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STATE OF WASHINGTON

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NO. 79896-6

36787-4-II

**SUPREME COURT  
OF THE STATE OF WASHINGTON**

EVAN ...

b/h

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LEO FINNEGAN CONSTRUCTION CO., INC.,  
A Washington corporation,

Respondent,

v.

NORTHWEST PLUMBING & PIPEFITTING INDUSTRY HEALTH,  
WELFARE & VACATION TRUST; WASHINGTON STATE  
PLUMBING & PIPEFITTING INDUSTRY PENSION PLAN; LOCAL  
26 SUPPLEMENTAL PENSION PLAN; LOCAL 26 JATC  
EDUCATIONAL DEVELOPMENT TRUST; MCI FUND; AND  
PLUMBERS AND PIPEFITTERS NATIONAL PENSION FUND,

Appellants.

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APPEAL FROM THE SUPERIOR COURT  
FOR PIERCE COUNTY  
HONORABLE RONALD E. CULPEPPER

---

**BRIEF OF APPELLANTS**

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McKENZIE ROTHWELL BARLOW  
& KORPI, P.S.

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## I. ASSIGNMENT OF ERROR

### A. Assignment of Error

The trial court erred in entering its February 13, 2007 Order Granting Plaintiff's Motion for Summary Judgment and Granting Declaratory Relief.

### B. Issues Pertaining to Assignment of Error

1. In its 1995 *Travelers* decision, the U.S. Supreme Court abandoned its expansive and literal interpretation of ERISA's preemption clause. Nevertheless, in its 2000 *Trig Electric* decision, the Washington Supreme Court, in a 5-4 ruling, decided that Washington's public works lien statutes continued to be preempted by ERISA. In view of the dissenting opinion in *Trig* and subsequent decisions by the Ninth Circuit Court of Appeals and the California Supreme Court finding no ERISA preemption of similar statutes, should *Trig* be overruled?

2. The appellant Trusts filed an amended public works lien under RCW 39.08 and RCW 60.28 on July 15, 2005. The Trusts filed a lien foreclosure action in U.S. District Court on October 18, 2005, and then filed another such action on remand to Pierce County Superior Court on February 24, 2006. In that action, defendant Chapman Mechanical, Inc. was served on March 8, 2006, more than four months after the filing of the

lien notice. Are the Trusts entitled to foreclose their lien under RCW 60.28 against respondent and the non-Chapman third-party defendants?

3. The Trusts' counterclaim and third-party claims are brought not only under RCW 60.28, but also RCW 39.08. Regardless of whether the Trusts' claims are enforceable under RCW 60.28, are those claims enforceable against respondent and its payment and performance bond under RCW 39.08?

## **II. STATEMENT OF THE CASE**

### **A. Procedural History**

In September 2005 respondent Leo Finnegan Construction Co., Inc. ("Finnegan") filed an action seeking a declaratory judgment that the appellant Trusts did not have valid claims or enforceable liens against Finnegan's public works bond. (CP 1-6) In response, the Trusts filed an amended answer, third-party complaint, and counterclaim seeking to foreclose its lien. (CP 7-12)

In December 2006 Finnegan filed a motion for summary judgment on the Trusts' counterclaims and for declaratory relief. (CP 17-30) On February 13, 2007 the trial court entered an order granting the motion. (CP 65-67) The Trusts timely filed their Notice of Appeal to the Supreme Court on March 8, 2007. (CP 68-72)

**B. Facts**

The Trusts are jointly-administered multiemployer union-management employee benefit trust funds, organized and operated under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), 29 U.S.C. § 1001 *et seq.*, and created under Section 302(c) of the Labor Management Relations Act, 29 U.S.C. § 186(c). Under a collective bargaining agreement between Chapman Mechanical, Inc. (“Chapman”) and the Plumbers and Pipefitters United Association Local 26, Chapman was required to pay monthly employee benefit contributions to the Trusts based on the hours worked by its employees. (CP 45-50)

