

NO. 48842-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

WASHINGTON STATE DEPARTMENT OF
LABOR AND INDUSTRIES,

Respondent,

v.

DOUG AND ALICE KRISTENSEN

(Conveyance #7610),

Appellants.

REPLY BRIEF OF APPELLANTS KRISTENSEN

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I. INTRODUCTION

The Department, *Resp. Br. at 6*, asserts that “it is regrettable” that the Department in 1989 approved the Kristensens’ Rehmke Mark 12 tram. Presumably, the Department believes its subsequent inspections, re-approvals and fee collections from the Kristensens are likewise “regrettable.” Claiming that it made mistakes, the Department would have the Kristensens pay for those mistakes. Equitable estoppel prevents such a miscarriage of justice.

II. ARGUMENT IN REPLY

Contrary to the Department’s assertions, the Kristensens established the five elements of equitable estoppel against the Department by clear, cogent, and convincing evidence. Those five elements are: (1) a statement, admission, or act by the Department, the party to be estopped, that is inconsistent with its later claims; (2) the Kristensens, the party asserting estoppel, acted in reliance upon the statement or action; (3) injury would result to the Kristensens if the Department were allowed to repudiate its prior statement or action; (4) estoppel is “necessary to prevent a manifest injustice;” and (5) estoppel will not impair governmental functions. *Silverstreak, Inc. v. Dep’t of Labor and Indus.*, 159 Wn.2d 868, 887, 154 P.3d 891 (2007).

A. The Kristensens Established a Statement, Admission, or Act by the Department, Which is Inconsistent with Its Later Red Tag.

From the outset in 1989, the Department knew that the Kristensens' tram had a safety hook in the event tram cables failed, because the installation application the Department's William T. O'Hara signed states, "Positive Engagement Hook – On Car" AR 222. Further, the Department charged the Kristensens an additional "Fee for Checking Plans." AR 218, 222. Thereafter, the Department engaged in multiple inspections and approvals of the Kristensens' and others' Rehmke trams, with no less than five of its officials repeatedly approving the installation, modification, and/or operation of the Rehmke Mark 12 tram. *See* AR 222, 225, 228, 234-35, 240, 241, 242, 244, 245, 246, 247, 248, 249, 250.

Reasonable minds could not differ that the various Department officials' repeated inspections and approvals of the "Positive Engagement Hook" Rehmke Mark 12 tram constitute acts by the Department, and Mr. O'Hara's signature of approval of the tram is plainly a written statement. Nor could reasonable minds differ that the Department's red-tag of the same Rehmke Mark 12 tram is inconsistent with those prior acts and statements of approval. If reasonable minds can reach only one conclusion on an issue of fact, that issue may be determined on summary judgment. *McCarthy v. Clark County*, 193 Wn. App. 314, 328, 376 P.3d

1127 (2016). The ALJ's conclusion that the Department's approval was an act inconsistent with its red-tag should be affirmed.

1. The Rehmke Mark 12's safety record.

Asserting that "the Kristensens are wrong" that the Department submitted no evidence of a Rehmke tram having failed or caused personal injury, *Resp. Br. at 20*, the Department points to one sentence (from AR 198) where a person claimed some awareness of "a Rehmke RIE car safety failure event that happened in California and caused personal injury." That hearsay statement does not implicate the Rehmke Mark 12 tram, only an unidentified Rehmke tram. Nor does it indicate that the California tram had a positive engagement hook, or if it did, that the hook was the cause of any injury. Moreover, on its face, the statement is not made with personal knowledge as required by CR 56(e). Even if the statement were competent, it does not create an issue of fact regarding the Department's acts and statements that are inconsistent with its current claim. The Department presented no competent evidence that the 39 Washington Rehmke trams, or any such trams outside the state, had ever failed or caused personal injury.

2. The Department's misguided reliance on a repealed WAC.

The Department, *Resp. Br. at 23*, asserts as "an independent basis for red-tagging the Kristensens' tram" in 2013, that the safety hook it now

deems unsafe “did not comply with the applicable safety regulation at the time, former WAC 296-94-170(2), because it was not a type A or B safety that applied pressure to the guard rails to stop the tram.” Former WAC 296-94-170(2), repealed in 2001, provided:

Operation of Car Safeties. The car safety shall be of the Type A or B and operated by a speed governor. The governor shall operate to set the safety at a maximum speed of one hundred forty percent of rated speed and on breakage of the hoisting ropes, the safety shall operate without appreciable delay and independently of the governor speed action.

