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No. 88080-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

W.G. CLARK CONSTRUCTION CO., 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.

REPLY BRIEF OF THE APPELLANT CARPENTERS TRUSTS

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I. STATEMENT OF THE CASE ON REPLY

This case is not about whether this Court's decision in *International Brotherhood of Electrical Workers, Local Union No. 46 v. Trig Electric Construction Co.*, 142 Wn.2d 431 (2000) was correctly made. Rather, the question is whether, given subsequent case law by federal and state courts, *Trig* still accurately states federal ERISA preemption doctrine. This Court in *Trig* declined to abrogate its decision *Puget Sound Electrical Workers Health & Welfare Trust Fund v. Merit Co.*, 123 Wn.2d 565 (1994), holding that Washington's public works bond statutes, RCW 39.08 and 60.28 were preempted by ERISA because they had an impermissible connection with ERISA by providing an alternative enforcement mechanism. *Trig*, 142 Wn.2d at 437, 443.

As set forth in their briefing, the Carpenters Trusts respectfully contend this Court's interpretation of federal ERISA preemption doctrine in *Trig*, given subsequent case law interpreting the doctrine in light of non-signatory, third-party liability, is overbroad and not in step with the current scope of federal preemption. Accordingly, the Carpenters Trust contend this Court's decisions in *Merit* and *Trig* should be abrogated, restoring the decades-old rights of the Carpenters Trusts, and similarly situated claimants, to the protections of Washington's public works lien statutes.

II. ARGUMENT ON REPLY

The scope of federal ERISA preemption doctrine has narrowed and there is no longer a relevant split of authority as to whether statutes of general applicability that exercise areas of traditional state regulation, such as RCW 39.08 and RCW 60.28, are preempted. Moreover, with the starting point for a preemption analysis now beginning with the presumption that Congress did not intend to preempt state law, a reasonable person can but conclude that Washington's lien statutes are not preempted by ERISA. As set forth below, W.G. Clark's brief in opposition does little to dissuade from that conclusion.

A. *Trig* no Longer Correctly States Federal ERISA Preemption Doctrine.

Trig no longer correctly states federal ERISA preemption doctrine for a number of reasons, including: (i) Congress did not intend to preempt state laws of general applicability that exercise areas of traditional state regulation; (ii) Congress' intent as to preemption is neither clear nor manifest; (iii) the presumption against preemption has not been rebutted; (iv) Washington's public works lien statutes are an exercise of traditional state regulation; and (v) subsequent application of the doctrine by a wide variety of state and federal courts since *Trig* has resulted in a uniform rejection of preemption of such statutes.

1. **Congress did not Intend to Preempt State Laws of General Applicability that Exercise Areas of Traditional State Regulation.**

The United States Supreme Court in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995) reset the starting point for analyzing whether a state statute is preempted by ERISA:

[D]espite the variety of these opportunities for federal preeminence, we have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with *the starting presumption that Congress does not intend to supplant state law.*

Travelers, 514 U.S. at 654 (emphasis added), citing *Maryland v. Louisiana*, 451 U.S. 725, 101 S.Ct. 2114, 68 L.Ed. 576 (1981). The *Travelers* court continued:

[W]e have worked on the ‘assumption that the historic police power 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 (emphasis added), citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947). State statutes exercise areas of traditional state regulation are not preempted:

[P]reemption does not occur...if the state law only has a *tenuous, remote, or peripheral connection with covered plans*, as is the case with many laws of general applicability.

Travelers, 514 U.S. at 661 (emphasis added). The *Travelers* court explained that ERISA preempts only those state laws having such a “connection with or reference to” employee benefit plans that they affect the nature of such plans and the objectives of ERISA. *Travelers*, 415 U.S. at 656.

Two years later, the United States Supreme Court in *Dillingham* further narrowed the scope of the test for ERISA preemption by stating that preemption occurs only “[w]here a State's law acts immediately and exclusively upon ERISA plans, ... or where the existence of ERISA plans is essential to the [State] law's operation.” *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316, 325, 334, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997).

