

74727-4

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COURT OF APPEALS DIVISION I OF THE STATE OF
WASHINGTON

Case # 74727-4-I

Mark C. Iden & Vicki Winston
Appellants

vs.

Washington State Department
of Labor and Industries
Respondent

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

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1 **Introduction**

2 On January 8, 2013 a representative from the Dept of Labor and Industries
3 Elevator Division (Dept), without prior notice, entered the private property
4 of Appellants Mark Iden and Vicki Winston and red-tagged their private
5 hillside elevator (tram). This tram provides the primary safe method of
6 access to the Winston-Iden home from the parking area. The red-tag
7 stated "This lift has been red-tagged because of a recall for the Rehmke
8 over speed hook device. Replacements must include Type A safeties."
9 Dept communications, including information provided on the Dept's
10 website on February 15, 2013 only after the red-tag issuance revealed that
11 the Dept justified their red-tag sanctions against multiple homeowners due
12 to 1.) the fact that they "personally witnessed what happens during a safety
13 test", 2.) a video they received from Hillside Elevator, who introduced a
14 tram with Type A safety in 2003, and 3.) "installers reporting that the
15 condition of many of these trams are in disrepair and not being maintained
16 or tested regularly". The Dept states that their decision to red-tag at this
17 time was based, in part, because they had a light duty employee who was
18 available to perform these inspections.
19 The red-tag stated that this was a "recall". Rehmke, our tram's
20 manufacturer, had died many years before and his company was gone.
21 This was not a "recall".

1 We, Vicki Winston and Mark Iden, appear pro se in this action. By way
2 of introduction, we have approximately 60 career years between us at
3 Boeing in various engineering roles that primarily include testing and
4 design for components and assemblies considered critical for flight safety.
5 We submit that Mark Iden performs the maintenance on our tram. As a
6 degreed engineer, he is highly qualified to do so and is intimately familiar
7 with the tram's design and function.

8 **Assignment of Error No. 1.**

9 Judge Rogoff erred in his final order of January 15, 2016 when he stated
10 that before 2005, the Dept took the position that the tram's emergency
11 braking system was inconsistent with required regulations, but was content
12 simply informing the Winston-Idens of that fact rather than requiring a
13 repair before allowing the tram to operate. Rogoff then accepted Dept's
14 2005 determination that the Winston-Iden tram was unsafe, with Rogoff
15 stating also that it presented a very real and very immediate danger to
16 those using it, finding no evidence that the Dept's decision making process
17 was flawed, unfair, or unconstitutional.

18 **Assignment of Error No. 2.**

19 Administrative Judge Krabill erred in his final order of March 10, 2015,
20 when he accepted the Dept's 2005 determination that the Rehmke Mark 12
21 tram was unsafe, and therefore it could inspect the Rehmke Mark 12 tram
22 owned by the Appellants, red tag the tram and demand specific

1 replacement components that were and are not commercially available for
2 the Winston-Iden tram.

3 **Assignment of Error No. 3.**

4 Administrative Judge Krabill erred in his final order of March 10, 2015,
5 when he concluded that the Dept could not grant a variance because the
6 Rehmke hook is not as safe as the safeties required under former WAC
7 296-94-0170 and current WAC 296-96-07170.

8 **Assignment of Error No. 4.**

9 Administrative Judge Krabill erred in his final order of March 10, 2015,
10 and subsequently Judge Rogoff erred in his final order of January 15, 2016
11 when they concluded that the Dept did not grant a variance. Judge Rogoff
12 erred, by not granting spoliation of evidence when the Dept failed to keep
13 a key document noted as "acceptance letter" in its possession.

14 **Assignment of Error No. 5.**

15 Administrative Judge Krabill erred in his final order of March 10, 2015,
16 when he concluded that the Dept made no statement upon which Ms
17 Winston and Mr. Iden could rely.

18 **Assignment of Error No. 6 .**

19 Administrative Judge Krabill erred in his final order of March 10, 2015
20 when he stated that the Dept issued operating permits independent of
21 inspection results.

22 **Assignment of Error No. 7.**

1 Administrative Judge Krabill erred in his final order of March 10, 2015,
2 when he stated that because dynamic testing consumes the system tested,
3 the Rehmke hook brake cannot be fully tested.

4 **Assignment of Error No. 8.**

5 Judge Rogoff erred in his final order of January 15, 2016 when he stated
6 that the Dept repeatedly and consistently communicated to the Appellants
7 that the tram was not in compliance with state regulations and needed to
8 be fixed (i.e. brought up to code).

9 **Assignment of Error No. 9.**

10 Administrative Judge Krabill erred in his final order of March 10, 2015,
11 when he noted that that the Appellants were required to order a re-
12 inspection of their tram, and in not doing so were non-responsive to a
13 certified letter from the Dept that requested the Appellants to call the
14 Dept.

15 **Assignment of Error No. 10.**

16 Judge Rogoff erred in his final order of January 15, 2016 when he stated
17 that the Appellants propose a modification to the current Rehmke Hook
18 braking system, which would make the system "equivalent" to a Type A
19 or Type B safety system, but would not cost as much as installing a Type
20 A or Type B safety system.

21 **Issue No. 1.** RCW 70.87.110 allows for "approval or waiver when
22 requirements are shown to be impracticable, such as involving expense not

1 justified by the protection secured." In order to grant a waiver or variance
2 RCW 70.87.110 states that "the Dept shall not allow the modification or
3 waiver unless equivalent or safer construction is secured in other ways".
4 In approximately 2003, Type A safeties for private trams first became
5 commercially available in Washington. In 1989, at the time the subject
6 tram was installed, private trams that contained Type A or Type B safeties
7 were not commercially available in the state of Washington. WAC 296-94
8 required these safeties, however the RCW provided an allowance for an
9 exception or variance. Rehmke, a Washington tram builder, provided the
10 Dept detailed data on his safety system with his installation application.
11 The Dept approved the installation based on this data, knowing that it did
12 not meet the Type A or B requirements and therefore would require an
13 alternative approval per RCW 70.87.110 to ensure consistency with
14 required regulations. Dept members at the time were required by the
15 RCW to determine that an equivalent level of safety had been achieved in
16 other ways. They accomplished this by reviewing all submitted drawings,
17 reviewing on-site the installation, and witnessing equipment
18 demonstration and tests. Evidence exists that each of these tasks was
19 performed by one or more Dept employees. The Dept tasked the tram's
20 original owner Roblee or his agent, Rehmke with submitting a request for
21 variance. This was accomplished, and subsequently an acceptance letter
22 was generated by the Dept. Can the court conclude that the Rehmke

1 braking system is inconsistent with RCW 70.87.110, when this RCW
2 permits variances that provide equivalent or safer construction in other
3 ways, when the Dept in 1989 demonstrates that it took necessary steps to
4 evaluate the design of this tram, established that the Rehmke tram needed
5 a variance, approved the installation request, instructed that the owner or
6 his agent apply for the specific variance required for the Rehmke safety
7 and other items, and then subsequently issued an acceptance letter, with
8 the Chief Elevator Inspector issuing a final Operating Permit?
9 (Assignment of Error No.1), (Assignment of Error No 3)

10 **Issue No. 2.** The Dept's Chief Elevator Inspector (CIE) testified that he
11 heard from an "engineer" about an incident with a "Rehmke tram" that the
12 "engineer" observed from an adjacent lot. The CIE first incorrectly
13 testified that the person who told him this story was an engineer, but was
14 corrected during his testimony by another Dept employee. Subsequent
15 testimony from the CIE revealed that this incident occurred out of state
16 and that the CIE never performed a follow-up investigation or requested
17 records to validate this allegation. Can third party hearsay (about an
18 incident alleged to have occurred in another state, but for which no record
19 or evidence was provided) be considered as evidence that Rehmke trams
20 are unsafe? (Assignment of Error 1)

21 **Issue No. 3.** The Dept provided the following as evidence, justifying their
22 decision that Rehmke trams were unsafe, and justifying the Dept's 2013

1 red-tagging of Rehmke trams, because they personally witnessed a safety
2 test: Dept employee Ernstes testified about an incident that she alleges
3 occurred 16 years prior, during a brief previous employment period with
4 the state in 1999. Under cross examination, the employee alleges that she
5 made a report of that incident. Any record of such an incident was
6 demanded in discovery but not produced. Such a record could be used to
7 ascertain the accuracy of this employee's memory. Rehmke did not patent
8 his tram, and over a period of about 30 years he provided assistance to
9 many others in Washington with building trams that looked quite similar
10 to his. An inspection record, which typically shows conveyance numbers
11 and manufacturer information, could establish whether or not the tram
12 Ernstes alleges she saw over 16 years prior to her testimony was in fact, a
13 Rehmke tram. Such a record could validate the trams age, condition, and
14 other facts to determine if it provided an acceptable correlation to the
15 trams the Dept red-tagged in 2013, including the appellant's tram. Is this
16 Dept employee's 16 year old recollection, that took place during a
17 previous employment period with the state, and which was unsubstantiated
18 by the required record, admissible as evidence? (Assignment of Error 1)
19 Does it provide substantial basis for determining that the tram was unsafe?
20 (Assignment of Error 1)
21 **Issue No. 4.** The Dept provided a marketing video made by Hillside
22 Elevator to promote the sales of their trams, as evidence that Rehmke

