No. 84168-3

MADSEN, C.J. (concurring)—I agree with the result the majority reached because I agree with its holding that CH2M Hill negligently prepared design plans and specifications. *See* RCW 51.24.035(2). However, having determined that CH2M negligently prepared design plans and specifications for which it was not entitled to immunity, the majority had no need to reach RCW 51.24.035(1). *See* RCW 51.24.035(2). Thus, its interpretation of that portion of the statute is dictum. It is also erroneous. In my view, CH2M was "retained to perform professional services on a construction project," and Kelly Irving was "representing [CH2M] in the performance of professional services on the site of the construction project" within the meaning of RCW 51.24.035(1). Because I believe that the majority's interpretation of RCW 51.24.035(1) is not only unnecessary but also impermissible, I write separately.

ANALYSIS

The majority gives significant deference to the trial court's "finding of fact" that "'the area of the plant where the skillets were installed was not a construction project nor a construction site within the meaning of RCW 51.24.035(1).'" Majority at 10 (quoting Clerk's Papers (CP) at 3128). This deference rests on the majority's erroneous belief,

apparently shared by the trial court, that whether the accident involved a construction project or construction site is a question of fact. *Id*. at 10; *see* CP at 3128 (trial court's Findings of Fact and Conclusions of Law mischaracterizing this legal conclusion as a "finding of fact"). To the contrary, the determination of whether CH2M was retained to perform services on a construction project and whether Kelly Irving was performing services on the site of a construction project requires a court to interpret the statutory terms "construction," "project," and "site" before applying these terms to the relevant facts. RCW 51.24.035(1). Questions of statutory interpretation are questions of law, subject to de novo review. *Conom v. Snohomish County*, 155 Wn.2d 154, 157, 118 P.3d 344 (2005). Accordingly, the substantial deference the majority accords to this "finding of fact" is misplaced.

The majority makes much of RCW 51.12.010, which commands a liberal construction of Title 51 in favor of employees. Majority at 7 et seq. This interpretive provision compels us to interpret ambiguities within this title in favor of the injured worker. It does not, however, free us from the confines of unambiguous statutory text. *Cf. Mathewson v. Olmstead*, 126 Wash. 269, 273, 218 P. 226 (1923) ("[W]e will *in all doubtful cases* sustain the right of the injured workman against the third party wrongdoer who has not contributed to the fund." (emphasis added)). Thus, in giving RCW 51.24.035(1) a meaning the text cannot bear, the majority goes well beyond the mandate of RCW 51.12.010.

The majority finds further support for its narrow reading of RCW 51.24.035(1) in

the notion that statutory grants of immunity in derogation of common law are narrowly construed. Majority at 9. However, this statute does not derogate from common law and instead appears to codify the common law.

In *Riggins v. Bechtel Power Corp*., 44 Wn. App. 244, 722 P.2d 819 (1986), a case that predated RCW 51.24.035 by one year, the Court of Appeals considered whether Bechtel, a consultant engineering firm at the Hanford site charged with construction duties, owed a duty to provide a safe work site for workers at the Hanford plant. *Id*. at 245-46. The court's inquiry focused on Bechtel's contractual duties to ensure workplace safety and the level of supervision Bechtel was required to provide. *Id*. at 249. This inquiry mirrors that under RCW 51.24.035(1), under which a third party design professional is liable for work site injuries only if it has contractually assumed responsibility for safety or exercised actual control of the work site. Similarly, in *Loyland v. Stone & Webster Engineering Corp*., 9 Wn. App. 682, 514 P.2d 184 (1973), *overruled on other grounds by Bayne v. Todd Shipyards Corp.*, 88 Wn.2d 917, 922, 568 P.2d 771 (1977), injured workers brought suit against Stone & Webster Engineering Corporation, which had contracted with a public utility district to design, supervise, and execute an extension to a hydroelectric power plant. *Id.* at 683. In assessing the design professional's liability, the Court of Appeals held that liability hinged on "[t]he extent of supervision required of Stone & Webster in its contract with the district and the amount and character of inspection which it was to conduct." *Id*. at 687; *see also Porter v. Stevens, Thompson & Runyan, Inc*., 24 Wn. App. 624, 602 P.2d 1192 (1979) (holding

that consulting engineer was not liable for workplace injury where it was not contractually responsible for safety precautions and did not exercise actual control of the work site).

