

SUPREME COURT
OF THE STATE OF WASHINGTON

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.

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2010 MAR -3 AM 8:03
BY RONALD R. CARPENTER
EMK

**RESPONDENTS' JOINT ANSWER TO AMERICAN COUNCIL
OF ENGINEERING COMPANIES OF WASHINGTON
AMICUS CURIAE BRIEF**

Daniel E. Huntington
WSBA #8277
Richter-Wimberley, P.S.
422 W. Riverside, Suite 1300
Spokane, Washington 99201
(509) 455-4201
Attorneys for Respondent Cmos

Gary N. Bloom
WSBA #6713
Harbaugh & Bloom, P.S.
422 W. Riverside, Suite 1300
Spokane, Washington 99201
(509) 624-4727
Attorneys for Respondent Cmos

Richard C. Robinson
WSBA #9035
Layman, Layman & Robinson, PLLP
316 Occidental Ave. S., Suite 500
Seattle, WA 98104-2874
(206) 340-1314
Attorneys for Respondents Michaels
and Evans

George M. Ahrend
WSBA #25160
Dano, Gilbert & Ahrend, PLLC
100 E. Broadway Ave.
Moses Lake, WA 98837-1740
(509) 764-8426
Attorneys for Respondent Evans

TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. STATEMENT OF THE CASE 2

III. ARGUMENT 7

 A. Standard of Review..... 7

 B. The Exception to Immunity in RCW 51.24.035(2)
 Encompasses All Design Plans and Specifications, Whether
 Written or Unwritten..... 10

 C. Even If the Exception To Immunity In RCW 51.24.035(2) Were
 Limited To Written Design Plans, The Negligent Failure To
 Prepare A Required Written Design Plan Is Excepted 16

 D. RCW 51.24.035(1) Design Professional Immunity Is Not
 Negated By The Exception To Immunity In RCW 51.24.035(2).... 18

IV. CONCLUSION 20

TABLE OF AUTHORITIES

Cases

<i>Amant v. Pacific Power & Light Co.</i> , 10 Wn. App. 785, 520 P.2d 181 (1974), <i>affirmed</i> , 84 Wn.2d 872, 529 P.2d 829 (1975)	9, 19
<i>Bayne v. Todd Shipyards Corp.</i> , 88 Wn.2d 917, 568 P.2d 771 (1977)	18
<i>Burkhart v. Harrod</i> , 110 Wn.2d 381, 755 P.2d 759 (1988)	16
<i>Burton v. Lehman</i> , 153 Wn.2d 416, 103 P.3d 1230 (2005)	15
<i>Cerrillo v. Esparza</i> , 158 Wn.2d 194, 142 P.3d 155 (2006)	12
<i>City of Spokane v. Spokane County</i> , 158 Wn.2d 661, 146 P.3d 893 (2006)	12
<i>Dean v. McFarland</i> , 81 Wn.2d 215, 500 P.2d 1244 (1972)	10
<i>Edwards v. Anderson Eng'g, Inc.</i> , 284 Kan. 892, 166 P.3d 1047 (2007)	12, 13
<i>Franklin County Sheriff's Office v. Sellers</i> , 97 Wn.2d 317, 646 P.2d 113 (1982)	7
<i>Goucher v. J.R. Simplot Company</i> , 104 Wn.2d 662, 709 P.2d 774 (1985)	18
<i>Harris v. Robert C. Groth, M.D., P.S.</i> , 99 Wn.2d 438, 663 P.2d 113 (1983)	8
<i>In re Estate of Jones</i> , 152 Wn.2d 1, 93 P.3d 147 (2004)	9
<i>Kelley v. Howard S. Wright Constr. Co.</i> , 90 Wn.2d 323, 582 P.2d 500 (1978)	18, 19, 20
<i>Kilian v. Atkinson</i> , 147 Wn.2d 16, 50 P.3d 638 (2002)	12
<i>Loyland v. Stone & Webster Eng'g Corp.</i> , 9 Wn. App. 682, 514 P.2d 184 (1973)	9, 19
<i>Lutheran Day Care v. Snohomish County</i> , 119 Wn.2d 91, 829 P.2d 746 (1992)	10

