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NO. ~~79896-6~~

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IN THE 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 JATC EDUCATIONAL DEVELOPMENT TRUST; MCI FUND;  
and PLUMBERS AND PIPEFITTERS NATIONAL PENSION FUND,

Appellants.

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BRIEF OF RESPONDENT

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## I. SUMMARY OF ARGUMENT

On two separate occasions, the Washington State Supreme Court has ruled definitively that union trust claims against RCW 39.08 and RCW 60.28 performance bonds and retainage funds are barred by the Employee Retirement Income Security Act (“ERISA”). *IBEW Local No. 46 v. Trig Electric Constr. Co.*, 142 Wn.2d 431, 13 P.3d 622 (2000) (“*Trig*”) and *Puget Sound Electrical Workers Health & Welfare Trust Fund v. Merit Co.*, 123 Wn.2d 565, 870 P.2d 960 (1994) (“*Merit*”). In spite of this well settled law, in December, 2004, the Appellants herein (the “Trusts”) filed a Notice of Claim of Lien against Leo Finnegan’s (“Respondent”) performance bond and retainage funds, and then threatened a lawsuit for foreclosure of the lien. The Appellants concede that their lien is invalid under the binding Washington decisions of *Merit* and *Trig*, but contend that they are still justified to proceed based upon decisions from California and the Ninth Circuit Court of Appeals. Appellants fail to note, however, that the legal analysis applied in the California and Ninth Circuit decisions was examined and soundly rejected by this Court in *Trig*. *Merit* and *Trig* are sound law, entitled to deference, and should not be disturbed.

## II. STATEMENT OF ISSUE

Should this Court overturn its holdings in *IBEW Local No. 46 v. Trig Electric Constr. Co.*, 142 Wn.2d 431, 13 P.3d 622 (2000) (“*Trig*”) and *Puget Sound Electrical Workers Health & Welfare Trust Fund v. Merit Co.*, 123 Wn.2d 565, 870 P.2d 960 (1994) (“*Merit*”), that the Washington state public works liens statutes are preempted by ERISA, based on a legal argument which the Court has already examined and rejected in *Trig*?

### III. STATEMENT OF THE CASE

#### A. Salient Facts

##### 1. The Parties.

The plaintiff/Respondent, Leo Finnegan, is a general contractor registered with the State of Washington. CP 2, *Respondent's Complaint For Declaratory Relief ("Complaint")*. Its principal place of business is in Pierce County, Washington. Id.

The defendants/third-party plaintiffs/Appellants are joint labor-management trust funds (hereinafter the "Trusts") created under Section 302(c) of the Labor Management Relations Act 29 U.S.C. 186(c), and governed by the Employee Retirement Income Security Act of 1972, 29 U.S.C. 1001, et. seq., as amended (hereinafter "ERISA"). CP 9, *Amended Answer, Third-Party Complaint, and Counterclaim ("Counterclaim")*.

##### 2. Tacoma Police Department Headquarters Project.

Leo Finnegan contracted with the City of Tacoma to act as the prime contractor on a project known as the Tacoma Police Department Headquarters Building located at 3701 S. Pine Street, Tacoma, Washington (the "Project.") CP 2, *Complaint*; CP 8, *Counterclaim*. In compliance with Washington State Law, *RCW 39.08 et. seq.*, Leo Finnegan posted a Performance Bond to the City of Tacoma, Bond No. CMB 8166266 (the "Public Works Bond"). Id. In addition, in compliance with Washington State Law, *RCW 60.28 et. seq.*, the City of Tacoma withheld a retainage on the Tacoma Police Headquarters Project. Id.

##### 3. Chapman's Subcontract.

On or about March 22, 2004, Leo Finnegan entered into a written sub-contract with third-party defendant Chapman Mechanical Inc. (hereinafter "Chapman") under which Chapman agreed to furnish and

construct the mechanical portion of the Project. CP 2, *Complaint*; CP 8, *Counterclaim*. Between June-November, 2004, Chapman performed pursuant to the terms of its contract with Leo Finnegan. Id.

Without warning, on or about November 12, 2004, Chapman demobilized its tools and equipment and abandoned the Tacoma Police Headquarters project. CP 2, *Complaint*. On November 13, 2004, Chapman notified Leo Finnegan by email that it had ceased all business operations. Id.

