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NO. 96365-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent / Cross-Petitioner,

v.

PHILLIP NUMRICH,

Petitioner.

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**BRIEF OF RESPONDENT / CROSS-PETITIONER**

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**A. INTRODUCTION**

Phillip Numrich's disregard for the safety of his workers caused the death of Harold Felton, his friend and employee. The State charged Numrich with Manslaughter in the Second Degree and Violation of Labor Safety Regulation with Death Resulting, a gross misdemeanor under RCW 49.17.190(3) (the "WISHA<sup>1</sup> misdemeanor"). Before a trial date had even been set, Numrich moved to dismiss the manslaughter charge, arguing that RCW 49.17.190(3) was the more specific statute and the State could not prosecute him for manslaughter under the "general-specific rule." The trial court properly rejected this argument and denied his motion. Numrich moved for direct discretionary review in this Court.

While Numrich's motion for discretionary review was pending, the State moved to amend the charges to add an alternative count of Manslaughter in the First Degree. The amendment was sought simply because the statute of limitation would otherwise run while the matter was on interlocutory appeal. Numrich objected and argued that the State's motion to amend was vindictive. Numrich could not assert any prejudice he would suffer from the amendment other than that it would delay the proceedings and had "wasted" time and resources. The trial court granted the motion, finding that the amendment would not prejudice Numrich and that the State had not acted vindictively.

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<sup>1</sup> Washington Industrial Safety and Health Act of 1973.

However, the trial court also found that the motion to amend could have been brought sooner and imposed sanctions on the State for having failed to do so. The State moved to reconsider, pointing out that the ruling was unsupported by authority and was directly contrary to this Court's controlling precedent. That motion was denied.

The trial court specifically set the amount of sanctions as Numrich's attorneys' fees for work done on his motion for discretionary review up to that point. The trial court then ordered sanctions in the amount requested by Numrich despite the fact that his fee petition was legally insufficient and without addressing either the State's objections/arguments against it or the reasonableness of the fees he requested.

The State respectfully asks this Court to hold that: 1) the "general-specific rule" does not preclude the State from prosecuting Numrich for manslaughter; 2) the trial court did not abuse its discretion in granting the State's motion to amend; 3) the trial did abuse its discretion in imposing sanctions; and 4) even if sanctions were appropriate, the trial court erred by accepting Numrich's legally insufficient fee petition without addressing the State's objections as to the amount and without assessing the reasonableness of the fees requested.

**B. CROSS-ASSIGNMENTS OF ERROR**

1. The trial court abused its discretion when it imposed sanctions against the State.

2. The trial court abused its discretion in setting the amount of sanctions.

**C. ISSUES PRESENTED BY STATE'S CROSS-PETITION**

1. The State brought a motion to amend the charges before a trial date had been set and provided a reasonable explanation as to why the motion was being brought when and how it was. The trial court found that there was no prejudice to Numrich in granting the motion, no basis to deny it, and that the State had not acted in bad faith or engaged in conduct tantamount to bad faith. Did the trial court abuse its discretion in nevertheless imposing sanctions against the State because it felt that the motion to amend should have been brought sooner?

2. The State did not violate any law, rule, or court order in bringing the motion to amend. Did the trial court abuse its discretion in imposing sanctions against the State?

3. The trial court set the amount of sanctions as the attorneys' fees incurred by Numrich for specified legal work and directed Numrich to file a fee petition. The fee petition Numrich filed was legally insufficient to establish the reasonableness of the fees he requested. Did the trial court abuse its discretion when it set the amount of sanctions based on this fee petition?

4. The State pointed out numerous issues with both the hourly fee and the hours worked claimed by Numrich in his fee petition. Did the trial court abuse its discretion when it accepted the fee affidavit of Numrich's

counsel without addressing the State's objections/arguments and without assessing the reasonableness of the fees requested?

**D. ISSUES PRESENTED BY PETITIONER**

1. The statutes setting forth the WISHA misdemeanor and the crimes of first- and second-degree manslaughter do not address the same subject matter and can be harmonized. Moreover, the statute setting forth the WISHA misdemeanor is not concurrent with the manslaughter statutes because it is possible to violate the former without violating either of the latter. Finally, applying the "general-specific rule" would contravene legislative intent and lead to absurd results that the Legislature could not have intended. May the State prosecute Numrich for manslaughter?

2. The State brought a motion to amend the charges before a trial date had even been set and explained that the motion was being brought to avoid the running of the statute of limitations. The trial court found that there was no prejudice to Numrich, no basis to deny it, the State had been candid with the court, and the State had not acted vindictively or in bad faith or engaged in conduct tantamount to bad faith. Did the trial court properly exercise its discretion in granting the motion to amend?

3. Numrich argued to the trial court: a) that the State's actions were vindictive; b) that the State's motion was being brought for an improper purpose; c) that the State was estopped from amending the charges; and d) that the State's actions prejudiced him. Did the trial court properly exercise its discretion when it considered and rejected these

arguments in granting the State's motion to amend and denying Numrich's motion to reconsider?

4. The trial court ruled that it need not address whether there was probable cause for first-degree manslaughter since the charge was being added to a case where probable cause had already been found for the existing charges. In addition, there is ample evidence establishing probable cause for first-degree manslaughter. Did the trial court properly grant the motion to amend?

5. Numrich filed motions in the alternative alleging governmental mismanagement and asking the court to either dismiss the charge pursuant to CrR 8.3(b) or to reconsider its granting of the motion to amend. The trial court ruled that there was nothing in these motions that changed its decision. Did the trial court properly exercise its discretion in effectively denying Numrich's CrR 8.3(b) motion?

**E. STATEMENT OF THE CASE**

**1. SUBSTANTIVE FACTS**

Phillip Numrich is the owner and operator of Alki Construction LLC. CP 452, 460.<sup>2</sup> Harold Felton was Numrich's employee and a long-time friend. CP 452, 460-61. On January 16, 2016, Numrich's company began to replace a sewer line at a residence in West Seattle. CP 452-53.

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<sup>2</sup> This case is before this Court on interlocutory appeal prior to any trial or testimonial hearing taking place. As a result, the substantive facts are drawn from the Certification for Determination of Probable Cause prepared by WSDLI Safety and Health Officer Mark Joseph and the Joint Investigation of Alki Construction Memorandum prepared by Officer Joseph and Assistant Attorneys General Cody Costello and Martin Newman. CP 452-56, 458-68.

Numrich used a method by which a trench was dug down at either end of the pipe to be replaced and then a hydraulic machine was used to pull a new pipe through the old one, simultaneously bursting the old pipe and inserting the new one into place. CP 452-53, 461-62.

One of those trenches—dug where the sewer line connected to the house—was 21 inches wide, six feet long, and more than seven feet deep. CP 453, 460-62. With a trench of this depth, there is a substantial risk that the excavation could cave-in and injure or kill a worker inside. CP 453, 466-67. A number of factors impact the risk of collapse. CP 453-54. These include the soil condition and type, the depth of the trench, and whether the soil was previously disturbed. CP 453-54, 462-64. All of these factors increased the likelihood of a collapse at the project in West Seattle. CP 453-54, 462-67. By January 26, 2016, a number of other factors increasing the likelihood of a collapse were also present: the trench had been “open” (i.e. dug) for approximately 10 days and the soil was heavily saturated after several days of rain. CP 453-54, 462-67.

Because of the danger posed to workers in trenches, Washington has safety regulations that apply to job site excavations. CP 453, 462-67. For a trench as big as the one in West Seattle, these regulations required, *inter alia*, that the walls be shored to prevent a cave-in. CP 453, 463. Although Numrich placed some shoring in the trench, it did not comply with regulations and was wholly insufficient to safely stabilize the excavation. CP 453-55, 463-64.

Also included in Washington safety regulations is the requirement that a “competent person” regularly inspect any trenches and the protective system installed in them. CP 453. “Competent person” is a term defined by WAC 296-155-650 as someone “who can identify existing or predictable hazards in the surroundings that are unsanitary, hazardous, or dangerous to employees.” CP 453. Inspections by the “competent person” must be made daily prior to the start of any work in a trench and must be repeated after every rainstorm or other hazard-increasing occurrence. Id. If the “competent person” observes any evidence of a situation that could result in a possible collapse, that person must remove all employees from the trench until precautions have been taken to ensure worker safety. Id. Numrich was the only “competent person” at the job site during the project. CP 453-55.

On January 26, 2016—10 days after work on the project started—Numrich, Felton, and Maximillion Henry (Numrich’s other employee) were at the job site. CP 454, 464-65. This was scheduled to be the last day of work on the project and Numrich was under pressure from the home owners to complete it. CP 464-65. Shortly after 10:00 a.m., the new pipe had been pulled into place and Felton was working in the trench closest to the house. CP 454-55, 464-65. Felton began using a motorized saw called a “Sawzall” to cut a pipe. CP 454, 465. This tool can cause extensive vibrations in the ground, which can disturb the soil and make a trench collapse more likely. CP 454, 465-67.

Numrich noted and commented to Henry on how dangerous it was for Felton to be using the tool in the trench. CP 454, 465. Numrich was aware that the ground around the trench had already been recently vibrated and disturbed by the process of pulling the new pipe through the old one. CP 454-55, 465-67. Despite being aware of all these risks and despite being the owner of the company, Felton's friend, the person in charge, and the "competent person" at the scene, Numrich made no effort to halt Felton's hazardous use of the tool and did not re-inspect the trench after Felton was done using it. CP 454-56, 465-67. Instead, Numrich left the jobsite to buy lunch. CP 454-55, 465.

Approximately 15 minutes after Numrich left, the trench collapsed, burying Felton under approximately seven feet of wet dirt. CP 455, 465. The Seattle Fire Department arrived at the scene shortly thereafter in response to Henry's 911 call, but rescuers were unable to free Felton before he died of compressional asphyxia. CP 453, 455, 465.