1 trams are unsafe, therefore justifying the Dept's 2013 red -tagging of
2 Rehmke trams. Hillside Elevator is a company that will make millions if
3 more than 30 Rehmke elevators in the state can be forced to be replaced at
4 a cost of \$125,000.00 each. Around 2003, Hillside introduced a tram that
5 possesses a Type A safety, the first commercially available Type A safety
6 (for trams) in Washington State. (Other companies had produced a one or
7 two trams, then gone out of business.) Hillside Elevator then produced
8 this alarmist marketing video utilizing 3 unidentified trams. The video
9 fails to provide any identification of the manufacturer or models for the
10 demonstrated trams. It does not provide information on the pre-
11 demonstration condition of the trams. The video does not inform the
12 viewer if the safety hook is a Rehmke hook, or if associated equipment
13 was intact. Rehmke tram safety devices rely on specific orientation for
14 proper interaction and function between undercarriage hook and the track
15 cross bar. It is important to note that each Rehmke tram is uniquely
16 designed for the specific slope on which it operates. This video uses a
17 fixed slope to demonstrate 3 trams, and it is unclear and improbable that
18 the trams were demonstrated on the specific slope for which each was
19 designed. Mismatching tramcars to the slope on which they are operated
20 can compromise the function of any undercarriage safety apparatus.
21 Instead of employing a crash dummy that would best replicate human
22 response in an emergency, the video shows a rigid, upright dept store

1 mannequin toppling over in the tram during the emergency stop. A rigid,
2 upright mannequin does not replicate human response in an emergency
3 situation. In the video, multiple trams are shown being repeatedly
4 released and allowed to impact the same track cross bar, until the track
5 cross bar begins to show signs of deformation. The Rehmke hook is an
6 emergency hook suitable for deployment in the rare event of a slack cable;
7 and this repeat assault upon one track cross bar does not replicate the type
8 of usage anticipated with safety hooks. The Dept offers this manipulated
9 marketing video from Hillside Elevator as a basis for their concerns about
10 Rehmke hook safety and the Rehmke tram's potential to eject a passenger.
11 Is the Hillside Elevator marketing video, which does not accurately depict
12 hook deployment, which is designed to alarm consumers and entice them
13 to purchase Hillside trams, and which simply fails to identify the trams
14 demonstrated, legitimate evidence that Rehmke Mark 12 trams are unsafe?
15 (Assignment of Error 1) Are manipulated marketing videos issued by one
16 competitor about another manufacturer's equipment appropriate sources of
17 information for a Washington State Dept of to use to form independent,
18 unbiased decisions about safety of a tram? (Assignment of Error 1) If the
19 presiding judge does not view a video during a hearing, can he accept that
20 adoption of such a video to form a decision about safety is unflawed or
21 unfair? (Assignment of Error 1)

1 **Issue No. 5.** Well after the video was produced, an engineer was
2 contracted by Hillside Elevator to watch their marketing video and make
3 written claims against the Rehmke safety hook. The engineer's letter
4 makes claims about Rehmke safety hooks that result in an instantaneous
5 stop. A properly maintained Rehmke Mark 12 tram contains a hook
6 assembly, that when deployed, subsequently activates hydraulic braking
7 devices, gradually bringing the tram to a stop over a fixed distance. The
8 Rehmke Mark 12 tram does not result in an instantaneous stop with energy
9 absorbed instantaneously as the engineer states. It is possible that
10 Rehmke's earliest models, produced decades before the appellant's tram,
11 may have had inferior braking systems, as Rehmke designs evolved over
12 time. However to claim that all Rehmke trams have safeties that produce
13 a hard stop with energy absorbed instantaneously shows this engineer's
14 lack of familiarity with the evolution of Rehmke designs. Ron Williams is
15 the engineer with whom the Dept consulted. Ron Williams, failed to
16 appear when subpoenaed to Administrative court to substantiate his
17 claims. Is this engineer's letter admissible evidence when, upon only
18 viewing the video years later and not viewing the actual demonstration, no
19 opportunity existed for the engineer to 1.) personally determine the
20 identity of the trams shown in the video, 2.) determine the appropriateness
21 of the slope of the track for the trams, 3.) verify the presence/or
22 completeness of the safety hooks for the trams observed, 4.) determine the

1 condition of the trams and the safety hooks demonstrated in the video, or

2 5.) be available for testimony to answer these ambiguous claims?

3 (Assignment of Error 1)

4 **Issue No. 6.** The Dept testified that they brought this action because of
5 concerns that they were made aware of by "industry representatives"
6 during Elevator Safety Advisory Committee meetings. The Dept provided
7 a CD of the audio-recorded and transcribed proceedings of those quarterly
8 meetings in discovery. For convenience, all excerpts from those
9 transcriptions that mentioned Rehmke trams were provided for Rogoff.

10 The excerpts show that there were no inputs received from "industry
11 personnel" during Elevator Advisory Committee meetings that discussed
12 the safety of the Rehmke hook. Can the Dept's claims of "concerns from
13 industry" that are then belied by the transcribed recordings from those
14 meetings be considered evidence that Rehmke trams are unsafe?

15 (Assignment of Error 1)

16 **Issue No. 7.** The Dept tells us on their website and in their testimony that
17 they brought this action because of 1.) a video they were given by Hillside
18 Elevator, 2.) an incident observed by a Dept employee during a previous
19 employment with the Dept, and 3.) concerns voiced by "industry
20 representatives" during Elevator Safety Advisory Committee meetings.
21 Additionally the CEI added his third party, unsubstantiated allegations
22 about an incident that occurred in another state. They also make reference

1 to the engineer contracted by Hillside Elevator to make claims about
2 Rehmke trams for which no correlation is provided by the Dept to the
3 Appellant's tram. The Dept testified there have been no records of failures
4 for the more than 30 Rehmke trams in Washington, despite the fact that all
5 these trams were in service since prior to 1994, comprising over 1000
6 years of service. The Dept has not brought a single accident report,
7 inspection report, or any other kind of document to substantiate their
8 allegations. Do the Dept's unfounded allegations, unsubstantiated claims,
9 and reliance upon a biased marketing video constitute sufficient evidence
10 that the Dept, in determining that the Rehmke tram was unsafe, employed
11 a decision making process that was unflawed, fair, and constitutional?
12 (Assignment of Error 1)

13 **Issue No. 8.** In 2005, the Dept. drafted an advisory letter concerning the
14 Rehmke tram. In 2008, the Dept finally mailed this same advisory letter
15 to inform Rehmke tram owners that the Dept was no longer approving
16 these safeties for new installations or alterations. The Dept explains that
17 the 3 year time span between the draft of the advisory letter and the
18 issuance of that letter was used to validate that the information the Dept
19 received was "not merely a ploy to gain business", however the Dept did
20 state in their 2005 draft that they had already made the determination that
21 the information "was not merely a ploy to gain business". The timeline of
22 the Dept actions clearly show that they did not consider this a "very real

1 and very immediate danger". Instead of informing homeowners, who
2 were allegedly at risk, if indeed this was a "very real and very immediate
3 danger", the Dept instead informed only the industry, and told them to
4 pass it along. With only 39 homeowners to advise, the Dept ignored its
5 minor responsibilities which would have been easily accomplished by
6 mailing each homeowner a letter. Additionally, the advisory letter
7 identifies the Rehmke safety hook as the only concern. The Rehmke
8 safety hook is not used in the day to day operations of the tram. The hook
9 only deploys in catastrophic situations, where either the tram car is freed
10 from its cable tether, the cable tether is freed from its winding drum, or the
11 cable breaks. Over 39 Rehmke trams have been in service since before
12 1994 without a single accident documented in the greater than 1000 years
13 of service reflected. This is excellent service record. The court referred to
14 this new action of the Dept as justified by a "very real and very immediate
15 danger", based on information from industry experts, a video, and "other
16 input." Based on the quality of evidentiary foundation provided by the
17 referenced video, the "information from industry", and other Dept named
18 sources, and the Dept's lack of urgency, can the court conclude that Dept
19 actions supported that this was a "very real and very immediate danger"?
20 (Assignment of Error No.1)

21 **Issue No. 9.** The tram's emergency braking system does not meet the
22 definition of a Type A or Type B safety. However, within the regulations

1 is an allowance for a variance which must be approved by the Dept. Does
2 the issuance of a variance, allowed by regulation RCW 70.87.110, make
3 the tram's emergency braking system consistent with required regulations?
4 (Assignment of Error No.1)

5 **Issue No. 10.** Administrative procedures RCW 34.05.328 provide that,
6 "despite its importance Washington's regulatory system must not impose
7 excessive, unreasonable, or unnecessary obligations." On the red-tag that
8 was attached to the Appellant's tram, was the following statement. "This
9 lift has been red-tagged because of a recall for the Rehmke overspeed
10 safety hook device. Replacements must include Type A safeties."

