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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

84108-3

NO. 27652-0-III

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

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

DAN P. EVANS, a single person; and

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

Respondents,

v.

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

Appellants.

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**BRIEF OF AMICUS CURIAE  
THE AMERICAN COUNCIL OF ENGINEERING COMPANIES  
OF WASHINGTON IN SUPPORT OF APPELLANT CH2M HILL, INC.**

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## INTRODUCTION

The Washington legislature enacted RCW 51.24.035 to protect design professionals from suits brought by employees of other firms who are injured on construction jobsites. The decision below incorrectly denies the Appellants the protection created by the legislature.

*Amicus* ACEC-W submits that the Trial Court misinterpreted terms used in RCW 51.24.035 when it concluded that the statute does not exempt the Appellants from liability for the Appellees' injuries. Specifically, ACEC-W submits that the Trial Court erred by not affording the terms "construction project," "site" and "design plans and specifications" their commonly understood or technical meanings. If those terms are given their commonly understood or technical meanings, the narrow exceptions in the statute do not apply here to defeat the goal of providing protection against liability.

ACEC-W supports Appellants CH2M Hill and Kelly Irving in asking this Court to correct the Trial Court's interpretation of RCW 51.24.035 and to reverse the decision below.

## IDENTITY AND INTEREST OF AMICUS

ACEC-W is a professional trade association representing 155 consulting engineering firms that employ almost 7,500 individual engineers, land surveyors, planners and scientists in all engineering disciplines throughout Washington. ACEC-W members design public and private projects including roads, bridges, schools, office buildings, infrastructure, technology, industrial facilities, environmental cleanup and many more projects that impact the lives and livelihoods of citizens of the Pacific Northwest.

The issues presented in this appeal are of critical concern to ACEC-W and its members and their respective employees. ACEC-W members are “design professionals” as defined in RCW 51.24.035(3). The performance of professional services on construction projects by ACEC-W members and other design professionals is implicated by this Court’s interpretation of the statute. ACEC-W brings a unique industry perspective to the Court’s consideration of this matter.

This *amicus curiae* brief is filed pursuant to RAP 10.6. ACEC-W has filed a motion for leave of Court to file this brief.

## STATEMENT OF THE CASE

ACEC-W adopts the Statement of Facts from CH2M Hill's opening Brief to this Court. See Brief of Appellant ("CH2M Brief") at pp. 3-39.

In the underlying suit, Appellees Cmos, Michaels and Evans (hereinafter, "Employees") sued CH2M Hill for injuries sustained on the job at the City of Spokane's Advanced Wastewater Treatment Plant (hereinafter, "Plant"). The City of Spokane had retained CH2M Hill to perform preliminary and conceptual engineering services on the City's 10-year capital improvement project for the Plant. CH2M Brief, App. E (Exh. 1, pp. 1-2). Employees alleged that, but for CH2M Hill's unwritten suggestion to install a valve as an interim remedial measure for a digester sludge problem, the domes would not have collapsed, and the injuries would not have occurred. See, CH2M Brief, App. A (CP 3115; F/F 40-41). CH2M Hill is a third-party vis-à-vis Employees. On the basis that it had not assumed responsibility for safety practices or actually controlled the premises and did not negligently prepare design plans and specifications, CH2M Hill contends that RCW 51.24.035 bars Employees' suit because none of

the three exceptions to the statute apply to CH2M Hill's role or performance.

Since it was enacted in 1987, RCW 51.24.035 has prevented third party suits against design professionals and their employees except when the design professional a) affirmatively assumes responsibility for safety practices, b) actually controls the premises where the employee sustained injury or c) negligently prepares design plans and specifications.<sup>1</sup> The statute creates an exception to the general rule stated in RCW 51.24.030(1) that an individual may seek damages against a third party for injury sustained on account of workplace injuries.

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<sup>1</sup> RCW 51.24.035, entitled "immunity of design professional and employees," states in its entirety:

(1) Notwithstanding RCW 51.24.030(1), the injured worker or beneficiary may not seek damages against a design professional who is a third person and who has been retained to perform professional services on a construction project, or any employee of a design professional who is assisting or representing the design professional in the performance of professional services on the site of the construction project, unless responsibility for safety practices is specifically assumed by contract, the provisions of which were mutually negotiated, or the design professional actually exercised control over the portion of the premises where the worker was injured.

(2) The immunity provided by this section does not apply to the negligent preparation of design plans and specifications.

(3) For the purposes of this section, "design professional" means an architect, professional engineer, land surveyor, or landscape architect, who is licensed or authorized by law to practice such profession, or any corporation organized under chapter 18.100 RCW or authorized under RCW 18.08.420 or 18.43.130 to render design services through the practice of one or more of such professions.

