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NO. 96365-7

**SUPREME COURT
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent/Cross-Petitioner,

v.

PHILLIP SCOTT NUMRICH,

Petitioner/Cross-Respondent.

**BRIEF OF AMICUS CURIAE
DEPARTMENT OF LABOR & INDUSTRIES**

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I. INTRODUCTION

When people in positions of authority make profit-oriented choices that put workers at risk, they should be punished. The Legislature allows for prosecutions of employers whose business decisions lead to workers being killed.

The framers of Washington's constitution recognized the importance of protecting workers from deleterious conditions at work, including business decisions that result in death, by directing laws to protect workers. Const. art II, § 35. This mandate wove workplace safety into the fabric of Washington's law, including allowing prosecutors to convict employers who caused the death of their employees. In 1973, the Legislature adopted the Washington Industrial Safety and Health Act (WISHA) to enhance worker protection in Washington. It included a provision that allows misdemeanor criminal penalties if the employer violates a WISHA regulation in the situation in which someone has died. But nothing in WISHA took away the power to convict an employer for recklessly ending the life of an employee under manslaughter laws.

The Department of Labor and Industries (L&I) submits this amicus curiae brief to explain that WISHA does not provide an exclusive remedy for workplace deaths. It is absurd to think that the same behavior if not caused by an employer could be punished as a felony, while if the

employer caused the death it is a misdemeanor. This would undermine how WISHA and criminal statutes work hand in hand to protect workers. And knowing that their actions could lead to a felony conviction properly provides a powerful incentive to employers to not make business decisions to shortcut safety.

L&I's brief will focus on WISHA policies to protect worker safety, and on how Numrich's argument leads to absurd results and less worker protection, and deviates from case law from other jurisdictions. L&I agrees with the State on the general-specific argument, and will focus on worker protection.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

L&I is the state agency that creates and enforces the safety and health standards under WISHA. RCW 49.17.040; *SuperValu, Inc. v. Dep't of Labor & Indus.*, 158 Wn.2d 422, 425, 144 P.3d 1160 (2006). As the WISHA enforcement agency, L&I must strive to ensure "safe and healthful working conditions for every man and woman working in the state of Washington." See RCW 49.17.010. The Court gives substantial weight to L&I's interpretation of WISHA. *Frank Coluccio Constr. Co. v. Dep't of Labor & Indus.*, 181 Wn. App. 25, 36, 329 P.3d 91 (2014).

Washington has an interest in using all tools possible to ensure worker safety, including criminal penalties. L&I thus has a vital interest in this case.

III. SPECIFIC ISSUE ADDRESSED BY AMICUS CURIAE

Did the Legislature intend to prohibit convicting an employer for recklessly killing a worker under the manslaughter statute when it adopted a misdemeanor statute intended to punish an employer who has violated a WISHA regulation and a death occurred?

IV. STATEMENT OF THE CASE

Phillip Numrich owns and operates Alki Construction, LLC. CP 452, 460. In January 2016, he was working on a project in West Seattle, replacing a sewer line. CP 452. Following several days of heavy rainfall, Numrich allowed Howard Felton, an employee, to enter an eight to 10-foot deep trench to work on the sewer replacement. CP 452-54, 460-67. Numrich knew that operating a saw in the trench earlier had caused the ground to loosen, but he was under pressure from the homeowner to finish the job. CP 454-55, 44-65.

With such a deep trench, there was a substantial risk that a cave-in could kill a worker.¹ But Numrich had only bought enough shoring (safety

¹ *Laser Underground & Earthworks, Inc. v. Dep't of Labor & Indus.*, 132 Wn. App. 274, 279, 153 P.3d 197 (2006) (“[T]here is no doubt that a cave-in of a trench wall can cause death or serious bodily harm.” (internal citation omitted)).

equipment) to protect two of the four sides of the trench from a cave-in. CP 454-55. While Felton was working inside the trench, the sides collapsed, burying him under a massive amount of dirt and killing him. CP 452-53, 455, 465. Workplace safety rules under WISHA require employers to provide adequate shoring in trenches greater than four feet. WAC 296-155-657, -66407.

