No. 31290-9

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

Jude I. Doty,

Plaintiff-Appellant,

v.

Department of Labor & Industries
of the State of Washington and Judy Schurke,
in her capacity as Deputy Director,

Defendant-Respondent.

REPLY BRIEF OF APPELLANT

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I. Introduction

Mr. Doty did not "employ" his sons and did not violate either of the charged regulations.

The Findings that Mr. Doty violated the child labor laws and that he committed serious violations of the child labor laws are in error. This Court should reverse those findings and remove any fines or assessments against Mr. Doty.

II. Reply Statement of the Case

The Department does not appear to dispute any of Mr. Doty's factual assertions in his Statement of the Case.

A party to an appeal who has an opportunity to respond to an opponent's factual claims and neglects to do so thereby admits the accuracy of the opponent's factual claims. Washburn v. Beatt Equipment Co., 120 Wn.2d 246, 270, 840 P.2d 860 (1992). The Department's apparent omission of a response to Mr. Doty's factual assertions constitutes a tacit admission that Mr. Doty's factual assertions are correct.

Mr. Doty explains why the Department's expert was incorrect regarding the risks of being on top of a very slowly moving building. App.Br. 28-33. The Department continues to rely on its incorrect expert. Dep.Br. 4-5.

Mr. Doty addresses other factual assertions of the Department in the relevant material below.

IV. Argument

A. Mr. Doty's view that he did not employ his children is not a verity on appeal.

In his Brief of Appellant, Mr. Doty asserts that the "findings are replete with assumptions or presuppositions that Mr. Doty employed his children." App.Br. 5. Mr. Doty does not identify any specific findings that assume or presuppose that Mr. Doty employed his children. See Dep.Br. 15-16.

Referring to the requirements of RAP 10.3, the Department states that Mr. Doty's statement—about the pervasive assumptions or presuppositions that Mr. Doty employed his children—assigns error to no findings.

Dep.Br. 16. After some more rhetoric, the Department states that whether Mr. Doty employed his children is a legal conclusion which this court may review. Dep.Br. 17.

Simply stated, the Department first argues that the status of employment is a verity on appeal and second admits that the status of employment is a question of law which is considered de novo. Dep.Br.17.

Consequently, the Department admits that Mr. Doty's position that he did not employ his children is not a verity on appeal.

B. The Department still lacks authority to re-define employment.

For its alleged authority to re-define employment, the Department relies on a specific statute, RCW 49.12.121(1). Dep.Br. 18. The Department "may adopt special rules for the protection of the safety, health, and welfare of minor employees." RCW 49.12.121(1). This statute grants the Department narrow authority to adopt "special rules." Id. This statute particularly does not grant

the Department broad or wide authority to adopt general rules.

The Department states that it had "broad rule-making authority under RCW 49.12.121." Dep.Br. 24; compare Dep.Br. 26. This statement explicitly contradicts the specific and narrow authority that statute grants the Department.

If the Department somehow had authority to re-define employment, it cannot rely on RCW 49.12.121 and is silent as to any other source of this alleged authority.

If the Department somehow had statutory authority to re-define employment (which would not be RCW 49.12.121), the Department could cite Manor v. Nestle Food Co.[1] for the proposition that a regulation authorized by statute can take precedence over prior case law.

Without appropriate statutory authority, Manor cannot

support the Department's position.

This Court should reject the Department's position and reverse the trial court and the agency.

C. The Department still fails to exclude the American Products test.

In American Products Co. v. Villwock, 7 Wn.2d 246 (1941), the Washington State Supreme Court identified the elements necessary to prove an employment relationship between a parent and a child.

The Department responds to American Products in two ways. First, the Department asserts that RCW 49.12.121 somehow allows the Department to re-define "employment" and that this re-definition contradicts American Products. Dep.Br. 25. As explained above, RCW 49.12.121 does not allow the Department to re-define "employment." Because RCW 49.12.121 does not allow the Department to re-define "employment," RCW

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[1] Manor v. Nestle Food Co., 131 Wn.2d 439, 443-444, 453-454

49.12.121 cannot contradict the definition of employment in American Products.

Second, the Department uses the definition of "employment" from WAC 296-125-015(2) to oppose American Products. Dep.Br. 25. As explained above, the Department had no authority under RCW 49.12.121 to adopt WAC 296-125-015(2). Because the Department had no authority to adopt WAC 296-125-015(2), this regulation cannot properly re-define "employment."

This Court should find that the Department was without authority to re-define "employment" and that Mr. Doty did not employ his children.