11 Rehmke never recalled this tram or its safety hook. He died in 1997.
12 Type A Safeties are not available for retrofitting on trams. This action by
13 the Dept requires that individual trams be replaced by homeowners at a
14 cost of \$125,000.00 (Cost of Hillside Elevator tram replacement featuring
15 a Type A safety). Despite the excessive costs of the mandated
16 replacement system, and despite multiple attempts the Appellants
17 attempted to negotiate through the AAG, the Dept has never agreed to
18 meet to discuss simple, affordable, and alternative methods like 1.) seat
19 belts (Rehmke trams are all fitted with seats and ample steel structure) or
20 2.) installation of additional cross bars on the rail to limit the potential
21 tramcar speed to less than walking speed after the hook sets and before the
22 brakes activate. Can the requirement to replace a tram at a cost of

1 \$125,000.00, when that tram has an excellent safety record and no reports
2 of incident or failure, and no independent engineering assessment to
3 validate Dept claims against the tram, be considered an excessive,
4 unreasonable, or an unnecessary obligation? (Assignment of Error No.2)

5 **Issue No. 11.** RCW 70.87.110 allows for "approval or waiver when
6 requirements are shown to be impracticable, such as involving expense not
7 justified by the protection secured." RCW 70.87.110 also states that "the
8 Dept shall not allow the modification or waiver unless equivalent or safer
9 construction is secured in other ways". Prior to installation, manufacturer
10 Rehmke submitted documents to the Dept that showed his design, which
11 included an alternative approach to a Type A or Type B safety. To
12 support his design concept, Rehmke provided a document that explained
13 how his systems approach specifically provided back-up methodologies
14 for those components that could fail resulting in a slack cable condition.
15 This approach works to prevent failure in the first place. In his design,
16 Rehmke provides equivalent or safer construction at the whole system
17 level, not at the individual component level. The Rehmke safety design
18 involved more than just the hooks. The system included a positive
19 displacement hydraulic pump overspeed governor system, an oversized
20 hoisting cable that provided twice the strength required by WAC296-94, a
21 back up or secondary tramcar-to-cable connection, additional "dead
22 wraps" on the winding drum to prevent detachment of the cable from the

1 drum, and finally the emergency and shock-absorbed Rehmke hooks to
2 engage the cross bars. This was the systematic Engineering solution that
3 was proposed to maintain an equivalent level of safety as required by
4 RCW 70.87.110. This data was reviewed by Dept employees in 1989,
5 who subsequently granted approval for the installation. After the tram was
6 installed, on-site installation review and acceptance testing was performed
7 by two Dept inspectors. The Dept inspectors 1.) instructed Rehmke to
8 obtain a variance for the alternate safety features and 2.) issued a
9 temporary 30 day Operating Permit. They did not direct Rehmke to make
10 modifications to the installed tram. 3 days later Rehmke provided a
11 Request for Variance for the specific items dictated by the inspectors,
12 referring to the instructions from the inspectors and to Roblee, the tram's
13 original owner. 27 days later an acceptance letter was issued by the Dept.
14 The cover letter informs specifically that the attached letter is an
15 acceptance letter. The RCW states that "the Dept shall not allow the
16 modification or waiver unless equivalent or safer construction is secured
17 in other ways" Can the Administrative Law Court have the authority to
18 restrict this RCW allowance, which does not currently mandate that
19 modifications or waivers can only be granted at the component level?
20 (Assignment of Error 3) Does the terminology "other ways" permit a
21 different approach that provides several methodologies for improving
22 safety to ensure that the tram does not accelerate enough to harm life or

1 limb? (Assignment of Error 3) Could current Dept employees 1.) who are
2 not engineers, 2.) demonstrate that they do not realize that not all Rehmke
3 model hook assemblies are the same, 3.) do not realize that the Rehmke
4 Mark 12 tram has a braking hook assembly that does not result in an
5 instantaneous stop, 4.) who have never seen the appellant's tram, 5.) are
6 unfamiliar with its level of maintenance performed by its engineer owner,
7 6.) come 27 years later and second guess the decision-making processes of
8 those who took time to review drawings and assess for equivalent safety,
9 review the installation of the tram, witness acceptance testing, and then
10 make informed decisions about the Appellants tram? (Assignment of Error
11 3)

12 **Issue No. 12.** Dept employee Ernstes testified that the Dept historically
13 issued a letter in response to a request for variance. If acceptance of a
14 variance occurs, according to the testimony of Ernstes, the Dept does issue
15 an acceptance letter; otherwise the Dept would issue a letter rejecting the
16 request for variance. McLaughlin, in a letter to the Dept CIE in 1992,
17 points out that listing allowed variances on the Operating Permit would
18 work to prevent confusion in the future. The Dept did not adopt that
19 insightful suggestion. CEI Day states as recorded in the 8.16.2005
20 Elevator Advisory Committee Meeting transcription that when he began
21 his job he was "working on our filing system. It was in quite a state of
22 disarray....and everything that happened throughout the years, it just ended

1 up in a huge turmoil." Is it the responsibility of the Dept, who has
2 authority to grant approval and variances over trams that will be
3 successively transferred to new owners, to maintain complete sets of
4 records for each tram? The Dept failed to retain what existing records
5 show to be an acceptance letter (properly positioned in time to be a
6 required variance), and there is absence of a letter that refuses acceptance.
7 In this instance can the Dept take action against a private party when the
8 Dept had a document that indicated that that Dept had key information
9 crucial to the action but failed to retain the record? Is it the Dept's
10 responsibility to retain key documents that they generate and make them
11 available for subsequent homeowners and the Dept's inspectors, or is it the
12 subsequent homeowner's responsibility to obtain historical records that
13 were generated before the homeowners took possession of the property?
14 (Assignment of Error No.3), (Assignment of Error No.4), (Assignment of
15 Error No.9)

16 The possession of an operating permit that does not cite variances allowed
17 for a particular tram can create confusion and follow-on difficulties when
18 the tram is undergoing annual inspection. This situation was anticipated
19 by homeowner Bob McLaughlin when he wrote in 1992 to William
20 O'Hara, the CEI at that time. McLaughlin requested that the Dept cite the
21 variances on the tram's operating permit to prevent later confusion,
22 particularly because there were no trams with Type A safeties available in

1 the state at that time (therefore all trams would require variances). In the
2 1989-1993 timeframe, before computers became widely used, was it the
3 homeowner's responsibility to obtain documents, historical information,
4 and approvals issued to previous owners by the Dept and make these
5 available to inspectors who visit their properties? (Assignment of Error
6 No.7) Is it the Dept's inspector's responsibility to obtain such documents
7 as variances and approvals prior to conducting an inspection?
8 (Assignment of Error No.7) Is it the Dept's responsibility to ensure that all
9 known documents pertinent to a conveyance, particularly acceptance
10 letters, are in the Dept's possession prior to sanctioning homeowners?
11 (Assignment of Error No.3), (Assignment of Error No.4)

12 **Issue No. 13.** During the installation application and approval process in
13 1989, Rehmke provided the Dept with detailed information of the Rehmke
14 Mark 12 Safety Features in Specification No. 120, and included
15 installation drawings. The Dept charged Rehmke a planning review fee.
16 The Dept subsequently approved the installation, knowing that the
17 Rehmke tram could not meet the Type A or B safety requirements
18 mandated by WAC296-94. Because there were no Type A or B safeties
19 commercially available for trams in the State of Washington in 1989, as
20 stated by McLaughlin in his letter, and because Type A safeties for trams
21 did not become available until~ 2003 as explained by Ernestes in her
22 testimony, to be complaint with regulations this Dept in 1989 could either

1 issue variances or approve no trams. Therefore this tram would require an
2 alternate approval to an "equivalent level of safety by other means", as
3 allowed by RCW 70.87.110. Rehmke stated on the cover letter for the
4 installation application, "if we can supply any additional information,
5 please do not hesitate to call upon us." There is no record that the Dept
6 requested more information. There is no record that at any time the Dept
7 required a design change or rejected the design. The installation permit
8 was issued to owner Roblee. After installation of the tram, two Dept
9 inspectors reviewed the tram's installation and witnessed all acceptance
10 tests. On the test report is written " All acceptance tests were performed,
11 no apparent deficiencies were found." This could appear confusing if there
12 was ever a goal of approving this tram to Type A or Type B safety
13 requirements, but where the goal was to determine equivalent safety, these
14 Dept inspectors would have been looking at the function of the Rehmke
15 hook and its braking system and other added safety features that
16 significantly diminished the possibility of slack cable condition to a very
17 low probability. In this Rehmke system, the hook engages the cross bar,
18 and then braking action begins with the speed would reduced by the
19 extension/resistance of 2 commercial NAPA heavy duty shock absorbers.
20 Three additional fail safe features provide double protection that the tram
21 will not go into slack cable condition. The Dept employees would have
22 seen demonstration of these additional features. The Dept. issued a

1 temporary 30 day operating permit subject to the owner or his
2 representatives obtaining variances on 3 paragraphs (5 items) of the WAC
3 296-94, including the -170 safety. Neither the inspection report or any
4 other document has been produced that directed the owner Roblee or his
5 representative Rehmke to do modifications or repairs to the tram. Three
6 days later Rehmke wrote a Request for Variance, referencing the inspector
7 by name, and addressed to the Dept of Labor and Industries Elevator
8 Division for those exact items noted on the inspection report. 27 days
9 later the Dept issued an acceptance letter to Roblee. This acceptance letter
10 had an attached cover letter that conveyed the "acceptance letter" and the
11 "new installation inspection results". The Dept has not produced a
12 rejection letter in response to the request for Variance, nor did the Dept
13 issue any other document that demanded further work to be performed
14 prior to issuance of an acceptance of this tram. Dept employee Ernestes
15 testified "the variances have always been a written document in response
16 to a letter" and "Every variance gets a letter back". In cross examination
17 when asked if she had any negatives responses to variance requests, she
18 responded "I have lots of those". When asked if she had one for the us
19 (Winston-Iden tram)? she responded, "No. There was no response to that
20 letter that I ever found". Ernestes also testified that the state only issued
21 permanent operating permits after corrections were completed. In the
22 instance of this tram, the only correction required by the Dept was that a