The Department of Labor & Industries investigated the fatality and issued a citation alleging willful violations of WISHA rules. CP 52. Numrich appealed the citation but settled at the Departmental level for an extended payment plan that affirmed all the violations as willful violations. CP 52.

V. ARGUMENT

The WISHA misdemeanor statute, RCW 49.17.190, is one tool to protect workers—to violate it an employer must willfully and knowingly violate a WISHA regulation. If death has resulted, the employer is guilty of a gross misdemeanor. In contrast, RCW 9A.32.060 does not require a willful and knowing violation of a WISHA regulation but does require recklessness as to the risk of death of the decedent. The two statutes punish different things, but both have the same result: protecting workers from unsafe behavior that could lead to their death. Allowing an employer, whose profit-based decision led to the death of an employee, to escape a

felony conviction for his reckless behavior would undercut worker safety, and the WISHA misdemeanor law shouldn't be read to preclude criminal prosecution consistent with federal Occupational Safety and Health Act (OSHA) law, which allows for criminal prosecution.

A. Washington's Misdemeanor Law Is Modelled After Federal Law, and There Is No Intent to Foreclose Manslaughter Convictions as Recognized Under Federal Law and Other State Courts

In 1970, Congress enacted OSHA to address more and more workplace fatalities, injuries, and illnesses and “[t]o assure safe and healthful working conditions for working men and women.” Occupational Safety & Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590. Congress allowed states to adopt their own comprehensive safety laws modelled after OSHA, a “state plan.” *See* 29 U.S.C. § 651(b)(11). So in 1973, Washington adopted WISHA to ensure “safe and healthful working conditions for every man and woman working in the state of Washington.” RCW 49.17.010. With the state plan system, Congress sought to enable states “to assume the fullest responsibility” of enforcement of workplace safety law. 29 U.S.C. § 651(b)(11). But WISHA must “equal or exceed the standards prescribed by [OSHA].” RCW 49.17.010; *see also* 29 U.S.C. § 667; *Afoa v. Port of Seattle*, 176 Wn.2d 460, 470, 296 P.3d 800 (2013).

Over the more than 40 years that have followed OSHA’s and WISHA’s passage, these federal and state standards have saved hundreds of thousands of workers’ lives and prevented countless more injuries and illnesses. But they do not prevent all deaths. Indeed, in Washington in the last decade, there have been 688 traumatic workplace deaths.² All tools must be brought to bear to prevent these deaths, and criminal prosecutions are one tool both under WISHA and under the criminal code.

OSHA and WISHA have virtually identical provisions allowing misdemeanor conviction for willfully and knowingly violating an OSHA or WISHA standard, which causes death. RCW 49.17.190(3); 29 U.S.C. § 666(e). The federal statute has been interpreted to not place limitations on state prosecutions under statutes like manslaughter. “Nothing in the OSH Act or its legislative history suggests that Congress intended to shield employers from criminal liability in the workplace or to preempt enforcement of State criminal laws of general application such as murder, manslaughter, and assault.” H.R. Rep. No. 100-1051, at 9 (1988), *quoted in People v. Hegedus*, 432 Mich. 598, 623 n.25, 443 N.W.2d 127 (1989).

In interpreting the preclusive effect of the criminal penalty in the federal OSHA or in state OSHA laws for violations of safety standards,

² Wash. Dep’t of Labor & Indus., *2019 Washington State Work-Related Fatalities Report 5*, https://lni.wa.gov/safety-health/safety-research/files/2020/93_5_2020_WorkRelatedFatalitiesInWashingtonState_2019.pdf.