By narrowing the scope of ERISA preemption, the *Travelers* court stated the objective of Congress in passing ERISA was to ensure national uniformity in the administration of the employee benefit plans that it covers. *Travelers*, 514 U.S. at 656–57; *Dillingham*, 519 U.S. at 326–30. It is now presumed that Congress does not intend to supplant state law, *Travelers*, 415 U.S. at 654–55; *Dillingham*, 519 U.S. at 331–32, particularly in regard to fields of traditional state regulation. *Travelers*, 514 U.S. at 655–56.

Because of this presumption, which apparently did not factor into the *Trig* court's decision,¹ ERISA's purported preemptive effect upon RCW 39.08 and 60.28 must be revisited from that starting point. And when one starts from the presumption of no preemption, and applies the tests for preemption set forth above, the Carpenters Trusts contend that there is no ERISA preemption of these Washington statutes and *Trig* must accordingly be abrogated.

2. **Congress' Intent as to ERISA Preemption is Neither Clear nor Manifest.**

As set forth above, Congress' intent as to ERISA preemption of state laws of general applicability that are an exercise of traditional state regulation must be clear and manifest. *Travelers*, 514 U.S. at 661. Thus, absent a showing of clear and manifest intent, it will be presumed that Congress did not intend to preempt such state laws. Washington courts have explicitly recognized this rule. *Wutzke v. Schwaelger*, 86 Wn. App. 898, 903 (1997), citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) (“We ‘start with the presumption 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.’”). The party arguing for preemption – W.G. Clark – bears a

¹ See *Trig* dissent, 142 Wn.2d at 444-46.

heavy burden. *Wutzke*, 86 Wn. App. at 903, citing *Pennsylvania Med. Soc'y v. Marconis*, 942 F.2d 842, 846 (3rd Cir. 1991).

As set forth below, W.G. Clark cannot and has not met its burden on presumption, as Congress' intent to preempt state laws of general applicability, exercising areas of traditional state regulation, is far from clear or manifest.

3. **RCW 39.08 and 60.28 are Statutes of General Applicability Exercising Areas of Traditional State Regulation.**

Enforcing rights and obligations arising from contract, pursuant to state law – such as a surety contract – for the protection of the public is an area that Congress has traditionally left to the states. *Southern California IBEW-NECA Trust Funds v. Standard Industrial Electric Company*, 247 F.3d 920, 929 (9th Cir. 2001) (Enforcement of contractual rights is an area traditionally left to state regulation); *Operating Engineers Health and Welfare Trust v. JWJ Contracting Co.*, 135 F.3d 671, 677 (9th Cir. 1998) (Preemption has limits when it enters areas traditionally left to state regulation such as health, safety, banking, securities, and insurance matters); *Carpenters Southern California Administrative Corp. v. D & L Camp Constr. Co. Inc.*, 738 F.2d 999, 1000 (9th Cir. 1984) (surety obligations are fixed by contract and regulated by state law for the protection of the public).

a) **There is no Impermissible Reference to ERISA.**

The plain language of both RCW 39.08 and 60.28 refers to neither ERISA nor employee benefit plans. RCW 39.08 defines claimants as:

...deliver to such board, council, commission, trustees, or body a good and sufficient bond, with a surety company as surety, conditioned that such person or persons *shall faithfully perform all the provisions of such contract and pay all laborers, mechanics, and subcontractors and material suppliers, and all persons who supply such person or persons, or subcontractors, with provisions and supplies for the carrying on of such work, which bond in cases of cities and towns shall be filed with the clerk or comptroller thereof, and any person or persons performing such services or furnishing material to any subcontractor shall have the same right under the provisions of such bond as if such work, services, or material was furnished to the original contractor...*²

Similarly, RCW 60.28 defines claimants as:

(2) *Every person performing labor* or furnishing supplies toward the completion of a public improvement contract shall have a lien upon moneys reserved by a public body under the provisions of a public improvement contract.³

Neither statute refers to ERISA, nor to ERISA plans or benefit plans in general. By enacting RCW 39.08 in 1909 and 60.28 in 1921, the Washington legislature could not have possibly intended to refer to ERISA

² RCW 39.08.010(1) (emphasis added).