1 variance be issued. 34 days after the (now missing) acceptance letter was
2 issued, Roblee made application for the Operating Permit, which was
3 issued on for the tram by the Chief Elevator Inspector O'Hara on Dec 19,
4 1989. The acceptance letter is the critical piece of evidence and is the
5 responsibility of the Dept to archive and maintain. However, at the
6 August 16, 2005 Elevator Safety Advisory Meeting, the record shows that
7 the new Dept CEI, Day, stated that they were redoing their filing system
8 which was in a "state of disarray" resulting in "huge turmoil". All the
9 evidence supports that the acceptance letter was the positive response to
10 the variance requested and there is no evidence that a rejection letter was
11 created in response to the request. There is only evidence of an
12 acceptance letter. While it may be that the variance is lost, misplaced, or
13 misfiled, can the the Courts conclude that no variance was granted from
14 the preponderance of evidence presented herein. Does the fact that a
15 cover letter exists, is provided as evidence from the Dept, that conveys
16 from the Dept what it describes as an "acceptance letter" mean that an
17 acceptance was granted? (Assignment of Error No.3), (Assignment of
18 Error No.4)
19 Does the Dept have the responsibility to properly maintain a
20 comprehensive and intact set of documents that conveys approval of
21 conveyances to multiple homeowners, including most specifically

1 acceptance documents required to operate an elevator? (Assignment of
2 Error No.3), (Assignment of Error No.4)

3 Can the Courts conclude that no spoliation of evidence has occurred when
4 1.) the complete process to obtain a variance from installation approval to
5 issuance of a final Operating Permit was accomplished except the
6 Acceptance letter is missing, 2.) there is evidence of an “Acceptance
7 Letter” having existed, 3.) no evidence for a rejection letter exists for the
8 Appellants tram, despite Dept claims that every variance request received
9 a rejection or an acceptance letter, and 4.) a final operating Permit was
10 issued, and Dept employee testified that you only received a final permit
11 after corrections, and 5.) the Dept's filing system was in disarray,?
12 (Assignment of Error No.4)

13 **Issue No. 14** A current employee testified that the Dept issued permits
14 after the initial inspections. A temporary operating permit would be
15 issued for a limited time if corrections and/or variances were needed. The
16 same employee testified a second and permanent operating permit would
17 only be issued if the findings listed on the inspection report had been
18 resolved, either by incorporating necessary changes and receiving a final
19 inspection, or by receiving a variance. Can the court reasonably conclude
20 that in 1989 the Dept always issued permits independent of inspection
21 results in light of the testimony was offered? (Assignment of Error No.5)

1 **Issue No. 15.** According to Black's Law Dictionary, a permit is "In
2 general, any document which grants a person the right to do something. A
3 license or grant of authority to do a thing. Matter of Building Permit and
4 Zoning, 29 N.C A.pp. 749,225 S.E 2d647,649. A written license or
5 warrant, issued by a person in authority, empowering the grantee to do
6 some act not forbidden by law, but not allowable without such authority."
7 When purchasing a home with a tram, if a citizen of this state reviews the
8 latest Dept inspection reports, verifies that the posted non-expiring
9 Operating Permit is valid, and that the Operating Permit does not need to
10 be transferred, can a citizen reasonable rely on these Dept documents to
11 establish the acceptance of the device? (Assignment of Error No.5)

12 **Issue No. 16** The emergency safety on the Rehmke tram consists of two
13 hooks that are spring loaded to rotate down if the cable tension drops
14 below 500 pounds, the hooks then "grab" the next cross bar, with shock
15 absorbers then extending and slowing the car to a stop. The emergency
16 safety system uses both the shock absorbers and the yielding (slight
17 bending) of the track cross member in to dissipate the car's kinetic energy
18 during an emergency stop. The tram emergency safety can be fully tested
19 and the impacted track rung may be damaged and may require
20 replacement depending on the amount of load in the car and the associated
21 energy required to stop the car. Can the court conclude that an emergency

1 system cannot be fully tested just because a minor system component may
2 require replacement after the test? (Assignment of Error No.7)

3 **Issue No. 17.** The subject of this action pertains to a red tag that was
4 issued only because the Appellants tram contains a Rehmke hook. Prior to
5 administrative hearings, the Appellants met in regular phone conversations
6 with the AAG representative and with Administrative Judge Stephen C.
7 Smith. The Appellants were informed that the only topic of the
8 Appellant's Administrative hearing was to be the Rehmke hook; and that
9 other issues the Dept had were not raised on the red tag, were therefore not
10 be the subject of the Administrative hearings.. These meetings were
11 recorded and are part of the record.

12 During the 1989 installation timeframe of the Appellant's tram, the initial
13 inspection report does not say to fix or replace the newly installed tram,
14 but directs the homeowner or his representative to apply for a variance.
15 This is reasonable since Type A or B safeties were not available in
16 Washington. The tram was again inspected on October 2, 1990 by the
17 Dept. That inspection report of the Roblee tram was reviewed by the
18 Appellants prior to purchasing their home. That 1990 report only
19 identified the car height and the gates as issues but, not the safety hook.
20 The Appellants knew the car height and gates were issues that were easily
21 rectifiable, although not necessarily recommended by the manufacturer.
22 The safety, approved by the Dept prior to installation, is a fundamental

1 design issue. The Appellants could not know the safety was an issue
2 based on the October 2, 1990 inspection report and the valid Operating
3 Permit. In the spring of 1993, ~6 months after purchasing their home, Ms.
4 Winston contacted the Dept and requested the annual inspection on their
5 tram. Iden testified that he observed the Inspector came without any of
6 our tram records or documentation, holding only the code. (The variances
7 allowed are unfortunately not listed on the Operating Permit.) This 1993
8 inspection listed the safety (WAC 296-94 -170) as an issue, inconsistent
9 with the previous inspection report. Can the court conclude that state
10 consistently communicated to the Appellants that the tram safety needed
11 to be fixed? (Assignment of Error No.8)

12 **Issue No. 18.** In 1997, the Washington State Legislature removed the
13 requirement for annual inspections for any tram that serviced a single
14 family dwelling. Appellant Iden testified that he received a certified letter
15 in 1997 from Chief Elevator Inspector Jan Gould. As requested in the
16 letter, Iden called her immediately. Gould's primary concern was whether
17 or not the Winston-Iden tram was being used exclusively for a single
18 family. Iden confirmed that the Appellants are a married couple with
19 different last names, and that our tram was only for use by our family.
20 Gould then informed Iden that he would be exempted from annual
21 inspections. Gould and Iden also discussed the possible need for a
22 inspection on the items listed on the 1993 inspection report. Iden

1 informed Gould that he did not need an inspection, because it was his
2 understanding that those items identified in 1993 had been actually
3 covered by a variance requested by Rehmke at the original installation.
4 Iden had confirmed this with Rehmke, who lived two doors down. Gould
5 told Iden that she would look into it and never got back to the appellant.
6 Subsequently, the Dept did not subject the Winston-Idens to annual
7 inspections that would have occurred had this conversation never taken
8 place. It is also notable that despite the issuance of this letter Gould never
9 r again contacted Iden to inform him that she had not found the
10 "acceptance letter" that would have granted the variance. In evidence is
11 the cover letter that conveyed an "acceptance letter" at the time of the
12 tram's installation and testing. While that letter is now missing it is not
13 known when it went missing. Can the court conclude that the Appellants
14 were non responsive to the 1997 letter when their testimony is that they
15 responded promptly, as requested, and had a conversation with the CEI
16 Gould about 2 issues of concern to the Dept? The lack of follow-on
17 annual inspections, and the lack of a letter or phone call back from CIE
18 Gould only supports that the variance had been issued, and found by
19 Gould, or that she found at least the cover letter that conveyed the
20 acceptance letter, and recognized that a variance had been issued.
21 (Assignment of Error No.9)

1 **Issue No. 19.** The Red Tag the Dept left on the Winston-Iden tram stated
2 “ This lift has been red tagged because of a recall of the Rehmke
3 overspeed safety hook device. Replacements must include Type A
4 safeties.” Administrative procedures RCW 34.05.328 (c) states that
5 “Despite its Importance, Washington's regulatory system must not impose
6 excessive, unreasonable, or unnecessary obligations; to do so only
7 discredits government, makes enforcement of essential regulations more
8 difficult, and detrimentally effects the economy of the state and the well-
9 being of our citizens”. There is no Type A safety retrofit available for the
10 Rehmke trams, the requirement that “Replacements must include Type A
11 safeties” creates an excessive, unreasonable requirement on the tram
12 owners. CEI Jack Day in his 2005 draft of the advisory letter stated “You
13 may have a few alternatives for upgrading”, that statement was removed
14 from the final letter. Had the Dept done a feasibility study as advised and
15 outlined in RCW 34.05.313 which states “During the development of a
16 rule or after its adoption, an agency may develop methods for measuring
17 or testing feasibility of complying with or administering the rule for
18 identifying simple, efficient and economic alternatives for achieving the
19 goal of the rule.” The Dept would have known that the Type A mandate,
20 required tram replacement. The Appellants attempted to offer some ideas
21 as economical alternatives to address the Dept stated concerns with the
22 Rehmke safety hooks (CP 11, Appellant Ex 19, pg 204-206). The Dept