## **2. PROCEDURAL FACTS**

Numrich was initially charged with Manslaughter in the Second Degree and Violation of Labor Safety Regulation with Death Resulting on January 5, 2018. CP 1-2. He filed a motion to dismiss the count of second-degree manslaughter. CP 14-27. That motion was denied by the trial court. CP 242-43. The State subsequently moved to amend to add a count of Manslaughter in the First Degree as an alternative charge. CP 430-68, 481-82. The trial court granted the motion over Numrich's objection, but ruled that the motion should have been brought sooner and

*sua sponte* imposed financial sanctions against the State. CP 470-72. The trial court later entered a subsequent order setting the amount of sanctions. CP 1131-32.

Numrich filed motions for direct discretionary review of the orders denying his motion to dismiss the count of second-degree manslaughter and granting the State’s motion to amend. The State filed motions for direct discretionary review of the orders imposing sanctions against the State and setting the specific amount of the sanctions. This Court consolidated and granted all four motions, designating Numrich as the Petitioner/Cross-Respondent and the State as the Respondent/Cross-Petitioner.

A more detailed recitation of the procedural history relevant to the State’s motion to amend—and the trial court’s orders stemming from it—is set forth below.

**F. ARGUMENT**

**1. THE “GENERAL-SPECIFIC RULE” DOES NOT PRECLUDE THE STATE FROM PROSECUTING NUMRICH FOR MANSLAUGHTER**

When a defendant’s actions violate both a specific and a general statute, the defendant should generally be charged under the former rather than the latter. See State v. Shriner, 101 Wn.2d 576, 580, 681 P.2d 237 (1984). However, this “general-specific rule” only applies when two statutes address the same subject matter and conflict to the point that they cannot be harmonized. State v. Conte, 159 Wn.2d 797, 810, 154 P.3d 194

(2007). In addition, the rule applies only when the two statutes are "concurrent." Shriner, 101 Wn.2d at 580. Statutes are concurrent when "the general statute will be violated in each instance in which the special statute has been violated." Id. at 580. As a result, this Court must "examine the elements of each statute to determine whether a person can violate the special statute without necessarily violating the general statute." State v. Heffner, 126 Wn. App. 803, 808, 110 P.3d 219 (2005). In this context, whether the defendant's actions in a specific case violate both statutes is irrelevant. Rather, the question is whether each and every violation of the "specific" statute will necessarily also violate the "general" one. State v. Chase, 134 Wn. App. 792, 802-03, 142 P.3d 630 (2006); Heffner, 126 Wn. App. at 808. Finally, the "general-specific rule" is a canon of statutory construction used to ascertain legislative intent.<sup>3</sup> See Conte, 159 Wn.2d at 803; State v. Danforth, 97 Wn.2d 255, 257-58, 643 P.2d 882 (1982); Shriner, 101 Wn.2d at 580. Specifically, the rule is used to determine whether the Legislature intended to preclude the State from charging the more "general" statute when a more "specific" one also applies. See Conte, 159 Wn.2d at 803.

Here, the trial court did not err in denying Numrich's motion to dismiss the charged count of second-degree manslaughter because the "general-specific rule" does not preclude the State from prosecuting him

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<sup>3</sup> In his opening brief, Numrich claims that the rule "is not merely an aid to statutory construction." Br. of Pet. at 23. Yet the very quotation he provides in support of this claim—from State v. Albarran, 187 Wn.2d 15, 20, 383 P.3d 1037 (2016)—refers to the rule as being used for the purpose of determining legislative intent. Id.

for that crime. Nor does it preclude the State from prosecuting him for the later-added alternative charge of first-degree manslaughter.

**a. The Manslaughter Statutes And The WISHA Misdemeanor Statute Address Different Subject Matters And Can Be Harmonized**

One way of determining whether statutes address the same subject matter and conflict to the point that they cannot be harmonized is to examine the elements of the statutes. If the statutes create crimes with different elements, they are simply different statutes that criminalize different conduct, meaning that either or both may be charged. State v. Farrington, 35 Wn. App. 799, 802, 669 P.2d 1275 (1983). That is the situation here.

In relevant part, a person is guilty of first-degree manslaughter when he or she “recklessly causes the death of another person.” RCW 9A.32.060. Similarly, in relevant part, a person is guilty of second-degree manslaughter when “with criminal negligence, he or she causes the death of another person.” RCW 9A.32.070. In the context of a manslaughter charge, a defendant acts recklessly when he “knows of and disregards a substantial risk that [death] may occur...”<sup>4</sup> and he acts with criminal negligence when he “fails to be aware of a substantial risk that [death] may occur...”<sup>5</sup> Thus, manslaughter requires proof both that the defendant had a specific level of mental state *and proof that this mental state*

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<sup>4</sup> RCW 9A.08.010(1)(c); 2016 Comment to WPIC 10.03 (citing State v. Gamble, 154 Wn.2d 457, 467-68, 114 P.3d 646 (2005))

<sup>5</sup> RCW 9A.080.010(1)(d); 2016 Comment to WPIC 10.04 (citing Gamble, 154 Wn.2d at 467-68).

*specifically related to the substantial risk of death to the decedent.*

Gamble, 154 Wn.2d 457, 468-69, 114 P.3d 646 (2005).<sup>6</sup>

Under RCW 49.17.190(3), by contrast, a person is guilty of the WISHA misdemeanor if the person is an employer who willfully and knowingly violates a specified safety standard and that violation causes the death of an employee. As a result, the WISHA misdemeanor requires proof both that the defendant had the mental state of “knowing” *and proof that this mental state specifically related to the violation of a safety provision.* Id.

Numrich argues that proof of the *mens rea* at issue in the WISHA misdemeanor will necessarily establish proof of the *mens rea* at issue in manslaughter because proof of a higher level of *mens rea* necessarily establishes proof of a lower level. Br. of Pet. at 18-21. But this argument oversimplifies the analysis and ignores the key point that the concept of *mens rea* involves both the *level* of mental state (e.g. knowing versus reckless versus negligent) and the *object* of the mental state (i.e. what the mental state relates to). For two crimes to have the same *mens rea* element, both the level **and** the object of the mental state must be the same. Thus, for example, although second-degree intentional murder<sup>7</sup> and

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<sup>6</sup> Numrich argued both below and previously to this Court that second-degree manslaughter does not require that the mental state relate to the risk of death. Numrich may have abandoned that argument, however, which would be appropriate as Gamble plainly applied to both degrees of manslaughter. 154 Wn.2d at 469. See, also, State v. Henderson, 180 Wn. App. 138, 149, 321 P.3d 298 (2014); State v. Latham, 183 Wn. App. 390, 405 P.3d 960 (2014); 2016 Comment to WPIC 10.04; 2016 Comment to WPIC 28.06.

<sup>7</sup> RCW 9A.32.050(1)(a)

second-degree felony murder<sup>8</sup> both have the same level of mental state (“intent”), they have different *mens rea* elements because the objects of the mental state are different—in intentional murder the intent is to cause death whereas in felony murder the intent is to commit a predicate felony. See State v. Armstrong, 143 Wn. App. 333, 341, 178 P.3d 1048 (2008).

In similar analytical frameworks, Washington courts have long recognized that a comparison of *mens rea* elements must include an analysis of both the level *and* the object of the mental state. For example, the test for whether one crime is a lesser-included offense of another is very similar to the test for the “general-specific rule.”<sup>9</sup> In that context, courts have held that second-degree manslaughter is a lesser-included offense of second-degree intentional murder because the object of the mental state (the death of the decedent) was the same and the higher mental state of second-degree intentional murder (intent) necessarily proved the lower mental state of second-degree manslaughter (criminal negligence). Gamble, 154 Wn.2d at 468-69. For the same reason, however, second-degree manslaughter is *not* a lesser included offense of second-degree felony murder because the objects of the mental states for these two crimes were different (intent vis-à-vis a felony versus criminal negligence vis-à-vis a death). Id. In other words, even though intent is a

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<sup>8</sup> RCW 9A.32.050(1)(b)

<sup>9</sup> Both compare the elements of two offenses to determine whether proof of the elements of one crime necessarily establishes proof of all of the elements of another. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); Heffner, 126 Wn. App. at 808.

higher mental state than criminal negligence, because the objects of the mental state are different, the *mens rea* elements are different, so proof of the former does not establish of the latter. Id.

That is exactly the case here—the crimes at issue have different *mens rea* elements because the objects of the mental state are wholly different. Manslaughter requires proof that a defendant was either reckless (first-degree) or negligent (second-degree) as to the risk of death of the decedent. In that context, whether or not Numrich violated a regulatory duty may be relevant in proving he had the requisite mental state,<sup>10</sup> but the State is not required to prove that he knew he was violating such a regulation. In contrast, the WISHA misdemeanor requires proof that a defendant knowingly violated a safety regulation, but the State is not required to prove that the defendant had any specific *mens rea* vis-à-vis the risk of death to the decedent. Because manslaughter and the WISHA misdemeanor have different elements, the “general-specific rule” simply does not apply to them. Farrington, 35 Wn. App. at 802.

Moreover, the crimes are directed at different conduct. The gravamen of the crime of manslaughter is that the defendant either recklessly or negligently caused the death of another. In contrast, the gravamen of the WISHA misdemeanor is that the defendant knowingly violated a health or safety regulation and that an employee died as a

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<sup>10</sup> See, e.g. State v. Lopez, 93 Wn. App. 619, 970 P.2d 765 (1999) (whether a defendant breached a statutory duty is relevant to whether he or she acted with criminal negligence, but is not conclusive on the issue)

result.<sup>11</sup> Manslaughter statutes aim to prevent people from acting recklessly or negligently in ways that risk the death of another. The more limited aim of the WISHA misdemeanor statute is to require employers to know and follow applicable safety regulations. As this case demonstrates, there may be times where a defendant violates all three statutes. However, that simply means that such a defendant has committed both manslaughter and the WISHA misdemeanor. As described in more detail below, there is nothing to indicate any intent on the part of the Legislature to preclude the State from prosecuting such a defendant for all applicable violations.

