

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.

BY RONALD R. CARPENTER  
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STATE OF WASHINGTON

**RESPONDENTS' JOINT ANSWER TO WASHINGTON STATE  
ASSOCIATION FOR JUSTICE FOUNDATION  
AMICUS CURIAE BRIEF**

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TABLE OF CONTENTS

I. INTRODUCTION..... 1  
II. RCW 51.24.035..... 1  
III. DUTY..... 3  
IV. CONCLUSION ..... 11

## TABLE OF AUTHORITIES

### Cases

<i>Burg v. Shannon &amp; Wilson, Inc.</i> , 110 Wn. App. 798, 43 P.3d 526 (2002) .....	8, 9, 10
<i>Davis v. Baugh Indus. Contr., Inc.</i> , 159 Wn.2d 413, 150 P.3d 545 (2007) .....	4, 5
<i>Evans v. Howard R. Green Co.</i> , 231 N.W.2d 907 (Iowa 1975) .....	6
<i>Hull v. Enger Constr. Co.</i> , 15 Wn. App. 511, 550 P.2d 692, review denied, 87 Wn.2d 1012 (1976) .....	4
<i>Kelley v. Howard S. Wright Constr. Co.</i> , 90 Wn.2d 323, 582 P.2d 500 (1978) .....	7
<i>MacPherson v. Buick Motor Company</i> , 217 N.Y. 382, 111 N.E. 1050 (1916) .....	5, 6
<i>Mudgett v. Marshall</i> , 574 A.2d 867 (Me. 1990) .....	6, 7
<i>Riggins v. Bechtel Power Corp.</i> , 44 Wn. App. 244, 722 P.2d 819, review denied, 107 Wn.2d 1003 (1986) .....	5, 6
<i>Rogerson Hiller Corp. v. Port of Port Angeles</i> , 96 Wn. App. 918, 925, 982 P.2d 131 (1999), review denied, 140 Wn.2d 1010 (2000) .....	7
<i>Rucshner v. ADT Sec. Sys., Inc.</i> , 149 Wn. App. 665, 204 P.3d 271, review denied, <i>K.H. v. ADT Sec. Sys., Inc.</i> , 166 Wn.2d 1030 (2009) .....	7
<i>Seattle Western Indus., Inc. v. David A. Mowat Co.</i> , 110 Wn.2d 1, 750 P.2d 245 (1988) .....	3
<i>Stuart v. Coldwell Banker Commercial Group, Inc.</i> , 109 Wn.2d 406, 745 P.2d 1284 (1987) .....	5
<i>Wells v. Vancouver</i> , 77 Wn.2d 800, 467 P.2d 292 (1970) .....	3, 4

### Statutes

RCW 51.24.035 .....	1
RCW 51.24.035(1) .....	1, 2, 3
RCW 51.24.035(2) .....	2, 3, 4
RCW Chapter 18.43 .....	10
WAC Chapter 196-27 .....	10

## I. INTRODUCTION

The Washington State Association for Justice Foundation (“WSAJF”) filed an amicus brief discussing the interpretation of RCW 51.24.035 design professional immunity and an engineer’s liability to third parties for negligent design.

## II. RCW 51.24.035

WSAJF’s interpretation limits RCW 51.24.035(1) design professional immunity to breach of duties involving the supervision of worksite safety practices, unless the design professional assumes responsibility for safety practices in a mutually negotiated contract, or exercises actual control over the premises where the third party was injured. *See* WSAJF Br. at 9-12. WSAJF rejects CH2M Hill, Inc.’s (“CH2M”) interpretation that RCW 51.24.035(1) provides a broad immunity for all activities of a design professional retained to perform professional services on a construction project, which immunity is limited only by the specific exceptions set forth in subsections (1) and (2). *See* WSAJF Br. at 14-16. WSAJF concludes that negligent design claims against design professionals are wholly without any immunity provided by RCW 51.24.035. *See* WSAJF at 16.