³ RCW 60.28.011(2) (emphasis added).

or ERISA trust funds, as ERISA did not come into existence until 1974. A state statute will only constitute an impermissible reference if the statute necessarily refers only to ERISA plans. *Standard Industrial*, 247 F.3d at 926, citing *Dillingham*, 519 U.S. at 330.

By the plain language of the statutes themselves, there are no references, indirect or otherwise, to ERISA. Even if a reference could be inferred, there is no impermissible reference as the statutes operate regardless of the existence or nature of ERISA benefit plans. *Standard Industrial*, 247 F.3d at 926. The inclusion of employee benefit trusts among those who may enforce a payment bond is not an impermissible reference to an ERISA plan. *Standard Industrial*, 247 F.3d at 926.

b) **There is no Direct Connection with ERISA Plans.**

Under current federal ERISA preemption doctrine, a state statute has an impermissible connection with ERISA if it:

- (1) Acts immediately and exclusively upon ERISA plans; or
- (2) Where the existence of ERISA plans is essential to the state law's operation.

Dillingham, 519 U.S. at 325, 334. An impermissible connection is one that attempts to regulate a core function of an ERISA plan: establishment of a plan, imposition of reporting, disclosure, funding, or vesting requirements, direction on how to write ERISA plans, and determination

of ERISA beneficiary status. *Standard Industrial*, 247 F.3d at 926, citing *Egelhoff v. Egelhoff*, 532 U.S. 141, 121 S.Ct. 1322, 149 L.Ed.2d 264 (2001). “To find an impermissible connection, we look ‘both to the objectives of the ERISA statute as a guide to the scope of state law that Congress understood would survive, as well as to the nature of the effect of the state law on ERISA plans.’” *Standard Industrial*, 247 F.3d at 925, citing *Rutledge v. Seyfarth*, 201 F.3d 1212, 1216 (9th Cir. 2000), amended and superseded on other grounds in 208 F.3d 1170.

W.G. Clark’s assertion that Washington’s public works lien statutes have a direct connection with ERISA plans⁴ simply runs contrary to the impermissible connection tests set forth by the United States Supreme Court. W.G. Clark provides no support for the proposition that either RCW 39.08 or 60.28 act exclusively upon ERISA plans or that ERISA plans are essential to the statutes’ operation, nor can it. Both RCW 39.08 and 60.28, by the plain language of the statutes themselves, do not act exclusively upon ERISA plans or implicate an area of core ERISA concern. Rather, each statute operates irrespective of ERISA plans, applying to all claimants, regardless of ERISA status, who provide labor or material to public projects.

⁴ W.G. Clark’s Response Brief at §IV.D.2.

Nor does W.G. Clark demonstrate that RCW 39.08 or 60.28 require the establishment of a separate benefit plan, impose new reporting, disclosure, funding, or vesting requirements for ERISA plans. W.G. Clark cites no authority for the proposition that Washington's lien statutes instruct employers how to write ERISA benefit plans, how to determine beneficiary statute, or condition requirements on how ERISA benefit plans are written. Indeed, the statutes, having predated ERISA by decades, are silent as to ERISA. Thus, the statutes cannot be construed to provide and alternate enforcement mechanism – collection of delinquency fringe benefit contributions are incidental to the core functions of ERISA plans.

W.G. Clark cites *Romney, Children's Wear and Allied Workers Union, A Local 23-25, IGLWU v. Lin*, 105 F.3d 806, 812 (2nd Cir. 1997), cert. den. 522 U.S. 906 (1997), suggesting that if a party is not listed by ERISA as being responsible for payment of contributions, then that party is not responsible under any other law or mechanism.⁵ The *Romney* case concerned enforcement of a New York statute that imposed liability on an employer's ten largest shareholders for amounts owing to employees, including "employer contributions to pension or annuity funds." *Romney*, 105 F.3d at 807. The *Romney* case is problematic for W.G. Clark for several reasons. First, *Romney* was decided pre-*Travelers*, under the

⁵ W.G. Clark's Response Brief, at 19.

older, broader *Shaw* test for preemption and that test is no longer valid. Second, the New York statute specifically referred to pension or annuity funds. Even under a post-*Travelers* analysis, such a specific reference to benefit plans would still likely run afoul of the “reference-to” prong of the current ERISA preemption test. The Washington statutes make no such specific reference, and accordingly, *Romney* lacks persuasive effect.