other jurisdictions have consistently upheld the application of other criminal penalties besides those provided for in OSHA and state OSHA laws. *State v. Far West Water & Sewer Inc.*, 224 Ariz. 173, 184, 228 P.3d 909 (2010) (concluding that nothing about Arizona OSHA law indicates that the Arizona Legislature imposed it as an “exclusive criminal sanction against an employer who violates the statutory duty thereby causing the death or serious harm of an employee”); *Sabine Consol., Inc. v. State*, 806 S.W.2d 553, 557 (Tex. Crim. App. 1991) (stating that OSHA penalty provisions “are not designed to cover a broad range of criminal conduct. . . . [and] [w]hereas OSHA standards apply only to specific hazards in the workplace, criminal law reaches to regulate conduct in society in general”); *Hegedus*, 432 Mich. at 620 (explaining that “very minor criminal sanctions” found in OSHA do not “preclude state [criminal] penalties” as Congress intended “to allow states to supplement OSHA penalties with their own sanctions” (internal citations omitted)); *People v. Chicago Magnet Wire Corp.*, 126 Ill. 2d 356, 367-68, 534 N.E.2d 962 (1989) (holding that it is unreasonable to conclude Congress intended OSHA to provide the only criminal sanctions available so as to preclude other “appropriate criminal sanctions in cases of egregious conduct causing serious or fatal injuries to employees”); *People v. Pymm*, 76 N.Y.2d 511, 521, 563 N.E.2d 1, 561 N.Y.S.2d 687 (1990) (“OSHA

[remedies] are prophylactic measures that are intended to prevent workplace accidents from ever occurring [While s]tate criminal prosecutions lead to the imposition of penalties that reflect society’s condemnation of behavior in violation of generally accepted norms.”) (internal citations omitted); *State ex rel. Cornellier v. Black*, 144 Wis. 2d 745, 755, 425 N.W.2d 21 (Ct. App. 1988) (holding that enforcement of “safety and health regulations is consistent, we believe, with the discharge of the state’s duty to protect the lives of employees, and all other citizens, through enforcement of its criminal laws”); *see also* Mark A. Rothstein, *Occupational Safety and Health Law* § 3.3 (2020).

If the federal misdemeanor provision and other jurisdictions’ safety laws do not preclude state convictions for manslaughter, neither should Washington’s law. This is because Washington’s interpretation of the law must meet or exceed the federal standards. RCW 49.17.010; *Afoa*, 176 Wn.2d at 470.

B. The Legislature Intended WISHA and RCW 49.17.190(3) to Expand, not Limit, the Tools Available to the State

The court “construe[s] WISHA statutes and regulations liberally to achieve their purpose of providing safe working conditions for workers in Washington.” *Frank Coluccio Constr. Co. v. Dep’t of Labor & Indus.*, 181

Wn. App. 25, 36, 329 P.3d 91 (2014). And courts give substantial weight to L&I's interpretations of WISHA. *Id.*

WISHA provides for workplace safety regulations and statutes. But its remedies are not exclusive. Numrich argues that WISHA is a carefully structured regulatory scheme that exclusively provides the remedy for criminal conduct related to workplace deaths. Pet'r Reply at 4. He points to the Industrial Insurance Act's exclusive remedy as an analog. Pet'r Reply at 5. But this Act proves the opposite point. In the Industrial Insurance Act, the Legislature chose to explicitly make the act the exclusive remedy for workplace injuries. RCW 51.04.010. But when adopting the closely related workplace safety act designed to prevent those injuries, the Legislature did not deem it an exclusive remedy. *See* RCW 49.17. And WISHA is enforced through private litigation frequently. *E.g.*, *Vargas v. Inland Washington, LLC*, 194 Wn.2d 720, 729–30, 452 P.3d 1205 (2019); *Carrera v. Olmstead*, 189 Wn. 2d 297, 310, 401 P.3d 304 (2017) (recognizing that “[t]he deterrent effect of [private] workplace safety enforcement also stands to benefit Washington workers by encouraging better compliance with safety regulations”).

Had the Legislature intended to make WISHA the exclusive remedy for workplace safety issues it would have said so, just like it did for the Industrial Insurance Act.