The plaintiffs interpret RCW 51.24.035(1) as providing an immunity for design professionals providing professional services on a

construction project, not necessarily limited to responsibility for safety practices. Whatever the scope of immunity provided by RCW 51.24.035(1), CH2M's conduct which proximately caused the plaintiffs' injuries and the death of Mike Cmos is excepted from any such immunity, because RCW 51.24.035(2) states "The immunity provided by this section does not apply to the negligent preparation of design plans and specifications."

As part of its contractual engineering design services, CH2M recommended a modification to a complicated recirculation and heating system (unchallenged Findings of Fact ("FOF") nos. 22-28, 30, CP 3111-13) but did not analyze how that modification would affect plant operations. FOF 40, challenged in part, CP 3115; RP 535-36, 539-41, 566-67, 569-70, 1739-40, 1865. CH2M's recommended modification required a change in the valving method the plant operators customarily used to transfer sludge between digesters. Challenged FOFs 40, 42, 43, and 48, CP 3115-16; RP 193, 214-15, 635, 846, 849-50, 872-73, 903-6, 916, 956-57, 971-72, 1466-69, 1480-83, 1927, 2180. Plaintiffs' engineering expert witnesses testified that the standard of care required CH2M to prepare a written analysis explaining the effects on plant operations caused by the recommended piping modifications, and include in the written analysis a statement of the need for revised standard

operating procedures and training for plant operators. Challenged FOFs 37-39, CP 3114; RP 258-59, 267, 648-53, 657-60, 731, 745-50, 1450-54, 1458, 1462, 1483-85. CH2M's failure to conduct any analysis and failure to prepare the required written design plan constitutes "the negligent preparation of design plans" within the meaning of RCW 51.24.035(2). Whatever the scope of immunity provided by RCW 51.24.035(1), under RCW 51.24.035(2) that immunity does not apply to CH2M's conduct. See Cmos Br. at 25-30; Micheals and Evans Br. at 25-32; Respondents' Joint Response to ACEC-W Amicus Br. at 10-18.

### III. DUTY

WSAJF observes that Washington appellate courts have not previously addressed the precise issue of whether the duty owed by an engineer or other design professional is limited to a contracting party, or extends to third persons injured as a result of negligent design. See WSAJF Br. at 13. WSAJF notes that in *Seattle Western Indus., Inc. v. David A. Mowat Co.*, 110 Wn.2d 1, 10, 750 P.2d 245 (1988), this Court implicitly recognized a common law negligent design claim. See WSAJ Br. at 13. In *Wells v. Vancouver*, 77 Wn.2d 800, 467 P.2d 292 (1970), where an airport invitee was injured by a defectively designed hangar, this Court also implicitly recognized a cause of action for negligent engineering design when the court approved jury instructions setting forth

the common law duty of an engineer stating that an engineer is guilty of negligence if he fails to apply the skill and learning which is required of similarly situated engineers. *Id.* at 803. See also, *Hull v. Enger Constr. Co.*, 15 Wn. App. 511, 550 P.2d 692, review denied, 87 Wn.2d 1012 (1976).

The enactment of RCW 51.24.035(2) implicitly recognizes an engineer's duty to third persons to exercise the appropriate standard of care in design. Without such a duty to third persons, there would be no need to except the negligent preparation of design plans in subsection (2) from the immunity provided engineers in subsection (1) to claims from injured third party workers.

In *Davis v. Baugh Indus. Contr., Inc.*, 159 Wn.2d 413, 150 P.3d 545 (2007), this Court abandoned the common law doctrine of completion and acceptance. The Court's discussion in that case is consistent with the recognition of an engineer's duty to exercise reasonable care in design so as not to injure third parties:

Under the modern *Restatement* approach, a builder or construction contractor is liable for injury or damage to a third person as a result of negligent work, even after completion and acceptance of that work, when it was reasonably foreseeable that a third person would be injured due to that negligence. ...

We join the vast majority of our sister states and abandon the ancient completion and acceptance doctrine.