**4. Claim of Lien followed by Unwarranted Demand.**

It is alleged by the Appellant Trusts that at the time Chapman closed its business, Chapman owed the Trusts significant contributions pursuant to the terms of their collective bargaining agreement. CP 10, *Counterclaim*. In December, 2004, the Appellant Trusts filed a Notice of Claim of Lien against Leo Finnegan's performance bond and retainage funds for the Tacoma Police Headquarters Project, in an attempt to collect amounts allegedly owed by Chapman, not by Respondent. CP 56, *Notice of Claim of Lien*. The lien was amended once on April 12, 2005, and then a second time on July 15, 2005. CP 57, 58, *Second Amended Notice of Claim of Lien ("Amended Lien")*. The total amount claimed by the Trusts in their Second Amended Notice of Claim of Lien with the City of Tacoma was \$76,148.15, broken down as follows:

Unpaid Contributions:	\$57,703.06
Liquidated Damage:	\$11,540.62
Interest:	\$5,244.49
Audit Fees:	\$1,561.08
Attorney Fees:	\$100.00

CP 58, *Amended Lien*. Then, almost a full year after Chapman walked off the project, on or about September 20, 2005, Leo Finnegan received a

demand letter from the Trusts demanding that Leo Finnegan pay the allegedly unpaid union benefit contributions owed by Chapman. CP 3, *Complaint*; CP 11, 12, *Counterclaim*. The Trusts demanded that Leo Finnegan pay not just Chapman's unpaid contributions, but also liquidated damages, interest, audit and attorney fees. *Id.*

**B. Procedural Facts**

**1. Leo Finnegan Files Complaint for Declaratory Relief.**

After the Trusts made demand upon Leo Finnegan for Chapman's allegedly unpaid contributions, Leo Finnegan filed a lawsuit for declaratory relief in the Pierce County Superior Court asking the Superior Court to declare that the Trusts do not have valid claims against Leo Finnegan's performance bond and retainage funds based on the holdings of *Merit* and *Trig*. CP 1-6, *Complaint*. The Trusts filed a counterclaim against Leo Finnegan for foreclosure of their lien rights under RCW 39.08 and RCW 60.28. CP 7-12, *Counterclaim*. The Trusts' counterclaim sought recovery of *all* amounts allegedly owed by Chapman Mechanical on *all projects* (not just the Tacoma Police Department Headquarters Building involving Appellant), and in an amount in excess of \$275,000.00. CP 10-12.

**2. Leo Finnegan Files Summary Judgment.**

On December 12, 2006, Leo Finnegan filed a Motion for Summary Judgment seeking a Declaratory Judgment that the Trusts do not have valid claims against Leo Finnegan's performance bond and retainage funds in accordance with *Merit* and *Trig*. CP 17-30. The matter was heard with oral argument on January 12, 2007, and on February 9, 2007, Pierce County Superior Court Judge Ronald Culpepper issued a final Order Granting Plaintiff's Motion for Summary Judgment and Granting Declaratory Relief. CP 65-67. The trial court declined to even consider

Leo Finnegan's alternative legal basis for relief (involving Appellant Trusts' failure to properly serve Chapman (See *Galvanizer's Co. v. State Highway Commission*, 8 Wn. App. 804, 509 P.2d 73 (1973))), because the trial court found that the *Merit* and *Trig* federal preemption deprived it of jurisdiction.

**3. Union Trusts Appeal To Washington Supreme Court.**

On March 9, 2007, the Trusts filed a Notice of Appeal directly to the Washington State Supreme Court. CP 68-72, *Notice of Appeal*. Thereafter, on March 22, 2007, the Trusts filed a Statement of Grounds for Direct Review in which they concede that *Merit* and *Trig* are dispositive of this case, and that Division 1 of the Court of Appeals is bound by their holdings. See *Appellant's Statement of Grounds for Direct Review By Supreme Court* on file herewith. Leo Finnegan opposes direct review and has filed an Answer to Statement of Grounds For Direct Review. See *Respondent's Answer to Statement of Grounds of Direct Review* on file herewith. The Court has not yet accepted direct review of this case.

**IV. ARGUMENT**

**A. This Court Has Already Ruled Twice On This Issue; Each Time Finding Preemption**

This case presents to the Court a question which it has already answered consistently on two separate occasions; once in 1994 (*Merit*) and a second time in 2000 (*Trig*); namely: Can ERISA-governed benefit trust funds recover amounts allegedly owed by delinquent subcontractors, from a general contractor's RCW 39.08 and RCW 60.28 performance bond and retainage funds? On both previous occasions, this Court has definitively answered that such claims are preempted by ERISA, and that the Trusts cannot recover under state law:

Thus, we hold that RCW 39.08 and RCW 60.28.010 relate to ERISA plans for the purposes of preemption under section 514(a) of ERISA. We therefore affirm the trial court's dismissal of the trusts claims.

*Merit*, 123 Wn.2d at 573.

We decline IBEW's invitation to overrule *Merit*. We hold ERISA preempts the union's lien foreclosure action against Lydig and Fidelity to enforce Trig's duty under federal law to make payments to its unionized employee's ERISA-governed benefit plans. We affirm the trial court's summary judgment order and dismiss the case.

*Trig*, 142 Wn.2d at 442-43. *Merit* and *Trig*, together, establish precedent in the State of Washington which is relied on by the construction industry as a bright-line rule that union trusts may not recover unpaid contributions from innocent third-party general contractors who they are not in contractual privity with.