**b. The Statutes Are Not Concurrent**

The “general-specific rule” applies only when two statutes are “concurrent.” As described above, statutes are concurrent only when the “general” statute is necessarily violated every time the “specific” one is. Shriner, 101 Wn.2d 580. If it is possible to violate the latter without violating the former, then the statutes are not concurrent and the rule does not apply. Chase, 134 Wn. App. at 802-03.

Here, because it is possible to violate RCW 49.17.190(3) without violating RCW 9A.32.060 and/or .070, the statutes are not current. As an initial matter, as described above, the two statutes have different elements.

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<sup>11</sup> Numrich asserts that the State argues that the WISHA misdemeanor does not require a causal connection between the wrongful act and the employee death. Br. of Pet. at 24-25. Numrich bases this argument on the fact that, in prior briefing, the State included the word “happened” in the phrase “and that an employee happened to die as a result.” Id. That was not the State’s intent and is not a reasonable reading of the State’s argument. The end of the phrase—which specified that the crime applied to situations in which an employee died “as a result” of the violation—was sufficient to make clear that a causal connection was required.

This difference in and of itself establishes that it is possible to violate RCW 49.17.190(3) without also violating RCW 9A.32.060 and/or .070.<sup>12</sup>

This is also demonstrated by consideration of at least three hypotheticals. First, an employer has a building crew working on the bottom floor of a multi-story construction site. WAC 296-155-205 requires that the employer provide every employee on the site with a hard hat. On a given day, although the employer knows that the regulations require it, she chooses not to provide hard hats to her employees because she honestly does not expect flying or falling objects. The employer does not realize, however, that work done by a different crew earlier in the day has left debris on an upper story. Some of that debris falls and strikes one of her employees on the head, causing an injury that would have been prevented if the employee was wearing a hard hat. The employee dies as a result.

Second, the employer of a logging crew knows that, under WAC 296-54-51160, he has a duty to provide leg protection (chaps) to all employees working on a downed tree who operate a chain saw *and* to ensure that his employees actually wear them. At the end of a day's work, an experienced employee notices that one more cut with a chainsaw needs to be made and heads back to a log to make it. In his haste, the employee,

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<sup>12</sup> It is certainly true that, *in this case*, the State is arguing that the fact that Numrich knowingly violated safety regulations is part of the proof that he acted recklessly and/or negligently. The test for concurrency, however, is based on what is *possible* given the elements of the crimes. Chase, 134 Wn. App. at 802-03. In that context, the specific facts of the instant case are irrelevant to that determination. Id.

who has already removed his chaps, does not put them back on. The employer does not notice that the employee has removed his chaps, but—knowing that the employee is experienced and only needs to make one more cut—also does not check to confirm that he is wearing them. The worker accidentally cuts his leg with the chainsaw in a way that would have been prevented if he was wearing his chaps and bleeds to death.

In both of these hypotheticals, the employer would clearly have violated RCW 49.17.190(3). In the first scenario, the employer knowingly violated a safety regulation by failing to provide hard hats as required and this resulted in an employee death when the employee was struck by falling debris and injured in a way that would have been prevented by a hard hat. In the second scenario, the employer knowingly violated a safety regulation by failing to check to ensure that his employee was wearing required chaps before operating a chain saw and the lack of safety gear resulted in an employee death when the employee was injured in a way that would have been prevented by chaps. However, a reasonable person would not necessarily conclude that these employers were either reckless or criminally negligent vis-à-vis the risk of death. As a result, arguably neither would have committed manslaughter.

Finally, the third hypothetical is—potentially—this case. Here, the evidence that Numrich committed the WISHA misdemeanor is virtually indisputable. As a result, should this case go to trial, Numrich will almost certainly argue that, while he committed that crime, he did not commit manslaughter. And he will be allowed to make that argument precisely

because commission of the WISHA misdemeanor does not necessarily prove manslaughter.

Despite this, Numrich asserts that it is impossible to violate RCW 49.17.190(3) without also violating RCW 9A.32.060 and/or .070. Br. of Pet. at 18-21, 25-28. Numrich's argument, however, suffers from three fatal flaws. First, Numrich's entire argument is premised on the assertion that, because "knowing" is a higher level of mental state than "criminal negligence," proof of the *mens rea* element in RCW 49.17.190(3) will necessarily prove the *mens rea* elements of RCW 9A.32.060 and .070. Br. of Pet. at 18-21. But, as described above, that is not the case here because the objects of the mental states are different. As a result, proof of the former *mens rea* will not necessarily prove the latter.

Second, Numrich claims that the WISHA standards establish the standards of care for employers in Washington and that, therefore, "in each and every case that a person willfully or knowingly violates a safety regulation, it can also be said that the employer has engaged in negligent and reckless conduct." Br. of Pet. at 20-21. This is incorrect. Whether an employer has violated his duty of care towards his employees is a separate question from whether a person has violated the standard of care that a reasonable person would exercise to prevent the substantial risk of wrongful death. As noted above, a statutory duty is relevant to determining recklessness or criminal negligence, but is not conclusive. Lopez, 93 Wn. App. 619.

Finally, Numrich asserts that “it is impossible to envision a case where an individual would be guilty of committing the WISHA misdemeanor without necessarily committing a manslaughter offense.” Br. of Pet. at 29. This assertion, too, is simply incorrect. As the first two hypotheticals above indicate, such a scenario is certainly possible.

Based on prior briefing, Numrich has anticipated variations on these hypotheticals and attempted to preemptively rebut to them. His arguments against them, however, are not persuasive. With regard to the both hypotheticals, Numrich argues that the employer would not be guilty of the WISHA misdemeanor because what happened was a “fluke” and the actions of others would constitute legally intervening causes of death. Br. of Pet. at 26-27. In support of this argument, Numrich cites to State v. Bauer, in which this Court concluded that a criminal defendant could not be held legally liable for third-degree assault (with a criminal negligence *mens rea*) where he left a loaded gun at his house and his girlfriend’s child took it to school and accidentally shot and injured another student. 180 Wn.2d 929, 329 P.3d 67 (2014). But the situation in Bauer is qualitatively different than that at issue in these hypotheticals. Labor safety regulations exist precisely to guard workers against workplace *accidents*. Almost by definition, accidents happen when unexpected. As a result, an alleged violation of RCW 49.17.190(3) will often involve questions of causation. But Numrich’s argument implies that a violation of a safety regulation could lead to conviction for a WISHA misdemeanor only if the employer actually knew of and ignored a specific and explicit hazard or was

personally responsible for causing the accident that killed the employee. That is simply not the law and nothing in Bauer or other Washington authority supports such an extreme position.

Numrich also asserts that the employer would not be guilty of a WISHA misdemeanor in the second hypothetical because he did not commit a willful or knowing violation of safety regulations and because his failure to check for protective gear was not the “but for” cause of the employee’s death. Br. of Pet. at 28-29. But this simply ignores both what the relevant safety regulation actually says and the facts of the hypothetical. WAC 296-54-51160 requires an employer to ensure that each employee who is operating a chain saw is wearing leg protection that meets ASTM standards to protect against contact with a moving chain saw. As a result, the hypothetical employer did knowingly violate a safety regulation when he allowed the employee to operate a chainsaw without first ensuring that he was wearing the required leg protection. And the “but for” test for causation was met in the hypothetical because, by definition, chaps that complied with the regulation would have protected the worker’s leg and prevented the cut that led to his death.

Moreover, Numrich will almost certainly argue at trial that proof that he is guilty of the WISHA misdemeanor does not establish that he is guilty of manslaughter. Because the State believes that Numrich is guilty of both crimes it will not try to legally preclude that argument. But the fact that Numrich will likely take exactly that position at trial undercuts his current claim that it is a legal impossibility.

**c. Numrich’s Application Of The “General-Specific Rule” Would Thwart Legislative Intent**

As noted above, the “general-specific rule” is a canon of statutory construction specifically used by courts to help determine whether the Legislature intended to preclude the State from charging a more “general” statute when a more “specific” one also applies. Conte, 159 Wn.2d at 803. The fundamental purpose of applying any rule of statutory construction is to give effect to the intent of the Legislature. In re Estate of Holland, 177 Wn.2d 68, 75-76, 301 P.3d 31 (2013). In applying this particular canon of statutory construction, this Court has explicitly cautioned that it must be used with particular care and should be “applied to preclude a criminal prosecution *only where the legislative intent is crystal clear.*” Conte, 159 Wn.2d at 815 (emphasis added). Particularly given this warning, the “general-specific rule” must be used in conjunction with other principles of statutory construction, including the general rule that a court must apply the construction that best fulfills the statutory purpose and carries out any express legislative intent and must avoid interpreting statutes in a way that leads to unlikely, absurd, or strained results. See In re Marriage of Kovacs, 121 Wn.2d 795, 804, 854 P.2d 629 (1993); City of Seattle v. Fontanilla, 128 Wn.2d 492, 498, 909 P.2d 1294 (1996); State v. Contreras, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994). Here, even if the “general-specific” rule could theoretically be applied to RCW 9A.32.060/.070 and RCW 49.17.190(3), Numrich’s argument should still be rejected because it would thwart legislative intent.