... We find it does not accord with currently accepted principles of liability because it was grounded in the long abandoned privity rule that a negligent builder or seller of an article was liable to no one but the purchaser. *See, e.g., ... MacPherson v. Buick Motor Company*, 217 N.Y. 382, 397, 111 N.E. 1050 (1916). This approach to analyzing liability was first rejected in *MacPherson*. There, Judge (and later Justice) Benjamin N. Cardozo's watershed opinion explained that

[w]e have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.

*MacPherson*, 217 N.Y. at 390. Cardozo has prevailed, and the privity requirement in tort law has been abandoned not just in Washington, but in all United States jurisdictions in the decades since *MacPherson*. *See Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 418, 745 P.2d 1284 (1987).

159 Wn.2d at 417-18. (Some citations omitted.)

Similarly, in *Riggins v. Bechtel Power Corp.*, 44 Wn. App. 244, 722 P.2d 819, *review denied*, 107 Wn.2d 1003 (1986), the Court rejected an engineer's argument that it owed no duty to the employee of a subcontractor on a construction site. Unlike the present case where CH2M breached its duty to exercise the appropriate standard of care in engineering design, Riggins alleged the defendant engineer breached a duty to supervise safety

practices at a construction site. 44 Wn. App. at 245-46. Despite this difference in duties, the rejection of any privity requirement by the court in Riggins is applicable:

Bechtel claims that it had no duty of reasonable care to protect Ms. Riggins' safety because it did not employ Jones [her employer] directly. But this argument is overly reliant upon contract theory to the point of losing focus of the nature of the claim made here, a claim which asserts negligence, rather than breach of contract. Long ago, the courts eliminated privity of contract between the plaintiff and defendant before assessing tort liability. *See, e.g. ... MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050, 1053 (1916).

44 Wn. App. at 249. (Brackets added, some citations omitted.)

In its Respondents' Brief, the Estate of Mike Cmos discussed *Evans v. Howard R. Green Co.*, 231 N.W.2d 907 (Iowa 1975), and the Iowa Supreme Court's holding that an engineer owed a duty to third party employees in an accident caused by design defects in a wastewater treatment plant. *See* Cmos Br. at 32-34. That case was cited in *Mudgett v. Marshall*, 574 A.2d 867 (Me. 1990) where the Supreme Court of Maine addressed an engineer's duty of design to third parties. The Court referred to

... the general rule that the duty of an architect or engineer is not limited to the employer but may extend, without privity of contract, to other persons lawfully on the premises, including construction workers injured as a result of a defect in the design of the building or its component parts.

*Id.* at 871. The Court went on to hold:

Although we have not previously addressed this precise issue, we agree with the reasoning of the trial court

that there was a status relationship existing between Marshal as the designer of the steel to be used in the structure that could generate impact on [it] as it was in the process of being erected ... [imposing] the duty on him that he refrain from negligence in [the] preparation or in formulating a design ... that would create unreasonable dangers of injury to those engaged in the process of erecting the structure.

*Id.* at 872. (Brackets added by Court.)

WSAJF only discusses common law negligent design claims. *See* WSAJF Br. at 12-13. A legal duty may arise from common law, contract, or statute. *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 925, 982 P.2d 131 (1999), *review denied*, 140 Wn.2d 1010 (2000). *See also, Kelley v. Howard S. Wright Constr. Co.*, 90 Wn.2d 323, 330-334, 582 P.2d 500 (1978) (a general contractor's duty to provide adequate safety precautions for a subcontractor's employees could be created by common law, contract or statute). In *Rucshner v. ADT Sec. Sys., Inc.*, 149 Wn. App. 665, 681, 204 P.3d 271, *review denied*, *K.H. v. ADT Sec. Sys., Inc.*, 166 Wn.2d 1030 (2009), the appellate court cited *Kelley v. Howard S. Wright Constr. Co.*, 90 Wn.2d at 334, for the proposition that "an affirmative duty assumed by contract may create liability to persons not a

party to the contract, where failure to properly perform the duty results in injury to them.”