1. ***Puget Sound Electrical Workers Health & Welfare Trust Fund v. Merit Co.*, 123 Wn.2d 565, 870 P.2d 960 (1994)**

Presented with nearly identical facts to the case at bar, this Court, in *Merit*, held that ERISA preempts union trusts claims against Washington's public works lien statutes, RCW 39.08 and RCW 60.28.010. The basis of the *Merit* decision was the undeniable fact that the state public works lien statutes impose substantive liability on general contractors who are not otherwise contractually obligated to the trusts:

*. . . Washington's public works lien statutes create an entirely separate cause of action against the general contractors who otherwise have no contractual obligation to the plans.* Furthermore, they provide a mechanism for funding employee benefit plans not available under the provisions of ERISA. By imposing liability upon general

contractors who have not agreed to make contributions to ERISA funds, Washington's public works lien statutes regulate how ERISA plans are funded. Consequently, they relate to ERISA benefit plans and the provisions of ERISA that address the nonpayment of contributions by employers to employee benefit plans. . . . Washington's public works lien statutes expand liability to ensure the funding of ERISA plans. ***Although these statutes assist ERISA funds . . . , their enforcement and collection mechanisms must yield to the extent they supplement those provided by ERISA.***

*Merit*, 123 Wn.2d at 573 (emphasis added). The Court found that allowing the Trusts to use Washington public lien statutes to collect unpaid contributions from innocent general contractors impermissibly expanded the comprehensive enforcement and collection mechanisms of ERISA, and therefore must yield. See *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 54 (1987) (ERISA's civil enforcement mechanisms are intended to be the exclusive method of enforcing its substantive provisions.) As this Court held in *Merit*, if there is recourse for the trusts, it lies under the exclusive federal enforcement mechanism to collect from the employers, not from suing innocent third-party general contractors under state lien laws.

**2. *International Broth. Of Elec. Workers, Local Union No. 46 v. Trig Elec. Const. Co.*, 142 Wn.2d 431, 13 P.3d 622 (2000).**

In 1995, a year after the *Merit* decision, the United States Supreme Court issued the decision of *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995) ("*Travelers*"), a decision which the Trusts allege turned the tide in the preemption analysis. In *Travelers*, the United States Supreme Court relaxed the standard for preemption and found that state laws which only have a tenuous, remote,

or peripheral connection with ERISA plans do not merit preemption. *Id.*, at 661. Armed with the *Travelers* decision the trusts brought the issue of ERISA preemption of Washington's public lien statutes back before the Washington Supreme Court in 2000. *International Broth. Of Elec. Workers, Local Union No. 46 v. Trig Elec. Const. Co.*, 142 Wn.2d 431, 13 P.3d 622 (2000). The trusts asked this Supreme Court to reverse its 1994 *Merit* decision in light of *Travelers*, and as subsequently interpreted by *Operating Engineers Health and Welfare Trust v. JWJ Contracting Co.*, 135 F.3d 671 (9<sup>th</sup> Cir. 1998) ("*JWJ*"). Under facts similar to those in *Merit*, and to those presently before this Court, the Court in *Trig* found that *Merit* remained good law, and reaffirmed that RCW 39.08 and RCW 60.28 are preempted by ERISA.

In *Trig*, this Washington Supreme Court focused on the fact that Washington's public lien statutes invade the core function of ERISA regulation by providing a civil enforcement mechanism beyond what Congress specified in ERISA (because the public lien statute itself establishes the only basis upon which the Trusts may seek to collect from a general contractor or its surety). *Trig*, 142 Wn.2d at 438-9. The *Trig* Court found that United States Supreme Court's *Travelers* decision actually supported a finding of preemption:

*Travelers* itself expressly contemplates ERISA preemption in a case such as this where a state statute provides an enforcement mechanism for funding an ERISA plan supplemental to the provisions of ERISA itself. In *Travelers*, the Supreme Court expressly noted "state laws providing alternative enforcement mechanisms also relate to ERISA plans, triggering preemption." [citation omitted.] *Travelers Ins. Co.*, the case on which IBEW would have us overrule *Merit*, actually reaffirms the appropriateness of ERISA preemption in this kind of case.

*Trig*, 142 Wn.2d at 439. The *Trig* Court ultimately concluded:

. . . [W]e decided in *Merit* that RCW 39.08 and RCW 60.28 manifest a substantial invasion into the field ERISA occupies by creating a separate cause of action against general contractors otherwise without liability to the employees of a subcontractor under the benefit plans by providing a non-ERISA enforcement mechanism for finding the plans. [Citation omitted.] ***Nothing in substantive ERISA law has changed in the intervening years between Merit and this case that alters our conclusion.***

*Trig*, 142 Wn.2d at 440 (emphasis added).