<i>Mathewson v. Olmstead</i> , 126 Wash. 269, 218 P. 226	11
<i>McClarty v. Totem Elec.</i> , 157 Wn.2d 214, 137 P.3d 844 (2006)	18
<i>Miller v. Jacoby</i> , 145 Wn.2d 65, 33 P.3d 68 (2001)	8
<i>Plano v. City of Renton</i> , 103 Wn. App. 910, 14 P.3d 871 (2000)	10
<i>Porter v. Stevens, Thompson, & Runyan, Inc.</i> , 24 Wn. App. 624, 602 P.2d 1192 (1979), review denied, 93 Wn.2d 1010 (1980)	19
<i>Qwest Corp. v. City of Kent</i> , 157 Wn.2d 545, 139 P.3d 1091 (2006)	12
<i>Riggins v. Bechtel Power Corp.</i> , 44 Wn. App. 244, 249-52, 722 P.2d 819, review denied, 107 Wn.2d 1003 (1986)	8-9, 19
<i>Silliman v. Argus Servs., Inc.</i> , 105 Wn. App. 232, 19 P.3d 428, review denied, 144 Wn.2d 1005, 29 P.3d 717 (2001)	7, 8
<i>Snohomish County Fire Prot. Dist. No. 1 v. Wash. State Boundary Review Bd.</i> , 155 Wn.2d 70, 117 P.3d 348 (2005)	12
<i>State v. Alvarado</i> , 164 Wn.2d 556, 192 P.3d 345 (2008)	17-18
<i>State v. Lilyblad</i> , 163 Wn.2d 1, 177 P.3d 686 (2008)	15, 16
<i>Stute v. P.B.M.C., Inc.</i> , 114 Wn.2d 454, 788 P.2d 545 (1990)	19
<i>Sunnyside Valley Irrigation Dist. v. Dickie</i> , 149 Wn.2d 873, 73 P.3d 369 (2003)	9
<i>System Tank Lines, Inc. v. Dixon</i> , 47 Wn.2d 147, 286 P.2d 704 (1955)	16
<i>Thatcher v. DSHS</i> , 80 Wn. App. 319, 908 P.2d 920 (1995)	15
<i>Ward v. Ceco Corp.</i> , 40 Wn. App. 619, 699 P.2d 814, review denied, 104 Wn.2d 1004 (1985)	18-19

<i>Wash. Pub. Ports Ass'n v. Dep't of Revenue,</i> 148 Wn.2d 637, 62 P.3d 462 (2003)	15
<i>Wright v. Jeckle,</i> 158 Wn.2d 375, 379-80, 144 P.3d 301 (2006).....	18

Statutes

RCW 18.08.370	15
RCW 18.43.070	15
RCW 51.08.180	8
RCW 51.24.030(1).....	10
RCW 51.24.035	1, 8, 18
RCW 51.24.035(1).....	19
RCW 51.24.035(2).....	<i>passim</i>

Other Authorities

6 Washington Practice: Pattern Instructions Civil 10.01 (5th ed. 2005 and Supp. 2009-10).....	16
IBC § 201.4 (2003)	14
IBC § 2101.1 (2003)	14
<i>Webster's Third New International Dictionary</i> 612 (1993)	14, 16

I. INTRODUCTION

The American Council of Engineering Companies of Washington (“ACEC-W”) filed an amicus brief in support of CH2M Hill, Inc.’s (“CH2M”) claim for RCW 51.24.035 design professional immunity. Ignoring the record on review, ACEC-W simply adopts CH2M’s rendition of the facts as its own Statement of the Case. Based solely upon its review of that source, ACEC-W incorrectly summarizes the plaintiffs’ claim to be that a mere unwritten suggestion by CH2M to install a valve caused the dome collapse and plaintiffs’ injuries.

The trial court’s findings of fact, many unchallenged on appeal and the remainder supported by substantial evidence, establish that CH2M’s design to separate the sludge flows by installing valves or skillets in the digester piping constituted an interim change to an ongoing CH2M engineering design and upgrade of a complex recirculation and heating piping system. The court found that CH2M failed to analyze the effects of its interim design change on the plant operators’ established method for transferring sludge between digesters, failed to advise plant personnel that CH2M’s sludge flow design change altered the valving method the plant operators used to transfer sludge, and failed to provide plant personnel with a written analysis describing the effects and necessary change in

operators' procedures caused by CH2M's sludge flow design change. The trial court found that each of these failures violated the standard of care for an engineer, and was a proximate cause of the digester dome collapse and the resulting death of Mike Cmos and injuries to Dan Evans and Larry Michaels.