Chapman became delinquent in making the required monthly contributions for the months of June 2004 through November 2004. (CP 58) So in December 2004 the Trusts filed a lien notice against the payment and performance bond issued to Finnegan. (CP 56) The lien notice asserted claims for unpaid employee benefit contributions due for work performed on a public works project by employees of the subcontractor Chapman. (CP 56) The Trusts filed amended lien notices on April 12, 2005 and July 15, 2005. (CP 57, 58)

In September 2005 Finnegan filed its declaratory judgment action. (CP 1-6) The Trusts removed the action to the U.S. District Court and filed their Answer, Third-Party Complaint, and Counterclaim on October

18, 2005. (CP 38-44) The U.S. District Court remanded the case to Pierce County Superior Court on December 5, 2005. (CP 75-206) The Trusts filed their Amended Answer, Third-Party Complaint, and Counterclaim in Pierce County Superior Court on February 24, 2006 (CP 59-64), and served Chapman with their complaint on March 8, 2006. (CP 207-208) In December 2006 Finnegan moved for summary judgment. (CP 17-30) The trial court granted the motion, declaring that under Washington law the Trusts' claims under Washington's public works lien statutes, RCW 39.08 *et seq.* and RCW 60.28 *et seq.*, are preempted by ERISA. (CP 65-67)

### III. ARGUMENT

**A. The Dissenting Opinion in the Washington Supreme Court's *Trig Electric* Decision Correctly Reasoned That Because the Public Works Lien Statutes Are Only Remotely Connected to ERISA, They Are Not Preempted.**

According to the dissenting justices in *IBEW Local 46 v. Trig Electric*, 142 Wn.2d 431, 13 P.2d 622 (2000), the majority opinion in that case relied on a preemption analysis that the U.S. Supreme Court abandoned in *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995). Moreover, an analysis of cases decided after *Travelers* reveals that the remedy provided by the public works lien statutes is only remotely connected to ERISA, so the Trusts' claims are not preempted. This Court

should adopt the analysis of *Trig's* dissenting justices, and conclude that *Trig* should be overruled.

RCW 39.08, which requires the execution and delivery of a performance bond with respect to public works construction projects, provides in relevant part as follows:

Whenever any . . . body acting for the state or any county or municipality or any public body shall contract with any person or corporation to do any work for the . . . municipality, or other public body, city, town, or district, such . . . body shall require the person or persons with whom such contract is made to make, execute, and deliver to such . . . body a good and sufficient bond, with a surety company as surety, conditioned that such person or persons shall faithfully perform all the provisions of such contract and pay all laborers, mechanics, and subcontractors and materialmen, and all persons who supply such person or persons, or subcontractors, with provisions and supplies for the carrying on of such work, which bond in cases of cities and towns shall be filed with the clerk or comptroller thereof, and any person or persons performing such services or furnishing material to any subcontractor shall have the same right under the provisions of such bond as if such work, services or material was furnished to the original contractor. . . .

RCW 39.08.010. The related statute, RCW 60.28, requires that the public body on a public works project retain a percentage of the moneys otherwise due to the general contractor:

Contracts for public improvements or work, other than for professional services, by the state, or any county, city, town, district, board, or other public body, herein referred to as "public body", shall provide, and there shall be reserved by the public body from the moneys earned by the

contractor on estimates during the progress of the improvement or work, a sum not to exceed five percent, said sum to be retained by the state, county, city, town, district, board, or other public body, as a trust fund for the protection and payment of any person or persons, mechanic, subcontractor or materialman who shall perform any labor upon such contract or the doing of said work, and all persons who shall supply such person or persons or subcontractors with provisions and supplies for the carrying on of such work . . . Every person performing labor or furnishing supplies toward the completion of said improvement or work shall have a lien upon said moneys so reserved. . . .

RCW 60.28.010(1).