As an initial matter, applying the rule as Numrich advocates would undercut the entire purpose of WISHA and the intent behind it. RCW 49.17.190 is part of WISHA. RCW 49.17.900. Subsection (3) of the statute is nearly identical to 29 USCA § 666(e) of the federal Occupational Safety and Health Act of 1970 (OSHA). The express legislative history of WISHA is extremely short and does not discuss the proposed criminal sanctions contained in RCW 49.17.190. Rather, the only discussion in the legislative history deals with the need to ensure that Washington’s statutes would be at least as effective as OSHA in order to avoid federal preemption. *Enacting the Washington Industrial Safety and Health Act of 1973: Hearing on SB 2389 Before the S. Comm. on Labor*, 1973 Leg., 43<sup>rd</sup> Sess. at 2 (Feb. 2, 1973); See also RCW 49.17.010. Because of this, many of the provisions of WISHA—including RCW 49.17.190(3)—are similar, if not identical, to provisions in OSHA. Where the provisions of a Washington statute are analogous to a corresponding federal provision, this Court looks to federal authority, as the Legislature’s intent is presumed to be identical to Congress’s. See Clarke v. Shoreline Sch. Dist. No. 412, King Cty., 106 Wn.2d 102, 118, 720 P.2d 793 (1986).

Prior to the enactment of OSHA/WISHA, there was nothing that precluded state prosecutors from bringing felony charges against employers under existing state laws criminalizing homicide and assault. It is clear that Congress did not intend OSHA to limit the ability of state prosecutors to bring such traditional criminal charges against employers for workplace acts or omissions. “Nothing in [OSHA] or its legislative

history suggest that Congress intended to...preempt enforcement of State criminal laws of general application such as murder, manslaughter, or assault.” H.R. REP. NO. 1051, 100<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 10 (1988) (quoted in People v. Hegedus, 432 Mich. 598, 623 n.25, 443 N.W.2d 127 (1989)). This intent to preserve the ability to bring existing, traditional crimes would be defeated if Numrich’s argument were accepted.

Moreover, 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, three hypothetical examples demonstrate that applying the rule as Numrich advocates would lead to exactly such results.

First, woven into the very fabric of OSHA/WISHA is a recognition of the general responsibility of employers for their employees, including the responsibility to provide reasonably safe and healthy working conditions. See RCW 49.17.060. No such duty exists between two strangers. In this context, the application of the “general-specific rule” advocated by Numrich would lead to the absurd result that a person who recklessly or negligently caused the death of a stranger—a person for whom he had no responsibility and towards whom he owed no duty of care—could be charged with a felony but a person who knowingly violated a safety regulation which led to the death of an employee—a person for whom he did have responsibility and towards whom he did owe a duty of care—could only be charged with a gross misdemeanor.

Second, many workplace safety regulations protect the public as well as employees precisely because industrial accidents can and do injure

or kill members of the public, too.<sup>13</sup> But the rule advocated by Numrich would lead to the absurd result that the exact same dereliction of duty by an employer resulting in the death of both an employee and a non-employee in the same event would support a manslaughter charge for one, but only a gross misdemeanor charge for the other.

Finally, by its own terms, RCW 49.17.190(3) applies only when a knowing violation of a safety regulation leads to the *death* of an employee. However, 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.” The application of the “general-specific rule” advocated by Numrich would lead to the absurd result that an employer who knowingly violated a safety regulation could be charged with a felony if the violation resulted in a worker being merely injured, but could only be charged with a gross misdemeanor if the violation resulted in the worker being killed.

**d. None Of Numrich’s Additional Arguments  
Warrant A Different Outcome**

Numrich makes two additional assertions in support of his “general-specific rule” argument. Neither is persuasive.

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<sup>13</sup> See, e.g., Mike Carter, Daniel Gilbert, and Davit Gutman, ‘Totally avoidable’: state faults, fines companies in collapse of Seattle tower crane in April, The Seattle Times, October 17, 2019 (construction crane collapse in Seattle killed two workers employed at the site and two uninvolved members of the public in cars driving below)

First, Numrich argues that the decision in State v. Danforth<sup>14</sup> supports his position. Br. of Pet. at 21-22. This is incorrect. Holdings in “general-specific rule” cases are highly specific to the statutes in question because the holding is tied to the language of those particular statutes. In Danforth, this Court held that when a defendant fails to return to a work release facility, the State could only charge the crime of willfully failing to return to a work release program (in violation of RCW 72.65.070) rather than the crime of escape (in violation of RCW 9A.76.110). These statutes have nothing to do with manslaughter, the WISHA misdemeanor, or violating workplace safety rules.

The *analysis* in Danforth, by contrast, actually supports the State’s position.<sup>15</sup> In Danforth, this Court described its decision as being based on “sound principles of statutory interpretation and respect for legislative enactments.” 97 Wn.2d at 259. Here, as discussed at length above, those very principles lead to the conclusion that the “general-specific rule” does not apply to the statutes at issue in this case.

Second, Numrich asserts that WISHA creates a “comprehensive and unified statutory scheme to regulate workplace safety” such as to create an inference of legislative intent to have the WISHA misdemeanor be the only crime that may be charged in this case. Br. at Pet. at 16. This argument must also be rejected. As discussed at length above, there is no

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<sup>14</sup> 97 Wn.2d 255

<sup>15</sup> It is precisely for this reason that Danforth is cited repeatedly above.

indication of any intent—either explicit or implicit—on the part of the Legislature to eliminate manslaughter as a potential charge. Rather, every indication is that the Legislature intended WISHA and RCW 49.17.190(3) to expand, not limit, the tools available to the State by providing a lesser option to be used in conjunction with existing criminal statutes.

**2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE STATE'S MOTION TO AMEND**

**a. Additional Procedural Facts Regarding The State's Motion To Amend And The Trial Court's Imposition Of Sanctions<sup>16</sup>**

On January 5, 2018, the State filed its initial Information charging Numrich with second-degree manslaughter and the WISHA misdemeanor. CP 1-2. Although there was probable cause to charge Numrich with first-degree manslaughter at the time, due to the generally conservative filing policy of the King County Prosecuting Attorney's Office, second-degree manslaughter was filed initially and a decision whether to amend was reserved to a later time. CP 476.

Numrich was arraigned on January 16, 2018. CP 476. On February 5, 2018, deputy prosecutors met with one of Numrich's attorneys to discuss the case. Id. During this meeting, the State made clear that it was not willing to offer a plea deal to only the misdemeanor charge. CP 476-77. Plea discussions essentially ceased at that point and Numrich's

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<sup>16</sup> The procedural facts relevant to Numrich's challenge to the trial court order granting the State's motion to amend are inextricably intertwining with those relevant to the State's challenges to the orders imposing and setting the amount of sanctions. As a result, the State will set forth the entirety of these procedural facts here.

attorney indicated that he would instead move to dismiss the charge of second-degree manslaughter based on the “general-specific rule.” CP 476-77. There was no discussion of possible amendments to the charges if the case proceeded to trial. Id. Neither the State nor counsel for Numrich raised the issue. Id. Numrich’s lawyer appeared confident that he would prevail on the motion to dismiss. Id.

On April 30, 2018, Numrich filed his motion to dismiss the second-degree manslaughter count. CP 14-54. Following extensive briefing and oral argument, the trial court denied the motion on August 23, 2018. CP 14-54, 64-243; RP 22-83.<sup>17</sup> Numrich then sought direct discretionary review in this Court. CP 244-48.

Between February and October of 2018, the case-setting hearing in the trial court was repeatedly continued at Numrich’s request. CP 13, 55, 61; Supp. CP \_\_ (Sub no. 13, ORDER FOR CONTINUANCE: SETTING 03-26-2018, 2/12/2018); Supp. CP \_\_ (Sub no. 31, ORDER FOR CONTINUANCE: SETTING 07-19-2018, 6/25/2018); Supp. CP \_\_ (Sub no. 35, ORDER FOR CONTINUANCE: SETTING 08-23-2018, 7/16/2018); Supp. CP \_\_ (Sub no. 40, ORDER FOR CONTINUANCE: SETTING 10-23-2018, 8/23/2018); Supp. CP \_\_ (Sub no. 46, ORDER FOR CONTINUANCE: SETTING 12-05-2018, 10/1/2018). As a result, no trial date has ever been set. CP 479-80.

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<sup>17</sup> The entire report of proceedings is consecutively paginated and will be referred to simply by page number.

On October 1, 2018, the parties received a letter from this Court's Deputy Clerk setting a briefing schedule. The schedule required the State to serve and file any answers to Numrich's motion by October 18 and set the matter for consideration by the Commissioner on November 1.

At that point, the parties had still not discussed any trial issues, including whether the State was contemplating possible amendments to the charges. CP 476-79. Numrich's attorneys had never asked if the State was considering any amendments, nor raised the issue of possible amendments, nor engaged in any of the plea negotiations or usual processes that would generally prompt a discussion of possible amendments. Id. Rather, Numrich's attorneys appeared to continue to believe that they would ultimately prevail on the motion to dismiss. Id.

While preparing the State's answer to Numrich's motion for discretionary review, the State became concerned that the statute of limitations for first-degree manslaughter, which would run in January of 2019, might pass before the motion for discretionary review was resolved. CP 479-80. At that time, counsel for the State consulted with other deputy prosecutors and conducted legal research to determine if further delay in seeking to amend the charges would ultimately bar an amendment to first-degree manslaughter. CP 480. The State determined that there was a very real risk that the statute of limitations would run on a first-degree manslaughter charge unless a motion to amend was brought in the trial court prior to the November 1, 2018 argument before this Court's Commissioner.

CP 480. The State communicated its intent to amend in an email to Numrich's attorneys on October 18, 2018. CP 480-81.

Because Numrich was arguing that discretionary review was warranted under both RAP 2.3(b)(2) and (b)(4), and since the amendment could affect the analysis as to whether review should be granted under the latter, the State believed it appropriate to alert this Court to the possible amendment. CP 479-81. In its brief filed with this Court on October 18, 2018, the State, therefore, both noted its intent to amend and argued that the anticipated amendment would make review inappropriate under RAP 2.3(b)(4).<sup>18</sup> CP 480-81. However, this point was only one of the many arguments raised by the State as to why Numrich's motion for review should be denied. CP 481.