CH2M's modification of the digester piping system and failure to prepare a written analysis of that modification constitute "the negligent preparation of design plans" within the meaning of RCW 51.24.035(2). CH2M is not entitled to immunity for its negligence.¹

II. STATEMENT OF THE CASE

CH2M entered into its initial contract with the City of Spokane ("City") in 1998. Unchallenged Finding of Fact (hereinafter, "FOF") 7, CP 3108-09.² Kelly Irving ("Irving") was an engineer employed by CH2M (FOF 6, CP 3108) who served as the program manager at CH2M's full-time office at the City's sewage treatment plant. FOF 10, CP 3109. Irving's job description included managing all design projects and managing all change. FOF 11, CP 3109.

In March 2003, Irving prepared a modification to the CH2M/City

¹ Respondents also contend CH2M's services were not performed on a construction project within the meaning of RCW 51.24.035(1). See Respondent Cmos' Brief at 30-31; Respondents Michaels and Evans Brief at 26, n. 7.

² FOF citations are unchallenged on appeal, unless indicated otherwise.

contract which provided that CH2M would design and manage an upgrade and redesign of the digester recirculation and heating system. FOF 15, CP 3110. In November 2003, CH2M began the conceptual design for the digester recirculation and heating system upgrade. FOFs 18, 19, CP 3111.

CH2M and Irving knew that in the routine operation of the sewage treatment plant, operators transferred large quantities of sludge between the digesters through a system of valves and large pipes by use of the recirculation pumps. FOFs 13, 14, CP 3110. In December 2003, as part of the recirculation and heating system design project, Irving and another CH2M engineer inspected the digester area and noted that plant operators used the recirculation pumps to transfer sludge between the digesters. FOF 20, CP 3111. On February 23, 2004, CH2M prepared a Technical Memorandum concerning the digester recirculation-heating design project, again noting the operators conducted daily sludge transfers between digesters by use of the recirculation pumps. FOF 21, CP 3111.

The March 31, 2004, CH2M agenda for its digester recirculation-heating design meeting included issues regarding sludge heating and sludge transfers. FOF 22, CP 3111. In order to resolve a heating deficiency in the digesters, CH2M and Irving recommended separating sludge flows in the recirculation system. FOFs 23, 24, CP 3111-12. Minutes from CH2M's weekly digester/heating design meeting dated

April 28, 2004, set forth CH2M's recommendation that "piping mods will be done so digester recirc and digester feed do not go through same pipe to enter digester." FOF 25, CP 3112.

At a May 3, 2004, meeting between CH2M and the City plant supervisors, Irving recommended that the separation of sludge flows be achieved by installing valves in the existing recirculation piping system for each of the three digesters. FOF 26, CP 3112. Irving prepared minutes from this May 3 meeting in which he referred to the sludge flow separation as "digester recirc piping re-route" and placed it under a heading entitled "Change Management," *which Irving testified meant that the re-route was a CH2M task.* FOF 27, CP 3112; RP 526-27, 1757-61. CH2M's separation of flows design and the decision to place a skillet at a particular location constitute "design" within its ordinary usage in engineering. RP 1440-43 1445-47. Irving himself characterized CH2M's work as "designing," "design process," and "design work," (RP 568, 1800-01) and conceded that design is not limited to the drafting of detailed drawings. RP 1800-01. CH2M's separation of flows design and the location of the skillets were "engineering design services" provided pursuant to the March 2003 contract modification to redesign the recirculation system. FOF 24, 25, 28, CP 3112-13.

City staff suggested installing a metal plate, referred to as a "blank

flange” or a “skillet,” instead of the valve recommended by Irving because it would be more expedient and less expensive. FOF 32, CP 3113. CH2M agreed that the installation of the skillet would accomplish the same result as Irving’s valve. RP 523-24, 1624-25, 1864-65. Irving had no preference for the use of a valve as opposed to a skillet, and Irving and CH2M accepted the suggestion for the insertion of a skillet in lieu of a valve. Challenged FOF 33, CP 3113; RP 523-24, 1624-25. Irving and CH2M knew that the skillets would be installed by the City on May 4 and 5, 2004, (Ex 19, p.1; RP 527-30, 535) at locations in the digester recirculation piping joints which had been marked with red paint with the participation of Irving and CH2M. RP 419-21, 1571-76, 1835-36, 1841-43. Following the digester dome collapse, the Spokane Fire Department conducted interviews on May 11 and 13, 2004, and reported that Irving stated CH2M made the recommendation to add a “blank flange” to the digester piping to separate the sludge flows. Ex. 57, p.3.