There should be no question, when applying the current test for federal ERISA preemption as set forth by the United States Supreme Court and the Ninth Circuit, that RCW 39.08 and 60.28 do not have a connection with, or reference to, ERISA benefit plans.

4. W.G. Clark Ignores the Majority of Authority Cited by the Carpenter Trusts.

W.G. Clark ignores virtually all of the persuasive authority cited by the Carpenters Trusts – and for good reason – the cases are directly adverse to the position advanced by W.G. Clark. This Court in *Trig* took issue with holding third parties liable for payment of fringe benefit contributions – parties who were not signatory to the labor agreement giving rise to the obligation to pay – as creating an alternative enforcement mechanism triggering ERISA preemption. *Trig*, 142 Wn.2d at 627.

Every single case cited by the Carpenters Trusts on this issue holds enforcement of fringe benefit contributions against non-signatory, third

parties not preempted by ERISA, and accordingly, by operation of law, are not alternate enforcement mechanisms. The cases are divided into two general areas: (i) bond claims involving statutes similar to RCW 39.08 and 60.28; and (ii) mechanics lien claims. In every case, the state statute at issue is a statute of general applicability exercising an area of traditional state regulation. In every case, the statutes at issue purport to hold non-signatory, third parties liability for payment of fringe benefit contributions.

a) **Pre-Trig Cases that Declined to Find Preemption were not Brought to the Attention of this Court.**

The Carpenters Trusts have identified three cases that were not brought to the attention of this Court in *Trig*.⁶ In each of the three cases, the court reviewed the state statute of general applicability giving rise to claims against non-signatory, third parties. In each instance, the court declined to find the pertinent state statutes preempted by ERISA.

In 1997, the Indiana Court of Appeals held that claims against a general contractor's surety under Indiana's public works lien statute for payment of a signatory subcontractor's delinquent fringe benefit contributions were not preempted by ERISA. *Seaboard Surety Company*

⁶ No mention of these cases was found in a review of the briefing submitted by parties and amicus to this Court in *Trig*.

v. Indiana State District Council of Laborers and HOD Carriers Health and Welfare Fund, 645 N.E.2d 1121, 1127-28 (1995). Notably, the Indiana court found that Congress, when it amended ERISA in 1980 to add remedies for plans to collect delinquent fringe benefit contributions, did not intend to preempt alternate state law collection remedies:

The federal House of Representatives Committee on Ways and Means acknowledged the existence of alternate state remedies for delinquent multiemployer plan contributions in its report on the proposed amendment:

‘The Bill pre[-]empts any state or other law which would prevent the award of reasonable attorney's fees, court costs or liquidated damages, or which would limit liquidated damages to an amount below the 20 percent level. However, the Bill does not preclude the award of liquidated damages in excess of the 20 percent level where an award of such a higher level of liquidated damages is permitted under applicable State or other law. *The Committee amendment does not change any other type of remedy permitted under State or Federal law with respect to delinquent multiemployer plan contributions.*’

H.R.Rep. No. 869(II), 96th Cong., 2d Sess. 48-49 (1980), reprinted in 1980 U.S.C.C.A.N. 3037-38. This portion of the amendment's legislative history expressly recognizes alternate state law remedies and provides that they are not pre-empted by the ERISA remedy added under 29 U.S.C. §§ 1132(g) and 1145. *The omission of any remedy for delinquent contributions prior to the 1980 amendment and the recognition of alternate state remedies in the amendment's legislative history*

show that the ERISA remedy for delinquent contributions was not intended to be exclusive.

Indiana State District Council of Laborers, 645 N.E.2d at 1124-25 (emphasis added). The Indiana court also noted that the surety, Seaboard, voluntarily guaranteed payment of a subcontractor's delinquent fringe benefit contributions when it issued the bond under Indiana's public works statute.⁷ *Indiana State District Council of Laborers*, 645 N.E.2d at 1127. Moreover, the Indiana court found no preemption because (i) the Nineteenth Century-era law was a traditional exercise of state authority; (ii) the law affects relations between a plan and a surety "who is an outside party, they do not affect relations among parties to an ERISA plan;" and (iii) state law remedies may increase the money available for payment of benefits but do not purport to change benefit eligibility or how benefits are calculated. *Indiana State District Council of Laborers*, 645 N.E.2d at 1127-28. All of these important points raised by the Indiana court are applicable here.

