

74727-4

74727-4

COURT OF APPEALS DIVISION I OF THE STATE OF WASHINGTON

Washington State Department )  
of Labor and Industries, )  
Respondent. )

v. )

Mark C. Iden & Vicki Winston, )  
Appellant. )

Court of Appeals Case No. 74727-4-I

Appellant Reply Brief

Mark C. Iden & Vicki Winston

14901 28<sup>th</sup> Ave SW

Burien, WA 98166

Appellants appearing *pro se*

2015 SEP 29 AM 11:18  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON

1 The Dept red-tags the appellant's tram, along with 38 other trams, for  
2 having a Rehmke safety hook. On January 8, 2013, a Dept inspector  
3 entered the private property of appellants Iden and Winston (both  
4 engineers with 60 years of engineering experience), determined that the  
5 appellants' tram had a Rehmke hook, and red-tagged the tram (Clerks  
6 Paper 11, Dept Ex 1, pg 136-138 - Inspection Report Dated 1/8/13).  
7 Original homeowner Roblee had the tram installed in 1989. However,  
8 until approximately 2003, 14 years after the tram's installation, despite  
9 WAC 296-94 requirements, Type A and Type B safeties WERE NOT  
10 AVAILABLE on inclined elevators in Washington State, and have never  
11 become available for retrofit of this tram approved for installation in 1989  
12 (Ernstes testimony Hearing transcript, pg 145 line 17). These types of  
13 safeties were available only for vertical elevators in Washington. The  
14 RCW provided a remedy for this situation, allowing variances when  
15 "equivalent or safer construction is secured in other ways" (RCW  
16 70.87.110 Exceptions). It is important to note that this RCW allowance  
17 DOES NOT dictate the requirement for each replacement component to  
18 function exactly as the component it replaces, as the Dept implies. Dept  
19 members in 1989 were responsible to ensure that "equivalent or safer  
20 construction is secured in other ways".  
21 The Rehmke hook is similar to a Type B safety and the Rehmke design  
22 includes additional safety features to provide an equivalent level of safety.

1 The Rehmke hook was 1.) identified to the Dept before the Dept approved  
2 installation of this equipment (CP 11, Dept Ex 16, pg 163-169 –  
3 Installation application – 9/20/89), 2.) present during initial acceptance  
4 testing witnessed by two Dept inspectors, and 3.) addressed in the request  
5 for variance (CP 11, Dept Ex 17, pg 170-172 – Letter from Rehmke to the  
6 Dept 10/19/89). Upon completion of initial tram inspection and testing, it  
7 was Romero who issued a temporary 30 day permit and directed that a  
8 variance be obtained (CP 11, Dept Ex 14, pg 161 – Temporary permit –  
9 10/16/89). Current Dept employee Ernstes testified that a final Operating  
10 Permit was issued only after corrections (Ernstes testimony Hearing  
11 transcript, 1/6/15, pg 107 ln 12). After an acceptance letter from the Dept  
12 had been issued (CP 11, Dept Ex 18, pg 173 – Dept’s letter to Roblee  
13 11/15/89), and after Chief Elevator Inspector O’Hara approved the  
14 application for final operating permit (CP 11, Dept Ex 19, pg 174 –  
15 Application for Operating permit – 12/19/89), it was Romero who signed  
16 the yellow final Operating Permit (CP 11, Appl Ex 1, pg 259 – Elevator  
17 section operating permit). About the time of the subject tram's acceptance  
18 there were only ~ 50-60 other trams like Roblee's, that had been properly  
19 tested and approved by the Dept, and had the requisite yellow Operating  
20 Permit displayed (Seattle Times article 12/24/91, Attachment 1).  
21 Private trams were subject to annual state inspections from ~ June 1991 to  
22 1997; inspections took place when the inspectors were working in a given

1 area (Seattle Times article dated 12/24/91, Attachment 1). Romero, one of  
2 two inspectors who participated in the initial tram acceptance testing in  
3 1989 (CP 11, Dept Ex 11, pg 156-157 - Inspection report 10/16/89), also  
4 performed the tram's first annual inspection in 1990 (CP 11, Dept Ex 10,  
5 pg 154-155 – Inspection report 10/2/90). It is important to know that it  
6 was Romero who issued only a temporary 30 day permit in Oct. 1989,  
7 clearly stating that a variance must be obtained, and Romero who signed  
8 the final Operating Permit in 1989, and Romero, who DID NOT document  
9 a finding for the Rehmke safety on his second inspection (1st annual  
10 inspection) of the tram in 1990. This provides evidence that Romero  
11 knew of the requirement for variance, directed that a variance be obtained,  
12 knew that the requisite variance had been issued (AKA acceptance letter),  
13 and was then free to not only issue the final Operating Permit, but was free  
14 to not fault Roblee's tram for possessing a Rehmke hook during its first  
15 annual inspection. From these actions it is clear that Romero knew that  
16 the variance existed that contained an allowance for the hook, despite the  
17 Dept's failure to retain important records, such as the "acceptance letter".  
18 After the tram's initial acceptance and issuance of a final Operating Permit  
19 in 1989, only 2 subsequent state inspections were conducted. Winston  
20 requested an inspection in 1993. In a day before computers were used, an  
21 inspector would have had to obtain pertinent records from Olympia before  
22 performing this inspection in Seattle. By unwittingly arranging their own