With respect to preemption, Section 514(a) of ERISA, 29 U.S.C. §

1144(a), provides:

. . . the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . .

ERISA Section 514(c)(1), 29 U.S.C. § 1144(c)(1), provides:

The term “State law” includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State . . . .

As the dissent in *Trig* pointed out, before *Travelers* the U.S. Supreme Court relied on an expansive and literal interpretation of ERISA’S preemption clause, finding that state laws having even remote effects on ERISA plans were preempted. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983). But in *Travelers*,

the U.S. Supreme Court retreated from and abandoned that approach, finding that state laws having only a “tenuous, remote, or peripheral” connection with covered plans” do not merit preemption. *Travelers*, 514 U.S. at 661, 115 S.Ct. 1671. Accordingly, state courts should now look to the “objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.” *Travelers*, 514 U.S. at 656, 115 S.Ct. 1671. Applying these objectives in this case leads inescapably to the conclusion that Congress never intended employers to use ERISA to shield themselves from paying employee benefits.

According to the dissent in *Trig*, Congress enacted ERISA to remedy the “mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds.” *Calif. Division of Labor Standards Enforcement v. Dillingham Constr., Inc.*, 519 U.S. 316, 326-27, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997) (quoting *Massachusetts v. Morash*, 490 U.S. 107, 115, 109 S.Ct. 1668, 104 L.Ed.2d 98 (1989)). But Congress did not intend that ERISA preemption displace the traditional presumption against federal preemption of state law. *Travelers*, 514 U.S. at 655, 115 S.Ct. 1671. The dissent went on to observe that the Ninth Circuit Court of Appeals has adopted the *Travelers* analysis. *Operating Eng’rs Health and Welfare Trust Fund v. JWJ Contracting Co.*, 135 F.3d 671 (9<sup>th</sup> Cir. 1998) — and this *before* the

Ninth Circuit's decision in *Southern Calif. IBEW-NECA Trust Funds v. Standard Industrial Electric*, 247 F.3d 920 (9<sup>th</sup> Cir. 2001), discussed in Section B, *infra*.

The *Trig* dissenting justices stated that the majority “seriously misrepresents” the Ninth Circuit’s *JWJ Contracting* decision. *Trig*, 142 Wn.2d at 446, 13 P.2d at 630. Rather than affirming the continuing authority of its pre-*Travelers* decisions in *Trustees of Elec. Workers Health and Welfare Trust v. Marjo Corp.*, 988 F.2d 865 (9<sup>th</sup> Cir. 1992) and *Carpenters Health & Welfare Trust Fund v. Tri Capital Corp.*, 25 F.3d 849 (9<sup>th</sup> Cir. 1994), the *JWJ* court stated instead that the *Marjo* and *Tri Capital* decisions relied on “expansive language from the Supreme Court demonstrating an understanding of ERISA pre-emption that has since been tailored to better fit Congress’s policy intentions.” *JWJ Contracting*, 135 F.3d at 679.

According to the *Trig* dissenting opinion, the majority upheld its 1994 decision finding preemption of the lien statutes, *Puget Sound Elec. Workers Health & Welfare Trust Fund v. Merit Co.*, 123 Wn.2d 565, 870 P.2d 960 (1994), primarily because *Travelers* affirmed the U.S. Supreme Court’s previous holding in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990), that ERISA preempted a Texas state law providing an alternative enforcement mechanism. But

*Ingersoll-Rand* is distinguishable from *Trig*, said the dissent, because the law at issue in that case was “specifically designed to affect employee benefit plans. . . ,” *Ingersoll-Rand*, 498 U.S. at 140, 111 S.Ct. 478. The Washington public works lien laws, by contrast, are laws of general applicability available to an entire class of creditors, irrespective of the existence of an ERISA plan.

