

NO. 79896-6

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SUPREME COURT  
STATE OF WASHINGTON  
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**SUPREME COURT  
OF THE STATE OF WASHINGTON**

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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

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**REPLY BRIEF OF APPELLANTS**

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## I. INTRODUCTION

Time and events have proved the *Trig* decision to be both incorrect and harmful. Contrary Ninth Circuit authority subsequent to *Trig* has produced confusion and forum shopping in Washington with respect to the enforcement of public works lien claims. In overturning *Trig*, this Court would eliminate the confusion and resulting legal expense to both general contractors and ERISA trust funds. Reversing *Trig* would also serve to align this Court's ERISA preemption jurisprudence with that of most courts across the country. For these reasons and others explained below, *Trig* should be overruled.

## II. ARGUMENT

### A. Respondent's Characterization of *Trig* as a "Bright-Line Rule" Is Illusory, Because the Trusts Can Foreclose Their Liens in Federal District Court.

Far from serving as a "bright-line rule," as Finnegan suggests, *Trig* has helped to create a confusing legal landscape in Washington with respect to the enforceability of public works liens. As matters now stand, ERISA trust funds can invoke the federal courts' supplemental jurisdiction to foreclose their liens in the federal district courts, under the authority of *Southern Calif. IBEW-NECA Trust Funds v. Standard Industrial Electric*, 247 F.3d 920 (9<sup>th</sup> Cir. 2001), discussed at length in the Trusts' opening

brief. Indeed, the only avenue available to general contractors to prevent that result is to win a race to the courthouse to file a declaratory-judgment action in state superior court — which is precisely what Finnegan did in this case. The conflict between *Trig* and *Standard Industrial* has bred nothing but confusion and litigation expense for all parties involved. Unless this Court harmonizes its ERISA preemption analysis with that of the Ninth Circuit Court of Appeals, this unpredictability will only continue.

**B. In Light of the *Standard Industrial* Decision, *Trig* Has Proven Both Incorrect and Harmful.**

As this Court observed in *Trig*, “[s]tare decisis ‘requires a clear showing that an established rule is incorrect and harmful before it is abandoned.’” 142 Wn.2d at 442. *Trig* is incorrect because it does not distinguish the lien statutes from laws that are “specifically designed to affect employee benefit plans,” *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 140, 111 S.Ct. 478 (1990). And in view of the Ninth Circuit’s *Standard Industrial* decision, *Trig* is harmful because it will continue to breed unnecessary litigation in Washington’s state and federal courts until it is overturned.

**C. Contrary to Respondent's Allegation, There Is No "Split of Authority Across the Country" Regarding ERISA Preemption of Public Works Lien Statutes.**

Tellingly, Finnegan cites only three post-*Travelers* decisions finding ERISA preemption of public works lien statutes: *Plumbing Industry Board v. Howell*, 126 F.3d 61 (2d Cir. 1997); *EklecCo v. Iron Workers*, 170 F.3d 353 (2d Cir. 1999); and, of course, *Trig*. In other words, only this Court and the Second Circuit Court of Appeals have found preemption of state lien statutes since *Travelers*. Many other courts after *Travelers*, on the other hand, have found that these statutes are not preempted.<sup>1</sup>

In short, this Court's sharply split decision in *Trig* and two other decisions from the Second Circuit do not create a "split of authority across the country" in the post-*Travelers* preemption environment. This Court should join the overwhelming majority of courts since *Travelers* that have

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<sup>1</sup> See, e.g., *Hawaii Laborers' Trust Funds v. Maui Prince Hotel*, 918 P.2d 1143 (Hawaii 1996) (Hawaii Mechanic's and Materialman's Lien Law not preempted); *Michigan Laborers Health Care Fund v. Seaboard Surety Co.*, 137 F.3d 427 (6<sup>th</sup> Cir. 1998) (finding no preemption of the Michigan Public Works Act); *Bellemead Development Corp. v. New Jersey Council of Carpenters Benefit Funds*, 11 F.Supp.2d 500 (D.N.J. 1998) (ERISA does not preempt New Jersey Construction Lien Law); *Plumbers and Pipefitters v. Farmington Casualty Co.*, 33 F.Supp.2d 904 (D.Or. 1998) (Oregon construction lien statute not preempted); *Carpenters Local Union No. 26 v. U.S. Fidelity & Guaranty Co.*, 215 F.3d 136 (1<sup>st</sup> Cir. 2000) (no preemption of Massachusetts bond statute; overruling earlier decision finding preemption); *Southern California IBEW-NECA Trust Funds v. Standard Industrial Electric Co.*, 247 F.3d 920 (9<sup>th</sup> Cir. 2001) (California stop notice and payment bond statute not preempted; overruling earlier decisions finding preemption); *Betancourt v. Storke Housing Investors*, 82 P.3d 286 (Cal. 2003) (California's mechanic's lien statute of general applicability not preempted).

refused to find preemption of the lien statutes, and overrule *Trig* accordingly.

**D. The Equities in This Case Actually Favor the Trusts.**

Finnegan cites three “equities” allegedly favoring preemption of the lien statutes. Each of the “equities” cited, however, requires a finding that the lien statutes are not preempted.