In 1998, the Sixth Circuit held claims against a general contractor and its surety under Michigan's Public Works Act for payment of a

⁷ This is an important point for this Court to consider. Arguably, W.G. Clark and its surety have done the same here. By issuing a payment and performance bond and withholding retained percentage (or bonding around the retained percentage requirement), W.G. Clark and its surety have voluntarily agreed to guaranty payment of all amounts due laborers of contractors and subcontractors, including fringe benefits that comprise a portion of the laborers' wages.

signatory subcontractor's delinquent fringe benefit contributions were not preempted by ERISA. *Trustees for Michigan Laborers' Health Care Fund v. Seaboard Surety Company*, 137 F.3d 427, 429 (6th Cir. 1998). The Sixth Circuit's conclusions are particularly persuasive, given the similarity in purpose and effect of Michigan's Public Works Act to Washington's lien statutes:

The Michigan Public Works Act treats contributions due to an ERISA fund exactly as all other forms of compensation due a laborer or furnisher of materials on a public construction project. The statute does not interfere with nor require any administrative action of the Plans. It does not cause any additional expense to the Plans. To the extent that the statute operates to ensure payment of contributions to the Plans, it is incidental to its primary objective; in this case, *to compel contractors on a public works project to pay their laborer's full compensation either directly or through a bond secured as provided by law. This law does not [affect an ERISA plan in any meaningful way.*

The Michigan Public Works Act is a statute of general applicability which causes the surety in this case to pay compensation as provided *under the terms of its bonding contract*. The statute neither "relates to" nor has a "connection with" an ERISA plan and plaintiffs' action to recover contribution payments from defendant's payment bond is not preempted by ERISA.

Seaboard Surety Co., 137 F.3d at 429 (emphasis added).

In 2000, just months before this Court issued its decision in *Trig*, the Oregon Court of Appeals considered whether ERISA preempted trust

Funds' attempts to foreclose upon a non-signatory, third party using Oregon's construction lien statute. *International Brotherhood of Electrical Workers, Local 48 v. Oregon Steel Mills, Inc.*, 5 P.3d 1122, rev. den., 27 P.3d 1044 (Or. App. 2001). The Oregon court held Oregon's construction lien statute did not refer to, or have an impermissible connection, with ERISA, and therefore was not preempted. *Oregon Steel Mills*, 5 P.3d at 1128-30. The Oregon court similarly noted Congress' reference to the survival of state law collection remedies when it amended ERISA in 1980. *Oregon Steel Mills*, 5 P.3d at 1130-31 ("The 1980 amendment confirms that Congress did not intend that ERISA would preempt state law remedies, such as the lien laws, that give employee benefit plans remedies against third parties.").

These three cases do not appear to have been cited or briefed by any of the parties, including amicus, before this Court in *Trig* and therefore not considered by the *Trig* court in its analysis of ERISA preemption of RCW 39.08 and 60.28. The cases are relevant as persuasive authority, as they lend weight to the contention that *Trig* no longer correctly states federal ERISA preemption doctrine.

b) Post-*Trig* Cases have found no Preemption of Claims against Non-Signatory Third-Parties.

Since *Trig*, courts seem to have uniformly held that state statutes of general applicability, that exercise areas of traditional state regulation, are not preempted by ERISA under the narrower test for preemption promulgated by *Travelers*.⁸ The timing of these cases, as well as the uniformity of holdings finding no preemption, lend substantial weight to the Carpenters Trusts' contention that the federal doctrine of ERISA preemption has shifted away from the position espoused by this Court in *Trig*.