In its contract with the City, CH2M assumed duties to defend claims from third parties arising from its own negligence or breach of its contractual obligations (unchallenged FOF 7, CP 3108-09), to apply the degree of skill and diligence normally employed by professional engineers under similar circumstances (unchallenged FOF 8, CP 3109), and to design and manage an upgrade to and redesign of the digester recirculation system and provide “on-call” services for plant operations. Unchallenged FOFs 15, 16, CP 3110. The trial court entered unchallenged findings that CH2M was engaged in engineering design services pursuant to the duties assumed in its contract with City when it recommended the piping modifications to the recirculation system as a design change and as “on-call” services for plant operations. Unchallenged FOFs 24, 25, 28, CP 3112-13. The trial court entered a Conclusion of Law that CH2M owed the plaintiffs both a contractual and a common law duty to exercise the degree of skill and diligence normally employed by professional engineers performing the same or similar services. Conclusion of Law 3, CP 3128-29.

WSAJF also asks this Court to disapprove *Burg v. Shannon & Wilson, Inc.*, 110 Wn. App. 798, 807, 43 P.3d 526 (2002) to the extent it

suggests no common law duty for negligent design is actionable absent proof of a special relationship. *See* WSAJF Br. at 13-14, n. 10. In *Burg*, the plaintiff homeowners' properties were damaged by landslides originating from city-owned property. The homeowners' earlier suit against the City of Seattle for failing to prevent the landslides was dismissed because there was no evidence that any alterations on the city-owned property increased the natural instability of that property. 110 Wn. App. at 803. The homeowners then brought suit against engineers who had been hired by the City before the landslides and had inspected the property and made various recommendations to the City for remedial measures to stabilize the property. The engineers had no contractual authority to actually implement any of their recommendations. *Id.* at 808. Before the City completed the stabilization measures, severe storms caused landslides that damaged the plaintiffs' homes. The appellate court affirmed the summary judgment dismissal of the plaintiffs' claims on the basis that the engineers did not have a duty to warn the homeowners.

Unlike the engineers in *Burg*, CH2M had a contract with the City of Spokane, the plaintiffs' employer, which included affirmative duties to redesign a digester recirculation system and to consult regarding plant operations. CH2M addressed the plan for the digester piping modification in its April 28, 2004 digester heating design meeting. Unchallenged FOF

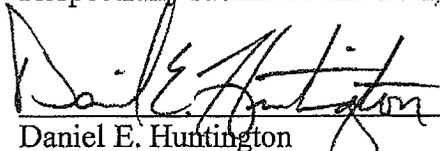
25, CP 3112; Ex. 16; RP 1755-57. CH2M's minutes from a May 3, 2004 meeting with City supervisors confirmed that the implementation of the digester piping modification was a CH2M task. Unchallenged FOF 27, CP 3112; Ex. 18, p. 2; RP 525-27, 1755-61. Unlike the claim against the engineers in *Burg* for simply failing to warn the homeowners when those engineers had not implemented any changes to the city property, CH2M was negligent for its *own* conduct in creating a hazard by designing and modifying a complex piping system without analyzing the operational effects of that design change and failing to prepare a written plan informing the City of the operational effects the design change would have on plant operations.

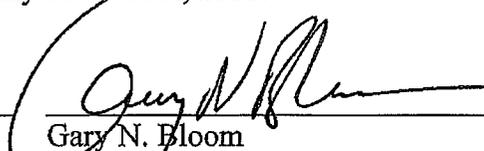
In *Burg*, the appellate court's suggestion that the plaintiffs must prove a "special relationship" was limited to the plaintiffs' cause of action based upon the engineers' alleged violation of statutes and regulations applicable to engineers. 110 Wn. App. at 807 (discussing RCW Chapter 18.43 and WAC Chapter 196-27). Importantly, none of the appellate court's comments regarding the need to show a "special relationship" apply to causes of action based upon common law or the breach of contractually assumed duties.

IV. CONCLUSION

The trial court's judgment should be affirmed.

Respectfully submitted this 11th day of October, 2010.

  
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## 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.]