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Court of Appeals
Division I
State of Washington

No. 74240-0-I

COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

JACK A. JOHNSON, in his capacity as the trustee of KEY
DEVELOPMENT PENSION, f/k/a G&G Meats Pension Fund and
Columbia Meat Products Pension Plan,

Appellant/Trial Court Plaintiff,

v.

CLYDE E. CARLSON and PRISCILLA A. CARLSON

Respondents/Trial Court Defendants.

BRIEF OF RESPONDENTS
CLYDE E. CARLSON AND PRISCILLA A. CARLSON
(AMENDED)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. INTRODUCTION..... 1

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

III. COUNTER STATEMENT OF THE CASE..... 3

A. Jack Johnson and Gary Dalhby, the only beneficiaries of the Pension Plan, managed its assets and investments and made the decision to bring the underlying action against Carlson despite the fact that the Notes were facially usurious...... 3

B. The Trial Court properly entered Judgment against the Pension Plan and allowed its assets to be garnished...... 5

IV. ARGUMENT..... 6

A. The de novo standard of review applies...... 6

 The de novo standard of review applies because this appeal involves a question of law..... 6

B. This Court should affirm the Trial Court Orders because ERISA plans are required to pay valid money judgments rendered against them and plan assets are subject to state court garnishment proceedings...... 7

 1. *The Pension Plain is obligated to pay the Judgment from plan assets under the ERISA “sue and be sued” clause.* 7

 2. *Garnishment is a permissible mechanism under ERISA for execution against the Pension Plan assets.*..... 9

 3. *The standard of care governing fiduciaries of the Pension Plan does not limit the extent*

*to which Carlson is entitled to satisfy the
Judgment from plan assets via garnishment.* 15

**C. This Court should affirm the Trial Court Orders
because Washington law specifically allows
execution against employee benefit plans for
valid plan obligations such as the Judgment.** 17

V. FEES AND COSTS ON APPEAL..... 18

VI. CONCLUSION 19

TABLE OF AUTHORITIES

Cases

| | |
|---|----------------|
| <i>Abofreka v. Alston Tobacco Co.</i> , 288 S.C. 122, 341 S.E.2d 622 (1986) | 8 |
| <i>Butzberger v. Foster</i> , 151 Wn.2d 396, 89 P.3d 689 (2004) | 19 |
| <i>Gray v. Phoenix Bond & Indem. Co.</i> , No. 12 C 6281, 2014 WL 1673740 (N.D. Ill. Apr. 27, 2014)..... | 12 |
| <i>Guidry v. Sheet Metal Workers Nat. Pension Fund</i> , 493 U.S. 365, 110 S. Ct. 680, 107 L. Ed. 2d 782 (1990)..... | 12 |
| <i>Huron Holding Corp. v. Lincoln Mine Operating Co.</i> , 312 U.S. 183, 61 S.Ct. 513, 85 L.Ed. 725 (1941) | 9 |
| <i>King v. W. United Assur. Co.</i> , 100 Wn. App. 556, 997 P.2d 1007 (2000) | 18 |
| <i>Luxemburg v. Hotel & Rest. Emp. & Bartenders Int'l Union Pension Fund</i> , 91 Misc. 2d 930, 398 N.Y.S.2d 589 (Sup. Ct. 1977)..... | 8 |
| <i>Mackey v. Lanier Collection Agency & Serv., Inc.</i> , 486 U.S. 825, 108 S. Ct. 2182, 100 L. Ed. 2d 836 (1988). 7, 8, 9, 10, 11 | |
| <i>Milgram v. Orthopedic Associates Defined Contribution Pension Plan</i> , 666 F.3d 68 (2d Cir. 2011)..... | 12, 13, 14, 15 |
| <i>Morris v. Local 804 Delivery & Warehouse Employees Health & Welfare Fund</i> , 116 Misc. 2d 234, 455 N.Y.S.2d 517 (Civ. Ct. 1982) | 7 |
| <i>Olympic S.S. Co., Inc. v. Centennial Ins. Co.</i> , 117 Wn.2d 37, 811 P.2d 673 (1991) | 19 |