1 stated concerns were that the car would gain too much speed prior to a
2 hook's engaging the next rail cross bar and a person potentially being
3 injured during an abrupt stop. Appellant's ideas included that 1.) seat
4 belt/shoulder harnesses could be added to the existing tram seat. Adding
5 track cross bars would reduce the distance between adjacent cross bar to
6 half, and limit the potential tram speed to less than walking speed before
7 the brakes were activated. Periodic replacement of hoist cable and fittings
8 are also good alternatives to Dept stated concerns. These suggestions
9 were not offered as an upgrade equivalent to a Type A or B safety. At a
10 meeting at the Winston-Iden property on May 29, 2014 with Jack Day,
11 Appellant Vicki Winston proposed seat belts, and Day's gruff response
12 was "I wouldn't be there to put your seat belt on for you". That statement
13 clearly demonstrated the Dept's unwillingness to work together on
14 alternative solutions. The Appellants never offered these ideas as ways to
15 become equivalent to Type A or B safety, but ways to ease the minds of
16 Dept employees and reduce the financial burden on tram owners. Can the
17 court definitively conclude the examples of the economically viable safety
18 improvement ideas were being proposed by the Winston-Iden as an
19 Equivalent to a Type A or B safety? (Assignment of Error No. 10)

20 **Statement of the Case**

21 **History**

1 In 1989, when the Appellants tram was installed, Type A or B safeties
2 were required by WAC 296-94. However in 1989, while Type A or B
3 safeties were available for other types of elevators, Type A or B safeties
4 were not commercially available for hillside elevators, or trams. (CP 11,
5 App Ex 27, pg. 254-256) Type A safeties for trams in Washington only
6 became available between 2003 and 2005, with a couple of prior attempts
7 resulting in bankruptcy of the companies (CP 11, RP 1, pg 145, line 6).
8 Local manufacturers of trams that were installed in Washington in 1989
9 would be required by RCW 70.87.110 to have an exception granted.

10 RCW 70.87.110 states "The requirements of this chapter are intended to
11 apply to all conveyances except as modified or waived by the Dept. They
12 are intended to be modified or waived whenever any requirements are
13 shown to be impracticable, such as involving expense not justified by the
14 protection secured. However, the Dept shall not allow the modification or
15 waiver unless equivalent or safer construction is secured in other ways."

16 **Introduction to Rehmke Trams**

17 Rehmke, a professional engineer, was a local manufacturer/installer of
18 trams. He operated in the area for ~30 years, helping others design their
19 trams, and eventually beginning his own company. Many trams exist
20 along our Washington slopes today that were not produced by Rehmke
21 but which may have incorporated some or all of his non-patented features.
22 This presents the possibility of look-a-likes. A central issue in this case is

1 a lack of identification of the trams the Dept used as a basis for
2 determining that the appellant's tram was unsafe.

3 The Appellant's Tram is Installed

4 In 1989, Rehmke, providing what he believed to be a system that provided
5 an "equivalent level of safety in other ways" as required by RCW
6 70.87.110, applied for the variance as specifically instructed by the Dept at
7 that time (CP 11, Dept Ex 17, pg 170-172). Although the current Dept
8 was required during discovery to provide all Dept procedures that
9 explained the process for approval in those days, it failed to do so (CP 11,
10 Dept Ex 20, pg 207-21). A central question is whether the Dept had the
11 responsibility to retain all critical records, for acceptance or rejection of a
12 tram. Lacking those procedures, we can only examine the records to see if
13 Rehmke successfully received acceptance of his request for variance. The
14 sequential process Rehmke used to obtain a variance was as follows:
15 Rehmke submitted an installation application on Sept 19, 1989, which was
16 approved on Sept 20, 1989 by William O'Hara, the Chief Elevator
17 Inspector at that time (CP 11, Dept Ex 16, pg 163-169). In a cover letter
18 for the installation application, Rehmke notified the Dept that he
19 anticipated that the installation would be complete on September 28, 1989
20 (CP 11, Dept Ex 15, pg 162). The Dept at some point in time was
21 provided Engineering drawings of the tram, as well as specifications for
22 the safety features of the system (CP 11, Dept Ex 20, pg 175-179). An

1 October 16, 1989 inspection report reveals that two Dept inspectors were
2 on-site to inspect the installation and witness the acceptance tests that
3 were performed (CP 11, Dept Ex 14, pg 161 and CP 11, Dept Ex 11, pg
4 156). While a lack of Dept procedures is problematic, the Inspection
5 report reveals that all "acceptance tests were performed. No apparent
6 deficiencies were found." The inspection report then states that "a permit
7 was issued for 30 days subject to the owner or his representative obtaining
8 a variance for the following:

- 9 A) WAC 296-94-110 #1 (car enclosures)
- 10 B) WAC 296-94-120 #2, #3, #4 (car doors or gates)
- 11 C) WAC 296-94-170 #3 (car safeties and governors)"

12 Three days later, on October 19th, Rehmke submitted his request for
13 variance, in the form of a letter to Chief Elevator Inspector O'Hare (CP 11,
14 Dept Ex 17, pg 170-171). Rehmke specifically addressed each issue noted
15 on the inspection report, and offered to make modifications "If there are
16 any modifications you wish, we will be happy to make them." In this
17 variance request, Rehmke referenced his customer, Roblee. On November
18 15th, the Dept conveyed an acceptance letter to Roblee. We know this
19 letter was issued because of the cover letter that conveyed it. The cover
20 letter specifically informed Roblee that it was an "acceptance letter". The
21 cover letter for the acceptance letter was provided by the Dept, but not the
22 attached acceptance letter, which this Dept says they cannot find. This

1 Dept's failure to retain or provide this acceptance letter is a key
2 consideration of this action. The acceptance of this tram is challenged by
3 the current Dept, and this forms the basis for subsequent Dept complaints
4 (CP 11, Dept Ex 18, pg 173). However on December 18th, 1989, shortly
5 after the "acceptance letter" was received by Roblee, Roblee submitted an
6 application and provided a payment for an Operating Permit from the Dept
7 (CP 11, Dept Ex 16, pg 163, and CP 11, Appl Ex 1, pg 259). The
8 Appellants submit that Roblee could now apply for the Operating Permit
9 because he received and saw the content of the acceptance letter
10 explaining that the requested variance had been granted. Dept employee
11 Ernstes testifies, "Now, getting your initial permit for 30 days, when you
12 get that, that says you've passed an inspection. You can pass an inspection
13 with corrections and have a timeline to complete them and then you
14 would--after that, you would get back then, an operating permit (CP11, RP
15 1, pg 107, ln 12). The bottom of the application tells us that Chief
16 Elevator Inspector O'Hara approved the request and issued the Operating
17 Permit on December 19, 1989.

18 **Inspections After Issuance of the Operating Permit**

19 On October 2,1990 Dept Inspector Robert Romero performed the annual
20 inspection on the newly installed Roblee tram. It is important to know that
21 Robert Romero was one of two inspectors who witnessed the initial testing
22 of the Roblee tram. Specifically, Romero was the inspector who attended

1 the onsite inspection and acceptance testing and directed that Roblee or his
2 representative apply for the variance for 5 items. On his 1990 inspection
3 report, Romero identified only minor issues limited to tram height and
4 gates (CP 11, Dept Ex 10, pg 154). These minor issues are not the subject
5 of this action by the Dept, who red-tagged only because our tram
6 possesses a Rehmke safety hook. The transcript for this discussion (CP11,
7 RP2, pg 26 lines 19- 20) includes an important typing error, where the
8 transcript should state that "But by 1990 there was another inspection of
9 our tram and the hook wasn't identified." Apologies from Appellant
10 Winston who was having problems with asthma that day. (CP 11, Dept Ex
11 10, pg 154).

12 Additional information:

13 Prior to the initial Administration hearing that preceded the Superior Court
14 Hearing, the Appellants discussed this case with the AAG representative
15 for the Dept and Judge Stephen C. Smith. The Appellants, appearing pro
16 se, asked Judge Smith if any other open issues such as these tram doors
17 and heights could become a topic in the course of the coming hearing.
18 Judge Smith informed us, in those meetings, that since this red tag only
19 addressed the safety of the Rehmke hook, and brought no other
20 components into question, that the subject of this action would be limited
21 to the hook and would be the only topic allowed in the hearing. Judge
22 Smith informed us that these telecons were being recorded, and would be

1 included on the record. Shortly before our administrative hearing , Robert
2 Krabill was reassigned as our Judge, and we submit that Krabill did not
3 honor this instruction from Smith that we were given.

4 The Appellants purchased the home where the tram is located in October
5 of 1992, and requested an annual inspection in the spring of 1993. The
6 inspector arrived at our tram where he met appellant Iden on June 24,
7 1993. Appellants testified that (RP 2, pg 30, ln 12) that the inspector
8 carried with him only the WAC. Iden further testified that the inspector
9 stood in the middle of the tramway to test the brake as the tram moved
10 toward the inspector, and Iden had to tell the inspector to move out of the
11 tramway. Appellant testified that such lack of preparation on the part of
12 the inspector, and unsafe actions on the part of the inspector caused
13 engineer Iden to question this inspector's ability to perform his job safely.