The dissent went on to endorse the reasoning of the Hawaii Supreme Court in finding that Hawaii’s lien laws were not preempted. In *Haw. Laborers Trust Funds v. Maui Prince Hotel*, 81 Hawaii 487, 918 P.2d 1143 (1996), the court reviewed ERISA’s legislative history and concluded that preemption of the lien statutes was inconsistent with ERISA’s objective of protecting workers. To rule otherwise would “ignore federal policy and fly in the face of logic.” *Haw. Laborers*, 81 Hawaii at 500, 918 P.2d 1143.

In conclusion, the dissenting opinion observed that because the lien statutes are laws of general applicability having only tenuous connections to ERISA plans and making no reference to such plans, the *Merit* decision is superseded by *Travelers*. Having failed to meet its burden to prove that Congress intended to supplant Washington’s lien laws, the general contractor in *Trig* was not, in the dissent’s view, entitled to a finding of ERISA preemption. *Trig*, 142 Wn.2d at 449-50, 13 P.2d at 631.

As the dissent in *Trig* observed, the majority opinion in *Trig* is erroneous because it does not fully take into account the change in ERISA preemption analysis wrought by *Travelers*. Although *Travelers* cited to *Ingersoll-Rand Co. v. McClendon*, *supra*, 498 U.S. 133, 111 S.Ct. 478 (1990), for the proposition that state laws providing alternative enforcement mechanisms are preempted, *Ingersoll-Rand* is indeed distinguishable under the *Travelers* analysis.

*Ingersoll-Rand* involved a common-law wrongful termination cause of action based on an employer's desire to prevent his employee from acquiring pension benefits under an ERISA plan. *Ingersoll-Rand*, 498 U.S. at 137-39, 111 S.Ct. 478. The cause of action was therefore "specifically designed to affect employee benefit plans," *Ingersoll-Rand*, 498 U.S. at 140, 111 S.Ct. 478, in contrast to the lien statutes, which are laws of general application having only a remote connection with ERISA. Under *Travelers*, these characteristics trump the statutes' status as an alternative enforcement mechanism, so they are not preempted.

Moreover, *Trig* is erroneous because it defies the intentions of Congress in enacting ERISA. The statute itself declares that "the policy of [ERISA is] to protect . . . the interests of participants in employee benefit plans . . . ." ERISA § 2(b), 29 U.S.C. § 1001(b). Preemption of ERISA-neutral state lien laws only hampers those interests. Moreover, the

legislative history underlying the Multiemployer Pension Plan Amendments Act of 1980, codified at ERISA § 515, 29 U.S.C. § 1145, underscores Congress's intention that traditional statutory lien remedies not be preempted: "The Committee amendment does not change any other type of remedy permitted under State or Federal Law with respect to delinquent multiemployer plan contributions." H.R. Rep. No. 869, 96 Cong., 2d Sess. (1986) (Part II), reprinted in 1980 U.S. Code Cong. & Admin. News 2918, 3037-38. This Court should therefore embrace this opportunity to align its ERISA preemption analysis with Congress's policy intentions.

**B. The Washington Courts Should Align Their ERISA Preemption Analysis with That of the Ninth Circuit Court of Appeals.**

Only five months after the Washington Supreme Court's *Trig Electric* decision, the Ninth Circuit Court of Appeals found that California's stop notice and payment bond statutes were not preempted by ERISA. *Southern Calif. IBEW-NECA Trust Funds v. Standard Industrial Electric, supra*, 247 F.3d 920 (9<sup>th</sup> Cir. 2001). This Court should revisit the *Trig* ruling in light of the analysis in *Standard Industrial*.