Since *Trig*, the following courts have refused to hold state lien and bond statutes of general applicability preempted by ERISA. Massachusetts: *Carpenters Local Union No. 26 v. U.S. Fidelity & Guar. Co.*, 215 F.3d 136 (1st Cir. 2000) (federal circuit court finds Massachusetts state lien statute not preempted as to claims against non-signatory, third parties). California: *Standard Industrial* (2001, federal circuit court finds California payment bond statute not preempted as to claims against non-signatory, third parties). Washington: *Ironworkers*

⁸ The Carpenters Trusts have been unable to locate any post-*Trig* case law holding state laws of general applicability, exercising areas of traditional state regulation and involving claims against non-signatory third parties for payment of delinquent fringe benefit contributions – whether under a mechanics lien or bond/lien statutes – preempted by ERISA.

District Council of the Pacific Northwest v. George Sollit Corporation, 2002 WL 31545972 (W.D.Wash. 2002) (federal district court finds state lien statutes not preempted as to claims against non-signatory, third parties). California: *Betancourt v. Storke Housing Investors*, 31 Cal.4th 1157, 8 Cal. Rptr.3d 259 (Cal. 2003) (state mechanics lien claims against non-signatory, third party not preempted). Connecticut: *Connecticut Carpenters Benefit Funds v. Burkhard Hotel Partners II, LLC*, 83 Conn. App. 352, 849 A.2d 922 (Ct. App. 2004) (state mechanics lien claims against non-signatory, third party not preempted). Minnesota: *Twin City Pipe Trades Service Association, Inc. v. Peak Mechanical, Inc.*, 689 N.W.2d 849 (Minn. App. 2004) (state mechanics lien claims against non-signatory, third party not preempted). Maine: *Local No. 496 of the International Association v. Wal-Mart Real Estate Business Trust*, 2004 WL 3196788 (Me. Super. Ct. 2004) (state mechanics lien claims against non-signatory, third party not preempted). Washington: *Board of Trustees of the Cement Masons Plasterers Health and Welfare Trust v. GBC Northwest, LLC*, 2007 WL 1306545 (W.D.Wash. 2007) (federal district court finds state lien statutes not preempted as to claims against non-signatory, third parties). Utah: *Forsberg v. Bovis Lend Lease, Inc.*, 184 P.3d 610 (Utah. App. 2008) (state mechanics lien and bond statutes not preempted by ERISA as to claims against non-signatory, third parties).

Washington: *Carpenters Retirement Trust of Western Washington v. Healthy Homes NW, LLC*, 2008 WL 2230754 (W.D.Wash. 2008) (federal district court finds state lien statutes not preempted as to claims against non-signatory, third parties). Illinois: *Central Laborers Pension Fund v. Nicholas and Associates, Inc.*, 2011 Ill.App.2d 100,125, 353 Ill.Dec. 747 (2011) (state mechanics lien claims against non-signatory, third party not preempted).

The number of cases, the varying federal and state jurisdictions addressing the same preemption issue, the breadth of state laws reviewed, and the resulting uniformity of holdings can lead to but one reasonable conclusion: the landscape of federal ERISA preemption has shifted away from the rule espoused by this Court in *Trig*.⁹ Accordingly, *Trig* no longer accurately states federal ERISA preemption doctrine and the Carpenters Trust contend it should be abrogated.

5. W.G. Clark Relies on Just Two pre-Travelers Cases.

W.G. Clark attempts to show a split in national authority on the issue of ERISA preemption of claims against non-signatory third parties.

⁹ W.G. Clark is unable to cite to any post-*Trig* authority – other than a convoluted interpretation of *Betancourt* – to support its preferred interpretation of federal ERISA preemption doctrine. W.G. Clark’s inability to cite any current case law supporting its position is a tacit admission that federal ERISA preemption doctrine has shifted since this Court’s decision in *Trig* was issued.

However, upon closer examination, each case cited by W.G. Clark is distinguishable, and as a result, there is no material split of authority.

W.G. Clark first cites to *Plumbing Industry Board, Plumbing Local Union No. 1 v. E.W. Howell Co., Inc.*, 126 F.3d 61 (1997) in an effort to show a split in national authority on the “alternative enforcement mechanism” issue. However, *Plumbing Industry Bd.* is distinguishable on a number of bases. First, the state statute was amended in 1985 to specifically include trust funds:

New York amended Lien Law § 5 in 1985, extending the ability to file such liens – formerly limited to laborers or materialmen – to ‘any trust fund which benefits and wage supplements are due or payable for the benefit of such [laborers].’