In sum, at common law, third party design professionals were liable for work site injuries only when they assumed responsibility for safety or exercised actual control. *E.g., Riggins*, 44 Wn. App. at 249; *Loyland*, 9 Wn. App. at 687. In ensuring immunity for design professionals who assume no such responsibility and exercise no such control, RCW 51.24.035(1) effectively codifies common law and by no means derogates from it.

With these principles in mind, I would hold that CH2M was retained to provide engineering services on a construction project within the meaning of RCW 51.24.035(1). As the majority correctly notes, we consult a common dictionary for undefined statutory terms in the absence of clear evidence that the legislature intended otherwise. Majority at 11 (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)). *Webster's Third New International Dictionary* 489 (2002) defines "construction" as "the act of putting parts together to form a complete, integrated object **:** Fabrication."[1] Relevant definitions of "project" in *Webster's* include

[1] Among the various definitions of "construction" in *Webster's*, only the second and fourth are conceivably relevant here. These definitions read in their entirety:
**2a :** the act of putting parts together to form a complete integrated object **:** fabrication < during the [*construction*] of the bridge > **b** (1) **:** the form or manner in which something has been put together **:** design < several ships of similar [*construction*] > < an analysis of the [*construction*] of a time bomb > (2) **:** the science or study of building or erection < two years in college mastering ship [*construction*] > **c :** something built or erected **:** structure < raw new [*constructions*]*s* along a highway >
**4 a :** the act of constructing a geometrical figure; *also* **:** its result **b :** an abstract or nonrepresentational sculptural creation composed of separate and often disparate elements.

"a devised or proposed plan **:** a scheme for which there seems hope of success" or "an undertaking devised to effect the reclamation or improvement of a particular area of land."[2] *Id*. at 1813. These broad definitions mirror the technical definition of "project," namely a "'construction undertaking . . . planned and executed in a fixed time period.'" Br. of Amicus Curiae Am. Council of Eng'g Cos. of Wash. in Support of Appellant CH2M Hill at 8 (quoting Cyril M. Harris, Dictionary of Architecture and Construction 768 (4th ed. 2005)). Accordingly, in this context, a "construction project" appears to be an undertaking or scheme aimed at improving land through the building process. As amicus aptly notes, "[a] 'construction project' is a process, not a place." Br. of Amicus Curiae Am. Council of Eng'g Cos. of Wash. in Support of Appellant CH2M Hill at 9.

A "site," in contrast, is a physical location, but it is also defined broadly, and—contrary to the majority's interpretation—without reference to a fixed radius. Relevant definitions of "site" in *Webster's* include "the local position of building, town, monument, or similar work either constructed or to be constructed [especially] in

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Webster's, *supra*, at 489.

[2] *Webster's* provides a number of definitions for "project," only two of which are applicable here: **1 :** a specific plan or design: as **a** [*obsolete*]**:** A tabular outline **:** draft, pattern **b :** a devised or proposed plan **:** a scheme for which there seems hope of success **:** proposal < presented his [*project*] to the committee > < he discusses his [*project*]*s* with her –*Current Biog*. >
**3 :** A planned undertaking: as **a :** a definitely formulated piece of research **b** (1) **:** an undertaking devised to effect the reclamation or improvement of a particular area of land < the construction of small irrigation [*project*]*s* –W. O. Douglas > (2) **:** the area of land involved **c :** a systematically built group of houses or apartment buildings; *esp* **:** one that includes community facilities and has been socially planned with government support to serve low-income families **d :** a vast enterprise [usually] sponsored and financed by a government < demands made for setting up public work [*project*]*s* –*Amer. Guide Series*: *N.Y.*> <the [*project*], as authorized by Congress provided for a ten-year expenditure of $88 million –*Current Biog*.> Webster's, *supra*, at 1813.

connection with its surroundings," "a space of ground occupied or to be occupied by a building," or "the scene of an action . . . or specified activity."[3] Webster's, *supra*, at 2128. Thus, the term "site of the construction project" in RCW 51.24.035(1) appears to denote a location at which a construction project—an undertaking or scheme designed to improve the land—is underway.