1 inspection, instead of waiting for the Dept inspectors to perform the  
2 inspections for the whole area, appellant Winston may have set the stage  
3 for the Inspector's error in that inspection by arranging an out of sequence  
4 inspection. Appellants testified that the inspector arrived without the  
5 tram's records (Recorded proceedings 12/28/15 pg 30 ln 12). It was  
6 imperative for the inspector to have the pertinent tram records because, as  
7 McLaughlin states in his letter to Chief Elevator Inspector O'Hara in Oct  
8 1992 (CP 11, Appl Ex 27, pg 254-256 – McLaughlin letter to Dept –  
9 10/23/92), the Dept did not list the variances on the Operating Permit, but  
10 regularly granted variances because the Type A or B safeties required by  
11 the WAC were not available to Washington homeowners. Lacking all  
12 necessary documentation to properly perform an inspection on the  
13 appellant's tram, the inspector only inspected to the WAC. On his  
14 inspection report he replicated the same findings previously noted by  
15 Romero during the tram's initial testing and inspection of 1989,  
16 appropriate in Oct 1989 because the Dept's acceptance letter had not yet  
17 been issued. It is important to note that after the Dept's acceptance letter  
18 was issued in Nov 1989, Romero did not issue a finding about the Rehmke  
19 Safety hook during his 1990 inspection. During the 1993 inspection, Iden  
20 was forced to tell the inspector to get out of the tramway when performing  
21 the brake inspection, for if the brake failed the inspector could be crushed.  
22 It was readily apparent to Iden that the inspector lacked training in safety.

1 The appellants had a clear understanding from 1.) the final Operating  
2 Permit, 2.) a conversation with neighbors Rehmke (the tram's  
3 manufacturer and installer), and McLaughlin (head of the tram user's  
4 group (TUGS), that the tram had a variance. At the time appellants  
5 purchased their home, neighbor McLaughlin provided them a copy of his  
6 letter to CEI O'Hara. McLaughlin's letter accurately predicted the  
7 misunderstanding that subsequently occurred during the tram's 1993  
8 inspection, i.e., the inspector's confusion that occurred because of the  
9 Dept's practice of not noting the allowed variances on the Operating  
10 Permit (CP 11, Appl Ex 27, pg 254-256 – McLaughlin letter to Dept –  
11 10/23/92). Also, in the early 1990's computers were not readily available,  
12 facilitating rapid access to online information that could have precluded  
13 this error. After a conference with Rehmke, the individual who applied  
14 for, and confirmed the existence of the variance, the appellants believed  
15 that the Dept error would be rectified at the 1994 inspection. But after  
16 1993, to appellant's knowledge, the Dept never came again for the annual  
17 inspections in our neighborhood, for their tram or those owned by the  
18 neighbors. Despite annual inspection mandates, this red-tagging action of  
19 2013 marked the first time since 1993 that a Dept employee or any other  
20 individual from the elevator industry had contact with the appellant's tram.  
21 After the appellants' post-inspection conversation with Rehmke, the  
22 appellants did, however, investigate the necessity for installing

1 interlocking doors on their tram. The appellants referred to this when they  
2 informed the Dept that they were looking at bringing their tram into  
3 compliance with the code (CP 11, Dept Ex 9, pg 152-153 - refund). The  
4 appellants understood from Rehmke that a couple of accidents with tram  
5 doors had occurred, but that these accidents did not involve Rehmke  
6 trams, which only operate at ground level. During their investigation,  
7 appellants learned that the addition of tram doors was against the  
8 manufacturer's recommendations (CP 11. pg 179 item 12), learning also  
9 from their insurance company, Safeco, that their insurance would be  
10 voided if they modified the tram in conflict with manufacturer's  
11 recommendations. The 1990 findings could not be addressed without  
12 appellants losing insurance coverage. RCW 34.05.328 states that "the  
13 regulatory system must not impose excessive, unreasonable, or  
14 unnecessary obligations..."