A hearing on the motion to amend was scheduled in the trial court on October 31, 2018. CP 481-82. Prior to the hearing, Numrich filed extensive written materials in opposition to the State's motion. CP 250-429. The State replied and explained both the circumstances surrounding its decision to bring the motion and the timing of it. CP 430-68. In his briefing and at oral argument, Numrich accused the State of, *inter alia*, prosecutorial vindictiveness, alleging that the motion to amend was brought to retaliate against him for having sought discretionary review. CP 250-74. He claimed that the amendment would prejudice him because it would delay the proceedings and would mean that he would have to relitigate various issues.

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<sup>18</sup> The amendment had no impact on the analysis of whether review would be appropriate under RAP 2.3(b)(2) and the State did not argue such.

CP 262-63; RP 94-97. He also asserted that the defense might have litigated the matter differently if it had known that the State would be seeking such an amendment. CP 260-61; RP 94-95. During the hearing, the trial court questioned the State as to the timing of the motion. RP 84-90.

On November 1, 2018, the trial court issued a written order granting the State's motion to amend. CP 470-72. The court found that the State's counsel had been candid with the court in explaining how and why the motion to amend came about; that there was no evidence that the motion to amend had been brought for an improper purpose; that the delay and alleged waste of time argued by Numrich did not constitute a prejudice warranting denial of the amendment; and that there was no other basis to deny the State's motion. Id.

However, the court also concluded that the State should have given notice of its intent to amend earlier and found that Numrich had incurred costs for appellate litigation due to the timing of the State's motion. CP 470-71. As a result, the court *sua sponte* imposed sanctions against the State. CP 470-72. The court specified that the amount of terms was to be "the attorneys' fees for the defense work on the discretionary appeal to this point" and directed Numrich's attorneys to file a fee petition. CP 471.

On November 13, 2018, the State filed a motion to reconsider the imposition of sanctions along with a declaration in support thereof. Supp.

CP \_\_ (Sub no. 56, Motion and Affidavit / Declaration, 11/13/2018);<sup>19</sup> CP 475-748. The State, *inter alia*, pointed out that the trial court's order conflicted with this Court's holding in State v. Gassman, 175 Wn.2d 208, 263 P.3d 113 (2012) and was based on the incomplete record that was before it at the time of the hearing. Supp. CP \_\_ (Sub no. 56, Motion and Affidavit / Declaration, 11/13/2018). Two days later, Numrich filed his fee petition seeking costs and fees in the amount of \$18,252.49. CP 749-58.

Over the next several months, extensive litigation took place in the trial court over this and related topics. This included the following:

- November 29 and 30, 2018 – Numrich filed his response to the State's motion reconsider; his own motion to dismiss pursuant to CrR 8.3(b) or, in the alternative, to reconsider the amendment; and a declaration in support thereof. CP 766-898.
- November 30, 2018 – The State filed its response to Numrich's fee petition. CP 899-923. In this document, the State pointed out that the petition was insufficient as a matter of law to warrant the imposition of fees. Id.
- December 5, 2018 – Numrich filed another declaration from the same attorney in support of his fee petition. CP 766-898. While this document was captioned as a "reply," in reality it was a supplemental filing that attempted to provide critical information that the State had pointed out was missing from the initial petition. Id.
- December 10, 2018 – The State filed its reply in support of its motion to reconsider. CP 927-44.
- December 11, 2018 – The State filed a motion to strike the supplemental declaration of Numrich's attorney, pointing out that it was an untimely effort to provide legally required information that should have been provided in the initial petition. CP 945-51. In the alternative, the State asked leave to file a supplemental response. Id.

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<sup>19</sup> Numrich filed a supplemental designation of clerk's papers in King County Superior Court designating this document on November 22, 2019. However, it does not appear that the superior court has yet prepared or transmitted it to this Court.

- December 17, 2018 – The State filed its response to Numrich’s alternative motions to dismiss/reconsider. CP 952-69.
- December 20, 2018 – Numrich filed his reply in support of his motions. CP 970-75.

On December 21, 2018, the trial court issued a written order that denied the State’s motion to reconsider the imposition of sanctions; denied the State’s motion to strike Numrich’s supplemental fee petition; denied Numrich’s motion to dismiss pursuant to CrR 8.3(b); and denied Numrich’s motion to reconsider the granting of the amendment. CP 976-77. The court stated:

The State’s Motion to Reconsider is properly brought as the Court imposed terms, not sanctions, *sua sponte*. The Court has reviewed the pleadings and the Motion is Denied based upon the reasons listed in the original Order. The Defense Motion to Dismiss or Alternatively, etc., is really a Motion to Reconsider. The additional argument does not change the decision of the Court. The Defense does not address the manner in which this Court addressed the prejudice of fees spent for the appeal, and it was unquestionably the right of the State to amend if it chose. For the nth time, this is a highly unusual procedural situation. This Court does not see fees as a usual remedy in criminal cases. Here, however, they are appropriate.

[The State] is correct that [Numrich’s attorney’s] original fee petition was inadequate. The motion to strike the pleading is Denied, however.

[Numrich’s attorney] needs to refile within ten days listing the number of hours for each lawyer and the subject matter they worked upon. This may be done redacted if there is attorney-client work product or privileged areas. The reasonableness of the hourly rate does not need to be addressed. The law in this area is well-defined and the Court needs to make particularized findings....Fees will be awarded, in some amount.

The parties now need to move forward.

CP 977.

On December 31, 2018, Numrich filed a third declaration from his attorney in support of his fee petition. CP 978-91. On January 8, 2019, the State filed its response, pointing out that there were still deficiencies in Numrich's fee petition and supporting documents. CP 992-1126. The following day, Numrich filed his reply. CP 1127-30. No hearing was ever held on the matter. Rather, on January 28, 2019, the trial court simply issued a written order awarding fees in the full amount—\$18,252.49—requested by Numrich. CP 1131-32. This consisted of the proposed order prepared by Numrich with one sentence crossed out and one sentence added. Id.

Additional facts are set forth below as relevant.

**b. The Trial Court Properly Exercised Its Discretion In Granting The Motion To Amend**

Pursuant to CrR 2.1(d), the court may permit an Information to be amended at any time before verdict so long as “substantial rights of the defendant are not prejudiced.” A defendant opposing amendment bears the burden of “showing specific prejudice to a substantial right.” State v. Thompson, 60 Wn. App. 662, 666, 806 P.2d 1251 (1991). A court's ruling on a State's motion to amend is discretionary. State v. Powell, 34 Wn. App. 791, 792, 664 P.2d 1 (1983). A court abuses its discretion only when it takes a position no reasonable person would adopt. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001).

Here, the State moved to amend the charges against Numrich, before a trial date had even been set, in order to add an alternative charge charge that might otherwise expire. The additional charge arose from the

same constellation of facts as the original charges and would not require any additional defense investigation or affect the nature of Numrich's defense at trial, which was still necessarily months away. The trial court's ruling was well within its broad discretion and should be affirmed.

In his initial briefing opposing the motion, Numrich argued, *inter alia*: 1) that the State's motion was the product of gamesmanship and bad faith litigation tactics; 2) that the State should be estopped from seeking amendment; 3) that the State's motion prejudiced his substantial rights; 4) that the State's motion was both actually and presumptively vindictive; and 5) that the proposed count of first-degree manslaughter was not supported by probable cause. CP 250-74. The State provided a written response that addressed these allegations and provided an explanation of why the motion was being brought when and how it was (consistent with the procedural facts sections above). CP 430-68. At the hearing on the motion, the trial court specifically questioned the State about this issue. RP 84-90.

Having considered all of these matters, the trial court found that the "prejudice" claimed by Numrich was really more a complaint about the costs he had incurred in the appellate process up to that point and an expression of frustration that the State had not brought the motion to amend sooner. CP 470. The trial court concluded that this was not a specific prejudice to a substantial right of the defendant within the meaning of CrR 2.1(d). CP 470-72. The trial court further found that the State had been candid with the court in explaining why the motion to

amend had been brought when and how it had and that there was no evidence that it was vindictive. CP 470-71. The trial court, therefore, granted the State's motion to amend. CP 470-72.

Numrich then filed motions in the alternative asking the trial court to either dismiss some or all of the counts or to reconsider its decision. CP 870-77. He asserted that dismissal of some or all of the charges was appropriate under CrR 8.3(b) due to governmental mismanagement and that denial of the motion to amend was an appropriate sanction for the alleged untimeliness of the motion. CP 870-77. Numrich also accused the State of having misled the trial court and having engaged in conduct tantamount to bad faith. CP 870-72, 876-77. The State responded, pointing out that Numrich's accusations that the State had misled the court and otherwise engaged in conduct tantamount to bad faith were based on factual assertions that were either simply incorrect or that misinterpreted and mischaracterized the record in a manner that cast the State's actions in an unfair and inaccurate light. CP 952-57.<sup>20</sup> Numrich filed a reply. CR 970-75. The trial court issued a written ruling indicating that it had reviewed all of the pleadings and considered the arguments therein, but that none of them had changed its decision. CP 976-77.

Given all of the above, the trial court clearly understood and applied the correct legal standard in ruling on the motion to amend.

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<sup>20</sup> The State's briefing and declaration explained the procedural history of that case to that point in much greater detail. Supp. CP \_\_ (Sub no. 56, Motion and Affidavit / Declaration, 11/13/2018); CP 475-748.

Numrich's legal and factual arguments against the motion were considered seriously. The court's ruling was supported by the evidence and the law. As a result, the trial court did not abuse its discretion.

Despite the above, Numrich asserts that there are numerous reasons why the State's motion to amend should have been denied. These arguments, however, are either based on a faulty interpretation of the record or were considered and rejected by the trial court. In either case, Numrich has failed to demonstrate that the trial court abused its discretion in granting the State's motion to amend.