CH2M was retained to provide program management and engineering design services for the city of Spokane's 10-year capital improvement program at the Advanced Wastewater Treatment Plant. The capital improvement program included a physical upgrade of existing facilities, among other improvements. A "construction project," namely a 10-year undertaking to improve the physical facilities, was underway throughout the entire term of CH2M's contract. Accordingly, CH2M was "retained to perform professional services on a construction project" within the meaning of RCW 51.24.035(1), regardless of whether actual, physical building was taking place at the time and precise location of plaintiffs' injuries. Thus, Kelly Irving was an "employee of a

[3] Potentially relevant definitions of "site" read, in their entirety,
**2 a :** the local position of building, town, monument, or similar work either constructed or to be constructed [especially] in connection with its surroundings < how Oxford and Cambridge in particular came to be chosen for [site]s—A.T. Quiller-Couch> <suitable [site] for a factory> < his structural solutions and his great sense of [site]—Lincoln Kirstein > **b :** a space of ground occupied or to be occupied by a building <offered the city a library . . . if the city would provide a [site]—*Amer. Guide Series: Md.*> **c :** land made suitable for building purposes by dividing into lots, laying out streets, and providing facilities (as water, sewers, power supply) < desirable corner [site]s are available > < waterfront [site]s for summer cottages >
**3 :** the scene of an action < battle [site] > < [site] of the murder > < [site] of an auto collision > or specified activity < mining [site] > <picnic [site] > <launching [site] for a rocket > < choosing a [site] for a convention > < [site] of a bone fracture >. Webster's, *supra*, at 2128.

design professional who [was] assisting or representing the design professional in the performance of professional services on the site of the construction project." RCW 51.24.035(1).

Moreover, even if the statute were read more narrowly, it is indisputable that in assisting with the placement of skillets—the synthesis of parts to form an integrated whole—Mr. Irving performed professional services on the site of a construction project. *See id.*; *Edwards v. Anderson Eng'g, Inc*., 284 Kan. 892, 902, 166 P.3d 1047 (2007) (holding that design professional's marking on pipe to indicate how it should be cut was a construction project within the meaning of a Kansas statute similar to RCW 51.24.035(1)). Contrary to the majority's suggestion, it is of no import that these services fell under the umbrella of CH2M's "'on-call'" duties. Majority at 13.

Accordingly, the trial court misinterpreted RCW 51.24.035(1) in concluding that the area of the sewage plant where the skillets were installed was neither a construction project nor a construction site within the meaning of this statute. Similarly, Timothy Pelton's testimony that the nearest construction was "several hundred feet away" does not negate the conclusion that CH2M was retained to perform professional services on a construction project and that the entire sewage treatment plant was the site of a construction project within the meaning of RCW 51.24.035(1). *See* 8 Verbatim Report of Proceedings (Sept. 17, 2008) at 1114-15. Thus, the majority errs in relying on Mr. Pelton's testimony and the trial court's "finding of fact." Majority at 12.

In addition, the majority misstates the relevant inquiry when it reasons that "[t]he

question is whether the existence of construction somewhere on the campus triggers the immunity of RCW 51.24.035." *Id*. at 12. CH2M's immunity under this statute stems not from discrete construction activities elsewhere on the plant but rather from the engineering firm's managerial role in an ongoing, plant-wide construction project. Thus, the majority's focus on spatial distances is misplaced, and its analogy to our capitol campus inapposite. *See id.* at 13.

As the majority acknowledges in a footnote, design professionals are particularly vulnerable to suits by injured workers under workers' compensation schemes that immunize employers from such lawsuits. *Id*. at 14 n.6. As one commentator noted prior to the enactment of immunity statutes, such as RCW 51.24.035,

> [t]he problem caused by workers' compensation statutes is illustrated by *Erhart v. Hummonds*, [232 Ark. 133, 134, 334 S.W.2d 869 (1960)] where the court used a strained interpretation of the contract to uphold a jury verdict against an architect in a wrongful death case. . . .
>
> Such distortions reflect the dilemma courts face when workers' compensation legislation prevents workers from pursuing tort claims against the one party most often at fault, the employer. Recovery from the employer is limited to a statutory amount by the legislative bargain which eliminated the need to prove negligence. Because the amounts available from this source in most states are grossly inadequate as compensation, the injured worker has an incentive to seek out third parties who are not immune to suit . . . Courts are thus often forced to choose between leaving a worker largely uncompensated for an injury and imposing liability on a party whose fault is comparatively minor.