15 In 1997, the Legislature removed the requirement for annual inspection of  
16 privately owned trams that serviced single families. About that time, the  
17 appellants received a letter from the Dept (CP 11, Dept Ex 6, pg 146-147 -  
18 Letter Dept to Winston-Iden 11/26/97). As directed by the letter, Iden  
19 called Chief Elevator Inspector (CEI) Jan Gould. In that conversation,  
20 Iden clarified that despite differing last names, that appellants were a  
21 married couple in a single family residence. After learning this, the CEI  
22 informed Iden that his tram was exempted from annual inspections. Also

1 during that conversation, Iden explained that it was his understanding that  
2 there was a variance negating the findings issued in the 1993 inspection  
3 report, and thus, it was Iden's understanding that re-inspection for  
4 corrective actions was unnecessary. It was also Iden's understanding from  
5 this conversation that Gould would re-contact Iden if she had a problem  
6 finding the tram's variance. The appellants have not been subsequently  
7 subjected to annual inspections as they would have been if this  
8 conversation about their single family residence had not taken place.  
9 There was no follow-on phone call or letter from Gould indicating that she  
10 had not found the variance. The appellants anticipated that Gould would  
11 find the variance, as it was the Dept's responsibility to keep it.  
12 Appellants submit that they come to this action with clean hands. The  
13 inspection report of 1990 did not require any correction of the hook; no  
14 record has been produced after that 1990 inspection and before the 1993  
15 inspection where the Dept notified original homeowner Roblee or the  
16 appellants that an omission had been made on the 1990 inspection. It is  
17 important to note that the Dept has NOT produced 1.) any document  
18 denying the request for variance, 2.) any document (dated after the 1989  
19 acceptance letter) reversing any part of that acceptance, 3) any document  
20 after the Dept's 1997 letter requiring that the tram must be inspected for  
21 corrections (if, in fact, the appellant's claim about a variance had not been  
22 substantiated by J. Gould, Chief Elevator Inspector).

1 The appellants received a letter from the Dept in 2008 (CP 11, Dept Ex 5,  
2 pg 144-145 - Letter Dept to Winston-Iden 6/18/08) This letter was  
3 advisory only, and the only action that was required of the recipients was  
4 that they should contact the Dept if they did not know if their tram had a  
5 Rehmke hook.

6 The next time the appellants heard from the Dept was when the inspector  
7 red-tagged the appellants tram in 2013.

8 The Dept claims that it made the decision to red-tag based on "substantial  
9 evidence" that the Rehmke hook is unsafe. This "substantial evidence"  
10 only consists of a 1.) a third party unsubstantiated incident alleged to have  
11 occurred in another state, 2.) one dept employee's "recollection" of a 17-  
12 year-old incident she alleges occurred during a previous employment with  
13 the state for which she fails to bring the required record demanded by  
14 discovery, 3.) a misrepresentative and non-factual marketing video  
15 produced by Hillside Elevator to alarm unsuspecting tram owners and  
16 entice them to purchase the Hillside Elevator's new tram, and, 4.) Dept  
17 CEI's allegations about "industry concerns" he allegedly learned about in  
18 Elevator Committee Safety meetings which are shown to be fabrications  
19 after a review of the recorded minutes from those safety meetings.

20 The current Dept never attended initial acceptance testing where the  
21 safeties and the additional enhancements of the Rehmke trams were  
22 demonstrated. The Dept has provided no factual basis for this Dept's red-

1 tag sanction: not a single report of any tram failure, accident report,  
2 meeting minutes, test reports, inspection reports, near-miss reports, or  
3 engineering reports of any kind to support that there were concerns from  
4 industry. The Dept never performed any testing nor required any testing  
5 to be performed by homeowners and submitted to the Dept for review, and  
6 never personally witnessed any testing (CP 11, Appl Ex 20, pg 217,  
7 Interrogatory 32 answer - Dept Supplemental Answer to Interrogatories).  
8 Instead they say they viewed the Hillside Elevator marketing video. This  
9 is not a technical video but a non-factual, non-representative advertising or  
10 marketing video. Dept Chief Day and his employee Ernstes testified that  
11 they are not engineers and must rely on engineers to make a determination  
12 that Rehmke Elevators are unsafe, but instead rely on Hillside Elevator's  
13 misleading marketing video. Hillside Elevator employees are not  
14 engineers, and the video they produced simply 1.) failed to identify the  
15 trams demonstrated, 2.) did not accurately depict the trams usage  
16 including proper pairing of the tram to the specific slope for which each  
17 was designed, and deployment of the safety hook and, 3.) did not explain  
18 how any reasonable person could draw a conclusion that a rigid, upright  
19 department store mannequin could represent human physical response in  
20 an emergency stop. The Dept is unsophisticated and inappropriate in their  
21 decision to react to this marketing video that relies on ignorance on the  
22 part of the viewer to sell Hillside Elevator product. The claim that this