First, Numrich argues that the trial applied the wrong legal standard when it stated that "it was unquestionably the right of the State to amend if it chose." CP 977. Numrich asserts that the use of this phrase shows that the trial court believed that the State had the right to amend whenever it wanted. Br. of Pet. at 30-31. But this argument takes the court's comment out of context. The trial court was clearly aware that the State's right to amend was not absolute. Among other things, Numrich repeatedly pointed out to the court that it had wide discretion to deny the State's motion even if it found no prejudice to him. CP 259, 874. Under these circumstances—and against the backdrop of the various motions before it—it is apparent that the court's ruling was simply that the State was allowed to amend the charges *in this case*, not that the State always has an unfettered right to amend at any time.

Second, Numrich asserts that there was "absolutely no justification for the State's delayed amendment" and implies that the State brought the

motion as a tactical maneuver in order to convince this Court to deny his motion for discretionary review. Br. of Pet. at 31, 35-37. From this combination of allegations, he argues that that the trial court abused its discretion in granting the State's motion to amend. Br. of Pet. at 31-37. Both of these assertions are incorrect.

As an initial matter, as described above the State provided an extensive explanation of why the motion to amend came about how and when it did. CP 449-50. This included a specific denial that the motion was being brought to retaliate against Numrich for seeking discretionary review, to gain advantage in the appellate litigation, or for any other improper purpose. CP 450. In granting the motion to amend, the trial court accepted the State's explanation, finding that the State had been candid with the court and that there was no evidence that the State's actions were vindictive or otherwise improper. CP 470-71. The State subsequently provided even more detailed information on this point. CP 475-83. While Numrich repeatedly accused the State of misleading the court in its explanation, the State pointed out that all of Numrich's claims were based on factual recitations that unfairly characterized the facts and/or were simply incorrect.<sup>21</sup> The court—having heard all of the arguments and reviewed all of the facts—rejected Numrich's accusations and did not disturb its finding regarding the credibility of the State's explanation of events. CP 976-77.

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<sup>21</sup> For example, Numrich accused the State of misleading the trial court in various ways in his response to the State's motion to reconsider the imposition of sanctions. CP 878-987. In its reply, the State explained at length how this was not the case. CP 927-44. Numrich made a virtually identical accusation in his motions to dismiss/reconsider and the State again explained in its response. CP 870-71, 876, 953-57.

Numrich also claims that the trial court's use of the phrase "and where the State is using this amendment to obtain dismissal of the discretionary review, and so announced in the responsive appellate briefing"<sup>22</sup> means that the trial court found that the State was amending the charges in an attempt to dispose of his motion for discretionary review. Br. of Pet. at 35-37. But this argument conflates the trial court's recognition of the potential *effect* of the amendment with the reason for it. When the order is read as a whole, it is clear that, while the trial court may have used inartful wording, it understood that these were two different things. CP 470-72. Despite Numrich's claim to the contrary, the trial court did not find that the State's *purpose* in seeking the amendment was to use it as a tool to dismiss discretionary review.

Third, Numrich argues that the trial court abused its discretion by failing to consider his claim that the State's motion to amend constituted prosecutorial vindictiveness. Br. of Pet. at 37-41. But this is simply incorrect. Numrich's claims of prosecutorial vindictiveness were explicitly and specifically argued to, and rejected by, the trial court. CP 263-66, 471.

"Prosecutorial vindictiveness is [the] intentional filing of a more serious crime in retaliation for a defendant's lawful exercise of a procedural right." State v. McKenzie, 31 Wn. App. 450, 452, 642 P.2d 760 (1981). On the other hand, it is well recognized that "an initial charging decision does not freeze prosecutorial discretion" and that prosecutorial vindictiveness

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<sup>22</sup> CP 471.

must be distinguished from the “rough and tumble” of legitimate plea bargaining and other aspects of pre-trial practice. State v. Lee, 69 Wn. App. 31, 847 P.2d 25 (1993). A defendant asserting prosecutorial vindictiveness in the pre-trial context bears the burden of establishing either actual vindictiveness or “a realistic likelihood of vindictiveness which will give rise to a presumption of vindictiveness.” State v. Bonisisio, 92 Wn. App. 783, 791, 964 P.2d 1222 (1998) (quoting United States v. Wall, 37 F.3d 1443, 1447 (10<sup>th</sup> Cir. 1994)). If the defendant makes this preliminary showing, the State must justify its decision with “‘legitimate, articulable, objective reasons’ for its actions.” Bonisisio, 92 Wn. App. At 791 (quoting Wall, 37 F.3d at 1447).

In this case, Numrich has established neither actual vindictiveness nor a “realistic likelihood of vindictiveness” that would give rise to a presumption of vindictiveness. Bonisisio, 92 Wn. App. At 791. Moreover, the State gave a detailed explanation of how and why the motion to amend came about when it did. CP 449-50, 475-83. This explanation constituted exactly the sort of “legitimate, articulable, and objective reasons” for the State’s actions that were sufficient to rebut a presumption of vindictiveness. Thus, the trial court did not abuse its discretion in rejecting Numrich’s claim of vindictive prosecution.

Fourth, Numrich argues that the trial court abused its discretion by failing to consider his claim that the State’s motion to amend violated principles of estoppel. Br. of Pet. at 42-43. Again, this is simply incorrect. Numrich’s estoppel argument was explicitly argued to the trial court and the

trial court rejected it when it granted the motion to amend. CP 261-62, 470-72. While Numrich may disagree with the trial court's ruling, he has not established that the court failed to consider it.

Numrich's estoppel argument is baseless in any event. No authority establishes that the doctrine of estoppel applies to a State's motion to amend criminal charges. Even if it did, the doctrine would not preclude the amendment in this case. Estoppel applies only when a party takes one position in a court proceeding and later seeks an advantage by taking "a *clearly inconsistent position.*" Arkinson v Ethan Allen, Inc., 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (emphasis added). Here, in response to a motion to dismiss a count of second-degree manslaughter, the State argued that prosecution of that charge was not precluded by the "general-specific rule." The State's later motion to amend to add an alternative charge of first-degree manslaughter is not inconsistent that position.

Finally, Numrich argues that the trial court abused its discretion when it concluded that it had no power to deny the motion to amend even though there was no probable cause for the count of first-degree manslaughter. Br. of Pet. at 43-44. But that was not what the trial court did. When Numrich addressed the alleged lack of probable cause at oral argument, the trial court indicated that the question of whether there was probable cause was really only an issue vis-à-vis the court's power to impose conditions on the defendant and that that did not need to be resolved in this case because probable cause had already been found for at

least one other crime. RP 100-01.<sup>23</sup> Numrich has not provided any binding authority establishing that the trial court, therefore, abused its discretion in declining to address probable cause further at that time.<sup>24</sup>

Moreover, even if probable cause was a necessary prerequisite to amendment, here there is ample probable cause supporting the charge of first-degree manslaughter. A person commits first-degree manslaughter when he or she “recklessly causes the death of another person.” RCW 9A.32.060(1). In this context, a person acts recklessly when “he or she knows of and disregards a substantial risk that [death] may occur and this disregard is a gross deviation from the conduct that a reasonable person would exercise in the same situation.” RCW 9A.080.010(2)(c); WPIC 10.03; 2016 Comment to WPIC 10.03 (citing Gamble, 154 Wn.2d at 467-68). The substantive facts of Numrich’s crime are set forth above. These substantive facts—and the reasonable inferences that can be drawn from them—establish probable cause for the charge of first-degree manslaughter. As the owner and operator of the company and the “competent person” for the project, Numrich was well aware of the general risk of death posed to workers in trenches like the one in question. CP 453-56, 466-67. He was further aware that the risk was substantially elevated given all of the risk factors that were present at this

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<sup>23</sup> Numrich cites to this exchange as taking place at page 97 of the Verbatim Report of Proceedings. Br. of Pet. at 43. However, it appears at pages 100-101 in the version provided to the State.

<sup>24</sup> The only authority provided by Numrich on this point is one unpublished Court of Appeals case that in turn cites to a Washington Supreme Court *dissent* and another published case dealing with a different issue (the professional conduct requirements for prosecutors). Br. of Pet. at 43.

particular job site on this particular day. CP 456, 462-67. However, despite being aware of all these risks and being the person responsible for guarding against them, Numrich left the site without making any effort to address these hazards and without re-inspecting the trench after they had arisen. CP 456, 464-67. The trench then collapsed and killed Felton. CP 455, 465. These facts establish probable cause to conclude that Numrich knew of and disregarded a substantial risk that death might occur, that his disregard of this risk was a gross deviation from the conduct a reasonable person would exercise in the situation, and that Felton died as a result.

**c. The Trial Court Did Not Abuse Its Discretion In Denying Numrich's CrR 8.3(b) Motion**

Numrich claims that the State mismanaged his case and that the trial court abused its discretion by failing to address his motion to dismiss pursuant to CrR 8.3(b). A trial court's decision on a CrR 8.3(b) motion is reviewed for abuse of discretion. State v. Dailey, 93 Wn.2d 454, 456, 610 P.2d 357 (1980). Numrich's argument must be denied.

As an initial matter, Numrich's claim that the trial court failed to address his motion is simply incorrect. After the court granted the State's motion to amend, Numrich filed motions in the alternative asking the trial court to either dismiss or to reconsider its decision granting the motion to amend. CP 870-77. Numrich argued, *inter alia*, that the State's motion to amend was untimely and that this constituted governmental mismanagement that was a basis to dismiss some or all of the charges under CrR 8.3(b). CP 870-77. The State's response included a lengthy

discussion of why dismissal pursuant to CrR 8.3(b) was not appropriate. CP 957-967. Numrich filed a reply. CR 970-75. The trial court issued a written ruling indicating that it had reviewed all of the pleadings and considered the arguments therein—which included Numrich’s CrR 8.3(b) motion—and that they did not change its decision. CP 977. Thus, the trial court clearly considered and rejected Numrich’s CrR 8.3(b) motion.