The *Trig* Court did not limit its analysis to *Travelers*, but rather exercised prudence in testing its decision against other non-binding post-*Travelers* decisions from other jurisdictions, including those from the 9<sup>th</sup> Circuit and California. Specifically, the *Trig* Court considered contrary opinions from other jurisdictions which held that state lien laws are laws of general applicability which only have tenuous connections to ERISA, and consequently are not preempted by ERISA.<sup>1</sup> See *Trig*, at 441-442, considering, among others, *Operating Engineers Health and Welfare Trust v. JWW Contracting Co.*, 135 F.3d 671 (9<sup>th</sup> Cir. 1998). But the *Trig* Court found the contrary non-binding decisions from the 9<sup>th</sup> Circuit and California to be unpersuasive and concluded the *Trig* decision by noting that the “post-*Merit* and post-*Travelers* authority [the appellant] cites simply do not take this case outside of the preemptive scope of ERISA as recognized explicitly even in *Travelers*.” *Trig*, 142 Wn.2d at 442.

In 2000, this Court carefully reviewed the *Travelers* decision, as well as its progeny, and settled this matter by affirming *Merit* and

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<sup>1</sup> The legal analysis rejected by the majority in *Trig*, is set forth approvingly by the dissenting judges in *Trig*.

established a bright-line rule that RCW 39.08 and RCW 60.28 are preempted by ERISA.

**3. Subsequent Ninth Circuit and California Decisions Cited by the Trusts Do Not Warrant A Reversal of Trig In Favor Of Trig's Dissenting Opinion.**

This Court is bound by the majority decisions in *Merit* and *Trig* under the doctrine of stare decisis. *Bellevue John Does 1-11 v. Bellevue School District #405*, 129 Wn. App. 832, 867-68, 120 P.3d 616 (2005). The dissenting opinion in *Trig*, was rejected by the *Trig* majority, and it has no binding precedential value. So to, contrary interpretations from the federal courts and from other states, including the Ninth Circuit and California have no precedential value. *State v. Barefield*, 110 Wn.2d 728, 732 n.2, 756 P.2d 731 (1988).

Undeterred, the Appellant Trusts here selectively cite non-binding decisions from the Ninth Circuit Court of Appeals and the California Supreme Court, to ask this Court to reverse its previous holdings in favor of an alternative legal analysis already expressly rejected. The decisions of *Southern California IBEW-NECA Trust Funds v. Standard Industrial Electrical Co.*, 247 F.3d 920 (9<sup>th</sup> Cir., 2001) and *Betancourt v. Storke Housing Investors*, 82 P.3d 286 (2003), (which are consistent with the *Trig* dissent) do not warrant the reversal of *Trig* in favor of a legal theory which has already been considered and expressly rejected.

**a. Merit and Trig Are Entitled To Deference Under The Doctrine Of Stare Decisis.**

The Appellant Trusts do not challenge the applicability of the decisions of *Trig* and *Merit* to the case at hand.<sup>2</sup> Rather, they improperly request that this Court decline to follow this binding authority in favor of decisions from the 9<sup>th</sup> Circuit Court of Appeals and the California State Supreme Court. In doing so, the Trusts completely ignore the principal of stare decisis. The doctrine of stare decisis is the foundation of our legal system:

Without stare decisis, the law ceases to be a system; it becomes instead a formless mass of unrelated rules, policies, declarations and assertions – a kind of amorphous creed yielding to and wielded by them who administer it. Take away stare decisis, and what is left may have force, but it will not be law.

*Bellevue John Does 1-11*, 129 Wn.2d at 868, quoting *State ex rel. State Fin. Comm. V. Martin*, 62 Wn.2d 645, 665-66, 384 P.2d 833 (1963).

The *Trig* Court recognized the validity of the doctrine of stare decisis when it upheld the ruling enunciated in *Merit*. The *Trig* Court found the holding of *Merit* to be an established rule under the doctrine of stare decisis and required the IBEW Trusts to meet a substantial burden of proving that *Merit* was both incorrect and harmful. Because the IBEW Trusts could not meet this burden, the Supreme Court upheld the continued validity of *Merit*:

Stare decisis “ ‘requires a clear showing that an established rule is incorrect and harmful before it is abandoned.’ ” *Walmart, Inc. v. Progressive Campaigns, Inc.*, 139 Wash.2d 623, 634, 989 P.2d 524 (1999) (quoting *In re Rights to Waters of Stranger Creek*, 77 Wash.2d 649, 653, 466 P.2d 508 (1970)). By failing to demonstrate a change in ERISA's preemptive force over state statutes providing an alternative enforcement mechanism to 29 U.S.C. § 1132(a),

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<sup>2</sup> See Appellants' Statement of Grounds For Direct Review, on file.

IBEW has not met this substantial burden. *Merit* remains good law.

*Trig*, at 442. The holding of *Merit* and *Trig* has now been established case law for over thirteen years. Its application has not proven incorrect or harmful, but rather has established a bright-line of authority upon which the construction industry actively relies. Under the doctrine of stare decisis, the decisions of *Merit* and *Trig* are entitled to deference, and should not be overturned based on the Appellant Trusts' self-serving argument that the *Trig* dissenting opinion is simply a more persuasive analysis.