Plumbing Industry Bd., 126 F.3d at 65. The Washington statutes at issue here have no such specific reference to trust funds.

Second, the cases the *Plumbing Industry Bd.* court relies upon in its alternate enforcement mechanism holding are either no longer good law, or are factually and materially distinguishable from this matter. *Plumbing Industry Bd.*, 126 F.3d at 69, citing *Trustees of Elec. Workers Health & Welfare Trust v. Marjo Corp.*, 988 F.2d 865 (9th Cir. 1992) (pre-*Travelers* case; abrogated by *Standard Industrial*); *McCoy v. Massachusetts Inst. Of Tech.*, 950 F.2d 13 (1st Cir. 1991) (pre-*Travelers* case; Massachusetts statute subsequently revised to remove specific

reference to trust funds); *M.C. Sturgis v. Herman Miller, Inc.*, 943 F.2d 1127 (9th Cir. 1991) (pre-*Travelers* case; abrogated by *Standard Industrial*); *Iron Workers Mid-South Pension Fund v. Terotechnology Corp.*, 891 F.2d 548 (5th Cir. 1990) (pre-*Travelers* case; Louisiana statute specifically refers to ERISA plans); *Carpenters So. Cal. Admin. Corp. v. El Capitan Dev. Co.*, 53 Cal.3d 1041, 811 P.2d 296 (Cal. 1991) (pre-*Travelers* case; California statute repealed and rewritten in 2012 to remove specific reference to trust funds); *Prestridge v. Shinault*, 552 So.2d 643 (La. Ct. App. 1989) (pre-*Travelers* case; Louisiana statute specifically refers to ERISA plans); *Edwards v. Bethlehem Steel Corp.*, 554 N.E.2d 833 (Ind. Ct. App. 1990) (pre-*Travelers* case; subsequent Indiana decision finds no preemption on payment bond claims);¹⁰ *Chestnut-Adams, Ltd. Partnership v. Bricklayers & Masons Trust Funds of Boston, Mass.*, 415 Mass 87, 612 N.E.2d 236 (1993) (pre-*Travelers* case; Massachusetts statute subsequently revised to remove specific reference to trust funds); and *Merit* (pre-*Travelers* case).

Finally, the *Plumbing Industry Bd.* court has been criticized for not appreciating the shift in preemption analysis brought forth by *Travelers* just a few months prior to the Second Circuit's decision. "[N]one of these

¹⁰ See *Seaboard Surety Company v. Indiana State District Council of Laborers and HOD Carriers Health and Welfare Fund*, 645 N.E.2d 1121 (1995).

cases gave due consideration to the presumption before finding preemption.” *Betancourt*, 31 Cal.4th at 1173, citing *Plumbing Industry Bd.* and *Trig*, among others.

W.G. Clark also cites to *El Capitan* for the proposition that the California Supreme Court is aligned with *Trig* on preemption. W.G. Clark’s contention, upon a close examination of *El Capitan*, and its successor, *Betancourt*, lacks merit. First, *El Capitan* was decided pre-*Travelers*, under the old *Shaw* standard for preemption. That alone renders *El Capitan* unpersuasive. Second, the statute subject to review in *El Capitan*, was repealed and re-written in 2012 to remove the express reference to trust funds. Third, the *Betancourt* court’s discussion of *El Capitan* is dicta because that particular statute was not before the court for review. Moreover, the *El Capitan* rationale was all but cast aside:

The trial court believed that El Capitan ‘is still good law’ and governs this case. We respectfully disagree. In the years following the decision in *El Capitan*, the United States Supreme Court has more narrowly construed the reach of ERISA.

Betancourt, 114 Cal.Rptr. at 555 (emphasis added). Despite the clear language, W.G. Clark attempts to muddy the *Betancourt* holding.¹¹ W.G. Clark’s quote is merely the *Betancourt* court’s quoting of its prior opinion in *El Capitan*. It is not, as W.G. Clark suggests, a holding that reinforces

¹¹ W.G. Clark Brief in Opposition, at in-line quote, at p. 25.

the purported validity of *El Capitan*. Indeed, *Betancourt* not so subtly suggests the opposite, that *El Capitan* is no longer good law.