Statutes

11 U.S.C. § 1103(c)(1)..... 15

29 U.S.C. § 1056 (d)(l) 11

29 U.S.C. § 1104(a)(1)(A)(i)-(ii) 16

29 U.S.C. § 1132(a) 11

29 U.S.C. § 1132(d)(2) 10, 11

29 U.S.C. Ch. 18..... 2, 16

RCW 19.52.030 1, 5

RCW 19.52.032 18

RCW 4.84.330 18

RCW 6.15.020(3)..... 17, 18

RCW 6.27.160 2, 18

RCW 6.27.160(2)..... 5

Other Authorities

RAP 14.1..... 2, 19

RAP 18.1..... 2, 19

I. INTRODUCTION

The Trial Court correctly denied the Pension Plan's Claim of Exemption to garnishment of a bank account at Washington Federal, Inc. (the "Account") (CP 91-91) and accordingly entered a Judgment on Answer of Garnishee and Order to Pay (CP 74-76).¹ The garnishment arose from the Trial Court's correct decision to enter a Judgment against the Pension Plan in connection with dismissing its misguided attempt to collect on two loans that were usurious under RCW 19.52.030. (CP 93-94).

Against this backdrop, the Trial Court correctly determined that the funds in the Account are an asset of the judgment debtor that is subject to garnishment for Pension Plan debts. Accordingly, this Court should affirm the Trial Court's sound decision denying the Pension Plan's Claim of Exemption and further award Carlson attorneys' fees and costs as the substantially prevailing party on appeal.²

¹ "Pension Plan" refers collectively to Appellant and Trial Court Plaintiff Key Development Pension Fund and its predecessors in interest, G&G Meats Pension Fund and Columbia Meat Products Pension Plan. Jack A. Johnson ("Jack") filed suit in his capacity as trustee of the Pension Fund. For clarity he is referred to by first name; no disrespect is intended.

² Respondents and Trial Court Defendants Clyde E. Carlson and Priscilla A. Carlson are referred to individually by their first names for clarity and together, as "Carlson" in the singular tense for readability.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Carlson does not assign error with respect to the Trial Court's correctly decided (i) August 21, 2015 Order Denying Plaintiff's Claim of Exemption From Garnishment (CP 91-92), (ii) Letter Ruling dated October 2, 2015 (CP 77), and (iii) Judgment on Answer of Garnishee and Order to Pay entered October 6, 2016 (CP 74-76) (collectively, the "Trial Court Orders"). The following issues pertain to the Pension Plan's assignments of error:

1. Whether this Court should affirm the Trial Court's denial of the Pension Plan's Claim of Exemption where:
 - (A) Under the Employee Retirement Income Security Act of 1974 ("ERISA") (PL 93-406 (HR 2), PL 93-406, SEPTEMBER 2, 1974, 88 Stat 829, enacted September 2, 1974, codified in part at 29 U.S.C. Ch. 18), pension plans are required to pay valid money judgments rendered against them with plan assets and garnishment is a permissible mechanism for execution against plan assets (*See* Section IV(B), *infra*); and
 - (B) Washington law specifically allows execution against employee benefit plans for valid plan obligations such as the Judgment (*See* Section IV(C), *infra*).
2. Whether this Court should award Carlson attorneys' fees and costs on appeal per RAP 14.1 *et seq.* and RAP 18.1 where (i) the subject promissory notes ("Notes") provide for an award of attorneys' fees and cost to the prevailing party, and (ii) RCW 6.27.160 provides for such an award to the prevailing party if an exemption claim was not made in good faith (*See* Section V, *infra*).

III. COUNTER STATEMENT OF THE CASE

- A. **Jack Johnson and Gary Dalhby, the only beneficiaries of the Pension Plan, managed its assets and investments and made the decision to bring the underlying action against Carlson despite the fact that the Notes were facially usurious.**

This case began as a collection lawsuit filed by the Pension Plan against Carlson, alleging nonpayment of two promissory notes, referred to herein as the Notes. (CP 8-16) In response, Carlson asserted the affirmative defense of usury as the interest rate on both Notes was 18%, exceeding the statutory maximum of 12% for loans which are obtained and used primarily for personal, family or household purposes. (CP 1-5)

In what appears to be an attempt to garner sympathy for the ‘plight’ of the beneficiaries, the Pension Plan in its Opening Brief portrays the two remaining beneficiaries of the Pension Plan (Jack Johnson and Gary Dahlby) as beneficiaries who are “fully vested” and “past retirement age” and receive the proceeds of the bank account “immediately” after the loan payments are made into the bank account.³ But that is not the whole story.