**b. The Dissenting Opinion in IBEW v. Trig Was Rejected by The Majority of This Court**

The Trusts spend eight pages of their appellant brief explaining the legal analysis of the dissenting opinion in *Trig*, and ask this Court to find consistent therewith. This request is unwarranted and only serves to highlight the fact that the Trusts' claim lacks viability. It goes without saying that this Supreme Court has already considered the legal analysis cited in the *Trig* dissenting opinion and rejected it in favor of the majority opinion. By arguing the merit of the dissenting opinion in *Trig*, the Trusts essentially concede that the Supreme Court has already properly considered their legal analysis once, but the Trusts argue that this Court simply got it wrong the first time. The *Trig* Court did not get it wrong the first time. Rather, in affirming the continued validity of *Merit*, the *Trig* Court simply recognized and applied a legal analysis of *Travelers* which is also accepted by many other Courts throughout the country. *See, e.g., Plumbing Industry Board, Plumbing Local Union No. 1 v. E.W. Howell Co., Inc.*, 126 F.3d, 61, 68, 69 (2d Cir. 1997); *EklecCo v. Iron Workers Locals, 40, 361 & 41 7 Union Sec. Funds*, 170 F.3d 353, 357 (2d. Cir.

1999); *Bricklayers Local 33 Benefit Funds v. America's Marble Source, Inc.*, 950 F.2d 114 (3d. Cir. 1991); *Chestnut-Adams Limited Partnership v. Bricklayers & Masons Trust*, 612 N.E.2d. 236 (Mass. 1993) (overruled on other grounds by *Central Trans., Inc. v. Package Printing Co.*, 706 N.E.2d 698 (Mass. 1999)); *Edwards v. Bethlehem Steel Corp.*, 554 N.E.2d 833, 837 (Ind. Ct. App. 1990).

The Second Circuit Court's decision in *Plumbing Industry Board, Plumbing Local Union No. 1 v. E.W. Howell Co., Inc.*, 126 F.3d 61 (2d Cir. 1997) ("*Howell*"), is just one example of another Court which analyzed *Travelers* and arrived at the same conclusion as this Washington Supreme Court in *Trig*. In *Howell*, the Second Circuit considered whether New York's lien law was preempted by ERISA under the *Travelers* framework. The Second Circuit relied on the same legal analysis as *Trig* to arrive at the conclusion that union trust attempts to enforce New York's state lien statutes were preempted by ERISA:

As the Supreme Court observed in *Ingersoll-Rand*, Section [1132(a)] was intended to be the "exclusive remedy for rights guaranteed under ERISA." . . . Simply put, Section [1132(a)] sets forth a comprehensive civil enforcement scheme that reflects the Legislature's desire to include certain remedies and exclude others, and the states are not free to add or subtract additional remedies to the mix, even if doing so would be helpful to the interests of plan beneficiaries or participants. *Pilot Life Insurance Co. v. Dedeaux*, 481 US. 41, 54 (1987).

. . .  
Analyzing the instant case in light of these principles, we conclude that [the New York lien law] . . . conflicts with ERISA because, as appellants concede, it requires the general contractor, absent any ERISA requirement that he do so, to assume responsibility for the subcontractor-employer's benefit obligations. Because the state law impermissibly adds to the exclusive list of parties ERISA

holds responsible for an employer's benefit obligations, it cannot stand.

*Howell*, 126 F.3d at 68, 69. The *Howell* decision focuses on two basic premises which our *Trig* Court found important, but which the Appellant Trusts fail to address in their request for reversal. First, a state is not free to designate new obligors for an employer's ERISA obligations. *Id.* at 68; *Trig*, at 437-38. Second, the state statutes at issue designate new obligors for an employer's ERISA obligations by forcing general contractors and their sureties to pay unfunded pension liabilities owed by a defaulting employer/subcontractor. *Id.*, at 69; *Trig* at 437.

Following the *Howell* decision, in a move strikingly similar to the present case, the union Trusts brought a second case before the Second Circuit Court of Appeals, and asked the Court to reverse its previous *Howell* decision on the basis that the court failed to properly account for the United States Supreme Court's decision in *Travelers. EklecCo v. Iron Workers Locals 40, 361 & 417 Union Security Funds*, 170 F.3d 353, 357 (2d Cir. 1999). The Second Circuit Court of Appeals was not persuaded:

The Funds' brief argues that we should revisit [*Howell*] because it ignored the Supreme Court's new direction for ERISA preemption cases signaled in [*Travelers*]. The Funds' principal argument is that ERISA could not have been intended to preempt mechanics' lien statutes because such statutes assist employees rather than harm them. However, the *Travelers* court clearly indicated that any state statute providing an alternative enforcement mechanism for ERISA is preempted . . . . Further, the decision in [*Howell*] cites *Travelers* and its progeny, and therefore reflects awareness and consideration of that authority. *See* 126 F.3d at 66-68. We adhere to [*Howell*].