The Trial Court engaged in statutory interpretation to determine the applicability of RCW 51.24.035 and concluded:

94. At all pertinent times prior to and on May 10, 2004, the area of the plant where the skillets<sup>2</sup> were installed was not a construction project nor a construction site within the meaning of RCW 51.24.035(1).

95. The Irving proposal to separate sludge flows referenced above in these Findings constitutes the negligent preparation of design plan within the meaning of RCW 51.24.035(2).

CH2M Brief, App. A, CP 3128 (F/F 94 and 95).<sup>3</sup>

## ARGUMENT

### A. Standard of Review

Statutory interpretation is a question of law subject to de novo review. *Burns v. City of Seattle*, 161 Wn.2d 129, 140, 164 P.3d 475 (2007).

### B. The Trial Court Erred by Interpreting Undefined Terms in RCW 51.24.035 Contrary to the Common or Technical Definitions of Those Terms.

When interpreting statutory language, a court must give effect to all language within the statute, rendering no portion meaningless or

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<sup>2</sup> "Skillets" are flat metal discs with a handle, shaped like a frying pan. Maintenance workers at the plant used skillets to block flow to or from pipes. See, CH2M Brief, p. 7, Fn. 4.

<sup>3</sup> Though the Trial Court labeled these conclusions "findings of fact," they are premised upon an erroneous interpretation of the statute. The Trial Court made no other findings or conclusions referring to RCW 51.24.035.

superfluous. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) citing, *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999).

"[I]f a term is not defined in a statute, the term will be given its plain and ordinary meaning." *Shoreline Community College Dist. No. 7 v. Employment Sec. Dept.*, 120 Wn.2d 394, 403, 842 P.2d 938 (1992) (internal citations omitted). When ascertaining the meaning of well-accepted, ordinary terms, it is proper for a court to resort to a "regular dictionary." *Tingey v. Haisch*, 159 Wn.2d 652, 658-659, 152 P.3d 1020 (2007) citing, *City of Spokane ex rel. Wastewater Mgmt. Dep't v. Dep't of Revenue*, 145 Wn.2d 445, 454, 38 P.3d 1010 (2002). When ascertaining the meaning of technical terms used in technical contexts, courts refer to "technical rather than a general purpose dictionary." *Tingey*, 159 Wn.2d at 658-659; *City of Spokane*, 145 Wn.2d at 454.

In *Tingey*, the Washington Supreme Court sought to interpret the term "account receivable" as used in the phrase "account receivable incurred in the ordinary course of business." *Tingey*, 159 Wn.2d at 658. The Court evaluated the context in which the phrase appeared and determined that the legislature intended the term to be

used in the technical field of accounting and finance. *Id.* at 658. Therefore, to remain consistent with the technical use of the phrase, the Court looked to a “technical dictionary,” the *Dictionary of Accounting*, to ascertain the term’s technical definition. *Id.* at 659.

The legislature did not define “construction project,” “site” or “design plans and specifications” in RCW 51.24.035 or elsewhere in the Workers’ Compensation Act. These terms should be given their common definition unless a technical definition exists in the field to which they apply. *Shoreline Community College*, 120 Wn.2d at 403.

**1. Improving The Treatment Plant Constituted a “Construction Project,” and the Digester Building Constituted the “Site of the Construction Project” Within the Common and Technical Meanings of the Terms.**

RCW 51.24.035(1) provides immunity to third party design professionals “retained to perform professional services on a construction project” and to employees of design professionals “assisting or representing the design professional . . . on the site of the construction project.” (Emphasis added.) These terms must be analyzed separately. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (when the legislature uses two different terms in the same statute, the court attempts to give meaning to all terms).

**a. Improving the Treatment Plant constituted a “construction project” within the common and technical meaning of the term.**

Under the common or the technical meaning of the term, the capital improvement project to renovate and update the Plant constituted a “construction project” within RCW 51.24.035(1). A regular dictionary defines “construction project” broadly. The *American Heritage Dictionary* definition of “construction” and “construct” is the act or process of construction, assembling and combining parts. *American Heritage Dictionary*, 394-395 (4<sup>th</sup> Ed. 2000). It defines “project” as “a plan or proposal; scheme. . . . [a]n undertaking requiring concerted effort.” *Id.* at 1402. Taken together, a “construction project” reasonably encompasses constructing and planning to construct, assemble or combine parts. This definition is supported by the definition in a technical dictionary wherein “project” encompasses a “construction undertaking . . . planned and executed in a fixed time period.” See, Harris, Cyril M., *Dictionary of Architecture and Construction*, 768 (4<sup>th</sup> Ed. 2005).