1 Dept relied on "substantial evidence" to support their actions is a bogus  
2 claim. Now the Dept comes and claims that their "substantial evidence"  
3 includes that Dept employee "Ernstes ordered an engineering report". The  
4 "report" was provided by Hillside who only paid an engineer to look at  
5 their marketing video, and write a paragraph about what he saw on their  
6 marketing video. This engineer failed to show up when subpoenaed by  
7 Administrative Court. (CP 11, Appl Ex 22, pg 243 – Westco Engineering  
8 letter - Undated) Quite frankly, any reasonable person would question the  
9 actions of a Dept that relies on non-factual marketing output, third party  
10 unsubstantiated claims of an incident in another state, and an alleged but  
11 unsubstantiated incident over 17 years old, in lieu of first-person  
12 independent engineering reports, as "substantial evidence" to impose  
13 considerable sanctions on private homeowners.

14 Any reasonable person can deduce that Ernstes or Day, in positions to  
15 demand and obtain any and all such records, should be able to readily  
16 supply evidence of alleged "interactions" with industry during this alleged  
17 "investigation". Any reasonable citizen should be able to view the  
18 "substantial evidence" that resulted in red-tags and drives tram  
19 replacement costs in excess of \$125,000. There is no evidence in this case  
20 to substantiate any action against homeowners; The Emperor Has No  
21 Clothes.

1 Appellants ask that the court review the failure of this Dept to maintain  
2 key records essential to this case, and the complete lack of evidence  
3 brought by this Dept to justify their actions, and grant relief to the  
4 appellants in the form of Laches or Equitable Estoppel.

5

6

7 9/26/2016

Respectfully submitted,

8

9



10

Vicki Winston

11

Appearing, pro se

12

13



14

Mark Iden

15

Appearing, pro se

# Trams Must Be Inspected -- At Medina Site, Clamp On Cable Broke Loose

By Nancy Montgomery

Most of the private trams ferrying local residents down steep banks to waterfront homes have not been inspected by the state, as an obscure law has required since 1963.

"There are 50 or 60 in the state that are registered at this time and comply to code," said William O'Hara, chief elevator inspector for the state Department of Labor and Industries and the inspector investigating Saturday's Medina tram accident that paralyzed one woman and injured several other people.

The owners of the tram were cited yesterday for 15 technical and safety violations, said Brian Dirks, a spokesman for labor and industries.

Among the most important was the lack of a speed governor - a device widely available only for the past year, said O'Hara. It acts like an emergency brake and engages when the car overspeeds.

But the lack of a governor wasn't the cause of the accident. O'Hara said the accident was caused because an improper clamp - one that damages cables and isn't strong enough - failed to hold the cable connected to the tram car. The cable unraveled and the car fell more than 100 feet and smashed into the home's foundation.

"The U-clamps holding the end of the cable did not hold, and the cable slid through the clamp and became disconnected," O'Hara said, adding that a safety backup for broken cables failed to engage.

"What caused the cable to come unhooked I can't say yet," he said. "I can't say whether they were loose or the car hung up and they went slack and then broke loose. I haven't talked to anybody who was on the ride yet."

The cables were brand-new, O'Hara said, installed five weeks ago by A&M Elevator Inc., the private company that had done maintenance on the 30-year-old tram for years.

Inspectors estimate there may be as many as 300 private trams on Lake Washington and Lake Sammamish.

Most of them, like the one that crashed Saturday, were not inspected by the state when they were installed, as the law has required since 1963, let alone inspected annually, as a 6-month-old interpretation of the law now demands.

"The owners should be aware that the law is there," said Dirks. "A lot of times, they don't know it's in place. A lot of these trams just slip through the cracks. A lot of them are homemade or made from kits."

"We haven't been able to go out and do an adequate job of policing," Dirks said. "It would require someone going out in a boat."

Homeowners aren't the only ones who have been unaware of the law. Of the two companies in the state that build and install trams, O'Hara said, one company "didn't know they had to be inspected by the state until I called and told them. Some engineers don't even get back to me."

Since Saturday's accident, however, the department will take a different approach. Instead of waiting to be contacted for an inspection by people who may not know they need one, inspectors will be mailing letters and going door to door to tram owners' homes, O'Hara said.