Neither Irving nor any other CH2M employee performed any analysis to determine the effects that their sludge flow separation in the recirculation system would have on the method the plant operators used to transfer sludge between digesters. Challenged FOF 40; RP 535-36, 539-41, 566-67, 569-70, 1739-40, 1865. None of the plant supervisors who attended the May 3, 2004, meeting with CH2M were aware that

installation of the skillets would require a new valving method for transferring sludge between the digesters. Challenged FOF 42, CP 3115; RP 235-37, 482-83, 566, 571-72, 578, 1110-13, 1570-71, 1686-87, 1921-23, 2174-77. In fact, the installation of the skillets did change the method the operators customarily used to transfer sludge between digesters. Challenged FOFs 40, 42, 43, 48, CP 3115-16; RP 193, 214-15, 635, 846, 849-50, 872-73, 903-06, 916, 956-57, 971-72, 1466-69, 1480-83, 1927, 2180.

The standard of care for an engineer required CH2M to perform an engineering analysis of the ways in which its sludge flow modification would affect the plant operators' procedures. Challenged FOF 38, CP 3114; RP 258, 267, 648-53, 657-58, 731, 1443-45, 1447-48, 1452-53. The standard of care required CH2M to inform the plant supervisors of the results of such an engineering analysis, and to put that engineering analysis in writing, advising the supervisors of all effects of the sludge flow separation modification on plant operators' procedures, the need for new standard operating procedures encompassing the changes, and the need for training the plant's operators to comply with the new standard operating procedures. Challenged FOF 39, CP 3114; RP 258-59, 267, 657-60, 745-50, 1447, 1450-54, 1458, 1462, 1478-79, 1483-85. It was foreseeable to CH2M and Irving that their failure to comply with the

engineering standard of care could create significant risk of bodily injury or death to plant operators. FOF 12, CP 3109.

If CH2M and Irving had complied with the engineering standard of care by providing a written analysis regarding the effects of the skillet installation on sludge transfers, it is probable that the operators would have known how to properly valve the attempted sludge transfer on May 10, 2004 and the transfer would have been successful. Challenged FOF 57, CP 3118; RP 260-61, 587, 1449-52, 1932-33, 2180-81, 2187. If the attempted sludge transfer on May 10, 2004 had been successful, the dome would not have collapsed and the plaintiffs would not have been injured. Challenged FOF 57, CP 3118; RP 189-90, 661-62, 672, 675-76, 1933, 2160-61.

III. ARGUMENT

A. Standard of Review

When reviewing cases involving the application of law to facts, the appellate court will not try de novo facts determined by the superior court, but will determine the correct law and apply it to those facts. *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 329-30, 646 P.2d 113 (1982). In *Silliman v. Argus Servs., Inc.*, 105 Wn. App. 232, 19 P.3d 428, review denied, 144 Wn.2d 1005, 29 P.3d 717 (2001), Argus argued that its allegedly liable employee was entitled to immunity as a co-worker of

plaintiff, pursuant to RCW 51.08.180. The court framed the issue on appeal as follows:

Both parties agree Argus is an independent contractor. However, the parties dispute whether Argus is providing “personal labor” within the meaning of RCW 51.08.180, a mixed question of law and fact. What services Argus provided is a question of fact; whether these services constitute “personal labor” within the meaning of the statute is a question of law.

105 Wn. App. at 236 (internal citation omitted).

CH2M claims immunity under RCW 51.24.035. An exception to that immunity is set forth in RCW 51.24.035(2):

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

Pursuant to the holding in *Silliman*, what services CH2M and Irving provided is a question of fact. Consistent with *Silliman*, what services CH2M and Irving were required to provide by the engineering standard of care, and *did not* provide, are also questions of fact. What is required by a professional standard of care is generally a question of fact, established by expert testimony. See, e.g., *Miller v. Jacoby*, 145 Wn.2d 65, 72, 33 P.3d 68 (2001) (medical malpractice); *Harris v. Robert C. Groth, M.D., P.S.*, 99 Wn.2d 438, 449, n.6, 663 P.2d 113 (1983) (medical malpractice). Similarly, the extent or “scope” of an engineer’s duty is a question of fact. *Riggins v. Bechtel Power Corp.*, 44 Wn. App. 244, 249-52, 722 P.2d 819,

review denied, 107 Wn.2d 1003 (1986) (citing *Loyland v. Stone & Webster Eng'g Corp.*, 9 Wn. App. 682, 514 P.2d 184 (1973); *Amant v. Pacific Power & Light Co.*, 10 Wn. App. 785, 520 P.2d 181 (1974), *affirmed*, 84 Wn.2d 872, 529 P.2d 829 (1975).