The *Standard Industrial* court first affirmed the lower court's ruling that the California payment bond statute was not preempted. In so doing, it invoked the Ninth Circuit's reasoning in *JWJ Contracting, supra*, 135

F.3d 671 (9<sup>th</sup> Cir. 1998), in which the court found no preemption of Arizona's payment bond remedy. The *Standard Industrial* court observed that the California statute was similar to the Arizona law, in that it did not require the establishment of a separate benefit plan, nor did it impose new reporting disclosure, funding, or vesting requirements for ERISA plans. Similarly, the California statute did not tell employers how to write ERISA benefit plans or how to determine ERISA beneficiary status, and did not condition requirements on how ERISA plans were written. 247 F.3d at 925.

Significantly, the *Standard Industrial* court rejected the argument embraced in *Trig* that *JWJ Contracting*, which found no preemption, is distinguishable because the general contractor in *JWJ* had a direct relationship with the trust funds. Reasoning that the trust funds in both cases were the intended beneficiaries of the bonds involved, the court concluded that the bond remedies in the two cases “do not have any legally cognizable differences.” *Standard Industrial*, 247 F.3d at 927.

Finally, the *Standard Industrial* court observed that “a core inquiry in determining whether a state law claim is preempted is the effect on an ERISA governed relationship.” 247 F.3d at 920. The court acknowledged that California's payment bond remedy regulates the relationship between ERISA trusts and an employer's surety, “but the effect of this state

regulated relationship on ERISA's domain is too tenuous to precipitate preemption under ERISA." 247 F.3d at 927.

With respect to California's stop notice statute, the *Standard Industrial* court found that it, too, was not preempted, and overruled its earlier decisions to the contrary in *Carpenters Health and Welfare Trust v. Tri-Capital Corp.*, 25 F.3d 849 (9<sup>th</sup> Cir. 1994); *Trustees of the Electrical Workers v. Marjo Corp.*, 988 F.2d 865 (9<sup>th</sup> Cir. 1992); and *Sturgis v. Herman Miller Inc.*, 943 F.2d 1127 (9<sup>th</sup> Cir. 1991).

The Ninth Circuit has not hesitated to overrule its earlier ERISA preemption decisions in light of *Travelers*. The Washington Supreme Court should do the same with respect to *Trig*.

**C. The Washington Courts Should Likewise Harmonize Their ERISA Preemption Analysis with That of the California Supreme Court.**

Three years after *Trig*, the California Supreme Court held that California's general mechanic's lien statute was not preempted by ERISA. *Betancourt v. Storke Housing Investors*, 82 P.3d 286 (2003). Acknowledging the "changed legal landscape" in the wake of *Travelers* (quoting *Carpenters v. U.S. Fidelity*, 215 F.3d 136 (1st Cir. 2000)), the California high court found that the statute did not constitute an alternative enforcement mechanism subject to ERISA preemption. 82 P.3d at 294.

*Betancourt* particularly criticized *Trig* as one of only three post-*Travelers* decisions finding ERISA preemption of state lien statutes:

Although these cases recognized the “starting presumption that Congress does not intend to supplant state law” in areas of traditional state regulation (*Travelers, supra*, 514 U.S. at p. 654, 115 S.Ct. 1671), we conclude that none of these cases gave due consideration to the presumption before finding preemption. [Citations.] Indeed, in discussing the alternative enforcement mechanism doctrine, these cases did not expressly consider whether the state statute at issue was in an area of traditional state regulation.

*Betancourt*, 82 P.3d at 295.

Because the Washington public works lien laws pre-exist ERISA and have always been an area of traditional state regulation, this Court should determine finally that they lie outside ERISA’S preemptive scope.

