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No. 88080-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

W.G. CLARK CONSTRUCTION C O., a Washington corporation,
Respondent,

v.

CARPENTERS HEALTH & SECURITY TRUST OF WESTERN
WASHINGTON; CARPENTERS RETIREMENT TRUST;
CARPENTERS-EMPLOYERS VACATION TRUST; CARPENTERS-
EMPLOYERS APPRENTICESHIP & TRAINING TRUST, Appellants,

and

PACIFIC NORTHWEST REGIONAL COUNCIL OF CARPENTERS, a
Local Union, Appellant; PARAMOUNT SCAFFOLD, INC., a
Washington corporation, Respondent.

ANSWER OF THE APPELLANT CARPENTERS TRUSTS TO
AMICUS BRIEF OF AGC OF WASHINGTON

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I. INTRODUCTION

Pursuant to the Court's November 27, 2013 letter order, the Appellant Carpenters Trusts submit their answer to the Amicus Brief of AGC of Washington for the Court's consideration.

II. ANSWER AND AUTHORITY

The AGC of Washington (the "AGC") suggests to this Court (i) the Carpenters Trusts' interpretation of ERISA preemption contradicts current preemption doctrine;¹ (ii) that ERISA's purpose was to ensure payment of benefits by the employer who owes them;² (iii) ERISA's remedies are exclusive to all others;³ and (iv) that the Trust Funds breached their fiduciary duty with regard to collections against Paramount Scaffold and are therefore before this Court with "unclean hands."⁴ The Carpenters Trusts contend none of the AGC's arguments warrant keeping the rule of law as set forth in *Merit*⁵ and *Trig*.⁶

¹ AGC Amicus Brief, at pp. 2-5, §I.

² ACG Amicus Brief, at pp. 5-10, §II.

³ AGC Amicus Brief, at pp. 10-14, §III.

⁴ AGC Amicus Brief, at pp. 14-17, §IV.

⁵ *Puget Sound Electrical Workers Health and Welfare Trust Funds v. Merit Company*, 123 Wn.2d 565 (1994).

⁶ *International Brotherhood of Electrical Workers, Local Union No. 46 v. Trig Electric Construction Co.*, 142 Wn.2d 431 (2000).

A. **Current Federal Preemption Doctrine Supports the Carpenters Trusts' Position.**

The AGC cites selectively from *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Company*, 514 U.S. 645, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995), to support its argument that a very broad *Shaw*-type preemption standard should be applied here. However, the AGC disregards this key portion of the *Travelers* opinion:

Indeed, in cases like this one, where federal law is said to bar state action in fields of traditional state regulation, we have worked on the “assumption that *the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.*”

Travelers, 514 U.S. at 655 (citations omitted, emphasis added).

The issue here is applying federal ERISA preemption doctrine to a state law claim that is an exercise of Washington’s traditional state police power, rather than to an ERISA benefits claim. Nonetheless, the AGC maintains it is correct and the courts who have all considered the application of ERISA preemption post-*Travelers* to the type of state bond and lien claims present here – at least four federal circuit courts, numerous federal district courts, and courts in at least fifteen other states – must have got it wrong.⁷

⁷ The Carpenters Trusts have extensively cited these cases in its briefing to the Court and will not repeat them here, for brevity.

The AGC also resorts to citing case law that is inapposite to the case before this Court. See, *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 208, 124 S.Ct. 2488, 159 L.Ed.3d 312 (2004). *Aetna Health* is a wrongful denial of benefits case under ERISA §502(a)(1)(B) that involves only ERISA-defined parties: a participant, a plan, and a fiduciary, and the preemption analysis there proceeds on that basis. It is not – like here – a case involving claims under a state statute of general applicability between a trust fund and a non-ERISA, third party. *Aetna Health* is a case demonstrating preemption in the context of a plan participant seeking payment of wrongly denied health claims from an ERISA plan and its ERISA fiduciary (the plan administrator), and simply provides no guidance here.