In describing what services CH2M provided, ACEC-W blindly accepts the Statement of the Case set forth in the appellants' brief. In contrast, the record on review sets forth the facts determined by the superior court. The trial judge issued findings of fact which, among other things, set forth what services CH2M provided, what services CH2M was required to provide in compliance with the standard of care, and what services CH2M did not provide in violation of the standard of care. Unchallenged findings of fact are verities on appeal. *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). Challenged findings of fact are upheld if the findings are based upon substantial evidence. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003).

A review of the unchallenged findings and the substantial evidence supporting the challenged findings demonstrates that the services CH2M provided relating to the skillet installation were an interim design change during the course of engineering services for the redesign of the digester recirculation and heating system. CH2M's services go far beyond a mere

suggestion, as described by ACEC-W. Equally important, the court's findings and the evidence also show what services CH2M was required to provide to meet the engineering standard of care, and that CH2M failed to provide these required services.

B. The Exception to Immunity in RCW 51.24.035(2) Encompasses All Design Plans and Specifications, Whether Written or Unwritten

ACEC-W does not address how an immunity statute must be interpreted, nor does it disagree with the rule of strict construction discussed in Respondents' briefing.³ A statute in derogation of the common law must be strictly construed, and "[t]he statutory operation is not to be extended for the benefit of those who do not *clearly* come within the terms of the statute." *Dean v. McFarland*, 81 Wn.2d 215, 219-20, 500 P.2d 1244 (1972) (emphasis original). Immunity leaves wronged claimants without a remedy, which "runs contrary to the most fundamental precepts of our legal system." *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 105, 829 P.2d 746 (1992) (discussing quasi-judicial immunity). A statutory grant of immunity is to be strictly construed. *Plano v. City of Renton*, 103 Wn. App. 910, 911-12, 14 P.3d 871 (2000).

Third parties are not generally entitled to immunity from suit for industrial injuries. RCW 51.24.030(1). "The industrial insurance fund is

³ See Cmos Brief at 24-26; Evans/Michaels Brief at 26-28.

provided for the exclusive benefit of the employer and the workman, and we will, in all doubtful cases, sustain the right of the injured workman against the third party wrongdoer who has not contributed to the fund.” *Mathewson v. Olmstead*, 126 Wash. 269, 273, 218 P. 226 (1923).

Narrowly construing third party immunity fosters full compensation for the injured worker and reimbursement for the State fund, and thereby serves the remedial purposes of the Industrial Insurance Act.

RCW 51.24.035(2) must be interpreted within this framework. After reviewing the trial court findings and evidence to determine what services CH2M should have provided, did provide, and did not provide, the appellate court determines as a matter of law whether CH2M’s conduct constitutes “the negligent preparation of design plans” within the meaning of the statute. ACEC-W focuses on the statutory meaning of “design plans and specifications,” without any discussion of the meaning of “negligent preparation.” Relying upon standard and technical dictionary definitions, the International Building Code and statutes from RCW Title 18, ACEC-W argues that if given either commonly understood or technical meanings, “design plans and specifications” actually means “*written* design plans and specifications.”

If the meaning of statutory language is clear on its face, an appellate court gives effect to that plain meaning derived from the

language of the statute alone. *City of Spokane v. Spokane County*, 158 Wn.2d 661, 673, 146 P.3d 893 (2006). “Thus when a statute is not ambiguous, only a plain language analysis of a statute is appropriate.” *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006). Where the plain meaning of a statute is not apparent, the appellate court may derive the legislature’s intended meaning by consulting dictionary definitions or by considering what the legislature has said in related statutes, which disclose legislative intent about the provision in question. *Snohomish County Fire Prot. Dist. No. 1 v. Wash. State Boundary Review Bd.*, 155 Wn.2d 70, 76, 117 P.3d 348 (2005). A reviewing court will not add language to an unambiguous statute even if it believes the legislature intended something else but did not adequately express it. *Cerrillo*, 158 Wn.2d at 201 (quoting *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002)). If the legislature omits language from the statute, whether intentionally or inadvertently, a reviewing court will not read into the statute the language it believes was omitted. *Qwest Corp. v. City of Kent*, 157 Wn.2d 545, 553, 139 P.3d 1091 (2006).