14 Iden observed that the inspector, in bringing only the WAC, that the
15 inspector failed to bring our tram's records to the inspection. McLaughlin,
16 a homeowner, anticipated this problem in his letter to Chief Elevator
17 Inspector O'Hara 8 months before our inspection, "WAC 296-94-
18 170.(Section 2) requires the use of a device (Type A or B safeties) which
19 is not commercially available to homeowners. I request that these be
20 deleted until such a time as the device is readily available."..."In the event
21 an inclined passenger elevator does not meet a provision of this chapter,
22 but the enforcing authority deems that an equivalent level of safety is

1 achieved the elevator will be approved." ... "any sections so waived will be
2 noted on the approving certificate. This is to bring the code into line with
3 current practice"(CP 11, App Ex 27, pg 256). Because the unprepared
4 inspector did not bring the tram's pertinent records, and because the
5 variances were not listed on the Approving Certificate (the Operating
6 Permit), the inspector restated all the original items noted by the two
7 inspectors who reviewed the Roblee tram's installation in 1989, and
8 instructed Rehmke to obtain a variance.
9 (CP 11, RP2, pg 30, ln 12)
10 1997 Legislative Action and Dept letter.
11 In 1997 the Washington Legislature removed the requirement for annual
12 inspections of private trams. The Appellants received a letter from Jan
13 Gould, Chief Elevator Inspector. Gould noted two concerns on the letter,
14 and an instruction to phone the Dept (CP 11, Dept Ex 6, pg 146). Iden
15 testified, "So we got a letter from Jan Gould, who was the chief at the
16 time. And -- and it said -- and she said, basically, if there's a problem with
17 -- if -- if these facts are not correct, get back to me. I called her
18 immediately, and said we were a single family dwelling. My wife just
19 never chose to change her last name, and that -- that we understood that
20 the operating permit and the variance were items that were identified in
21 previous inspections were requested through a variance through Bill
22 Rehmke. She said she'd look into it and get back to me. The next time I

1 heard from the Dept of Labor & Industries was when the 2008 letter was
2 delivered" (CP 11, RP 1, pg 277, line 7). That this conversation took
3 place is evidenced by two factual negatives including 1.) the Dept never
4 again contacted the Appellants about an annual inspection, which they
5 would have been required to perform without this personal clarification,
6 and 2.) by the fact that Jan Gould never called or sent a follow up letter to
7 inform us that they had not found the "acceptance letter" for the variance
8 that Gould and Iden discussed in 1997. In 1999, a tram manufactured by
9 Hillside Elevator and possessing a Rehmke hook was installed less than
10 two feet away from the appellant's property line. This tram, identified by
11 the Dept as RIE #8512, with an identical hook configuration to ours, was
12 approved by the Dept in 1999. The allowance for this same hook
13 configuration, that we observed in 1999, assured the Appellants that the
14 hook was still being accepted by the Dept's as late as 1999.

15 Washington Type A Safeties Become Available in 2003

16 Washington State's first commercially available trams possessing Type A
17 safeties became available ~ 2003. In 2005 Dept Chief Elevator Inspector
18 Day started working at the Dept and about the same time Dept employee
19 Ernstes returned to work at the Dept (CP 11, RP1, pg 35, ln 7 and (CP 11,
20 RP1, pg 95, ln 10). By November 4, 2005 Day had viewed Hillside
21 Elevator's marketing video and wrote a draft letter stating his concerns
22 with the Rehmke hooks. Day established by the time of his draft that he

1 had already discussed it with industry to "make sure it wasn't a ploy to
2 gain business" (CP 11, Appl Ex 6, pg 273-274). In the Dept's brief, the
3 Dept says that they learned about the concerns from industry, in the
4 Elevator Safety Advisory Committee meetings (CP 11, RP1, pg 41, ln12).
5 The proceedings from these meetings have a complete absence of
6 discussions on Rehmke hook safety, introduced by "industry
7 representatives." The Rehmke tram hook safety is discussed by Day and
8 Ernstes **only after** the Dept issued the red tag to Rehmke tram owners (CP
9 11, Appl Ex 21, pg 232-242).

10 Day did not release this letter until 2008, adding that Rehmke hook
11 safeties would no longer be approved for new installations or alterations
12 and keeping the statement that he "wanted to be sure that it wasn't a ploy
13 to gain business". Day explained in the February 19, 2013 Elevator Safety
14 Meeting Minutes that "The 2008 letter was basically created for the
15 industry in itself so that they could explain to the customers that they serve
16 that there's not a sales ploy on their behalf in taking care of these Rehmke
17 design flaws (CP11, Appl Ex 21, pg 237 line 6-10) However, Day had
18 already made this same statement in his 2005 draft (CP 11, Appl Ex 7, pg
19 275-276).

20 **Summary of the Argument:**

21 The Appellants argument centers largely around whether or not the Dept
22 brought applicable, reasonable, factual, substantiated evidence when

1 taking action against the Appellants. The Dept never saw or assessed the
2 appellant's tram prior to red-tagging the appellant's tram, they red-tagging
3 the Appellants tram only because it had a Rehmke hook. The Dept was
4 led to believe these red-tags were warranted 1.) by a misleading and
5 misrepresentative marketing video produced by Hillside Elevator, and 2.)
6 a letter (contracted by Hillside Elevator) from engineer Ron Williams,
7 who viewed the video and made statements about trams that were
8 unidentified in the video and about which Williams could not have
9 personal knowledge as to the identity,3.) from a Dept employee
10 "personally witnessing what happens during a safety test" (16 years
11 before, during a previous employment with the state, and without bringing
12 the required record to substantiate her claim and the accuracy of that
13 claim, and 4.) from reports from industry personnel that these trams were
14 not being maintained. The Appellants are engineers and perform the
15 maintenance on their own tram, therefore the industry personnel did not
16 have knowledge of our tram's maintenance. We submit that a review of
17 the quality of information that this Dept used to determine that Rehmke
18 trams were unsafe will show that this Dept used extremely poor judgment.
19 In the instance of the Appellants, the Dept could only have considered
20 biased evidence (the video), non-applicable evidence (Ron Williams'
21 statement), one unsubstantiated claim from Dept employee Day, and one
22 unsubstantiated claim from Dept employee Ernstes, and the completely

1 unsubstantiated claims that Day learned about industry concerns in
2 Elevator Safety Committee meetings. The Dept also did not do a thorough
3 document review prior to red-tagging the appellant's tram. Had they done
4 this, they would have determined that there was a key document known to
5 be in existence and called an "acceptance letter" missing from their
6 records. Review of the documents before and after this missing
7 acceptance letter was issued support that this letter was most certainly a
8 variance, requested only days before that missing letter was issued. Day
9 knew that the records were in disarray and in turmoil (Elevator Safety
10 Committee meeting minutes dated 8.16.2005, pg 10, ln 19) when he came
11 to the Dept in 2005; this Dept had a particular responsibility to carefully
12 check records before taking action against tram owners. The Appellants
13 submit that the Dept had responsibility to use good, informed judgment
14 that would preclude the Dept from taking substantial action against the
15 Appellants without factual basis. The Dept had the responsibility to act in
16 accordance with Administrative Procedures that required that the Dept not
17 demand excessive or burdensome requirements, particularly when the
18 Dept never performed their own independent review and investigations of
19 individual trams, to remove the stigma of bias, and provide some factual
20 basis before taking substantial action against the Appellants. We do not
21 seek any relief other than releasing us from this unnecessary burden that
22 requires us to replace our tram at a cost now in excess of \$125,000.

1 **Conclusion**

2 We ask that the Court conclude that Spoliation of Evidence has occurred,
3 and grant Laches, or Equitable Estoppel.

4 **Spoliation of Evidence**

5 Key documents known to exist were not produced by the Dept in
6 Discovery. These documents are essential to provide evidence of our
7 trams approval, but their production by the Dept would have prejudiced
8 the Dept. In one instance, we found a cover letter that exists that
9 conveyed (and provides evidence for the existence of) the Dept's
10 acceptance letter to our tram's original owner issued after a request for
11 variance. By the detailed analysis provided, we can see that this missing
12 document was the acceptance letter. The Dept had a responsibility to
13 maintain this document, and this document would have strongly
14 prejudiced the outcome of previous hearings. Secondly, Ernstes,
15 according to Elevator Safety Meeting minutes from 2-19-2013 (CP11,
16 Appl 21, pg 234, ln 3) stated, "that one thing a lot of these (Rehmke) trams
17 had was variances." When Winston cross examined Ernstes in 2015, and
18 asked "Do you have a variance for every approval of a Rehmke tram?
19 Ernstes replied "No, there were no variances." Here 2 years later, Ernstes
20 denied that the elevators had variances (CP11, RP 1, pg 148, ln 19). The
21 Dept did not produce these variances when requested during discovery.
22 These variances also would have prejudiced Dept outcomes at our January

1 hearing. Again, we see the appearance of spoliation of evidence on the
2 part of the current Dept.