CH2M Hill had been retained to perform professional engineering services related to the City’s 10-year capital improvement project to upgrade the Plant. CH2M Hill’s services included

developing plans for improvements that would be constructed over the life of the capital improvement program. That is consistent with the common and technical definition of the term "construction project" as used in RCW 51.24.035.

A "construction project" is a process, not a place. When the Trial Court stated that ". . . the area of the plant where the skillets were installed was not a construction project . . .," the Trial Court demonstrated its misinterpretation of the term and therefore of the statute. While Employees advance the proposition that "construction project" has something to do with the "temporal and spatial relationship between CH2M's negligent design and the plaintiffs' injuries . . ." there is nothing in any recognized definition that supports the proposition. Cmos Brief, pp. 30-31. A construction project is an endeavor, not a location.

CH2M Hill is immune from Employees' claims because CH2M Hill is a design professional the City retained to perform professional services on a "construction project" as the legislature intended that term to be understood.

**b. The Digester Building constituted a “site of the construction project” within the common meaning of the term.**

RCW 51.24.035(1) also extends immunity to “any employee of a design professional who is assisting or representing the design professional . . . on the site of the construction project.” (Emphasis added.) As stated above, the term “construction project” – which determines whether a design professional is immune from suit – does not refer to a location or place. By contrast, the term “on the site of the construction project” – which determines whether an employee of a design professional is immune from suit for his or her on-location services – obviously refers to a place. Under the common meaning of the term and the facts of the case, the digester building constituted the site of the construction project within RCW 51.24.035(1).

A “site of the construction project” as used in RCW 51.24.035(1) consists primarily of those locations where construction operations are conducted. The *American Heritage Dictionary* defines “site” as “the place where a structure or group of structures was, is, or is to be located.” *American Heritage Dictionary, supra*, at 1628. Necessarily, for purposes of RCW 51.24.035(1), the “site of the

construction project" includes the discrete areas where construction, assembly, or combining parts are actually conducted.

Appellant Kelly Irving was CH2M Hill's program manager representing CH2M Hill at the Plant. CH2M Brief, App. A (CP 3109; F/F 11); RP 509. Employees admit that the digester room was the "site" where laborers installed skillets into piping joints. Cmos Brief, pp. 30-31. Since installing skillets into the existing structure constitutes "combining parts" – one step in the process that is a "construction project" as that term is commonly and technically understood – the digester room was the "site of the construction project."

When the Trial Court stated that ". . . the area of the plant where the skillets were installed was not . . . a construction site within the meaning of RCW 51.24.035(1)," it erred in two respects. First, "construction site" is not a term that is used in the statute. It connotes a narrower area and time than the language actually used in the statute. Second, the evidence is that the Plant and the digester building was the site of the construction project because construction activity was being performed there.

Appellant Irving is immune from Employees' suit because he was "assisting or representing the design professional in the performance of professional services on the site of the construction project" within the meaning of RCW 51.24.035(1).

**2. The Unwritten Suggestion to Install a Valve Does Not Constitute "Design Plans and Specifications" within the Common or Technical Meaning of the Term.**

The legislature carved out exceptions to the immunity granted by RCW 51.24.035.

In RCW 51.24.035(1), immunity is not available to a design professional or the on-location employee of a design professional that has specifically assumed responsibility for safety practices by contract or is exercising actual control over the location where the injury occurred. Employees do not contend that Appellants had a duty to enforce worksite safety practices or had any supervisory authority over the worksite and therefore do not contend that this exception to the statutory immunities applies. Cmos Brief, p. 31.

The other exception is stated in RCW 51.24.035(2): "The immunity provided by this section does not apply to the negligent preparation of design plans and specifications." (Emphasis added.) The legislature did not define "design plans and specifications."

The Trial Court undertook to interpret RCW 51.24.035(2). When the Trial Court stated that “[t]he Irving proposal to separate sludge flows . . . constitutes the negligent preparation of design plan . . .,” it erred in two respects. First, the term “design plan” is not used in RCW 51.24.035(2) and suggests something broader than “design plans and specifications.” Second, the common and technical definitions of “design plans and specifications” require that they be written documents.

The Trial Court’s interpretation that “design plans and specifications” need not be in writing is contrary to common and technical definitions of the phrase and runs counter to other legislation governing design professionals.