For many years Jack Johnson and Gary Dahlby ran a business together and created the Pension Fund, sheltering hundreds of thousands of dollars from taxes. Jack Johnson and Gary Dahlby were not only the

³ See Opening Brief at 3.

only trustees of the Pension Plan, they were also the sole beneficiaries of the Pension Plan for the last 10 years.⁴ Thus, in short, Johnson and Dahlby created the Pension Plan, administered the Pension Plan as trustees, and for the last ten years have been the only beneficiaries.

Over the years Johnson and Dahlby have withdrawn over one million dollars each from the Pension Plan.⁵ They made the decisions on how to manage the Pension Plan's assets and investments, including the decision to make two usurious loans to Carlson.⁶ Carlson borrowed \$300,000 from the Pension Plan and over the years re-paid the Pension Plan over \$400,000, yet the Pension Plan (through its trustees Johnson and Dahlby) pursued this litigation despite the fact that the Notes were facially usurious.⁷ The Trustees failed in their litigation, and now acting as beneficiaries, attempt to avoid the consequences that they alone created, as trustees, by making usurious loans and pursuing unsuccessful litigation.

⁴ See Trial Exhibit 83.

⁵ *Id.*

⁶ See Trial Court Findings of Fact and Conclusions of Law, dated January 29, 2015. (CP 113-21)

⁷ See Trial Court Findings of Fact and Conclusions of Law, dated January 29, 2015. (CP 113-21)

B. The Trial Court properly entered Judgment against the Pension Plan and allowed its assets to be garnished.

On March 16, 2015, following a bench trial, the Trial Court entered an Order in favor of Carlson for Judgment against the Pension Plan for \$552,697.80. (CP 96-98) The Judgment was entered pursuant to RCW 19.52.030 (the usury statute) for penalties, costs and reasonable attorneys' fees in connection with Pension Plan's misguided claims against Carlson seeking to collect on two facially usurious loans. (CP 93-95) The Pension Plan refused to satisfy the Judgment and Carlson proceeded with collection activities as allowed by state law.

On June 30, 2015 this Court entered a Writ of Garnishment which garnished funds in the Account to satisfy the \$552,697.80 judgment the Pension Plan. (CP 109-12) On July 24, 2015, Washington Federal provided the Answer to Writ of Garnishment which stated that there was \$1,539.82 in the Account. (CP 6-7) Thereafter, on July 30, 2015, Defendants received by mail the Exemption Claim filed by Pension Plan, which asserted that the funds in the Account were not property belonging to the Pension Plan, but instead were property belonging to the participants of the Pension Plan. (CP 70-73) Thereafter, following the procedure set forth in RCW 6.27.160(2) Carlson filed a Declaration

Objecting to Mr. Johnson’s Exemption Claim and filed a Motion Re: Objection to Exemption Claim. (CP 23-46, 50-55)

The Trial Court granted Carlson’s Motion and denied the Pension Plan’s Exemption Claim by entering the three Trial Court Orders, as follows: (i) August 21, 2015 Order Denying Pension Plan’s Claim of Exemption From Garnishment (CP 91-92), (ii) Letter Ruling dated October 2, 2015 (CP 77), and (ii) Judgment on Answer of Garnishee and Order to Pay entered October 6, 2016 (CP 74-76). The Pension Plan timely appealed on October 28, 2015. (CP 83-84)

IV. ARGUMENT

A. The de novo standard of review applies.

The de novo standard of review applies because this appeal involves a question of law.⁸

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⁸ *Ang v. Martin*, 154 Wash. 2d 477, 481, 114 P.3d 637, 640 (2005).

B. This Court should affirm the Trial Court Orders because ERISA plans are required to pay valid money judgments rendered against them and plan assets are subject to state court garnishment proceedings.

1. The Pension Plan is obligated to pay the Judgment from plan assets under the ERISA “sue and be sued” clause.

The Pension Plan is liable for the Judgment, and therefore the resulting garnishment of the Account should be permitted, because ERISA plans can “sue and be sued” and must bear the consequences of such litigation.⁹ In so ruling in *Mackey v. Lanier Collection Agency & Serv., Inc.*, the United States Supreme Court emphasized that ERISA plans can be held liable in two types of civil suits: (1) those “brought by particular persons against ERISA plans, to secure specified relief, including the recovery of plan benefits”; and (2) lawsuits involving ERISA plans “for run-of-the-mill state-law claims such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan”.¹⁰ Examples of the latter suit include, without limitation, suit against ERISA plan for unpaid rent or unpaid attorneys’ fees, and tort suits against an ERISA plan.¹¹

⁹ *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 833, 108 S. Ct. 2182, 2187, 100 L. Ed. 2d 836 (1988).