B. The AGC Overstates the Breadth of ERISA’s Purpose.

The AGC argues that Congress “enacted ERISA to protect worker benefit payments and to protect interstate commerce from the burdens of employers failing to promptly pay their plan contributions”⁸ Congress’s concern, however, for interstate commerce had nothing to do with protecting non-signatory, third parties such as W.G. Clark from the inconvenience of having to make good on their statutory obligations under RCW 39.08 and 60.28. Rather, Congress was concerned with permitting

⁸ AGC Amicus Brief, at p. 5.

employee benefit plans and their plan sponsors to operate uniformly across the county without the intrusion of contrary state law on plan administration.⁹

Congress declared ERISA's policy to be to:

[P]rotect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries.

ERISA §2(b), 29 U.S.C. §1001(b).

As the predicate to that policy, Congress found that the regulation of *employee benefit plans* by ERISA would be regulation of interstate commerce:

[T]hat the operational scope and economic impact of [employee benefit] plans is increasingly interstate; ... that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; ... that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow

⁹ “[ERISA] was intended to ‘ensure that plans and plan sponsors would be subject to a uniform body of benefits law’ so as to ‘minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government’ and to prevent ‘the potential for conflict in substantive law ... requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction.’ *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990). See also *Egelhoff v. Egelhoff*, 532 U.S. 141, 148, 121 S.Ct. 1322, 149 L.Ed.2d 264 (2001).” *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 392, 122 S. Ct. 2151, 2173, 153 L. Ed. 2d 375 (2002)

of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; ...; and that it is therefore desirable in the interests of employees and their beneficiaries, ... and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

ERISA §2(b), 29 U.S.C. §1001(b). The single reference to “employer” in Congress’s findings and declarations of policy is in the phrase “the interstate character ... of the activities of their participants, and the employers, employee organizations, and other entities by which they [employee benefit plans] are established or maintained.” In other words, Congress had concern for *plan sponsors* (which are sometimes, but not always, employers) that maintain or establish benefit plans and operate in interstate commerce. When protecting interstate commerce by enacting ERISA, Congress was not concerned with protecting the activities of parties unrelated to the plan,¹⁰ even when they participate in interstate commerce, and certainly not for limiting their responsibility to respond to demands they make payment to the plan that they are otherwise obliged to make.

¹⁰ Neither respondent W.G. Clark, nor its surety, are ERISA participants, beneficiaries, employee benefit plans, plan sponsors, or fiduciaries. ERISA simply doesn’t govern their relationship to the Carpenters Trust.

C. The AGC Misinterprets the Purpose of ERISA's Remedies.

The AGC argues that ERISA's remedies for recovery of delinquent fringe benefit contributions are exclusive.¹¹ The AGC's argument is contrary to a fairly large body of case law on the subject, which has been briefed extensively by the Carpenters Trusts and the 57 other, amici Taft-Hartley trusts. See, for example, *United States for Benefit and on Behalf of Sherman v. Carter*, 353 U.S. 210, 220, 77 S.Ct. 793 (1957)(ERISA plan may recover delinquent contributions through a Miller Act lien); *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 US 825, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988)(ERISA plans may use general state garnishment statutes to collect contributions and to benefit participants.); *Southern California IBEW-NECA Trust Funds v. Standard Industrial Electric Company*, 247 F.3d 920 (9th Cir. 2001)(ERISA plans may use state law payment and performance bond statutes to recover delinquent contributions.); *Pierce County Hotel Employees and Restaurant Employees Health Trust v. Elks Lodge BPOE No. 1450*, 827 F.2d 1324, 1327 (9th Cir. 1987)(ERISA plans may use both ERISA and the Labor Management Relations Act to enforce payment of delinquent fringe benefit contributions); *Trustees of AFTRA Health Fund v. Bioni*, 303 F.3d

¹¹ AGC Amicus Brief, at pp. 10-14, §III.