**D. Because the *Galvanizer’s* Court Expressly Limited the Scope of Its Decision to the Enforceability of a Lien Under RCW 60.28 Against the Subcontractor Who Was Not Timely Served, the Trusts Have Not Lost Their Lien Rights Against the Non-Chapman Foreclosure Defendants.**

As the subcontractor primarily liable under the collective bargaining agreement for payment of employee benefit contributions, Chapman qualifies as the “alleged debtor” referred to in *Galvanizer’s Co. v. State Highway Commission*, 8 Wn.App. 804, 509 P.2d 73 (1973). In the trial court, Finnegan relied exclusively on this case for its argument that the Trusts lost their lien claim under RCW 60.28 because Chapman was

not served with the Trusts' foreclosure complaint until March 8, 2006. But

Finnegan ignored the following limiting language in the opinion:

We need not, and do not, decide whether or not all the contractors are necessary parties to this action. We limit this opinion solely to declaring that the alleged debtor is a necessary party upon whom service of process must have been made during the four month statutory life of the lien *in order that the lien be enforced as against him.* (emphasis in original)

*Galvanizer's*, 8 Wn.App. at 806. So as applied to this case, the *Galvanizer's* opinion teaches, at most, that the Trusts' lien may be unenforceable against only Chapman, which is insolvent anyway. *Galvanizer's* does not render unenforceable the Trusts' claims against the other lien foreclosure defendants.

**E. In Any Event, the Trusts' Claims under RCW 39.08 against Finnegan and Its Payment and Performance Bond Remain Enforceable.**

Regardless of the Trusts' rights under the public works lien statute, RCW 60.28, the Trusts nevertheless retain their rights under RCW 39.08, the public works bond statute. The distinction between the two statutes was made clear in *Haley v. Brady*, 17 Wn.2d 775, 137 P.2d 505 (1943):

The surety was sued under the provisions of sections 1159-1161 Rem.Rev.Stat. [now RCW 39.08] At no time did plaintiff make any attempt in this action to assert any lien against the reserve fund required to be set upon public improvements by the provisions of sections 10320 and 10322 Rem.Rev.Stat. [now RCW 60.28].

It is contended that sections 1159-1161 Rem.Rev.Stat. [now RCW 39.08] are lien statutes. We cannot agree.

We think that the legislature did not intend any merger of these different statutes or the remedies provided for in them, for section 10322 [now 60.28.030] contains and ends with the following proviso: 'Provided, however, that the limitation of four (4) months provided for herein shall not be construed as a limitation upon the right to sue the contractor or his \*784 surety where no right of foreclosure against said fund is sought.' See, also, *Maryland Casualty Co. v. City of Tacoma*, 199 Wash. 384, 92 P.2d 203; *United Pac., etc., Co., v. Port of Everett*, 182 Wash. 285, 295, 26 P.2d 736.

17 Wn.2d at 783, 784.

Finnegan has not argued that the Trusts are not entitled to enforce their rights under RCW 39.08 against the payment and performance bond. And as *Haley* affirms, the rights conferred under RCW 39.08 are entirely distinct from those provided by RCW 60.28, because the latter is a lien statute and the former is not. So regardless of the analysis that applies to the Trusts' lien rights under RCW 60.28, the Trusts' rights against the surety are preserved under RCW 39.08.

**F. The Trusts Are Entitled to Attorney's Fees on Appeal.**

In accordance with RAP 18.1(b), the Trusts request an award of attorneys' fees on appeal. The Trusts counterclaimed to foreclose on their liens, so attorney's fees are recoverable under RCW 39.08.030, which provides:

. . . in any suit or action brought against such surety or sureties by any such person or corporation to recover for any of the items hereinbefore specified, the claimant shall be entitled to recover in addition to all other costs, attorney's fees in such sum as the court shall adjudge reasonable..."

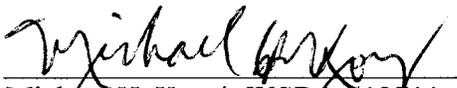
#### IV. CONCLUSION

For all of the foregoing reasons, this Court should reverse the trial court decision and remand this case to the superior court for further proceedings consistent with this Court's opinion.

DATED this 29<sup>th</sup> day of May, 2007.

Respectfully submitted,

McKENZIE ROTHWELL BARLOW  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 29th day of May, 2007 I caused to be served the BRIEF OF APPELLANTS on the attorneys for the Respondent at the following address:

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