts are what the legislature had in mind when amending RCW 4.16.080.

¶42 Despite the legislative history which indicates the legislature, wisely I believe, intended that account receivable under this bill would be limited to open accounts, we are urged to ignore this history because the term is plain on its face. [***36] The term, however, is

anything but plain. It means different things in different contexts.

¶43 Finally, I am concerned by the lack of balance of briefing in this case.²⁰ This case is brought by a lawyer against a client who is either unable or unwilling to pay. There was no written fee agreement between the parties. For more than three years the lawyer did not bill, nor did the client pay on the account. The lawyer subsequently turned the account over to a collection agency.

20 The respondents, Lloyd and Lucy Haisch, did not file briefs before this court. Tingey was supported by an amicus curiae brief and memorandum submitted by the trade organization Association of Credit and Collection Professionals (ACA) International. Tingey filed a petition for review, a supplemental brief, and a response to the amicus curiae brief of ACA International. In short, we were presented five briefs in favor of Tingey and none in favor of the Haischs.

¶44 Given the posture of this case, the Court of Appeals attempted to avoid an absurd [***37] result of permitting the exception to swallow the general rule, concluding that "account receivable" meant "open account," which is "[a]n account that is left open for ongoing debit and credit entries by two parties and that has a fluctuating balance until either party finds it convenient to settle and close." *Tingey*, 129 Wn. App. at 111 (quoting Black's Law Dictionary 20 (8th ed. 2004)). The Court of Appeals believed that the legislature intended to limit account receivable to revolving charge accounts. *Id.* at 116. The Court of Appeals made an [*674] admirable attempt at divining the intent of the legislature. I am not persuaded that the majority has the correct crystal ball, I appeal to the legislature to clear the waters and clearly define account receivable for RCW 4.16.040(2).

¶45 But I would further affirm because this is an egregious case. A lawyer failed to enter into a written fee agreement with a client, did not send statements for over three years, and then assigned his claim to another. Such claims have always been barred by the three-year statute of limitations, and I cannot believe the legislature intended this [***38] case to proceed. I respectfully dissent.

C. Johnson, J., concurs with Chambers, J.

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