*EklecCo*, 170 F.3d 353, 357 (2d Cir. 1999). Just as the Second Circuit Court of Appeals found its *Howell* decision well-reasoned and binding

precedent, so too should this Washington Supreme Court find consistent with its previous decisions in *Merit* and *Trig*.

- c. ***Southern California IBEW-NECA Trust Funds v. Standard Indus. Elec. Co.*, 247 F.3d 920 (9<sup>th</sup> Cir. 2001) (“*Standard Industrial*”) and *Betancourt v. Storke Housing Investors*, 82 P.3d 286 (Cal. 2003) (“*Betancourt*”) are not persuasive.**

The Trusts rely heavily upon two non-binding decisions from other jurisdictions, *Standard Industrial* (9<sup>th</sup> Circuit Court of Appeals) and *Betancourt* (California Supreme Court), to support their request that this Court reverse its holding in *Trig*. However, both the *Standard Industrial* and *Betancourt* Courts rely upon the legal rationale previously considered and expressly rejected by this Court in *Trig*.

In *Southern California IBEW-NECA Trust Funds v. Standard Indus. Elec. Co.*, 247 F.3d 920 (9<sup>th</sup> Cir. 2001), the 9<sup>th</sup> Circuit Court of Appeals considered whether a California public works bond statute, was preempted by ERISA. Relying extensively on *Operating Engineers Health and Welfare Trust v. JWJ Contracting Co.*, 135 F.3d 671 (9<sup>th</sup> Cir. 1998), the *Standard Industrial* Court declined to recognize the fact that the public works lien statute gave additional rights to the Trusts as against the general contractor and surety (the distinction recognized by *Trig*), as a sufficient basis for ERISA preemption. *Id.*, at 926-27. The *Standard Industrial* Court said:

California’s payment bond already does regulate the relationship between ERISA trust funds 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.

*Id.*, at 927. But the *Trig* Court has already considered this analysis presented by *Standard Industrial* and rejected it. Specifically, interpreting the *JWJ* line of authorities, the Washington Supreme Court rejected the entire analysis and found that it should not apply:

These cases are distinguishable because the bond foreclosure actions were against the delinquent employers themselves and did not attempt to shift liability to fund an ERISA plan to a third party. There is a significant difference between plaintiffs enforcing their rights against their employer's bond as opposed to applying a state lien law to recover benefit contributions from a third party to the contract rather than enforce rights under a contract.

*Trig*, 142 Wn.2d at 441. The *Standard Industrial* opinion completely fails to address this central tenet on which both *Merit* and *Trig* rest; that states may not allow "alternative enforcement mechanisms" to impose new substantive liabilities on innocent third parties.

The second case relied upon by the appellants adds no additional insight or value to resolution of this case. The California Supreme Court decision of *Betancourt v. Storke Housing Investors*, 82 P.3d 286 (Cal. 2003), reasoned that the California state public works lien statute at issue was merely a statute of "general application" enacted in an "area of traditional state regulation." *Id.*, at 290. In doing so, the California Court aligned itself with *Standard Industrial*, and the dissenting opinion in *Trig*. Again, in *Betancourt*, as in *Standard Industrial*, the Court declined to consider and recognize the "alternative enforcement mechanism" the public works lien statute created by imposing new substantive liabilities on innocent general contractors. Consequently, the California Supreme court recognized that other courts across the country, including this Court, might disagree with its analysis:

Several post-Travelers cases from other jurisdictions have reached conclusions different from ours.

*Betancourt*, 82 P.3d at 295. The *Betancourt* decision serves only to illustrate that there is a split of authority across the country on the issue of whether public works lien statutes are preempted by ERISA. It does not, however, justify a re-consideration of *Merit* and *Trig*.

**4. The Equities Do Not Warrant Reversal of *Trig* When The Trusts Already Have Federal Remedies For Recovery.**

As explained in subsection 3(a) above, the court should only consider imposing on the doctrine of stare decisis if the current law is both incorrect and harmful. In this case, the appellant Trusts have not shown that the current state of the law is incorrect or harmful, but rather seek to reverse *Trig* for their own self-serving interests. However, when the equities are considered, the changing the landscape here in Washington is unwarranted.

First, the lien sued by the Trusts in this case is for all practical purposes a secret lien a general contractor cannot foresee or protect against. This is because while a claimant is ordinarily required to file a preclaim notice, RCW 60.28.015, RCW 39.08.065, the lien claim at issue here is a judicially recognized lien which does not require preclaim notice. See *Crabtree v. Lewis*, 86 Wn.2d 282, 544 P.2d 10 (1975). The problematic scenario which general contractors would be faced with is that the trust lien comes in long after the work is substantially complete and the subcontractor has been paid. It is simply unfair for general contractors to have to pay for the same work twice when the nature of the lien makes detection of liability nearly impossible.