**a. The construction industry defines the term “design plans and specifications” as referencing written documents.**

The construction industry recognizes “design plans and specifications” as referencing written documents. The *International Building Code* (hereinafter, “IBC”, which is adopted by statute in Washington) repeatedly references “specifications” and defines “specified” as that “required by construction documents.” *IBC*, § 2102.1 (2003). The IBC defines “construction documents” as

“[w]ritten, graphic and pictorial documents prepared or assembled for describing the design, location and physical characteristics of the elements of a project necessary for obtaining a building permit.” *Id.* at § 202 (emphasis added).

The Court’s interpretation of “design plans and specifications” should be consistent with the industry’s use of the term.

**b. Regular and technical dictionary definitions demonstrate that “design plans and specifications” refer to written documents.**

Reference to a regular or to a technical dictionary supports the industry’s conception of “design plans and specifications” as written documents. The *American Heritage Dictionary* defines the noun “design” as “a drawing or sketch; [or] a graphic representation, especially a detailed plan for construction. . . .” *American Heritage Dictionary, supra*, at 492 (emphasis added). It defines “plans” as drawings or graphic representations, and “specifications” as “a detailed exact statement of particulars. . . .” *Id.* at 1341, 1669.

Reference to a technical dictionary definition also requires written “design plans and specifications.” The most relevant definition of “design” in the *Dictionary of Architecture and Construction* is “any visual concept of a man-made object, as of a

work of art or a machine.” Harris, *supra*, at 305 (emphasis added). The technical definition of “plans”<sup>4</sup> is “a set of drawings, including elevations and sections that collectively define a building” (*id.* at 735), and “specifications” as “a part of the contract documents . . . consisting of written descriptions of a technical nature of materials, equipment construction systems, standards, and workmanship.” *Id.* at 917. Taken together, “design plans and specifications” means any written technical description or graphic representation of a design depicted in a set of drawings or blueprints.

Applying the common, technical and industry definitions demonstrates that the Trial Court erred in concluding that the unwritten suggestion constituted “design plans and specifications.” In a regularly scheduled meeting with the City, CH2M Hill suggested a valve as an interim solution to a digester problem. CH2M Hill prepared no graphic representation or written description of the suggestion. In fact, the City never even installed the valve that CH2M Hill proposed. See, CH2M Brief, p. 33, citing RP 378-79, 1530-33, 1553, 1627.

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<sup>4</sup> “Plan,” when used in the singular, is not referenced in RCW 51.24.035(2) but is used in the Trial Court’s conclusion. It is also defined as a written representation:

Employees stretch the term “design plans and specifications” beyond recognition in their attempts to analogize this matter to Kansas case law. Employees allege that Appellant Irving’s “participation in marking piping joints” during a site walk with the City constituted negligent preparation of design plans. Cmos Brief, p. 28. Even if “participation” in a site walk where the City marked piping joints could be considered engineering design, reading the statute to except a design professional for this activity would allow the “design plans and specifications” exception to swallow the rule contrary to legislature’s plain intent.

**c. Washington statutes governing design professionals demonstrate that “plans” and “specifications” refer to written documents.**

Other Washington statutes support the view that the common, technical, and industry-wide understanding that “design plans and specifications” refers to written documents. Statutes regulating the practices of engineering and architecture require design professionals to affix their professional seal to their plans and specifications. RCW 18.43.070 states engineers must affix their seal to “[p]lans, specifications, plats and reports prepared by [them],” and RCW

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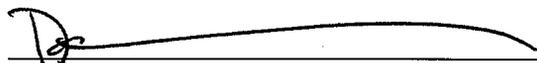
“[a] two-dimensional graphic representation of the design . . . .” *Dictionary of*

18.08.370 states that architects must affix their seal to “[d]rawings prepared by [them] . . . when filed with public authorities.” Since it is impossible to affix a professional seal to unwritten plans and specifications, these statutes must refer to written documents. To conclude otherwise would produce an absurd result and undermine the purpose of the statute contrary to the rules of statutory interpretation. *Tingey*, 159 Wn.2d at 664. Thus, any definition of “plans and specifications” that does not require a written document would undermine the long-standing legislative understanding of those terms.

### CONCLUSION

For the foregoing reasons, the American Council of Engineering Companies of Washington respectfully submits that the judgment from the Washington State Superior Court of Spokane County be reversed.

Respectfully submitted this 19 day of January, 2010.



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*Architecture & Construction*, p. 735.

**CERTIFICATE OF SERVICE BY MAIL**

The undersigned certifies under the penalty of perjury according to the laws of the United States and the State of Washington that on this date I caused to be served by postage prepaid mail true and correct copies of the foregoing document on the following:

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