765 (7th Cir. 2002)(ERISA plans may use state fraudulent concealment claims to recover wrongfully paid benefits); *In re Hemmeter*, 242 F.3d 1186, 1190-91 (9th Cir. 2001)(ERISA plans may use defalcation claims to recover delinquent contributions from individual owners of signatory employers);¹² *LoPresti v. Terwilliger*, 126 F.3d 34, 41 (2nd Cir. 1997)(ERISA plans may use common law conversion claims to recover non-asset contributions such as dues); *Trustees for Alaska Laborers-Construction Industry Health and Security Fund v. Ferrell*, 812 F.2d 512 (9th Cir. 1987)(ERISA plans may use common-law alter ego/successor entity claims to recover delinquent contributions from non-signatory parties.). If the AGC was correct in its exclusivity analysis, none of the above claims would be cognizable and enforceable.

The AGC also cites to the Congressional Record from ERISA's enactment in 1974, wherein Senator Williams reportedly stated:

[W]ith the narrow exceptions specified in the bill, the substantive and enforcement provisions...are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans.¹³

¹² Notably, not only are defalcation/conversion claims not preempted by ERISA, such claims are generally not dischargeable in bankruptcy. 11 U.S.C. §523(a)(4).

¹³ AGC Amicus Brief, at p. 13, fn. 4, citing *Travelers*, 514 U.S. at 657.

In making its argument, the AGC also fails to note that ERISA, when enacted in 1974, had no enforcement provisions for collection of delinquent fringe benefit contributions. Senator Williams was thus referring to enforcement actions brought by participants and beneficiaries to enforce eligibility or payment of health and pensions benefits to themselves under the terms of an ERISA plan.

Statutory language was added in a 1980 amendment to ERISA, which then provided ERISA plans with a mechanism for the collection of delinquent fringe benefit contributions from an employer/plan sponsor. It is in the context of that proposed amendment to ERISA in which the House Ways & Means Committee clarified:

The Committee amendment does not change any other type of remedy permitted under State or Federal law with respect to delinquent multiemployer plan contributions.¹⁴

Thus, the 1980 House of Representatives Report on the amendment to ERISA adding collection remedies is instructive as to Congressional intent. Because the report predates the actual 1980 amendment to ERISA, it renders the AGC's "post-enactment" argument irrelevant.

¹⁴ Carpenters Trusts Reply Brief, at p. 13, citing *Seaboard Surety Company v. Indiana State District Council of Laborers and HOD Carriers Health and Welfare Fund*, 645 N.E.2d 1121, 1127-28 (1995).

Finally, the AGC ignores the test for whether a state statute constitutes an alternative enforcement mechanism under ERISA:

The Supreme Court has identified two categories of state laws that act as alternative enforcement mechanisms to ERISA. One is where “the existence of a pension plan is a critical element of a state-law cause of action,” and the other is where a “state statute contains provisions that expressly refer to ERISA or ERISA plans....The former is preempted under ERISA’s express preemption statute, i.e., § 1144(a), and the latter is preempted under ERISA’s field (“complete”) preemption statute, i.e., 29 U.S.C. § 1132(a).

Bioni, 303 F.3d at 776, citing *DeBuono v. NYSA-ILA Medical and Clinical Services Fund*, 520 U.S. 806, 817, 117 S.Ct. 1747 (1997). Neither RCW 39.08 nor 60.28 depend upon the existence of an ERISA plan for their operation, or expressly refer to ERISA or ERISA plans.

D. The AGC Distracts by Raising Issues not Before This Court.

Finally, the AGC contends that the Carpenters Trusts’ requested relief against “innocent third parties”¹⁵ should be denied because they come before the Court with unclean hands.¹⁶ Unclean hands and breach of fiduciary duty are not issues before this Court. They were not briefed by the parties before the Superior Court. Only the AGC raises it on appeal. Courts generally do not consider arguments on appeal not raised

¹⁵ AGC Amicus Brief, at p. 14.

¹⁶ AGC Amicus Brief, at p. 17.

below. *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359 (1980); *Barnes v. Seattle Sch. Dist. No. 1*, 88 Wn.2d 483 (1977); *Fuqua v. Fuqua*, 88 Wn.2d 100 (1977). However, the Carpenters Trusts will briefly address them.