Second, the current state of the law advances the public interest to maintain a competitive field of financially vibrant general contractors to bid on public projects. A reversal of *Merit* and *Trig* would directly undermine that interest by creating substantial new liability to innocent parties. *Merit*, 123 Wn.2d at 572. The policy of this state is to support competitive bidding on public works projects (see *Southwest Washington Chapter National Electrical Contractors Association v. Pierce County*, 100 Wn.2d 109, 667 P.2d 1114 (1983)) and this Court should be wary of changing the landscape of the construction industry against the public policy and public interest of the State.

Finally, the Trusts have a wide array of federal remedies to protect themselves. For examples, the Trusts may require that subcontractors post fringe benefit payment bonds guaranteeing payment of ERISA debts in the event of default, and the Trusts have the right to collect liquidated damages in the event that subcontractors are delinquent. Consequently, if the Trusts exercise due diligence to ensure that the benefit contributions are paid in a timely manner by the responsible subcontractor, then they have no do not need a law which allows them to belatedly collect from third-party general contractors. In the current state of the law, the burdens and incentives for collection of contributions are where Congress placed them under ERISA's detailed scheme. Instead of seeking to reverse settled law, the Trusts should be diligent in enforcing the remedies ERISA (with its comprehensive remedial scheme) already confers.

**B. A Reversal of *Merit* and *Trig* Should Only Be Applied Prospectively.**

*Merit* and *Trig* are relied upon by general contractors in the State of Washington, who do not have measures of protection in place to afford a reversal of the law. Consequently, if this court decides to revisit and

reverse *Merit* and *Trig*, application of the new rule of law retroactively would be severely inequitable. Should this Court overrule *Merit* and *Trig*, Leo Finnegan respectfully submits that the new rule of law be applied on a purely prospective basis.

A court may overrule established precedent on a purely prospective basis particularly when a court expressly overrules a precedent upon which the case would otherwise be decided differently. See *In Re Audett*, 158 Wn.2d 712, 147 P.3d 982 (2006). The analysis for determining whether a new rule of law should be applied retroactively is set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) (“*Chevron*”). *In Re Audett*, 158 Wn.2d at 720-21. The *Chevron* Court sets forth three factors which a court should consider in determining whether an appellate decision applies prospectively or retroactively: (1) whether the decision establishes a new rule of law by overruling clear past precedent; (2) consider the prior history of the rule in questions, including its purpose and effect, whether retroactive application would further or retard the purposes of the rule; and (3) whether retroactive application would be inequitable when injustice and hardship can be avoided. *Id.*

Balancing the *Chevron* factors to this case, the balance falls heavily in favor of purely prospective application of a reversal of *Merit* and *Trig*. First, overruling *Merit* and *Trig* would constitute an abandonment of clear past precedent on which litigants have clearly relied. Second, there is nothing in a solely prospective application that would inhibit the operation of the new law. On the contrary, prospective application the new rule would fairly allow general contractors the opportunity to incorporate the new rule in their project planning and to protect against liability. Third, retroactive application would be severely inequitable to the Respondent. Here, Leo Finnegan has relied on the

established laws of the State of Washington, and should not be penalized for its adherence thereto. In addition, Leo Finnegan already paid the subcontractor should not have to pay again for the same work without any additional benefit. Leo Finnegan, argues adamantly that a reversal of *Merit* and *Trig* is unwarranted, but if such decision is made, the law should not be retroactively as against Leo Finnegan who is an innocent third-party.

**C. Galvenizer's Co. v. State Highway Commission, 8 Wn. App. 804, 509 P.2d 73 (1973), Prevents The Trusts from Enforcing Their Lien Claim Under RCW 60.28, Because the Trusts Failed to Timely Serve Chapman Mechanical**

In its Motion for Summary Judgment, Leo Finnegan argued that, even if the Superior Court disregarded *Merit* and *Trig*, the Trusts' claims are unenforceable as against Leo Finnegan's retainage funds because the Trusts failed to serve their debtor, Chapman, within four months of the Second Amended Notice Of Claim Of Lien dated July 15, 2005. CP 13, citing *Galvanizer's Co. v. State Highway Commission*, 8 Wn. App. 804, 509 P.2d 73 (1973). The Trusts did not serve Chapman Mechanical with a copy of the summons and complaint until March 8, 2006. *Id.* Ultimately, the trial court did not consider Leo Finnegan's argument for the application of *Galvanizer* because it found consistent with *Merit* and *Trig* that it did not have jurisdiction to rule on the Trusts lien claims in the first instance.