¹⁰ *Id.*

¹¹ *Id.* at 833, n. 8. In footnote 8, *Mackay* approvingly cites *Morris v. Local 804 Delivery & Warehouse Employees Health & Welfare Fund*, 116 Misc. 2d 234, 455

The inability of an ERISA plan to avoid execution against plan assets is illustrated in the context of tort claims against a plan.¹² For example, in *Abofreka v. Alston Tobacco*,¹³ the court upheld a judgment for libel entered in favor of physician against an ERISA plan.¹⁴ The *Mackay* court approvingly cited the *Abofreka* decision for the proposition that ERISA plans can be liable for torts committed by an ERISA plan.¹⁵ The commission of a tort by an ERISA plan is analogous to the usurious lending practice that the Pension Plan committed in this case. Accordingly, the Judgment against the plan should be allowed as a valid judgment against the Pension Plan for its decision to engage in usurious conduct.¹⁶

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N.Y.S.2d 517 (Civ. Ct. 1982) (suit against ERISA plan for unpaid rent); *Luxemburg v. Hotel & Rest. Emp. & Bartenders Int'l Union Pension Fund*, 91 Misc. 2d 930, 398 N.Y.S.2d 589 (Sup. Ct. 1977) (suit against ERISA plan for unpaid attorneys' fees); *Abofreka v. Alston Tobacco Co.*, 288 S.C. 122, 341 S.E.2d 622 (1986) (tort suit against ERISA plan).

¹² *Abofreka v. Alston Tobacco Co.*, 288 S.C. 122, 341 S.E.2d 622 (1986) (cited approvingly in *Mackey*, 486 U.S. at 833, n. 8).

¹³ *Id.*

¹⁴ *Abofreka*, 288 S.C. 122.

¹⁵ *Mackey*, 486 U.S. at 833, n. 8.

¹⁶ *Id.*

2. *Garnishment is a permissible mechanism under ERISA for execution against the Pension Plan assets.*

Regardless of the type of suit, garnishment is a permissible mechanism for enforcement of judgments obtained against an ERISA plan.¹⁷ In this regard, the *Mackay* opinion further provides:

ERISA does not provide an enforcement mechanism for collecting judgments won in either of these two types of actions. Thus, while § 502(d), the “sue and be sued” provision, contemplates execution of judgments won against plans in civil actions, it does not provide mechanisms to do so. Moreover, Federal Rule of Civil Procedure 69(a), which would apply when either type of civil suit discussed above is brought against an ERISA plan in federal court, defers to state law to provide methods for collecting judgments. Cf. also *Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 188–194, 61 S.Ct. 513, 515–18, 85 L.Ed. 725 (1941). **Consequently, state-law methods for collecting money judgments must, as a general matter, remain undisturbed by ERISA; otherwise, there would be no way to enforce such a judgment won against an ERISA plan.**^[18]

Seeking to avoid the above determination that plan assets are subject to garnishment, Pension Plan misplaces reliance on the “sue and be

¹⁷ *Mackey*, 486 U.S. at 833-34.

¹⁸ *Id.* (bold emphasis added; italics in original).

sued” provision contained in ERISA § 502(d)(2), 29 U.S.C. §

1132(d)(2).¹⁹ That subsection provides:

Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity....^[20]

Emphasizing that the underlying action that led to the Judgment was not brought “under Subchapter 1 of Chapter 18 of Title 29 of the U.S. Code,” the Pension Plan unavailingly argues that “[t]he clear meaning of the words of the statutory provision which defendants rely on doesn't support their argument.”²¹ However, *Mackay* expressly rejected such a narrow interpretation of the “sue and be sued” provision contained in ERISA § 502(d)(2)²², as follows:

When Congress provides by law that an entity may “sue and be sued,” this includes “all civil process[es] incident to ... legal proceedings” including “[g]arnishment and attachment.”... We have reaffirmed the view that a “sue and be sued” clause creates a presumption of susceptibility to garnishment and attachment in our more recent cases, as well....Even petitioners concede that our usual rule is that a “sue and be sued” clause makes a subject entity susceptible to garnishment.^[23]

¹⁹ See Opening Brief at 3-7.

²⁰ See 29 U.S.C. § 1132(d)(2).