Nor was this an abuse of discretion, as Numrich’s CrR 8.3(b) argument is baseless. To obtain dismissal under CrR 8.3(b), the burden is on the defendant to establish both: (1) arbitrary action or governmental misconduct; and (2) prejudice affecting his right to a fair trial. State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003); State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). Because the defendant bears the burden of demonstrating both, a court must deny a CrR 8.3(b) motion if the defendant fails to establish either prong. Rohrich, 149 Wn.2d at 654-55. A court considering a CrR 8.3(b) motion to dismiss must keep in mind that “dismissal is an extraordinary remedy to which the court should resort only in ‘truly egregious cases of mismanagement or misconduct.’” State v. Wilson, 149 Wn.2d 1, 9, 965 P.3d 657 (2003) (quoting State v. Duggins, 68 Wn. App. 396, 401, 844 P.2d 441 (1993)). Here, Numrich failed to establish either arbitrary action/governmental misconduct or prejudice to his right to a fair trial.

First, Numrich failed to establish egregious mismanagement or misconduct. Governmental misconduct “need not be of an evil or dishonest nature; simple mismanagement is sufficient.” State v.

Blackwell, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993). However, although simple mismanagement can constitute governmental misconduct for CrR 8.3(b) purposes, courts have repeatedly held that dismissal pursuant to the rule is still an extraordinary remedy that is to be used sparingly. Wilson, 149 Wn.2d at 9.

In State v. Smith, for example, the order on omnibus hearing directed the State to provide all police follow-up reports at least two weeks prior to trial. 67 Wn. App. 847, 850, 841 P.2d 65 (1992). On the day of trial, however, the State provided the defense with an additional lab report and a follow-up report from a detective identifying an additional suspect and an additional lab report. Id. The defense moved for dismissal, claiming that the new information destroyed the defense theory of the case as embodied in its trial memorandum. Id. The trial court denied the motion to dismiss. Id. at 851. The Court of Appeals affirmed, reiterating the long-standing rule that the dismissal is an extraordinary remedy that was not appropriate under the circumstances. Id. at 852. Washington appellate courts have reached consistent results in numerous other cases.<sup>25</sup> In contrast, the remedy of dismissal is usually reserved to only those cases that involve extraordinary prosecutorial mismanagement, often coupled

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<sup>25</sup> See, e.g., State v. Bradfield, 29 Wn. App. 679, 630 P.2d 494 (1981) (dismissal not warranted where State disclosed a witness represented by defense counsel four days prior to trial that resulted in counsel's forced withdrawal from case); State v. Greene, 49 Wn. App. 49, 742 P.2d 152 (1987) (dismissal not warranted even though State did not produce exculpatory written statement of defendant until the day of trial); State v. Flinn, 119 Wn. App. 232, 80 P.3d 171 (2003) (dismissal not warranted when State sought and obtained a five-week continuance of the trial date of an in-custody defendant in order to obtain a second evaluation and then determined that a second evaluation was not needed).

with actual misconduct. See, e.g., Michielli, 132 Wn. 2d at 937 (the State amended the Information—adding four additional charges—only five days before *trial* was scheduled to begin, without any justifiable explanation for the delay, and under circumstances that suggested the amendment was done to harass the defendant); Dailey, 93 Wn.2d 454 (the State, among other things: violated the court rules and explicit orders of the trial court throughout the proceedings; was late in providing an ordered bill of particulars; and filed a supplemental witness list the Friday before a Monday trial that increased the number of State’s witnesses from five to sixteen).

This case pales in comparison to any of those listed above. Here, the State added an alternative charge long before trial in order to avoid the running of the statute of limitations. The State has no duty to warn a defendant that it might so amend the charges. As a result, there was no misconduct or mismanagement within the meaning of CrR 8.3(b), let alone “truly egregious” misconduct warranting the extraordinary remedy of dismissal.

Second, Numrich has failed to establish prejudice affecting his right to a fair trial. As noted above, for dismissal under CrR 8.3(b) to be warranted, a defendant must establish actual prejudice that has actually affected his right to a fair trial. Rohrich, 149 Wn.2d 657-58.

Here, at the time of the amendment no trial date had been set and Numrich would likely have had months to prepare to meet the amended charges at trial. Moreover, the amendment changed almost nothing about

the case except adding an alternative charge with a different *mens rea*. It did not add to the discovery. It does not change Numrich's trial defenses. It does not require him to conduct any further investigation (beyond that which he would need to do to prepare for trial on the original charges). It will not result in the State calling any additional witnesses. Thus, there is simply no prejudice under CrR 8.3(b).

Despite this, Numrich argues that his rights have been prejudiced because the amendment has "forced [him] to waive his speedy trial rights repeatedly to pursue necessary remedies in superior court and perfect the issues related to the amendment in this Court." Br. of Pet. at 45-46. This argument is specious. Numrich was already actively pursuing a motion for discretionary review in this Court, his trial was already likely *months* away, and, under RAP 7.2(a), trial proceedings would be stayed pending review if his motion was granted.

**d. This Court Should Reject Numrich's Request That It Overrule The State's Charging Decision**

Numrich attempts to try this case on appeal in an effort to persuade this Court to substitute its judgment for that of the prosecuting attorney by dismissing the count of first-degree manslaughter. Br. of Pet. at 46-50. He argues that this is appropriate because the State has shown "a gross lack of appreciation for the 'awesome consequences' of the State's criminal charging responsibilities." Br. of Pet. at 49. This Court should reject this argument.

As an initial matter, the State is well-aware of its responsibilities. Numrich recklessly allowed a friend and employee to be buried alive and crushed to death under seven feet of wet earth. Any defendant who has caused the death of another through recklessness is liable to be charged with a crime. Numrich is not special in that regard.

More to the point, however, the authority to charge is vested in the prosecuting attorney acting as the representative of the State. This Court has long recognized that the authority to file charges in criminal cases—including the discretion to select the nature and number of available charges—is vested with prosecuting attorneys. State v. Rice, 174 Wn.2d 884, 903, 279 P.3d 849 (2012). It is true that this broad charging discretion is not unfettered. For example, a prosecutor must exercise individualized discretion in charging each case, must comport with constitutional requirements in charging, and can only charge crimes authorized by the legislature. Id. At the same time, however, prosecutorial charging discretion is not a power bestowed by legislative or judicial grace. Rather, “a prosecutor’s broad charging discretion is part of the inherent authority granted to prosecuting attorneys as executive officers under the Washington State Constitution.” Id. at 904.

Numrich appears to be asking this Court to dismiss the count of first-degree manslaughter based on arguments implying that the charge is not appropriate for the circumstances. While a jury will decide whether Numrich is guilty, the State is the entity with the authority to select the charges he faces. This Court should summarily reject Numrich’s request

that it overrule the State's decision and substitute its own judgement as to the proper charges.

**3. THE TRIAL COURT ERRED IN IMPOSING SANCTIONS IN ANY AMOUNT.**

As noted above, when the trial court granted the State's motion to amend, it also ordered terms against the State because it concluded that the motion should have been brought sooner. CP 470-72. This was not proper a basis to impose sanctions and the trial court abused its discretion in doing so.

This Court addressed precisely this issue—the power of a trial court to impose sanctions when it concludes that a State's motion to amend does not prejudice a defendant and should not be denied, but is brought in an untimely manner—in State v. Gassman. In Gassman, the State moved to amend the Information on the day of trial to change the date that the crime was allegedly committed. 175 Wn.2d at 209-10. The defendants objected on the grounds that they had prepared their entire trial defense around having an alibi for the date on which the State had initially alleged that the crime had taken place. Id. at 210. The trial court granted the motion to amend and continued the trial date to give the defendants time to prepare their defense(s) based on the newly charged date. Id. In doing so, the trial court found that the State's conduct in bring the motion to amend so late was “careless” and ordered the State to pay attorneys' fees to each defense counsel for the extra time they spent dealing with the issues created by the State's amendment. Id.

On appeal, this Court noted that there is no statute or rule allowing sanctions in such a situation, but concluded that a trial court does have the authority to impose them (including via ordering attorneys' fees) under its inherent equitable powers to manage its proceedings. Id. at 201-11 (citing In re Recall of Pearsall-Stipek, 136 Wn.2d 255, 266-67, 961 P.2d 343 (1998)). This Court also noted, however, that sanctions imposed under this inherent authority are subject to an important limitation—they can be imposed *only* if the court finds that the State acted in “bad faith” or engaged in conduct “tantamount to bad faith.” Id. Such bad faith or conduct tantamount to bad faith consists of “willfully abusive, vexatious, or intransigent tactics designed to stall or harass.” Id. at 211 (citing Chambers v. NASCO, Inc., 502 U.S. 32, 45-47, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)). Mere carelessness is not bad faith. Id. at 212-13. This Court, therefore, ruled that the trial court had abused its discretion in ordering sanctions. Id.

Here, as in Gassman, the State did not act in bad faith or engage in conduct tantamount to bad faith in amending the charges how and when it did. Although Numrich repeatedly accused the State of acting in bad faith, the trial court rejected these accusations. CP 250-422, 470-72, 870-98, 977. The record supports this finding. In the declaration that accompanied the State's motion to reconsider, counsel for the State set out in detail the procedural history of this case as it related to the motion to amend and explained the circumstances surrounding the State's decision to seek the amendment how and when it did. CP 475-83. Viewed fairly, the State's actions did not constitute bad faith or conduct tantamount to bad faith.

In its motion for reconsideration, the State argued that the trial court's imposition of sanctions would constitute an abuse of discretion under Gassman in light of the lack of bad faith or conduct tantamount to bad faith. Supp. CP \_\_ (Sub no. 56, Motion and Affidavit / Declaration, 11/13/2018). The trial court did not directly address Gassman in its order denying the State's motion. CP 976-77. Instead the trial court simply noted that it had imposed "terms" rather than "sanctions" and stated that the imposition of "fees" was an appropriate "remedy" in this case. CP 977. It is unclear, however, what difference this makes. The State is not aware of any authority that recognizes a relevant distinction between these various terms. And, to the extent that there is such a distinction, regardless of what the trial court chose to call it, the financial penalty it imposed on the State in this case was clearly a "sanction" within the meaning of the term relevant to the analysis in Gassman.