3 **Facts:** Laches is an equitable defense that can bar a claim that is
4 unreasonably delayed and prejudices the defendant. This defense can be
5 invoked when loss or degradation of evidence, favorable to the defendant,
6 occurs. This defense can be invoked when loss of witnesses favorable to
7 the defendant occurs through death or memory loss. And this defense can
8 be invoked when economic decisions are made that would not have been
9 made if the claim had been brought earlier.

10 **Discussion:** We strongly suggest that Laches provides an equitable
11 defense that applies to our situation. The Dept has engaged in an
12 unreasonable delay in bringing this claim forward, for a tram they
13 approved 26 years ago. Delay from the Dept in bringing this claim has
14 prejudiced us such that key witnesses such as Rehmke, our neighbor who
15 was also the builder and installer of our tram, has died. The Dept
16 personnel who witnessed our tram testing are no longer living or available.
17 We submit that the Dept's failure to assert any rights on this topic in a
18 timely manner justifies the claim being barred by Laches. Laches requires
19 that the unreasonable delay must prejudice the defendant. Examples of
20 such prejudice include evidence favorable to the defendant becoming lost
21 or degraded. One example of this prejudice was clearly demonstrated
22 when a cover letter informs us that an acceptance letter for our tram was

1 known to exist, but this acceptance letter was not produced by the Dept.
2 An example of loss of key information also occurred when Ernstes stated,
3 as recorded in the February 19, 2013 Elevator Safety Advisory Committee
4 meeting minutes referring to Rehmke trams, "one of the things a lot of
5 these elevators had were variances." (CP 11, Appl Ex 21, pg234, ln3). But
6 then Ernstes did not produce variances for the Administrative hearing 2
7 years later in January 2015. Petitioner Winston asked in cross
8 examination during the hearing, "Do you have a variance for every
9 approval of a Rehmke tram?" Ernstes responds, "no, there were no
10 variances." (CP 11, RP1, pg 148, ln 19). Ernstes testified that every
11 request for variance received a letter, but later stated, when referring to the
12 appellant's tram, "No, there was no response to that letter that I ever
13 found." (CP 11, RP1, pg 155, ln 19) The Appellants submit that they
14 were prejudiced when the Dept failed keep copies of procedures that
15 explained how the Dept conducted analyses to determine how equivalent
16 safety had been determined, and how the Dept documented acceptance for
17 equivalent safety. Prejudice occurs when in discovery, working
18 procedures used by the Dept in 1989, are found to be no longer available.
19 Another example of prejudice against us occurs when witnesses favorable
20 to us die. Rehmke, who designed, built, and installed our tram, and kept
21 careful records, has now passed away. He was an excellent engineer, and
22 we highly respected his work. He also was an unlimited source of

1 knowledge of Dept procedure, history, requirements, and had complete
2 knowledge of all the details of our tram, its design and acceptance process.
3 But the death of Rehmke ensures the absence of his excellent ability to
4 testify in our behalf or provide copies of key documents about all the
5 issues raised in this case. The state relied on testimony from current
6 employees who did not work for the Dept until at least 8 years after the
7 events of the original approval in 1989. Ernstes' speculative testimony
8 lacked foundation when she testified about her current work practices,
9 implying without personal knowledge, that these represented the Dept
10 practices and processes in place in 1989. The procedure of approving
11 these trams in 1989 when no Type A or B safety was commercially
12 available was never made available. One last and significant prejudice
13 against us is that we made economic decisions that we would never had
14 made if the Dept had brought this action forward earlier. We would not
15 have purchased our home if we knew the Dept was going to come back
16 and demand the replacement of our entire tram in the future. When we
17 purchased our home, we had 3 children and were facing imminent college
18 expenses. Petitioner Vicki Winston would not have retired in 2008, if we
19 had anticipated replacing our tram. We relied on the operating permit and
20 the Dept's Oct 2, 1990 inspection (CP 11, Dept Ex 10, pg 154-155) report
21 as evidence of the State's ongoing approval of our tram. This inspection
22 report identified only minor issues, car height and gates as Dept concerns.

1 | There was no indication that the emergency safety device, an integral part
2 | of the car design, was in question or not approved by the state. The
3 | current Dept now comes, 27 years after tram acceptance and lacking a
4 | complete collection of known records to second guess decisions made by
5 | employees of the Dept 27 years ago. The current Dept then demands that
6 | we make changes to our tram requiring full tram replacement at
7 | ~\$125,000.00 and we submit that this is a gross financial burden. We
8 | submit that these aforementioned instances of prejudice against us are
9 | sufficient to invoke Laches, barring this Dept action that was "slept on"
10 | for over two and a half decades. Rogoff said that the immediate danger
11 | was not known by the Dept in 2005. Evidence, from a finding in 1993,
12 | shows that the Dept wrote in an inspection report that the tram safety was
13 | not compliant with the code. If the Dept felt that the safety device of this
14 | tram was not sufficient at that time to be of equivalent safety, then the
15 | Dept should have acted at the time of the finding in 1993 and red-tagged
16 | the tram for non-compliance on a safety issue. But the Dept was
17 | inconsistent. They had no findings for the safety in 1990 inspection
18 | report, but then finding in 1993 that the safety had no variance and was
19 | then not of equivalent or safer construction, but did not act in a manner
20 | consistent with safety concerns. This is not consistent behavior on the part
21 | of the Dept.

22 | **Equitable Estoppel**

1 We respectfully submit that the conditions for Equitable Estoppel have
2 been met. We respectfully submit that we do meet the first element of
3 Equitable Estoppel. The first requirement of Equitable Estoppel requires
4 an affirmative statement by the Dept authorizing a variance. In fact, we
5 did receive an affirmative statement. The Dept made an affirmative
6 statement authorizing the variances when it issued the valid operating
7 permit in 1989, with no restrictions indicated on it, after variances were
8 requested. We were denied Equitable estoppel because it was determined
9 that no affirmative statement was made to Mr. Roblee, granting the
10 variance requested by Mr. Rehmke. In fact, issuance of the acceptance
11 letter by the Dept and then subsequent issuance of a permit without
12 limitations stated on it establishes the first element of equitable estoppel -
13 a statement, admission, or act inconsistent with present claims.

14 **Discussion:** In fact, the Dept did issue an acceptance letter after the
15 variance was requested. The Dept's failure to bring this document forward
16 does not mean that it did not exist at the time, or that evidence did not
17 exist about what the nature of the communication was, i.e. acceptance of
18 the requested variance. The Dept's failure to bring the acceptance letter
19 forward has the appearance of Spoliation of Evidence. The Dept failed to
20 bring any other document; including a correspondence log to provide
21 evidence they had possession of a complete list of their responses to
22 requests for variance for that time frame. In light of this information

1 above, we can only conclude that the variance was granted prior to the
2 operating permit issued on 12-19-1989 that replaced the temporary permit
3 issued on 10-16-1989.

4 The second element of Equitable Estoppel is reasonable reliance. We
5 respectfully submit that we do meet the second element of Equitable
6 Estoppel, which is reasonable reliance. The Dept did make a statement
7 upon which we could rely, in the form of an acceptance letter and an
8 Operating permit, issued after the tram was inspected by Dept employees
9 and tests witnessed. In addition, there is no way we could have known the
10 Dept would grant a final operating permit for a tram that the Dept deemed
11 unsafe. According to Black's Law Dictionary, a permit is grants a person
12 the right to do something....not allowable without such authority." In this
13 case, neither we nor the previous owners could legally operate the tram
14 without the final operating permit.

15 The document that states that an acceptance letter is being distributed to
16 Mr. Roblee supports the granting of the variance, despite the Dept's failure
17 to bring this record forward. The fact that the Dept did not bring a
18 rejection letter forward validates that the acceptance letter was for the
19 variance requested.

20 The Dept issued temporary operating permits only after initial inspection.

21 Mr. Roblee received the second and permanent permit in December of
22 1989, after the correction (issuance of the variance) had been

1 accomplished. This is in contrast to Krabill statement that at the time, the
2 Dept issued permits independent of inspection results, and that was why
3 he justified that the Appellants could not reasonably rely on the operating
4 permit as a statement that the elevator has passed inspection or won a
5 variance.

6 The third element of Equitable Estoppel is harm from the inconsistency,
7 and we agree with Judge Krabill on his decision on this element. We
8 would suffer great financial harm if forced to replace our tram at the cost
9 of \$125,000.00.

10 We respectfully submit there is manifest injustice in our case. We relied
11 on the valid permit, which had no limitations indicated on it, that was
12 issued in 1989, and appeared on our tram at the time we purchased our
13 home. It is in fact manifest injustice to be told many years later that the
14 variances weren't granted and the permit wasn't valid, and as a result we
15 would have to come up with ~\$125,000.00 to buy a new tram.

16 The fourth element of Equitable Estoppel is prevention of manifest
17 injustice. Judge Krabill states that the required replacement of the
18 Rehmke hook safety could have been accomplished by us, amortizing the
19 expense since 1993. As we noted, Type A safeties were not commercially
20 available to homeowners in Washington State in 1993. The first
21 commercially available Type A safeties for inclined elevators were
22 approved in the state in 2003. It would be a manifest injustice to now

1 require this gross expense because the Dept incorporated in 1989,
2 futuristic requirements that were not commercially available to the
3 homeowner. It would be a manifest injustice for the Dept to grant
4 approvals to install and operate such expensive equipment, only to revoke
5 approvals 25 years later. We could not act upon notice, as suggested by
6 Krabill, because we did not have notice of Dept concerns until the red-tag
7 event of 2013. The remedy did not exist for us at the time we purchased
8 the home in 1992, we had no way to know that the Dept in 2013 would
9 red-tag our tram, and demand replacement. Penalizing us today for not
10 taking action to incorporate what did not exist would create a manifest
11 injustice.