W.G. Clark can only cite to three cases in support of its contention that federal ERISA preemption doctrine has not shifted since this Court issued its opinion in *Trig*. The *Plumbing Industry Bd.* and *El Capitan* cases are 16 and 22 years old, respectively, and do not follow the U.S. Supreme Court's test for preemption in *Travelers* and subsequent cases. The third case, *Betancourt*, simply does not say what W.G. Clark thinks it says. Accordingly, W.G. Clark fails to rebut the Carpenters Trusts' overwhelming evidence that *Trig* no longer accurately states federal ERISA preemption doctrine.

B. W.G. Clark's Mootness Argument Lacks Merit.

W.G. Clark raises, for the first time on appeal, the argument that the Trust Funds' claims against W.G. Clark's retained percentage are now moot, and this Court should thus disregard the Carpenters Trusts' appeal.¹² W.G. Clark's argument is misplaced and not in accordance with Washington law.

First, issues not considered or raised before a trial court will generally not be considered on appeal. *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359 (1980); *Barnes v. Seattle Sch. Dist. No. 1*, 88 Wn.2d 483

¹² W.G. Clark's Brief in Opposition, at § IV.A.

(1977); *Fuqua v. Fuqua*, 88 Wn.2d 100 (1977). W.G. Clark's mootness argument rests on the theory that since the Carpenters Trusts did not file a foreclosure action in superior court, they have relinquished their rights to enforce the lien under RCW 60.28. W.G. Clark had opportunity to raise this issue in the trial court, but failed. The notice of claim of lien was filed on June 14, 2012. (CP 309) The statutory deadline to enforce the lien thus expired on October 14, 2012. W.G. Clark admits the Carpenters Trusts filed a foreclosure action on July 30, 2012, within the statutory four month period.¹³ W.G. Clark could have raised this issue before the superior court, but instead chose to race to judgment. W.G. Clark has thus waived its right to make a mootness argument on appeal.

Second, W.G. Clark's argument suggests that the venue clause in RCW 60.28 should be strictly interpreted, but it offers no support for that proposition. In fact, Washington courts have arguably declined to subscribe to such an interpretation. See, *Keystone Masonry, Inc. v. Garco Constr. Inc.*, 135 Wn. App. 927 (2006)(Venue requirement of public works lien statute may be overridden by forum selection clause.). The *Keystone Masonry* court's holding is inconsistent with W.G. Clark's strict interpretation theory. Moreover, W.G. Clark cites not one case that holds a federal court cannot resolve state law lien claims under the federal

¹³ W.G. Clark's Brief in Opposition, at p. 5.

supplemental jurisdiction statute. Accordingly, W.G. Clark's argument is without merit and it should be disregarded.

III. CONCLUSION

Starting with the presumption that Congress did not intend to preempt state statutes of general applicability exercising traditional state regulation, it is clear that since *Trig*, federal and state courts have uniformly held statutes such as RCW 39.08 and 60.28 are not preempted by ERISA. Neither statute refers to ERISA or ERISA plans, concerns establishment of a plan, imposition of reporting, disclosure, funding, or vesting requirements, direction on how to write ERISA plans, and determination of ERISA beneficiary status. Most important, neither statute creates an alternate enforcement mechanism for defining or obtaining benefits under an ERISA plan. The authority post-*Trig* supports this conclusion, as does the lack of authority cited by W.G. Clark. Accordingly, the Carpenters Trusts contend this Court should abrogate *Trig*, and by implication, *Merit*, as these cases no longer correctly reflect federal ERISA preemption doctrine and prevent laborers from using long-standing remedies to enforce full payment for work performed on Washington's public projects. This is something only the Washington Supreme Court can do, making direct review entirely appropriate here.

Dated the 22nd day of May, 2013.



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Clerk of Court,

Attached is the Carpenters Trusts' *Reply Brief of the Appellant Carpenters Trusts* for filing in this matter. Counsel for Respondent W.G. Clark and the Appellant Carpenters Union are copied on this message.

Thank you for your assistance with this filing. Please contact us if you have any questions or need additional information.

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