Back in 1992, when the Department had control over private trams, the Department required the Kristensens to install a speed governor, which the Kristensens did at a cost of \$3,930.00. AR 219, 231. A review of former WAC chapter 296-94, repealed in 2001, and the definitions contained in former WAC 296-94-020, reveals no definition of either “Type A” or “Type B” safeties. The new chapter, effective in 2001, does define these types of safeties at WAC 296-96-23227.

More importantly, the Department’s current rule, WAC 296-96-07170(1)(b), which came into effect in 2001, specifically allows for the Kristensen tram’s safety device. WAC 296-96-07170(1)(b) provides: “Elevator safeties must be type “A” or “B” *or other devices approved by the department* and must be operated by a speed governor.” [Emphasis added.] The Kristensens’ tram is expressly allowed under the current rule

because the tram safety device is specifically identified in the Department's approval as a "safety hook," AR 218, 222, and is operated by a speed governor, AR 219, 231.

Thus, even if the Kristensens had not relied upon the Department's multiple approvals that their tram complied with Department regulations and had thought to search former WAC chapter 296-94, they would have found nothing to indicate that their tram was not in full compliance with that chapter, because the Department had left "Type A" and "Type B" safeties undefined.

3. The Department's blanket approval of the Rehmke Mark 12 tram.

The Department's specific written approvals of the Kristensens' tram and its subsequent red-tag satisfies the first element of equitable estoppel – statements or acts inconsistent with its later claims. In a red-herring argument, the Department argues, *Resp. Br. at 23-24*, that an issue of fact exists regarding the Department's blanket approval of all Rehmke Mark 12 trams. The ALJ did not reach or decide this issue because it granted the Kristensens' equitable estoppel motion. *See* AR 2, ¶2.2, AR 11, ALJ Conclusion of Law 5.25.

The Department's blanket approval is set forth in a December 7, 1993 letter from William Rehmke, president of Rehmke Products

Corporation, to Howard Long, acting chief of the Department's Elevator Division, AR 254-56, which the Department produced in discovery. AR 236. In that letter, Mr. Rehmke wrote,

In 1989, at the suggestion of the Elevator Division, we applied for certain variances from WAC 296-94 for the MARK 12 tram.

These were granted and an operating certificate was issued.

All subsequent MARK 12 trams were, likewise, approved and issued operating certificates.

AR 256. Both Mr. Rehmke and Mr. Long are deceased, Mr. Rehmke's company has been out of business since 2000, and there are no company records. AR 237-38.

The Department has not disputed the authenticity of Mr. Rehmke's letter, nor has it provided any Department response to the letter or any evidence that the statements made therein were inaccurate. Although the Department did provide two declarations of its personnel, Ms. Ernestes first employed by the Department in 1997, and Mr. Day, in 2004, AR 151, 194, neither declaration rebutted Mr. Rehmke's statements.

B. The Kristensens Established Their Reliance on the Department's Statements and Acts.

The Department, *Resp. Br. at 26*, concedes that the Kristensens, in purchasing and installing their Rehmke tram, "reasonably relied" upon the Department's approval of that tram, and "does not dispute" the Kristensens' evidence that they "would have looked to some other

manufacturer if the Department had not approved installation application in 1989.” The Kristensens purchased and installed their Rehmke tram solely because the Department said it met the Department’s requirements for safety. AR 218. That undisputed evidence meets the reliance element of equitable estoppel.

The Department nonetheless attempts to rewrite the facts and law and shift the focus regarding the reliance element. Instead of focusing on the rights of Washington citizens to be able to rely upon their state government’s determination that the Rehmke tram was an approved and therefore “safe” product before they purchased and installed it and when they made the modifications to it that the Department required, the Department, citing RCW 70.87.145, claims that the Kristensens could not have reasonably relied upon the Department’s approval and re-approvals to conclude that the Department would never issue a red tag on the tram if it later became unsafe. The problem with the Department’s argument, as discussed more fully in Section E below, is that the Department’s claim is not that the Rehmke tram “became unsafe,” but rather that, even though there has been no change in circumstances with the tram or its safety hook, the Department has changed its opinion concerning tram’s safety and now (as of 2013) believes that it was mistaken about the tram’s safety when it approved and reapproved it since 1989.