12 The fifth element of Equitable Estoppel is non -interference with
13 government function, and we agree with Judge Krabill on his decision on
14 this fifth element. Krabill writes "The Dept has a duty to "provide for
15 safety "and "ensure the safe design of elevators". The Rehmke hook
16 safety design works to avoid catastrophe and continuing to tolerate a
17 single exception already tolerated for 26 years does not broadly interfere
18 with the Dept's fulfillment of its duties.

19

1 **TABLE OF AUTHORITIES**

2 **Statutes**

- 3 WAC 296-94 – SAFETY RULES GOVERNING THE
4 CONSTRUCTION, OPERATION, MAINTENANCE AND
5 INSPECTION OF INCLINED PASSENGER LIFTS FOR PRIVATE
6 USE. 1986 edition
- 7 WAC 296-96 - SAFETY REGULATIONS AND FEES FOR ALL
8 ELEVATORS, DUMBWAITERS, ESCALATORS AND OTHER
9 CONVEYANCES. current
- 10 WAC 296-96-07170 - What are the requirements of safeties and
11 governors?
- 12 RCW 70.87.110 - Exceptions authorized
- 13 RCW 70.87.120 - Inspectors—Inspections and reinspections—Suspension
14 or revocation of permit—Order to discontinue use—Penalties—
15 Investigation by Dept—Waiver of provisions during state of emergency
- 16 RCW 70-87.145
- 17 RCW 34.05 - ADMINISTRATIVE PROCEDURE ACT
- 18 RCW 34.05.060 - Informal settlements
- 19 RCW 34.05.020 - Savings—Authority of agencies to comply with
20 chapter—Effect of subsequent legislation.
- 21 RCW 34.05.220 - Rules for agency procedure—Indexes of opinions and
22 statements.

- 1 RCW 34.05.230 - Interpretive and policy statements.
- 2 RCW 34.05.313 - Feasibility studies—Pilot projects.
- 3 RCW 34.05.328 - Significant legislative rules, other selected rules.

4 **Referenced Documents**

- 5 Clerks paper 1, CP1, Petition for Judicial Review
- 6 Clerks paper 5, CP5, Trial Brief – Petitioner (Iden-Winston)
- 7 Clerks paper 6, CP6, Trial Brief Respondent (Dept Labor & Industries)
- 8 Clerks paper 7, CP7, Brief of Petitioner (Iden-Winston)
- 9 Clerks paper 9, CP9, Order Affirming Depts decision (Rogoff)
- 10 Clerks paper 10, CP10, Notice of appeal to Court of Appeal
- 11 Clerks paper 11, CP11, Certified Appeal Board Record

12 **Department Exhibits**

- 13 CP 11, Dept Ex 1, pg 136-138 - Inspection Report Dated 1/8/13
- 14 CP 11, Dept Ex 2, pg 139 - Telephone call 1/8/13
- 15 CP 11, Dept Ex 3, pg. 140 - Appeal Letter 1/22/13
- 16 CP 11, Dept Ex 4, pg 141-143 - Inspection Report 2/4/13
- 17 CP 11, Dept Ex 5, pg 144-145 - Letter Dept to Winston-Iden 6/18/08
- 18 CP 11, Dept Ex 6, pg 146-147 - Letter Dept to Winston-Iden 11/26/97
- 19 CP 11, Dept Ex 7, pg 148 – Inspection Report 6/24/93
- 20 CP 11, Dept Ex 8, pg 149-150 – Req for refund
- 21 CP 11, Dept Ex 9, pg 152-153 - refund
- 22 CP 11, Dept Ex 10, pg 154-155 – Inspection report 10/2/90

- 1 CP 11, Dept Ex 11, pg 156-157 - Inspection report 10/16/89
- 2 CP 11, Dept Ex 12, pg 158 - Letter change in ownership
- 3 CP 11, Dept Ex 13, pg 159-160 - Inspection report 9/20/90
- 4 CP 11, Dept Ex 14, pg 161 – Temporary permit – 10/16/89
- 5 CP 11, Dept Ex 15, pg 162 Letter from Rehmke to the Dept – 10/19/89
- 6 CP 11, Dept Ex 16, pg 163-169 – Installation application – 9/20/89
- 7 CP 11, Dept Ex 17, pg 170-172 – Letter from Rehmke to the Dept
- 8 10/19/89
- 9 CP 11, Dept Ex 18, pg 173 – Dept’s letter to Rehmke 10/15/89
- 10 CP 11, Dept Ex 19, pg 174 – Application for Operating permit – 12/19/89
- 11 CP 11, Dept Ex 20, pg 175-179 – Mark 12 Hillside Tram Safety Features
- 12 CP 11, Dept Ex 21, pg 180-185 – Dept’s Q & A regarding Rehmke
- 13 decision – 2/15/13
- 14 CP 11, Dept Ex 22, pg 186-187 - Copy RCW 70.87.145
- 15 CP 11, Dept Ex 23, pg 188-190 - Copy WAC 296-96-07170
- 16 CP 11, Dept Ex 24, Emergency Safety Demonstration video by Hillside
- 17 Elevator, Inc.
- 18 **Appellant Exhibits**
- 19 CP 11, Appl Ex 16, pg 192-193 - Timeline of Events
- 20 CP 11, Appl Ex 17, pg 194-201 - Rehmke Tram Operational Schematics
- 21 CP 11, Appl Ex 18, pg 202-203 - Inclined Slack Cable Calculations

1 CP 11, Appellant Ex 19, pg 204-206 - Examples of Economical Safety
2 Ideas
3 CP 11, Appl Ex 20, pg 207-231 - Dept Supplemental Answer to
4 Interrogatories
5 CP 11, Appl Ex 21, pg 232-242 - Elevator safety committee meeting
6 minutes 2/19/13
7 CP 11, Appl Ex 22, pg 243 – Westco Engineering letter - Undated
8 CP 11, Appl Ex 23, pg 244-245 – Spokesman review article 11/30/13
9 CP 11, Appl Ex 24, pg 246-251 – Dept’s Q & A regarding Rehmke
10 decision – 2/15/13
11 CP 11, Appl Ex 25, pg 252-253– Kristensen residence operating permit
12 CP 11, Appl Ex 27, pg 254-256 – McLaughlin letter to Dept – 10/23/92
13 CP 11, Appl Ex 1, pg 259 – Elevator section operating permit
14 CP 11, Appl Ex 2, pg 260-262 – Letter from Rehmke to Dept – 10/19/89
15 CP 11, Appl Ex 3, pg 263 - Approved operating permit application –
16 12/19/89
17 CP 11, Appl Ex 4, pg 264-268 – Rehmke Mark 12 Hillside Tram safety
18 features – 1/15/89
19 CP 11, Appl Ex 5, pg 269-272 Rehmke Mark 12 Hillside Tram Overspeed
20 protection – 8/1/92
21 CP 11, Appl Ex 6, pg 273-274 – Draft of Dept Advisory letter – 11/4/05
22 CP 11, Appl Ex 7, pg 275-276 - Dept Advisory letter – 6/18/08

- 1 CP 11, Appl Ex 8, pg 277-279 - shoreline mgt
- 2 CP 11, App Ex 9, pg 280-281 - Dept letter 11/6/12
- 3 CP 11, Appl Ex 10, pg 282 – American Elevator status update 12/14/12
- 4 CP 11, Appl Ex 11, pg 283 Hillside Elevator upgrade estimate – 2/7/13
- 5 CP 11, Appl Ex 12, pg 284-285 American Elevator status update 9/26/13
- 6 CP 11, Appl Ex 13, pg 286 – Daniel Lowinger letter – 5/20/13
- 7 CP 11, Appl Ex 14, pg 287-288 - Copy of RCW 70.87.145
- 8 CP 11, Appl Ex 15, pg 289-293 Burien shoreline
- 9 Clerks paper 11, CP11, Certified Appeal Board Record
- 10 **Hearing Transcripts**
- 11 CP 11, RP 1, pg 1-489, Office of Administrative Hearings, Hearing
- 12 Transcript – Judge Krabill
- 13 CP 11, RP 2, pg 1-100, King County Superior Court Transcript – Judge
- 14 Rogoff
- 15
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6/28/2016

Respectfully submitted,

A handwritten signature in cursive script, reading "Vicki Winston", is written over a horizontal line.

Vicki Winston

Appearing, pro se

A handwritten signature in cursive script, reading "Mark C. Iden", is written over a horizontal line.

Mark Iden

Appearing, pro se

DECLARATION OF SERVICE

I hereby certify that on the 28th day of June, 2016, I served the foregoing document on all parties of record:

via U.S. first class mail, with postage prepaid, in a sealed envelope:

Washington State Department of Labor and Industries
P.O. Box 44000
Olympia, WA 98504-4000

via hand delivery in person:

Eric R. Leonard
Assistant Attorney General of Washington
Labor and Industries Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188

DATED at Burien, Washington, this 28th day of June 2016.



Mark C. Iden

Appellants appearing *pro se*

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STATE OF WASHINGTON
SD 1000 P111