D. The Department's definition of "work" relies on its unauthorized re-definition of "employment," to which Mr. Doty actually objected.

The Department uses the word "work" in its unauthorized re-definition of "employment." Dep.Br. 27.

(1997), disapproved on different grounds by Wash. Indep. Tel. Ass'n v. Utils. & Transp. Comm'n, 148 Wn.2d 887 (2003).

The Department then uses some dictionary to define "work." Dep.Br. 27-28. Without the unauthorized re-definition of "employment," the Department's definition of "work" is useless.

This Court should strike the Department's unauthorized re-definition of "employment" and thereby render the Department's definition of "work" of no effect.

Although Mr. Doty objects to how the Department re-defines "employment" without authority, the Department objects that Mr. Doty somehow failed to object to how the Department defines "work." Dep.Br. 28. This Court should overrule the Department's objection and sustain Mr. Doty's objection here.

E. Mr. Doty may still raise the economic dependence test, did not waive it, and finds support for his position there.

The actual issue that separates the positions of Mr. Doty and the Department is whether he somehow employed his children in his business. Br.App. 5

(Assignment of Error 13). If Mr. Doty had neglected to assert this issue before the agency or at the superior court, then he might have waived it.

Without proof or argument, the Department merely asserts that Mr. Doty somehow waived an aspect of this issue. Compare Dep.Br. 37. The Department's assertion here is not well taken.

Similarly, Mr. Doty notes the common-sense distinction between, on one hand, the boys' economic dependence as children and Mr. Doty's control as parent and, on the other hand, the boys' economic dependence as alleged employees and Mr. Doty's control as an alleged employer. App.Br. 13-16.

The Department distorts Mr. Doty's common-sense distinction when the Department claims that Mr. Doty somehow suggests that Mr. Doty's children were somehow "in business" for themselves. Dep. Br. 38. The Department also puts the words "in business" as a

quotation and misleadingly implies thereby that the Department is actually quoting Mr. Doty. Dep.Br. 38.

This Court should determine that Mr. Doty may still raise the economic dependence test, that the Department's opposition to Mr. Doty's use of this test is not well taken, and that the economic dependence test shows that Mr. Doty did not employ his children.

F. The Department violates Mr. Doty's constitutional and home-school statutory rights.

Mr. Doty explains how the Department violates his constitutional and home-school statutory rights. App. Br. 23-24. In response, the Department repeatedly cites Prince v. Massachusetts, 321 U.S. 158, 166 S. Ct. 438, 88 L. Ed. 645 (1944). Dep.Br. 40-41.

Here is a key statement in the case: "Our ruling does not extend beyond the facts the case presents." Prince, 321 U.S. at 171.

The Department's prominent use of Prince is decidedly

an extension of Prince beyond its facts. One wonders how the Department reconciles its extending Prince with the Supreme Court's key statement just cited. The Department does not reconcile its extension with the key statement. Likewise, the Department neglects to mention the key statement.

The Department's citation of Prince in this matter is not well taken.

Similarly, the Department asserts that Mr. Doty somehow fails to support his conclusion that the Department violates Mr. Doty's rights. Dep.Br. 39. Mr. Doty is required to cite authority under RAP 10.3(a)(6) and actually cited authority. App. Br. 23-24.

The Department's argument on this point is not well taken either.

This Court should recognize the Department's attempted violations of Mr. Doty's rights under the home-school statute and under the Constitution and reverse the

trial court and the agency.

G. Mr. Doty committed no "serious violation." [Arguendo.]

This Court should decline the Department's invitation to replace the definition of "imminent" from case law with its own vague definition and should decline the Department's invitation to assert nearly unlimited authority to label almost any violation as "serious."

"A serious violation occurs if death or serious physical harm is imminent from a work practice." Dep.Br. 42 (citing RCW 49.12.390 and omitting the language that actual death or actual physical harm from a violation would make the violation serious). The Department admits that the regulations refrain from stating that the alleged violations are "serious" and admits that the regulations refrain from applying the label "imminent" to any risk of harm related to their violation. Dep.Br. 42-45.

Instead, the Department wants to be able to arbitrarily label or not label violations of these regulations as

"serious" or risk of any harm as "imminent" whenever it feels like and without regard to any need to be consistent in their application of the regulations.

The Department did not adopt any regulations equating the risk of harm of "imminent" violations with the regulations that Mr. Doty allegedly violated. For this reason, the validity of any such regulation is not now before the Court. If such a hypothetical regulation would be a "special" rule "for the protection of the safety, health, and welfare of minor employees," the hypothetical regulation could be valid. RCW 49.12.121(1).