In *Edwards v. Anderson Eng’g, Inc.*, 284 Kan. 892, 166 P.3d 1047 (2007), the Kansas Supreme Court held that whether an engineer’s conduct constituted “the negligent preparation of design plans or specifications” within the meaning of an exception to a Kansas design

professional immunity statute presented a question of law resolved by statutory interpretation. 166 P.3d at 1053-54. Like CH2M and ACEC-W, the defendant engineer in *Edwards* argued that the common understanding of “design plans or specifications” in the construction industry is that those terms refer to blueprint drawings and written specifications, and that the engineer’s markings on a pipe did not come within the plain meaning of the exception. *Id.* at 1055. The Court disagreed:

In order to perform its professional responsibilities, Anderson required that the concrete pipe be cut into four pieces and gave specific directions on the location of the cut lines. We perceive no appreciable distinction between providing the specifications for pipe cutting through a professional drawing or by physically marking on the pipe. Therefore, we find that Anderson’s markings on the concrete pipe were design plans or specifications...

Id.

As in *Edwards*, Irving’s recommendation to install the valves or skillets and Irving’s participation in marking the pipe joints where the skillets were subsequently installed constitute “design plans” and are exceptions to the immunity statute. Moreover, and unlike the engineer’s limited activity in *Edwards*, Irving’s role in installing the skillets resulted from CH2M’s months-long design project for the upgrade and redesign of the digester recirculation system.

Not only is ACEC-W’s use of selected dictionary definitions

unnecessary to ascertain the statutory meaning, it is also not helpful.

ACEC-W's definitions of the noun "design" do not assist in interpreting the adjectival use of "design" in RCW 51.24.035(2). The adjective "design" is defined as "used as a basis for anticipating practical problems and solving them at the engineering stage." *Webster's Third New International Dictionary* 612 (1993). While some dictionary definitions of "plan" include the concepts of writing or drawing, other definitions are not limited to written documents: "plan:... a method of achieving something: a way of carrying out a design... a method of doing something... a proposed undertaking or goal..." *Webster's* at 1729.

ACEC-W's definitions from the International Building Code (hereinafter "IBC") are similarly unhelpful. The IBC general definition for "construction documents" cited by ACEC-W provides no assistance in determining the meaning of "the negligent preparation of design plans and specifications" set forth in RCW 51.24.035(2). ACEC-W's IBC definition for "specified" is taken from Chapter 21 of the Code, which governs the design, construction, and quality of masonry. IBC § 2101.1 (2003). The particular words for which ACEC-W seeks definitions, "design plans and specifications," are not defined in the IBC. The IBC states that where terms are not defined in the IBC, "... such terms shall have ordinarily accepted meanings such as the context implies." IBC § 201.4 (2003).

Nor do ACEC-W's citations to statutes in RCW Title 18, Businesses and Professions, assist in interpreting the meaning of the exception to an immunity statute in Title 51, Industrial Insurance. ACEC-W argues that RCW 18.08.370, which requires architects to sign and seal drawings, and RCW 18.43.070, which requires engineers to sign and stamp plans, specifications, plats and reports, obviously refer to written documents. Such inferences have no relevance to interpreting the meaning of "the negligent preparation of design plans" in RCW 51.24.035(2), an exception to an immunity provision in the chapter of statutes relating to industrial insurance. An appellate court may interpret the plain meaning of language in a statute by referring to *closely related* statutes. *Wash. Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 645, 62 P.3d 462 (2003). The use of unrelated statutes to determine legislative intent is considered unreliable. *Thatcher v. DSHS*, 80 Wn. App. 319, 322-23, 908 P.2d 920 (1995).

A statute is not ambiguous merely because different interpretations of statutory terms are conceivable. *Burton v. Lehman*, 153 Wn.2d 416, 423, 103 P.3d 1230 (2005). In *State v. Lilyblad*, 163 Wn.2d 1, 177 P.3d 686 (2008), the court commented:

Taken out of context, a common word... surely is subject to seemingly limitless interpretations. However, multiple meanings of a word do not necessarily create ambiguity.

All words must be read in the context of the statute in which they appear, not in isolation or subject to all possible meanings found in a dictionary. “[A] single word in a statute should not be read in isolation, and ... ‘the meaning of words may be indicated or controlled by those with which they are associated.’” ’ ’ ”

163 Wn.2d at 9 (internal citations omitted).

C. Even If the Exception To Immunity In RCW 51.24.035(2) Were Limited To Written Design Plans, The Negligent Failure To Prepare A Required Written Design Plan Is Excepted

When read in the context of RCW 51.24.035(2), the meaning of “design,” “plans,” and “specifications,” cannot be determined in isolation. Rather, the court must interpret the plain meaning of “the negligent preparation of design plans and specifications.” “[N]egligence consists in the doing of an act which a reasonable man would not have done, *or in the failure to do an act* which a reasonable man would have done under similar circumstances.” *Burkhart v. Harrod*, 110 Wn.2d 381, 396, 755 P.2d 759 (1988) (quoting *System Tank Lines, Inc. v. Dixon*, 47 Wn.2d 147, 151, 286 P.2d 704 (1955) (emphasis added); *see also* 6 Washington Practice: Pattern Instructions Civil 10.01 (5th ed. 2005 and Supp. 2009-10). Negligence may occur either by commission or by omission. Preparation is defined as “the action or process of making something ready for use or service, ... the action or process of putting something together, ... the action or process of getting ready for some occasion, test,

or duty...” *Webster’s* at 1790.