²¹ See Opening Brief at 5-7.

²² See 29 U.S.C. § 1132(d)(2).

²³ *Mackey*, 486 U.S. at 834, n . 9 (citations omitted).

Thus, applied here, *Mackay* stands for the proposition that the Claim of Exemption was properly denied because (i) the Judgment against the Pension Plan was valid (see Section IV(B)(1), *supra*), and (ii) ERISA does not prevent state law garnishment of a plan’s assets for debts owed by the plan (as set forth in this Section).²⁴

Likewise, the Pension Plan’s argument based on *Mackay* that ERISA prohibits garnishment of a *pension* benefit plan as opposed to a *welfare* benefit plan is also unavailing.²⁵ As the Pension Plan concedes, the discussion in *Mackay* regarding this issue was non-controlling dicta.²⁶ Moreover, the analysis in *Mackay* of ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1), is inapplicable because it pertains to a distinction between whether section 206(d)(1) prevents alienation or garnishment of welfare plan *benefits* or pension plan *benefits*.²⁷ In contrast, this case involves the issue of whether plan *assets* can be garnished, not plan *benefits*. It is noteworthy

²⁴ *Id.* Because the “sue and be sued” clause in 29 U.S.C. § 1132(d)(2) does not limit the availability of civil remedies (including but not limited to garnishment proceedings) against an ERISA plan to suits brought under any particular ERISA subchapter, it is irrelevant whether Carlson is an entity or individual empowered to bring a civil action under 29 U.S.C. § 1132(a), despite the Pension Plan’s protestations to the contrary. *See* Opening Brief at 5-6.

²⁵ *Mackey*, 486 U.S. at 836.

²⁶ *Id.*; *see also* Opening Brief at 11.

²⁷ *Id.* at 837-38.

that the Second Circuit applied the principles of *Mackay* in *Milgram v. Orthopedic Associates Defined Contribution Pension Plan*²⁸ and determined that ERISA's anti-alienation rule did not prevent defined contribution pension plan *assets* from being used to satisfy a judicial judgment that had been entered against the plan itself.²⁹

The Pension Plan also misconstrues *Guidry v. Sheet Metal Workers Nat. Pension Fund*³⁰ by ignoring the distinction between judgments against the plan and its participants as compared to judgment creditors seeking to collect from the plan assets and participant benefits. However, courts that have specifically addressed the collection of a valid legal judgment against an ERISA plan have determined that there is an important distinction.³¹ Again, as discussed *supra* in this Section IV(B)(2), in *Milgram v. Orthopedic Associates Defined Contribution Pension Plan*, the Second Circuit discussed these distinctions at length and concluded that the plan assets of ERISA pension benefit plans differ from the

²⁸ *Milgram v. Orthopedic Associates Defined Contribution Pension Plan*, 666 F.3d 68 (2d Cir. 2011).

²⁹ *Milgram*, 666 F.3d at 74-78.

³⁰ *Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365, 369, 110 S. Ct. 680, 684, 107 L. Ed. 2d 782 (1990).

³¹ *Milgram*, 666 F.3d 68; *Gray v. Phoenix Bond & Indem. Co.*, No. 12 C 6281, 2014 WL 1673740 (N.D. Ill. Apr. 27, 2014).

participant benefits paid to participants under ERISA pension benefit plans, and that the former (plan assets) are not subject to ERISA's anti-alienation provisions and may be attached.³² In fact, *Milgram* specifically distinguishes *Guidry* on the basis that **it concerned a creditor of the plan participant** which sought to attach participant benefits that had already been paid out to the participant who was the judgment debtor.³³

The *Milgram* opinion further states that undistributed funds held in trust for the participants of an ERISA governed plan are considered *assets* of the plan that are legally owned and managed by the trustee, and not considered *benefits* of the participants.³⁴ The plan assets only become benefits of the participants when they are distributed to the participants.³⁵ Accordingly, prior to the time of distribution, a plan participant cannot truly be said to have a claim to any particular assets in the trust corpus of an ERISA defined contribution plan, such as the Pension Plan, and the plan assets may be used to pay creditors of the plan.³⁶

³² *Milgram*, 666 F.3d at 74.

³³ *Id.* at 74.

³⁴ *Id.* at 68.

³⁵ *Id.* at 74.