First, the parties represented by the AGC – of which Respondent W.G. Clark is one – are far from innocent here. Washington’s public works bond statute requires the general contractor to obtain a payment bond. RCW 39.08.010(a). Moreover, the statutory language requires the general contractor and/or its surety to cover all costs incurred on the public project, including those of its subcontractors. RCW 39.08.010(a)(ii). Similarly, Washington’s public works retained percentage statute requires retention of a percentage of the contract amount, or in the alternative a bond, to pay any person who has provided labor or material to a public works project. RCW 60.28.011(1), (2). Members of the AGC regularly bid and are awarded contracts by public agencies, including respondent W.G. Clark. They are aware of the statutory requirements of RCW 39.08 and 60.28, including the requirement that all laborers and materialmen of subcontractors must be paid in full. Members of the AGC obtain public works bonds, and retain a percentage of the contract price – or provide a retainage bond – in order to comply with RCW 39.08 and 60.28. Members of the AGC pay claims on liens from non-union labor and

materialmen. It's thus difficult to see how the AGC's characterization of its members as "innocent parties" is anything but disingenuous.

Second, the AGC argues the Carpenters Trusts are before this Court with unclean hands because they somehow breached their fiduciary duty in collection of contributions from respondent Paramount Scaffold. Contrary to what the AGC argues in its brief,¹⁷ the Carpenters Trusts did not seek to litigate these bond and lien claims in superior court. The Carpenters Trusts chose to bring their lien claims in federal court, in the same case in which they brought their ERISA and LMRA claims against Paramount Scaffold. However, W.G. Clark filed a preemptory declaratory relief action in superior court in order to avoid the federal court's enforcement of the Carpenters Trusts' claims. The federal judge in this case characterized W.G. Clark's preemptory action as blatant forum shopping.¹⁸

Moreover, the Carpenters Trusts have aggressively pursued collection of all amounts owing. The Carpenters Trusts sued the employer/plan sponsor Paramount Scaffold in federal court under ERISA

¹⁷ AGC Amicus Brief, at p. 15.

¹⁸ Brief of the Appellate Carpenters Trusts, at Appendix, Exh. 1: Order on Defendants' Motion to Dismiss and Plaintiffs' Motion for Summary Judgment, at 7:20-8:2.

and the LMRA, when Paramount Scaffold was an ongoing concern.¹⁹ The bulk of contributions owing were related to work on the U.S.S. Nimitz at the Bremerton Ship Yards. Ordinarily, the Carpenters Trusts could make claims under the federal Miller Act bond to seek payment of contributions, but the Department of Defense waived compliance with the Miller Act's bonding requirements for the U.S.S. Nimitz refit, as it is authorized to do under 40 U.S.C. §3134(a). The Carpenters Trusts also sued W.G. Clark and its surety in federal court alleging claims under RCW 39.08 and 60.28, alleged successor entity claims against California Access Scaffold, LLC, alleged ERISA breach of fiduciary duty claims and state law defalcation/conversion claims against Paramount Scaffold's president and treasurer, under Washington and/or California law. Given this aggressive effort to recover delinquent fringe benefit contributions, it is difficult see how the AGC can suggest to this Court that there are relevant fiduciary duty issues that warrant consideration by this Court.

¹⁹ Paramount Scaffold subsequently filed for bankruptcy protection in California. As every member of this Court knows, collection actions against a bankrupt entity cannot be maintained because of the automatic stay imposed by the federal Bankruptcy Court. The Carpenters Trusts' hands were thus tied as to Paramount Scaffold. It is notable that Paramount Scaffold's debts were not subsequently discharged in bankruptcy. The company requested a dismissal without discharge on its own motion.

III. CONCLUSION

The AGC seeks to perpetuate a system that the trial court characterized as broken,²⁰ one that does not apply RCW 39.08 and 60.28 equally to all similarly situated claimants, one that promotes costly and duplicitous litigation and forum-shopping, and one that runs contrary to the purpose of ERISA. The Carpenters Trusts contend the end result is a failure to fully protect and pay Washington laborers for work performed on public works projects.

Dated the 23rd day of December, 2013.



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²⁰ CP 465.

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Attached for filing is the Carpenters Trusts' answer to the amicus of the AGC of Washington.

Counsel for respondent and court-approved amici are copied on this message. Please contact us if you have any questions or require additional information.

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