Note, *Architectural Malpractice: A Contract-Based Approach*, 92 Harv. L. Rev. 1075, 1095-96 (1979) (footnotes omitted). Workers' compensation schemes are one of several recent developments that have resulted in the significant expansion of design

professionals' liability for construction accidents. *See generally id*. (arguing that design professionals have been increasingly subject to personal injury suits while their actual influence over work site safety has declined); Gary E. Snodgrass & William S. Thomas, *Defending Design Professionals: Is Contract Language an Adequate Shield?*, 64 Def. Couns. J. 389 (1997) (discussing use of expert testimony to impose duties on design professional in the absence of corresponding contractual duties); Jeffrey L. Nischwitz, Note, *The Crumbling Tower of Architectural Immunity: Evolution and Expansion of the Liability to Third Parties*, 45 Ohio St. L. J. 217 (1984) (discussing factors contributing to the expansion of design professionals' liability to third parties, including the fall of the privity doctrine, the decline of the owner acceptance rule, workers' compensation schemes, and the tendency of courts to impose common law duties on design professionals notwithstanding contractual provisions expressly disclaiming liability).

Thus, RCW 51.24.035, like strikingly similar statutes in other jurisdictions, likely reflects a legislative recognition of design professionals' increased exposure to liability for work site accidents and a desire to reduce this exposure through statutory immunity. *See, e.g.,* Conn. Gen. Stat. § 31-293(b); Ga. Code Ann. § 34-9-11(a); Me. Rev. Stat. tit. 39-A, § 104; Tenn. Code Ann. § 50-6-120(a); Fla. Stat. § 440.09(6); Pa. Stat. Ann. tit. 77, § 471. The majority's narrow reading of RCW 51.24.035(1) sharply diminishes the impact of this legislative intervention, and in so doing, strips design professionals of an important statutory protection.

Finally, although the majority repeatedly emphasizes the remedial purpose of the

Industrial Insurance Act (IIA), Title 51 RCW, its narrow interpretation of the terms "construction project" and "site of the construction project" does not necessarily serve this purpose because a narrow construction of immunity in turn narrows the scope of the design professional's duty to injured workers. If statutory immunity is defined so narrowly as to not apply, the design professional is liable in tort to the injured worker only if the latter can prove negligence on the part of the former. In particular, to make out a negligence claim, the injured worker must establish the design professional's duty to ensure worker safety. *Riggins*, 44 Wn. App. at 249. The scope of this duty is likely to correspond to the scope of the construction project for which the design professional was retained. Where a construction project is seen as a long-term undertaking that spans an entire campus, and a court finds that a design professional has a contractual or common law duty to ensure work site safety, that duty will extend to the entire project and persist throughout the duration of the project. In contrast where the construction project is construed more narrowly, a court is likely to limit the scope of the design professional's duties accordingly. Thus, while the majority's narrow conception of construction projects dramatically curtails design professionals' statutory immunity under RCW 51.24.035(1), it does not necessarily advance the remedial purpose of the IIA, namely providing relief to injured workers.

In this case, I would hold that CH2M was negligent in preparing design plans and specifications. *See* RCW 51.24.035(2). Thus, I agree with the result the majority reached here. However, because immunity under RCW 51.24.035(1) does not apply to

the negligent preparation of design plans and specifications, and because the majority held that CH2M's recommendations amounted to the negligent preparation of design plans and specifications, the majority had no need to reach RCW 51.24.035(1). *See* RCW 51.24.035(2); majority at 16. Thus, its construction of the terms "construction project" and "site of the construction project" is dictum. Because I am concerned that the majority's strained reading of RCW 51.24.035(1) was not only gratuitous but also in conflict with the statutory text, I cannot endorse the majority's reasoning.

AUTHOR:
Chief Justice Barbara A. Madsen

WE CONCUR:

Justice James M. Johnson

Justice Gerry L. Alexander