In any event, the case law has a precise understanding of the meaning of "imminent." App. Br. 25-27.

The Department only articulates a strikingly vague explanation for its use of "imminent." Dep.Br. 45 ("ready to take place").

This Court should reject the Department's attempt to replace the definition of "imminent" from case law with its

own vague definition and should reject the Department's evident attempt to assert nearly unlimited authority to label almost any violation as "serious."

H. Findings that misstate the record are entitled to no deference.

Regarding induced voltage, the Director follows pure speculation on the part of the Department. App. Br. 28-30. Although noted safety expert Carl Plumb specifically discussed induced voltage, the Director also found incorrectly that expert Plumb failed to mention induced voltage. App. Br. 28-30. The indisputably inaccurate finding that expert Plumb failed to mention induced voltage is entitled to no deference from anyone.

The Department also attempts to distinguish a person whose role is "only to inspect, investigate, or estimate roof level conditions" under former WAC 296-155-24515(2)(a)—all of whose conduct is essentially observational—from the conduct of an "observer." App. Br. 47. This alleged distinction is not valid.

Similarly, this alleged distinction also ignores the fact that the Director erroneously asserted, contrary to the record, that expert Plumb's explanation of the WAC lacked evidence and was not credible. App.Br. 30-33.

This Court should reject the findings of the Director that contradict the undisputed evidence.

I. Judgment against Mr. Doty as a married man in his separate capacity only [Arguendo]

Although the Department chose not to present to the trial court a judgment against Jude I. Doty and his marital community, the Department now complains that Mr. Doty somehow cannot raise the question of the capacity in which the Department seeks to make him a judgment debtor. Dep. Br. 48.

The Department invited this error by declining to specify that the judgment it sought was against Jude I. Doty and his marital community. Compare State v. Wakefield, 130 Wn.2d 464, 475, 925 P.2d 183 (1996).

Despite inviting this error, the Department criticizes Mr.

Doty for asking this Court to address the issue of his capacity. Dep. Br. 48. In doing so, the Department cites Oil Heat Co. v. Sweeney, 26 Wn. App. 351 (1980).

In Oil Heat Co., the plaintiff actually sued "the marital community of D. D. and Myrna Sweeney" to satisfy the debt." Id. Both spouses were named defendants in Oil Heat Co. Id.

In this matter, the Department chose not to name Angela Doty as a defendant and neglected to identify the capacity in which it sought relief from Mr. Doty.

These two indisputable points thoroughly distinguish this matter from Oil Heat Co.

Under argument not conceded, this Court should find that any judgment against Mr. Doty is against him in his separate capacity only.

J. Mr. Doty is entitled to attorney fees.

Arguing that the Department has "broad" authority to adopt rules, the Department re-defines "employment" on

the basis of a statute that only allows "special rules." See RCW 49.12.121. Likewise, the Department wants to be able to arbitrarily label violations of almost any regulation as a "serious violation" without any meaningful limit.

For this reason, the Department still has taken action against Mr. Doty that is not "substantially justified" under RCW 4.84.350(1).

The Department does not appear to have specifically addressed Mr. Doty's claim for attorney fees under 42 U.S.C. § 1988. The Department has evidently waived any opposition to Mr. Doty's fees under this statute.

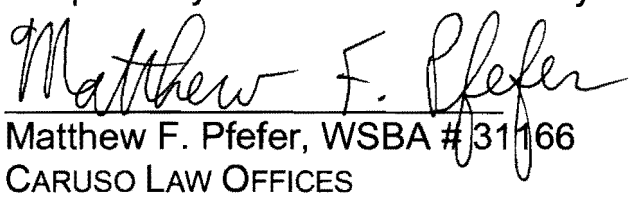
V. Conclusion

Mr. Doty did not "employ" his sons and did not violate either of the charged regulations.

The Findings that Mr. Doty violated the child labor laws and that he committed serious violations of the child labor laws are in error. This Court should reverse these findings, remove any fines or assessments against Mr.

Doty, and award him costs, fees, and litigation expenses in this matter.

Respectfully submitted this 26th day of March 2014.



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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am the attorney of record for the Plaintiff, am over the age of 18, am competent to testify, and make these statements upon my own personal knowledge.
2. I served this document on Anastasia R. Sandstrom of the Attorney General's Office, at 800 5th Ave Ste 2000 in Seattle WA 98104-3188 by prepaid postal mail on the date below.

Signed this 26th day of March 2014 in Spokane, Washington.

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