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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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No. 50867-2-II

**THE COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON  
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INFRASOURCE SERVICES LLC,

*Plaintiff/Appellant,*

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

*Defendant/Respondent.*

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**APPELLANT'S REPLY BRIEF**

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## I. INTRODUCTION

Two well-trained employees entered an excavation deeper than four feet, without adequate protection in place, in violation of the applicable laws – which they knew – and their employer’s clearly communicated and well-known safety rules – which they also knew. Another well-trained employee, their foreman, did not stop them from doing so, even though all three employees knew that these actions violated applicable state regulations and their company’s safety rules. This is a classic case of unpreventable employee misconduct. As such, Infrasource (“IFS”) respectfully requests that the Court vacate the Citation in its entirety.

## II. ARGUMENT

### A. **Infrasource Established the Affirmative Defense of Unpreventable Employment Misconduct**

The Department may not issue a citation if unpreventable employee misconduct (“UEM”) caused the violation. RCW 49.17.120(5)(a). As a threshold matter, the Superior Court found and the Department does not contest that IFS: (1) has thorough program, including work rules, training, and equipment designed to prevent the violation; (2) adequately communicated these rules to its employees; and (3) takes steps to discovery and correct safety violations. Only one element is in dispute – whether IFS effectively enforced its safety program as written, in practice, and not just in theory.

1. IFS Washington Employees Know Applicable Washington Rules

IFS showed that its safety program is effective in theory as well as in practice. Despite how the Department attempts to paint the matter in its brief, there is no question that the employees were adequately trained in IFS's safety rules – they all testified as such, as did the Department's own inspector. (Auckland at 45; de Leon at 31, 33; see also Bartells at 103-105; Hearing Exs. 6-8). Further, they had all the necessary tools and equipment on site to perform this work safely and in accordance with WISHA regulations, and IFS's safety rules. (Auckland at 45; de Leon at 32). The fact that they failed to use their tools and training properly on this isolated incident when they had never failed to do so before was completely unforeseeable.

Although IFS's national safety manual states a rule different than the rule in effect in Washington, IFS's Washington materials and training make it clear that the four foot rule applies in Washington, and there is no doubt that the employees involved in this incident were trained on and fully aware of the Washington rule. Also, the national manual itself makes it clear that state or local rules should apply when and if such rules are in conflict with the national manual. (Exs. 5-6). In addition, IFS employees know they can call IFS management of the IFS safety department (a resource available to employees 24/7) if they have any questions about safe work practices. IFS employees knew the proper standards to follow,

but unfortunately in this case, some employees chose not to follow these standards, despite being trained to do so.

2. The UEM Defense Applies To The Foreman's Actions

The Department erroneously suggests that because a foreman was involved in this incident, and because the work happened in plain view, IFS's UEM defense fails. This is false. IFS cannot be held strictly liable for former foreman Sawyer's actions, and the fact that Sawyer was involved in this incident and that he too violated IFS's safety rules (and Washington law) even though he was well-trained not to do so supports rather than disproves IFS's UEM defense. *See* Appellant's Opening Brief at 16-20; Dkt. 12.

3. Lack of Discipline History Shows That IFS's Safety Program Is Effective In Practice

After citing *BD Roofing* to note that "showing a good paper program does not demonstrate effectiveness in practice," the Department paradoxically goes on to take IFS to task for allegedly failing to paper the case file with discipline records unrelated to this matter. IFS witnesses testified about the company's discipline program in general, as well as specifically as applied to this incident. Further, IFS provided safety meeting minutes, job hazard assessments, tool box safety records, training records, and safety department inspections – all which touch on IFS's safety rules. The fact that employees have not been disciplined for failing to follow certain safety rules *because they have actually not violated these rules* supports rather than refutes that IFS's safety program is effective in

practice as well as in theory. The goal of any effective safety program should be to increase employee safety and adherence to safety rules – and IFS’s safety program has been doing just that – something that should be celebrated rather than punished.

**B. The Violations, If Upheld, Should Not Be Designated as Serious**

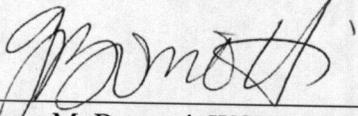
Because the employees’ conduct was entirely unforeseeable, and IFS could not have known, even with reasonable diligence, that Mr. Auckland and Mr. Row would enter a deep trench without appropriate safety equipment, or that Mr. Sawyer would not stop them from doing so, the alleged violation as improperly classified as “serious.” If not otherwise vacated based on the affirmative defense of UEM, which IFS established, both alleged violations should be reclassified as “general,” and the associated penalties should be recalculated accordingly.

**III. CONCLUSION**

For the reasons discussed above and in Appellant’s s opening brief, IFS respectfully requests that the Court vacate alleged Violations 1-1A and 1-1B because these violations were the result of unpreventable employee misconduct. In the alternative, IFS respectfully requests that the Court reclassify both alleged violations as general (non-serious) violations and recalculate the assessed penalties accordingly.

DATED this 18<sup>th</sup> day of December, 2017.

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### CERTIFICATE OF SERVICE

I, Ashley Rogers, certify that:

1. I am an employee of Fox Rothschild LLP, attorneys for Appellant Infrasource Services LLC in this matter. I am over 18 years of age, not a party hereto, and competent to testify if called upon.
2. On December 18, 2017, I served a true and correct copy of the foregoing document on the following party, attorney for Respondent, via email and mail, and addressed as follows:

Robert W. Ferguson, WSBA #26004  
Attorney General  
Dane William Henager, WSBA #45533  
Assistant Attorney General  
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED at Seattle, Washington, this 18<sup>th</sup> day of December, 2017.

Ashley M. Rogers  
Ashley Rogers