The situation presented here is analogous to Gassman. (Indeed, it is worth noting that Gassman dealt with a motion to amend *on the day of trial that entirely mooted the defendant's trial defense*. Here, in contrast, no trial date has even been set and the State's amendment does not moot or preclude any substantive defense argument.) In Gassman, the trial court found carelessness on the part of the State due to the late filing of a motion to amend. Here, the trial court essentially reached the same conclusion, finding that the State should have brought the motion to amend earlier. As a result, the trial court in this case abused its discretion by failing to apply the applicable legal standard from Gassman.

More generally, the proper imposition of sanctions presupposes misconduct. A trial court has no authority to sanction a party merely because the court would have preferred that the party act differently. Yet that is exactly what the trial court did in this case.

As the court noted in its order, the real harms claimed by Numrich were the “costs incurred in proceeding with the appellate process and a real frustration that the Prosecutor...filed this amendment so late.” CP 470. In this context, the gravamen of the court’s reasoning for imposing sanctions was the following statement:

What is singular here is that the State did not give notice of an amendment in an obvious situation that would have saved [Numrich] countless hours and fees for an appeal, and where the State is using this amendment to obtain dismissal of the discretionary review, and so announcing in the responsive appellate briefing, and where the issues presented by the Amendment are obviously intertwined with the issues on discretionary appeal, and where there are no additional facts or discovery or new legal theory.

CP 471. Even assuming that this statement was entirely correct, it was not a basis to impose sanctions. The trial court never identified any actual wrongdoing on the part of the State. Indeed, the trial court found essentially the opposite, ruling that the State unquestionably had the right to amend the charges when and how it did, that there was no prejudice to Numrich’s rights or any other basis to deny the motion, that the State’s motion was not vindictive, and that there was no indication of bad faith on the part of the State. CP 470-72, 976-77. Given these rulings, there was no basis for the trial court to impose terms.

Here, Numrich had lost a pre-trial motion to dismiss and was seeking interlocutory appeal. The trial court clearly would have preferred if the State had affirmatively reached out to Numrich's attorneys to make sure that they were aware of a possible trial amendment so that Numrich could determine whether immediate interlocutory appeal was the most cost-effective or efficient litigation strategy. But the State is not required to assist a defendant in this way and the preference that it would have done so does not equate to a finding of malfeasance. Nor is there any evidence or compelling argument that such an action on the part of the State would have actually changed Numrich's decision to seek interlocutory appeal when and how he did. As a result, the trial court failed to apply the correct legal standard and abused its discretion.

**4. THE TRIAL COURT ERRED IN SETTING THE AMOUNT OF SANCTIONS BASED ON A FEE PETITION THAT WAS LEGALLY INSUFFICIENT AND WITHOUT ADEQUATELY ASSESSING THE REASONABLENESS OF THE FEES REQUESTED.**

In its initial order imposing sanctions, the trial court indicated that the amount of sanctions would consist of Numrich's attorneys' fees for work on his motion for discretionary appeal to that point. CP 471. The defense was directed to submit a fee petition to support and establish that amount. CP 471. Numrich bore the burden of establishing that the fees he requested were reasonable. See Scott Fetzer Co. v. Weeks, 122 Wn.2d 2d 141, 151, 859 P.2d 1210 (1993); Berryman v. Metcalf, 177 Wn. App. 644, 657, 312 P.3d 745 (2013). This included establishing both that his attorneys' rates and the amount of work they did were reasonable. Berryman, 177 Wn. App.

at 661-64; Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 597, 675 P.2d 193 (1983). Here, the superior court found that Numrich had met this burden and accepted both the hourly rates and hours of work he claimed for his attorneys. CP 1131-32. This decision, however, constituted an abuse of discretion for a number of reasons

First, in reaching this decision the trial court ignored the holdings of numerous controlling appellate cases. For example, the party requesting fees bears the burden of establishing that the hourly rate requested for his attorney is reasonable. Blum v. Stenson, 465 U.S. 886, 895 n. 11, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984); Philip A. Talmadge & Thomas M. Fitzpatrick, The Lodestar Method for Calculating A Reasonable Attorney Fee in Washington, 52 Gonz. L. Rev. 1, 7 (2017). Clear and unambiguous Washington caselaw holds that the proof of the reasonableness of the attorney's hourly rate must consist of something beyond the mere unsupported declaration of the counsel whose hourly rate is in question. Mahler v. Szucs, 135 Wn.2d 398, 434-35, 957 P.2d 632 (1998); SentinelC3, Inc. v. Hunt, 181 Wn.2d 127, 144, 331 P.3d 40 (2014).

Here, despite the fact that the State repeatedly pointed out this legal requirement,<sup>26</sup> the only evidence presented by Numrich as to the reasonableness of his attorneys' rates was the repeated—but unsupported—assertion of one of the very attorneys who stood to benefit from the sanctions. CP 749-758, 924-26, 978-91, 1127-30. As a result,

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<sup>26</sup> CP 905-06, 947-49, 997-98.

Numrich’s materials were insufficient as a matter of law to establish the reasonableness of his attorneys’ claimed hourly rates. Despite this, however, the trial court found—without any analysis or explanation—that the billing rates for Numrich’s attorneys were reasonable. CP 1131-32 This finding ignored controlling caselaw, was not supported by substantial evidence, and constituted an abuse of discretion.

Similarly, courts reviewing fee petitions have shown a strong preference for contemporaneous records documenting the hours worked, because attempts to reconstruct hours later are generally unreliable. Mahler, 135 Wn.2d at 434; Johnson v. State Department of Transportation, 177 Wn. App. 684, 699, 313 P.3d 1197 (2013). Such “reconstructed” hours should only be accepted by a court imposing fees if the usage is reasonable under the circumstances and the hours are supported by other evidence such as testimony or secondary documentation. Id.

Here, despite the fact that the State repeatedly raised this issue,<sup>27</sup> Numrich provided no information as to either how his attorneys kept track of their hours worked or as to whether the billing records he had submitted were based on hours tracked contemporaneously or reconstructed later. CP 749-58, 924-26, 978-91, 1127-30. As a result, his fee petition was insufficiently documented. Despite this, however, the trial court found—against without any analysis or explanation—that the hours billed by Numrich’s attorneys were reasonable. CP 1131-32. This finding ignored

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<sup>27</sup> CP 905-06, 947-49, 998-99.

controlling case law, was not supported by substantial evidence, and constituted an abuse of discretion.

Second, in reaching its decision on the amount of fees, the trial court failed to adequately assess the reasonableness of Numrich's specific fee request as required by law. As a general matter, courts are required to "take an *active* role in assessing the reasonableness of fee awards....Courts should not simply accept unquestioningly fee affidavits from counsel." Mahler, 135 Wn.2d at 434-35 (emphasis in original). The trial court's active role in assessing reasonableness must be reflected in the findings and conclusions it enters in support of its decision.

A trial court does not need to deduct hours here and there just to prove to the appellate court that it has taken an active role in assessing the reasonableness of a fee request. But to facilitate review, the finds must do more than give lip service to the word "reasonable" *The findings must show how the court resolved disputed issues of fact and the conclusions must explain the court's analysis.*

Berryman, 177 Wn. App. at 658. (emphasis added). In Berryman, the appellate court concluded that the trial court's findings demonstrated that the trial court had committed reversible error in setting the amount of fees simply by failing to adequately address the reasonableness of the fees claimed. Id. at 658-59. In reaching this conclusion, the court noted that:

[w]hile the trial court did enter finds and conclusions in the present case, they are conclusory. There is no indication that the trial judge actively and independently confronted the question of what was a reasonable fee. We do not know if the trial court considered any of Farmer's objections to the

hourly rate, the number of hours billed, or the multiplier. The court simply accepted, unquestioningly, the fee affidavits from counsel.

Id. at 658.

As in Berryman, here is no indication that the trial court actively and independently considered the reasonableness of Numrich's fee petition or the State's objections to the hourly rates or number of hours billed. In its responsive briefing, the State repeatedly objected to both. CP 899-923, 945-51, 992-1126. Regarding the latter point in particular, the State raised significant questions about the adequacy of the billing records and pointed to numerous specific billing entries that appeared problematic. For example, the State argued that Numrich appeared to be seeking attorneys' fees for hours that were improperly "block billed;" were duplicative; were spent on tasks that were clerical, secretarial, or ministerial in nature; were unreasonable, unproductive, and excessive; and were spent on work that was outside the scope of what the trial court had previously ordered should be included in the fee petition. CP 1001-07. While the trial court entered findings that the hourly rates and hours claimed by Numrich's attorneys were reasonable, these findings are conclusory and do not show how the court resolved these disputed issues of fact. CP 1131-32. Nor did the court provide conclusions that outlined or explained its analysis. Id. Instead, the court essentially adopted without question the fee affidavits from Numrich's counsel. Id. The trial court's failure to address these concerns was reversible error in and of itself. Berryman, 177 Wn. App. at 658-59.

**G. CONCLUSION**

For the foregoing reasons, the State respectfully asks this Court to affirm the trial court's orders denying Numrich's motions to dismiss and granting the State's motion to amend. The trial court's order imposing sanctions against the State in any amount should be vacated and stricken on remand. In the alternative, the order imposing sanctions in the amount of \$18,252.49 should be vacated and stricken and the trial court should be ordered to conduct further proceedings where Numrich's fee petition is held to the appropriate legal standard and the reasonableness of the fees requested are properly evaluated.

DATED this 12th day of February, 2020.

Respectfully submitted,

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