

## Washington Limits the Immunity of Architect and Engineers against Construction Safety Claims

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By Michael K. Fandel, Stephen H. Goodman and Zachery R. Hiatt  
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In 1987, Washington's legislation granted design professionals, and their employees, immunity from claims of professional negligence brought by workers injured during the course of a construction project, unless the design professional contractually assumed responsibility for job-site safety or actually exercised control over the portion of the site where the injury occurred. The statute does not apply to the design professional's negligence in preparing design plans and specifications which result in job-site injuries.

Last week, in the first opportunity to interpret the statute, the Washington Supreme Court held that since the injuries in the case did not occur at a location where actual construction work was taking place, the statute did not apply to protect the design professional against job-site safety claims. *Michaels v. CH2M Hill* (Wash. S. Ct., May 2011) [[link to opinion](#)] The facts of the case were as follows.

In 1998, the City of Spokane hired CH2M Hill for a 10-year capital improvement project to upgrade and retrofit the City's waste water treatment plant. In 2003, CH2M Hill modified its contract with the City to provide that, in addition to managing the design of upgrades to the plant, it would provide "on-call" services during the upgrades to assist the City in operating the plant. As part of its services, CH2M Hill proposed changes to the recirculation system of the City's digesters. The City's operators were unaware of how the changes would affect the over-filling of one of the digesters, and during operations to relieve sludge building up in the roof of the digester it collapsed, killing one operator and injuring two others.



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The survivors sued CH2MHill for negligence, and CH2MHill argued it was immune under the design professionals statute because its services related to the construction of improvements to the City's plant. Focusing on CH2M Hill's on-call services, the Washington Supreme Court disagreed and held that the statute only applies to injuries arising from services directly related to actual construction work. The court narrowly construed the statutory terms "construction site" as meaning the "space of ground occupied or to be occupied by a building that is or will be put together to form a complete integrated object" and "construction project" as the "overarching plan and process of so completing the building." Thus, if a design professional's services are not performed on the site of actual construction or directly related to the construction process, such services may not be protected by the statute for job-site safety claims.

The court also rejected CH2M Hill's argument that the advice it had given to the City to improve the operation of its digesters did not fall within the statute's exception for claims related to the negligent preparation of design plans and specifications. CH2M Hill argued that the exception only applied to written plans and specifications which are ordinarily prepared for construction projects. The court held that the exception was not so limited and that it applied to verbal advice as well as written plans and specifications.

The following are steps design professionals, contractors and owners should consider in light of the court's ruling:

- Design professionals should make sure contract documents clearly identify who is responsible for job-site safety, and if the design professional is not responsible the documents should explicitly disclaim such responsibility.
- The party most capable of managing job-site safety should be made responsible for safety, and the contract documents should clearly express that understanding. On most projects this responsibility resides with the general contractor, as it is usually most capable of managing safety.
- Industry forms of owner-architect contracts often provide that the architect is the owner's site representative. In light of the court's ruling, owners may want to consider using more limiting language to express the architect's responsibilities and relationship with the owner.
- Owner-contractor agreements and sometimes owner-architect agreements include flow-down indemnity and insurance provisions that provide limited liability protection for the architect or engineer. Owners and contractors should make sure such provisions are appropriately drafted to meet statutory requirements and are complied with in the construction process. Owners or contractors who fail to add an architect or engineer to a policy when required by an agreement may find themselves insuring the design professional.

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