³⁶ *Id.*

That said, a participant's future benefits in a defined contribution plan will be adversely affected as a result of current poor management or investment decisions by the trustee that expose the plan's assets to liability.³⁷ For instance, in this case, the assets potentially available to distribute as benefits to participants will most likely be reduced as a result of the adverse judgment against the Pension Plan.³⁸

However, this potential reduction does not serve as a basis to prevent all collection activity by a creditor of the plan. Carlson only seeks to collect from the assets of the Pension Plan. This activity is not precluded under ERISA's anti-alienation provisions discussed in *Mackey* and *Guidry*, but rather is allowed by ERISA in accordance with applicable state law judgment enforcement mechanisms.

In addition to contemplating the enforcement of money judgments against ERISA plans through state law mechanisms, ERISA also

³⁷ *Milgram*, 666 F.3d at 76-78 (plan participants in defined contribution plan bear the risk that poor investment and management decisions will expose the plan assets to liability).

³⁸ The Pension is a profit sharing plan which is a type of defined contribution plan and differs from a defined benefit plan. In a defined contribution plan, the employer and employee contribute a fixed sum on a periodic basis and the employer is under no obligation to maintain the participant benefits at a set level. *Milgram*, 666 F.3d at 76. Accordingly, the participants bear the risk associated with investment instability, underfunding, longevity and litigation. *Id.* This is in stark contrast to a defined benefit plan where an employer *promises* participants a specific benefit upon retirement and the employer is responsible for covering any plan shortfalls. *Id.*

specifically requires plan assets to be used to “defray reasonable expenses of administering the plan.”³⁹ Although the reasonable expenses of administering the plan are not defined under ERISA, courts have interpreted this provision to include “the payment of a judicial judgment that the Plan is required by law to satisfy...”⁴⁰ The plan fiduciary’s use of plan assets to pay a judgment which is a valid legal obligation of the plan is considered “a ministerial function, not a discretionary one to which fiduciary liability would attach.”⁴¹ Accordingly, under ERISA, Defendants are entitled to collect on their judgment from assets of the Pension Plan.

3. *The standard of care governing fiduciaries of the Pension Plan does not limit the extent to which Carlson is entitled to satisfy the Judgment from plan assets via garnishment.*

Highlighting the absurdity of its position, the Pension Plan essentially argues that ERISA permits judgment creditors to recover on “valid obligations” only up to the amount of “**reasonable** expenses of administering the plain.”⁴² In so arguing, it is noteworthy that the Pension Plan necessarily concedes the above point that a judgment can be entered

³⁹ See 11 U.S.C. § 1103(c)(1).

⁴⁰ *Milgram*, 666 F.3d at 77.

⁴¹ *Id.*

⁴² See Opening Brief at 15-16 (emphasis in original).

against an ERISA plan and that the judgment creditor is entitled to recover at least *some* proceeds from an ERISA plan, *i.e.*, so long as the amount is within the bounds of a “reasonable” administrative expense.

In any event, the argument fails because the “reasonable expense” language on which the Pension Plan relies governs the standard of care applicable to fiduciaries of an ERISA plan.⁴³ The reasonable expense restriction does not relate in any way, shape or form to a restriction on the extent to which an ERISA plan can be held liable under the “sue and be sued” provision as described in Section IV(B)(1), *supra*.⁴⁴ In this case, the extent to which judgment is enforceable against the Pension Plan is not limited by any “reasonable expense” or other requirement relating to the “prudent man standard of care” applicable to plan a plan fiduciary.⁴⁵ These sections do no limit the extent to which Carlson can collect (via garnishment or otherwise) its Judgment from assets of the Pension Plan.

⁴³ See Opening Brief at 15-16; *see also* 29 U.S.C. § 1104(a)(1)(A)(i)-(ii).

⁴⁴ In this regard, it is noteworthy that ERISA is a federal law that establishes minimum standards for pension plans in private industry and provides for extensive rules on the federal income tax effects of transactions associated with employee benefit plans. *See* 29 U.S.C. Ch. 18. ERISA was enacted to protect the interests of employee benefit plan participants and their beneficiaries by: (i) requiring the disclosure of financial and other information concerning the plan to beneficiaries; (ii) establishing standards of conduct for plan fiduciaries; and (iii) providing for appropriate remedies and access to the federal courts. *Id.*

⁴⁵ *See* 29 U.S.C. § 1104(a)(1)(A)(i)-(ii).