First, Finnegan argues that public-works liens are “secret” liens that take general contractors by surprise and “unfairly” require them to “pay for the same work twice.” Respondent’s brief at 17. It is even more unfair, however, to deny employees the payment of their health and related benefits altogether, which is the result if the Trusts cannot look to the general contractor for payment when the subcontractor employer becomes insolvent. That, after all, is why the public works lien statutes were enacted in the first place: to protect employee wages and benefits from the financial vagaries besetting the construction industry. General contractors should assume the risk that the subcontractors with whom they do business will become insolvent; and they are certainly in a better financial position to assume that risk than the subcontractor’s employees.

Second, Finnegan suggests that a reversal of *Trig* would undermine an alleged “public interest to maintain a competitive field of financially vibrant general contractors to bid on public projects . . . by creating

substantial new liability to innocent parties.” Respondent’s brief at 18. This argument is untenable for at least two reasons. First, making the lien statutes applicable across the construction industry levels the playing field, with the result that general contractors will be no less financially “vibrant” than they were before this Court first found preemption in 1994. Second, the notion that general contractors are “innocent parties” is risible: they freely enter into their subcontracts in the full awareness that their subcontractors may become insolvent. Again, the ultimate equitable consideration is whether the contractor or the employee should bear the risk of the subcontractor’s inability to pay the earned benefits. Quite simply, that risk should not be borne by the employee, so *Trig* should be reversed accordingly.

Third, Finnegan avers that “the Trusts have a wide array of federal remedies to protect themselves,” citing fringe benefit bonds and the statutory right under ERISA to collect liquidated damages. Respondent’s brief at 18. The problem with fringe benefit bonds, however, is that they are only rarely sufficient to cover the full amount of unpaid benefit contributions due. In the typical case, the Trusts have already collected the available bond moneys by the time they seek to enforce their public-works liens. And as for liquidated damages, it stands to reason that if a subcontractor cannot pay its employee benefit contributions, it cannot pay

liquidated damages, either. So in the event of a subcontractor's insolvency, the right to collect liquidated damages is a hollow remedy indeed, making the need to collect from the general contractor by means of the public works lien statutes all the more compelling.

The foregoing demonstrates that the equities favor the employees, which is precisely the consideration that animated the legislature when it enacted the public works lien statutes in the early twentieth century. *Trig* should be overturned.

**E. The *Harper* Decision Emphasizes That Rules of Federal Law Are to be Given Retroactive Effect, Unless the Court Expressly Reserves the Question of Retroactivity.**

Finnegan argues that if this Court overturns *Trig*, the new ruling should be applied prospectively only. To do so, however, would flout the U. S. Supreme Court's rulings in not only *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993), but also *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).

The U.S. Supreme Court's *Harper* decision called into question the viability of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), discussed in Section F., *infra*, by setting forth the following rule:

When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review

and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

\* \* \*

When this Court does not “reserve the question whether its holding should be applied to the parties before it,” however, an opinion announcing a rule of federal law “is properly understood to have followed the normal rule of retroactive application” and must be “read to hold...that its rule should apply retroactively to the litigants then before the Court.” . . . Furthermore, the legal imperative “to apply a rule of federal law retroactively after the case announcing the rule has already done so” must “prevai[l] over any claim based on a *Chevron Oil* analysis.”

*Harper*, 509 U.S. 86, 113 S.Ct. 2510, 2517-18 (1993). Thus, before the *Chevron Oil* factors, discussed *infra*, can even apply, this Court would need to apply the “express reservation test” stated in *Harper*. But because the *Chevron Oil* criteria are not satisfied in this case, this Court has no reason to apply a reversal of *Trig* on a purely prospective basis. Consequently, no basis exists for the application of the “express reservation test” to this case, and a reversal of *Trig* must therefore be applied retroactively.

**F. Even If This Court Were To Reserve the Retroactivity Question, the *Chevron Oil* Criteria Are Not Met In This Case.**

The *Chevron Oil* analysis considers three factors: (1) whether the decision establishes a new rule of law by either overruling past precedent

on which litigants may have relied, or deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) whether retrospective operation will further or retard operation of that rule; and (3) whether retroactive application would be inequitable. Here, the first factor alone mandates that a reversal of *Trig* be applied retroactively.

The Trusts are not arguing for a “new rule of law” in this case. To the contrary, they seek only the restoration of the status quo ante that existed a mere fourteen years ago, and that had been in place for decades previously — indeed, throughout most of the twentieth century. Further, it is disingenuous of Finnegan to suggest that it has relied on *Trig*, given that contrary Ninth Circuit authority has existed alongside it for six years in the form of the *Standard Industrial* decision. And finally, the issue presented in this case is not at all one “of first impression whose resolution was not clearly foreshadowed.” To the contrary, this issue has been percolating through both the state and federal courts for years, and general contractors in Washington have surely been aware that it was only a matter of time before this Court would revisit it.

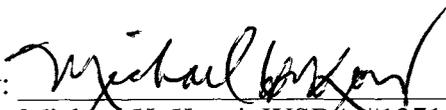
### III. CONCLUSION

For all of the foregoing reasons, the *Trig* decision should be overruled, and the Court's decision should be applied retroactively.

DATED this 27<sup>th</sup> day of August, 2007.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

2007 AUG 28 P 2:32

I hereby certify that on the 28<sup>th</sup> day of August, 2007 I caused to be served the REPLY BRIEF OF APPELLANTS on the attorneys for the Respondent at the following address:

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