The trial court found that the engineering standard of care required CH2M to prepare a *written* engineering analysis setting forth the effects of its sludge flow design modification on plant operators’ procedures, the need for new standard operating procedures, and the need for training the plant operators to comply with the new standard operating procedures.

The trial court found that CH2M failed to prepare such a written engineering analysis. This failure constitutes “the negligent preparation of design plans” within the meaning of RCW 51.24.035(2). Even if ACEC-W could inject the word “written” into the statutory exception to immunity, CH2M’s *failure* to prepare a written analysis *is* “the negligent preparation of [written] design plans.”

ACEC-W wants the exception to immunity in RCW 51.24.035(2) to apply only if an engineer prepares a written document negligently, and not if the engineer negligently fails to prepare any written document. Under ACEC-W’s interpretation, an engineer required by the engineering standard of care to prepare a written plan would be liable if the plan was negligently written, but would be granted immunity simply by failing to prepare the required written document. An engineer could guarantee immunity by never complying with a standard of care requiring a written document. Common sense informs judicial analysis of the plain meaning

of statutory language. *State v. Alvarado*, 164 Wn.2d 556, 562, 192 P.3d 345 (2008). An appellate court avoids readings of statutes that lead to strained or absurd results. *Wright v. Jeckle*, 158 Wn.2d 375, 379-80, 144 P.3d 301 (2006). “[S]tatutes must be given a rational and sensible interpretation....” *McClarty v. Totem Elec.*, 157 Wn.2d 214, 228, 137 P.3d 844 (2006).

D. RCW 51.24.035(1) Design Professional Immunity Is Not
Negated By The Exception To Immunity In RCW 51.24.035(2)

ACEC-W contends that interpreting RCW 51.24.035(2) to except engineering design from the immunity granted in section (1) of that statute would “swallow the rule.” ACEC-W overstates the effect of the exception to immunity. Section (1) provides engineers with immunity for injuries to a worker on a construction project, and section (2) excepts from that immunity injuries caused by the engineer’s negligent design plans.

Prior to the enactment of RCW 51.24.035, numerous cases discussed the common law, contractual, and statutory duties of owners, general contractors, subcontractors, and engineers for injuries to some other contractor’s employee on a work site. See, e.g., *Goucher v. J.R. Simplot Company*, 104 Wn.2d 662, 709 P.2d 774 (1985), *Bayne v. Todd Shipyards Corp.*, 88 Wn.2d 917, 568 P.2d 771 (1977) (owner’s duty); *Kelley v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 582 P.2d 500

(1978) (general contractor's duty); *Ward v. Ceco Corp.*, 40 Wn. App. 619, 699 P.2d 814, *review denied*, 104 Wn.2d 1004 (1985) (subcontractor's duty); *Riggins v. Bechtel Power Corp.*, *supra*, *Porter v. Stevens, Thompson, & Runyan, Inc.*, 24 Wn. App. 624, 602 P.2d 1192 (1979), *review denied*, 93 Wn.2d 1010 (1980), *Amant v. Pacific Power & Light Co.*, *supra*, *Loyland v. Stone & Webster Eng'g Corp.*, *supra* (engineer's duty).

In *Kelley v. Howard S. Wright Constr. Co.*, *supra*, the court found that a general contractor had a duty, within the scope of its control over the work, to provide a safe work place for all employees; the test of control is the right to exercise control and not the actual exercise of control; and a general contractor's general supervisory functions were sufficient to establish control over work conditions of a subcontractor's employee.⁴ With that caselaw background, the adoption of RCW 51.24.035(1) immunized an engineer from liability for such general contractor-type construction site duties, unless the engineer specifically assumed work site safety duties by contract, or the engineer exercised actual control over the area where the worker is injured. Section (2) excepts from that immunity injuries caused by the engineer's negligent

⁴ *Stute v. P.B.M.C., Inc.*, 114 Wn.2d 454, 461, 788 P.2d 545 (1990), discussing the court's holdings in *Kelley*.