C. **This Court should affirm the Trial Court Orders because Washington law specifically allows execution against employee benefit plans for valid plan obligations such as the Judgment.**

Washington law similarly permits Carlson to execute on the judgment against the Pension Plan from the assets of the Pension Plan through Washington's statutory collection mechanisms. In this regard, RCW 6.15.020(3), which the Pension Plan cites approvingly, provides:

The right of a person to a pension, annuity, or retirement allowance or disability allowance, or death benefits, or any optional benefit, or any other right accrued or accruing to any citizen of the state of Washington under any employee benefit plan, and any fund created by such a plan or arrangement, shall be exempt from execution, attachment, garnishment, or seizure by or under any legal process whatever. This subsection shall not apply to child support collection actions issued under chapter 26.18, 26.23, or 74.20A RCW if otherwise permitted by federal law. This subsection shall permit benefits under any such plan or arrangement to be payable to a spouse, former spouse, child, or other dependent of a participant in such plan to the extent expressly provided for in a qualified domestic relations order that meets the requirements for such orders under the plan, or, in the case of benefits payable under a plan described in 26 U.S.C. Sec. 403(b) or 408 of the internal revenue code of 1986, as amended, or section 409 of such code as in effect before January 1, 1984, to the extent provided in any order issued by a court of competent jurisdiction that provides for maintenance or support. **This subsection does not prohibit actions against an employee benefit plan, or fund for valid obligations**

incurred by the plan or fund for the benefit of the plan or fund. (emphasis added)^[46]

Simply put, like ERISA, the plain language of RCW 6.15.020(3) only protects the right of a person to his plan benefits, and not a plan to its plan assets. Accordingly, the Carlson's judgment is a valid legal obligation of the Pension Plan that is subject to garnishment.⁴⁷

V. FEES AND COSTS ON APPEAL

Both of the Notes provide that the prevailing party in a collection action is entitled to an award of attorneys' fees and costs. (CP 12, 15) RCW 4.84.330 awards attorney fees authorized by contract. The Usury Statute, RCW 19.52.032, is complementary to, and not in conflict with, RCW 4.84.330.⁴⁸ An award of fees on appeal is proper under RCW 6.27.160, which provides for an award of attorneys' fees and costs to the prevailing party if the court determines that an exemption claim was not made in good faith. As detailed above, there is not basis in law or fact for the Pension Plan's Exemption Claim. Thus, RCW 6.27.160 provides another ground on which to award fees and cost on appeal. Accordingly,

⁴⁶ See RCW 6.15.020(3).

⁴⁷ *Id.*

⁴⁸ *King v. W. United Assur. Co.*, 100 Wn. App. 556, 561, 997 P.2d 1007 (2000)).

per RAP 14.1 *et seq.* and RAP 18.1, Carlson requests, and should be entitled to, an award of attorneys' fees and expenses on appeal.⁴⁹

VI. CONCLUSION

It was the Pension Plan's decision to engage in predatory lending practices and charge Carlson, who is also of retirement age, excessive rates of interest. Similarly, it was the Pension Plan's decision to commence a lawsuit against Carlson to collect the outstanding principal amount of \$300,000 plus unpaid interest on the two Notes even though Carlson had already paid the Pension a total of over \$400,000.00 on the two Notes.⁵⁰ It was also the Pension Plan's decision to prosecute its case to trial rather than reaching a reasonable compromise.

The Pension Plan cannot now escape its obligation to pay the valid legal judgment rendered against it particularly when both ERISA and applicable Washington state law allow for just that. The Pension Plan cannot separate the benefit of bringing a lawsuit from the burden of bringing a lawsuit. The two go hand-in-hand and now the Pension Plan

⁴⁹ *Olympic S.S. Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 51-54, 811 P.2d 673, 680-82 (1991); *Butzberger v. Foster*, 151 Wn.2d 396, 413-14, 89 P.3d 689 (2004).

⁵⁰ See Trial Court Findings of Fact and Conclusions of Law, dated January 29, 2015. (CP 113-21)

must accept the burden and pay the valid legal judgment rendered against it from the Pension Plan assets.

For the reasons set forth above, this Court should affirm the Trial Court's decision to deny the Claim of Exemption (CP 91-92) and enter Judgment on Answer of Garnishee and Order to Pay (CP 74-76). Consequently, Carlson is entitled to award of attorneys' fees and costs as the substantially prevailing party on appeal.

Respectfully submitted this 24th day of May, 2016.

Peterson Russell Kelly PLLC

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