C. The Kristensens Established the Injury Element of Equitable Estoppel.

The Department essentially concedes, *Resp. Br. at 27*, that if it is allowed to repudiate its prior approval of the Rehmke Mark 12, the Kristensens are injured. Indeed, all the Department asserts, *Resp. Br. at 27*, with respect to the injury element is that “if there is no reasonable reliance (second element), there is no injury (third element).” Under the Department’s own assertion, because there was reasonable reliance on the Department’s approval and re-approvals, there is injury.

D. The Kristensens Established that Estoppel is Necessary to Prevent a Manifest Injustice.

Here, the manifest injustice lies in the Department’s position that the Kristensens pay for the mistakes the Department claims it made. Nothing in the record points to any error or wrongdoing by the Kristensens. Over many years the Kristensens did everything, including paying every fee, the Department requested of them. The Department’s response fails to explain or justify why these undisputed facts do not give rise to a manifest injustice if the Department is not estopped.

E. The Kristensens Established that Estoppel Will Not Impair Government Functions.

The Department asserts, *Resp. Br. at 4*, that there were “several Mark 12 hillside trams” originally installed in Washington between 1970 and 1995. The Department does not state how many of those Mark 12

trams other than the Kristensens' tram remain today. Assuming all of the "several" continue to exist and function, the Department's stated belief is that its exercise of governmental functions would be "severely impaired" if equitable estoppel principles were applied to a single tram.

The Department's apparent argument is that affirming the ALJ's decision to revoke the red-tag on the Kristensen tram would somehow prevent the Department from ever issuing any red-tags. But, the Department's ability to issue a red-tag is set forth in RCW 70.87.145(1), which provides:

(1) An authorized representative of the department may order the owner or person operating a conveyance to discontinue the operation of a conveyance, and may place a notice that states that the conveyance may not be operated on a conspicuous place in the conveyance, if:

(a) The conveyance work has not been permitted and performed in accordance with this chapter; or

(b) The conveyance has otherwise become unsafe.

Subsection (a) of RCW 70.87.145(1) does not apply because the conveyance work on the Kristensen tram was permitted and performed in accordance with RCW chapter 70.87. Hence, if the Department has the ability to red-tag at all, its authority to do so necessarily must fall under subsection (b). But, the Kristensens' tram did not "become unsafe." Although the Legislature easily could have done so, it did not provide for red-tagging if "The conveyance is unsafe." Instead, it provided for red-

tagging if “The conveyance has otherwise become unsafe.”

The Department submitted declarations in opposition to the Kristensens’ motion for summary judgment. In their respective declarations, each of the declarants disagrees with former Department personnel and essentially states that the Kristensen tram has always been unsafe. Not one of those declarations points to a single fact from which one could conclude that something happened to the Kristensen tram to render it unsafe. Hence, the Department’s red-tag fails unless the Department can demonstrate that something occurred to the Kristensens’ tram to make it “become” unsafe. The Department submitted no evidence that the tram became unsafe or from which such an inference could be drawn. Application of equitable estoppel here will set aside this red-tag, but will not prevent the Department from pursuing safety or from issuing future red-tags when a conveyance, unlike the Kristensens’ tram, has not been permitted or has become unsafe.

III. CONCLUSION

For the foregoing reasons and those set forth in the Brief of Appellants Kristensen, this Court should reverse the Superior Court’s Findings of Fact, Conclusions of Law, and Judgment, and remand this matter to the Superior Court for a determination of attorney’s fees and expenses pursuant to RCW 4.84.350.

RESPECTFULLY SUBMITTED this 7th day of November, 2016.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 7th day of November, 2016, I caused a true and correct copy of the foregoing document, "Reply Brief of Appellants Kristensen" to be delivered in the manner indicated below to the following counsel of record:

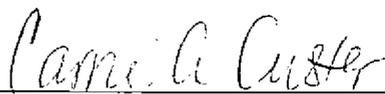
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