Numrich’s arguments also violate one of the basic canons of statutory construction, that no statute should be construed in a manner that leads to strained or absurd results. *State v. Larson*, 184 Wn.2d 843, 851, 365 P.3d 740 (2015). Here, Numrich’s argument leads to absurd results because in enacting statutes to protect worker safety, the Legislature could not have intended a result under which someone who, solely by being an employer, escapes a felony sanction. Consider three examples:

Example A: As noted by the State, RCW 49.17.130(3) applies only when a knowing violation of a safety regulation leads to the *death* of an employee. But under RCW 9A.36.031(1)(f), a person is guilty of third-degree assault—a felony—if he or she “with criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.” In this context, applying Numrich’s argument would lead to the absurd result that an employer who knowingly violated a safety regulation could be charged with a felony if the violation led to a worker being severely injured and surviving, but could be charged only with a gross misdemeanor if the violation led to the worker being killed.

Example B: A worker recklessly operates a crane near a crowded sidewalk and an employee bystander is killed. This would likely result in a manslaughter conviction. RCW 9A.32.060. But if was an employer rather

than a worker who willfully and knowingly violated crane regulations to operate unsafely near employees and an employee was killed, there would only be a misdemeanor conviction under Numrich's theory. Yet employers owe a higher duty of care to their employees than to members of the public. Employers owe a nondelegable duty to their employees to provide a safe workplace. *See Ward v. Ceco Corp.*, 40 Wn. App. 619, 628-29, 699 P.2d 814 (1985). They do not owe a similar heightened duty to members of the public.

Example C: A driver with a farmworker employee passenger operates a van at 90 miles an hour and violates WAC 296-307-07003, and the result is a crash with another vehicle that kills both the employee passenger and the driver of the other vehicle. Even though the defendant caused both deaths *in the same event*, under the defendant's theory, he could be charged with a felony for one (killing the driver) and only with a misdemeanor for the other (killing his employee passenger).

The result of only a misdemeanor conviction in these examples would be absurd. RCW 49.17.190 is not a shield for all consequences of unsafe behavior by an employer. Rather, it provides another method of punishing an employer's actions that lead to death in recognition that not all violations of RCW 49.17.190 are violations of the manslaughter statutes.

C. Manslaughter Convictions for Workplace Deaths Serve an Important Deterrent to Unsafe Behavior

As of 2017, there were 191,045 employer establishments in Washington.³ And in fiscal year 2017, Washington employers had worksites with 29,029 compensable workers' compensation claims.⁴ Thus, the potential for on-the-job injuries in employment is high, as is the risk of death. Because of the seriousness of deaths at the workplace, the State should have all tools available to prosecute employers whose decisions lead to death.

L&I believes that, just as the prospect of tort liability makes it more likely that employers will comply with safety rules (*e.g.*, *Vargas, Carrera*), when employers know that they can be subject to a felony conviction for reckless or negligent behavior that leads to a death, they have a greater incentive to fully comply with safety rules. When they are making profit-based decisions, perhaps the prospect of a felony conviction will make the employer focus on safety.

³ U.S. Census Bureau, *Quick Facts: Washington*, <https://www.census.gov/quickfacts/fact/table/WA/SBO001212#viewtop> (last visited May 7, 2020).

⁴ Wash. Dep't of Labor & Indus., *Claim Counts and Costs by Claim Received Year, Status and Liability: Fiscal Year 2017* (Sept. 22, 2017), https://lni.wa.gov/claims/for-employers/workers-compensation-injury-data/_docs/ClaimsRecdYrStatusLiabFY2007-19.xls.

The Michigan Supreme Court emphasized both the deterrent effect of these prosecutions and how they fit into the State's duty to protect its citizens from criminal behavior:

While deterrence, and thus to some extent regulation, is one aim of general criminal laws, so too is punishment—clearly not one of OSHA's primary goals. A more important purpose, however, is the protection of employees as members of the general public. While OSHA is concerned with protecting employees as "workers" from specific safety and health hazards connected with their occupations, the state is concerned with protecting the employees as "citizens" from criminal conduct. Whether that conduct occurs in public or in private, in the home or in the workplace, the state's interest in preventing it, and punishing it, is indeed both legitimate and substantial.