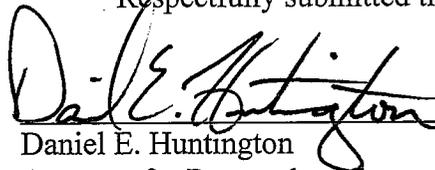
design plans. That exception does not “swallow the rule,” as an engineer is left with immunity for *Kelley*-type claims that could be brought against a general contractor.

CH2M’s violation of the engineering standard of care in modifying a complicated industrial piping system and failing to prepare a written analysis of the effects of its recommended skillet installation constitutes “the negligent preparation of design plans” within the meaning of RCW 51.24.035(2). CH2M is not entitled to immunity for its negligence.

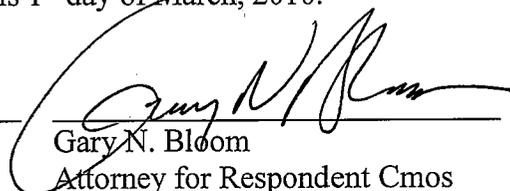
IV. CONCLUSION

The trial court’s judgment should be affirmed.

Respectfully submitted this 1st day of March, 2010.



Daniel E. Huntington
Attorney for Respondent Cmos
WSBA No. 8277



Gary N. Bloom
Attorney for Respondent Cmos
WSBA No. 6713

Richard C. Robinson
Attorney for Respondents
Michaels and Evans
WSBA No. 9035

George Ahrend
Attorney for Respondent Evans
WSBA No. 25160

APPENDIX

51.24.035. Immunity of design professional and employees.

(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. [1987 c 212 § 1801.]

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of March, 2010, I caused the original and true and correct copies of the foregoing Respondents' Joint Answer to American Council of Engineering Companies of Washington Amicus Curiae Brief to be served on the following court and counsel of record in the manner indicated:

Ronald R. Carpenter	<input checked="" type="checkbox"/>	Regular Mail (Original)
Washington State Supreme Court	<input type="checkbox"/>	Certified Mail
Temple of Justice	<input type="checkbox"/>	Hand Delivered
P.O. Box 40929	<input type="checkbox"/>	Facsimile
Olympia, WA 98504-0929		

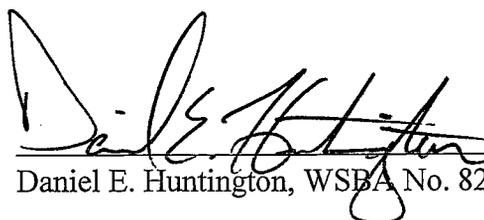
Kenneth W. Masters	<input checked="" type="checkbox"/>	Regular Mail
Wiggins & Masters, PLLC	<input type="checkbox"/>	Certified Mail
241 Madison Avenue North	<input checked="" type="checkbox"/>	Email (Copy)
Bainbridge Island, WA 98110	<input type="checkbox"/>	Facsimile

Beth M. Andrus	<input type="checkbox"/>	Regular Mail
Terence J. Scanlan	<input type="checkbox"/>	Certified Mail
Skellenger Bender, P.S.	<input checked="" type="checkbox"/>	Hand Delivered (Copy)
1301 Fifth Avenue, Suite 3401	<input type="checkbox"/>	Facsimile
Seattle, WA 98101-2605		

Douglas J. Green	<input type="checkbox"/>	Regular Mail
Amber L. Hardwick	<input type="checkbox"/>	Certified Mail
Green & Yalowitz, PLLC	<input checked="" type="checkbox"/>	Hand Delivered (Copy)
1420 Fifth Avenue, Suite 2010	<input type="checkbox"/>	Facsimile
Seattle, WA 98101		

Richard C. Robinson	<input type="checkbox"/>	Regular Mail
Layman, Layman & Robinson, PLLP	<input type="checkbox"/>	Certified Mail
316 Occidental Ave. S., Suite 500	<input checked="" type="checkbox"/>	Email (Copy)
Seattle, WA 98101-2874	<input type="checkbox"/>	Facsimile

George M. Ahrend	<input type="checkbox"/>	Regular Mail
Dano, Gilbert & Ahrend, PLLC	<input type="checkbox"/>	Certified Mail
100 E. Broadway Ave.	<input checked="" type="checkbox"/>	Email (Copy)
Moses Lake, WA 98837	<input type="checkbox"/>	Facsimile


Daniel E. Huntington, WSBA No. 8277