Leo Finnegan urges this Court to also uphold *Merit* and *Trig*. However, even if this Court reverses *Merit* and *Trig*, the law is clear that a the Trusts lost their right to foreclose their statutory lien against Leo Finnegan's retainage funds by failing to serve Chapman with a summons and complaint for foreclosure within the four month statutory time period

stated in *RCW 60.28.010. Galvanizer's Co. v. State Highway Commission*, 8 Wn. App. 804, 509 P.2d 73 (1973). The issue and holding of *Galvanizer* is succinctly stated:

The issue presented by this appeal is whether or not a lien claimant under the public works lien law, RCW 60.28, has lost his right to foreclose a statutory lien by failing to service his alleged debtor with summons and complaint for foreclosure of the lien within the statutory time period - - four months - - after having filed the notice of claim, so long as the public body which retained the liened funds was served within the four month statutory period. We hold that under those circumstances the lien has been lost and foreclosure is precluded.

*Galvanizer's Co.*, 8 Wn. App. at 805.

The Trusts argue for an extremely limited application of *Galvanizer*, by asking this Court to find that it applies only defeat a lien as against an insolvent subcontractor. But this analysis of *Galvanizer* is incomplete and inaccurate. *Galvanizer* holds that the "alleged debtor" is a "Necessary" party which must be served with process before the expiration of the statutory period of the life of the lien in order for the court to even acquire jurisdiction to enforce the lien. The complete passage in *Galvanizer* states:

*Galvanizer's* and P & F agree that a complaint to foreclose a statutory lien must be filed and also that the *Necessary* parties must be served with process before the expiration of the statutory period of the life of the lien in order to enforce the lien. Indeed, the court acquires no jurisdiction to enforce the lien unless valid service has been made upon *necessary* parties within the statutory period of the life of the lien. City Sash & Door Co. v. Bunn, 90 Wash. 669, 156 P. 854 (1916). *Galvanizer's* contends that the Washington State Highway Commission is the only necessary-in contradistinction to a proper-party to the foreclosure action. P & F contends that the prime contractor, all subcontractors

and the alleged debtor are all necessary parties as well as the commission.

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.

*Galvanizer's Co. v. State Highway Commission*, 8 Wn. App. 804, 806 (***Emphasis Added.***) Further analyzing the Trusts argument, it does not make any sense that the *Galvanizer* decision be limited in its application to enforcement against subcontractors. First, the subcontractor's do not have retainage funds withheld by the lien statute *RCW 60.28*, such that the *Galvanizer* decision would make sense being applied only against them. Rather, the subcontractors are in direct privity of contract with their suppliers, materialman, and labor, and may be sued on their contract, not under the lien statute. Second, it goes without saying, that the Superior Court will not have jurisdiction over the defendant subcontractor until a summons and complaint are properly served anyway. Applying *Galvanizer* in the limited fashion suggested by the Trusts would only serve to render the *Galvanizer* decision completely meaningless.

The Trusts do not contest the fact that they failed to serve the alleged debtor, Chapman Mechanical, with this lawsuit within the four-month statutory life of their Claim of Lien. Because the trust failed to serve a "necessary party," this court has no jurisdiction to enforce the lien claim asserted by the defendant union trusts as against plaintiff's retainage funds held pursuant to *RCW 60.28 et. seq.*

**D. Defendant's Should Be Denied Their Request For An Award of Attorney Fees And Costs Incurred On Appeal**

The Appellant Trusts filed their Second Amended Claim of Lien in the face of definitive Washington Supreme Court authority that holding that they do not have valid and enforceable lien claims against Respondent's public works bond and retainage. See *Trig* and *Merit*. The Respondents have relied on the binding authority of Trig and Merit to contest and defend against the Appellant's liens. The Respondents are justified in their resistance of the Appellant's liens, and even if this Court were to ultimately reverse its previous decisions, an award of attorney fees and costs for the Trusts is entirely inequitable. Leo Finnegan respectfully requests that this Court deny the Trusts request for attorney fees pursuant to RCW 39.08 et. seq.

**V. CONCLUSION**

For all the foregoing reasons, Respondent Leo Finnegan respectfully asks this Court to affirm the continuing validity of *Merit* and *Trig* and to affirm Pierce County Superior Court Judge Ronald Culpepper's final Order Granting Plaintiff's Motion for Summary Judgment and Granting Declaratory Relief.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of July, 2007.

LASHER HOLZAPFEL  
SPERRY & EBBERSON P.L.L.C.

  
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**CERTIFICATE OF SERVICE**

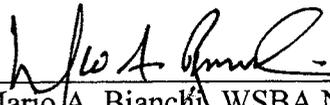
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BY RO... I certify and declare under penalty of perjury of the laws of the  
State of Washington, that on July 30, 2007, I served a copy  
of Brief of Respond on counsel of record for Appellant by email and by  
ABC Legal Messenger to the following address:

Michael H. Korpi  
McKENZIE ROTHWELL BARLOW  
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DATED THIS this 30<sup>th</sup> day of July, 2007.

LASHER HOLZAPFEL  
SPERRY & EBBERSON P.L.L.C.

  
\_\_\_\_\_  
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SEE AS ATTACHMENT  
TO E-MAIL