"We're going house to house on these bank properties," O'Hara said. "I think with this accident it's going to open the door for us."

Not knowing wasn't the only reason the state's eight inspectors - who are responsible for 7,500 commercial elevators throughout the state, as well as for private trams - have put their yellow state inspection seal on so few trams.

Until a new interpretation of the law by the state attorney general came out six months ago, inspectors were loath to test tram owners' private-property rights.

"There are 'No Trespassing' signs all over," O'Hara said, and homeowners have refused access to inspectors.

"I think sometimes they're afraid we're going to tell them it requires thousands of dollars in repairs," Dirks said. The inspection fee is \$70.

The fine for not complying with the law is \$150, O'Hara said. If people refuse him access now, he said he intends to fine them. Asked how eight inspectors would be able to handle the increased workload, O'Hara said, "We're going to move fast."

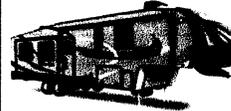
ADVERTISING

## Summer Reduction SALE

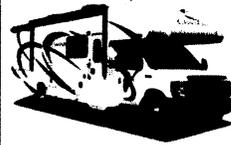
Going On NOW!



2016 Trailers  
Now starting at  
**\$13,995**



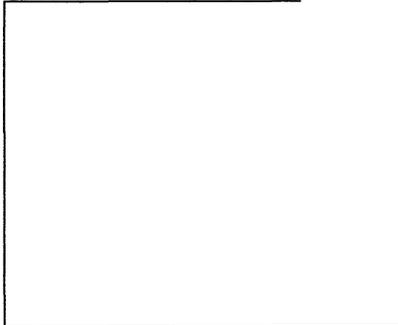
2016 Fifth Wheels  
Now starting at  
**\$27,995**



2016 Motorhomes  
Now starting at  
**\$69,847**



Monroe • Smokey Point, Arlington



ATTACHMENT 1

Jim and Cynthia Roush, who own the home and tram at 2441 Evergreen Point Road, may also be fined the \$150, he said.

Joyce Winsor, 63, one of the passengers in the tram, was listed in serious condition yesterday in an intensive-care unit at Harborview Medical Center. She has had tests at the University of Washington Medical Center to determine the extent of her paralysis.

Cassandra Collier, 42, was listed in serious condition at Overlake Medical Center, where her daughter, Cary Collier, 12, was in satisfactory condition.

Winsor's husband, Robert Winsor, 63, and Collier's 8-year-old daughter were treated for minor injuries at Overlake and released late Saturday, according to hospital records.

Copyright (c) 1991 Seattle Times Company, All Rights Reserved.

ADVERTISING



Get home delivery today!

ADVERTISING



**SITE MAP** Home Local Nation/World Business/Tech Sports Entertainment Living Travel Opinion Obituaries Extras Forums

**CONTACT/HELP**

- Site feedback/questions
- Frequently asked questions
- Home delivery issues
- Send us news tips
- Send letters to the editor
- Submit event listings
- Request corrections
- Newsroom contacts
- Social media
- Report malware

**CONNECT**

- Facebook
- Twitter
- Google+
- Mobile site
- Mobile apps
- Low-graphic site
- Newsletters
- RSS
- Today's News Index

**ADVERTISING**

- Advertise with us
- Digital advertising
- Classifieds
- Death notices
- Job listings
- Auto listings
- Real Estate listings
- Rental listings
- Advertiser Showcase

**COMPANY**

- About us
- Employment
- Historical archives
- Pulitzer prizes
- Seattle Times store
- Purchase photos
- Permissions
- Newspapers In Education

**SUBSCRIBER SERVICES**

- Subscribe
- Manage subscription
- Temporary stops
- Make a payment
- Print Replica



Today's front page (PDF)

The Seattle Times Network: seattletimes.com | Jobs | Autos | Homes | Classifieds | Rentals | Personals

Copyright ©2016 The Seattle Times | Advertise with us | Privacy statement | Terms of service

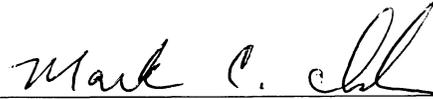
**DECLARATION OF SERVICE**

I hereby certify that on the 26<sup>th</sup> day of September, 2016, I served the foregoing document on all parties of record via U.S. first class mail, with postage prepaid, in a sealed envelope:

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

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

DATED at Iowa City, Iowa, this 26<sup>th</sup> day of September 2016.



Mark C. Iden

Appellants appearing *pro se*

STATE OF WASHINGTON  
2016 SEP 29 AM 11:18