Hegedus, 432 Mich. at 614.

Besides protecting workers, felony criminal prosecutions of employers help level the playing field so that the overwhelming majority of employers who purchase safety equipment and properly follow safety rules are not placed at a competitive disadvantage.

For the above reasons, prosecutors around the country have started to bring felony prosecutions such as this matter. Nationally, for several decades both law review articles and worker advocates have criticized the lack of criminal prosecutions for workplace injuries and deaths.⁵

⁵ See Ira Reiner & Jan Chatten-Brown, *When It Is Not an Accident, But a Crime: Prosecutors Get Tough With OSHA Violations*, 17 N. Ky. L. Rev. 83, 90 (1989); Martha T. McCluskey, et al., Ctr. for Progressive Reform, *Preventing Death and Injury on the*

So starting with an “OSHA Crimes” program in the Los Angeles County District Attorney’s Office in 2014, state criminal prosecutions for workplace safety injuries and fatalities, including felony prosecutions, have rapidly grown over the past six years.⁶ Similarly, in 2016, OSHA started a project with the Department of Justice to increase federal criminal prosecutions.⁷

Thus, the State’s prosecution is part of a national trend by prosecutors to charge employers with felonies following workplace fatalities and serious injuries because of the enhanced deterrent value of criminal prosecutions.⁸ As this Court has previously recognized, Washington is a national leader in protecting workers; this Court should

Job: The Criminal Justice Alternative in State Law (2016), https://cpr-assets.s3.amazonaws.com/documents/WorkerProsecutionManual_1602.pdf.

⁶ L.A. Cnty. Dist. Attorney’s Office, *District Attorney Jackie Lacey Launches OSHA and Environmental Crimes Rollout Program* (Apr. 17, 2014), <https://da.lacounty.gov/media/news/district-attorney-jackie-lacey-launches-osha-and-environmental-crimes-rollout-program>; Center for Progressive Reform, *Crimes Against Workers Database*, http://progressivereform.org/State_OSH_Prosecutions.cfm (last visited May 7, 2020).

⁷ See Kyle W. Morrison, *Facing Time: Will Criminal Prosecutions Under the OSH Act Become More Common?*, *Safety & Health Magazine* (Apr. 24, 2016), <https://www.safetyandhealthmagazine.com/articles/13907-facing-time>.

⁸ See *People v. Harco Const. LLC*, 163 A.D.3d 406, 76 N.Y.S.3d 408 (2018); Renee Algarin, Suffolk Cnty. Dist. Attorney, *Company and Owner Guilty of Manslaughter in Workers’ Deaths* (Oct. 31, 2019), <https://www.suffolkdistrictattorney.com/press-releases/items/2019/10/31/company-and-owner-guilty-of-manslaughter-in-workers-deaths>; Kristin White, *Criminal Charges for OSHA Violations? State Prosecutors Are Taking Increased Interest*, *JD Supra* (Sept. 9, 2019), <https://www.jdsupra.com/legalnews/criminal-charges-for-osha-violations-32090/>; Martha T. McCluskey, et al., Ctr. for Progressive Reform, *Preventing Death and Injury on the Job: The Criminal Justice Alternative in State Law* (2016), https://cpr-assets.s3.amazonaws.com/documents/WorkerProsecutionManual_1602.pdf.

similarly give effect to the legislative intent of protecting workers by retaining this important tool.. *See Drinkwitz v. Alliant Techsys, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000) (noting that Washington has a “long and proud history” of protecting workers).

VI. CONCLUSION

All available measures should be employed to make sure that workers have safe workplaces. L&I urges the Court to hold that when an employer violates worker-safety regulations, and an employee dies on a worksite, that the State should not be limited to pursuing only misdemeanors.

RESPECTFULLY SUBMITTED this 11th day of May, 2020.

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The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Department of Labor & Industries' Brief of Amicus Curiae and this Certificate of Service in the below described manner:

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DATED this 11th day of May, 2020.

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