 74240-0

No. 74240-0-I

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

Key Development Pension, Appellant

v.

Clyde E. Carlson and Priscilla A. Carlson, Respondents

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

In their respondents' brief, Carlson[1] makes several arguments on issues that are not in dispute. The issues here are whether the payment of a judgment that is over three times the amount of pension benefits left to pay the plan participants is a reasonable administrative expense; whether the Washington exemption statute provision permitting lawsuits against pension plans for "valid obligations incurred by the plan or fund for the benefit of the plan or fund" allows a judgment against the fund for anything that is beyond a "reasonable expense for administration of the plan" as permitted by ERISA; and whether undistributed plan fund belongs to the plan participants.

II. FACT CHECK

At page 4 of the brief, Carlson argues that they borrowed $300,000.00 from the Pension and repaid the Pension over $400,000.00. While it is true that Carlson signed the two notes in question, Carlson did not repay anything to the Pension over the ten year period of payments. Each and every payment was made by Northwest Seaplanes, Inc. *See,* Trial Exhibits 3-12 and 15-23 transmitted to this Court under Case No. 73347-8-I Carlson produced no evidence that any repayment was made by

[1] The appellant will use the same designation of the parties that it used in its opening brief: "Key" for the appellant Key Development Pension, Carlson for the Respondents, Clyde and Priscilla Carlson.

Carlson individually. Neither Northwest Seaplanes, Inc. or Carlson accounted for these payments in their respective tax returns. *See* Trial Exhibits 25-37 transmitted to the Court under Key's appeal under Case No. 73347-8-I These interest payments were not deducted by the corporation as a corporate expense, but also Carlson did not declare these payments by the corporation as personal income or a dividend from the corporation.

III. ARGUMENT

A. Payment of a judgment that is more than three times the amount of benefits left for plan participants is not a reasonable administrative expense.

The "sue and be sued" provision in ERISA which Carlson relies on is, by its very terms, limited to suits brought under ERISA. The case that Carlson relies heavily on is *Milgram v. Orthopedic Associates Defined Contribution Pension Plan,* 666 F.3d 68 (2d Cir. 2011) was a lawsuit brought under Section 502(d)(1)-(2), 29 U.S.C. § 1132(d(1)-(2). All of the courts discussion and holding in that case deals with remedies available when an eligible person under ERISA brings an action under ERISA. Carlson concedes that the lawsuit brought by Key was not an ERISA lawsuit. Although no provision of ERISA was involved in the lawsuit that resulted in the judgment against Key, ERISA is involved when Carlson attempted to use Washington's garnishment statute to not allow. *See Mackay v. Lanier Collection Agency & Serv. Inc.* 486 U.S. 825, 108 S. Ct. 2182, 100 L. Ed. 2d 836 (1988)[2]. ERISA permits plan assets to be used only for payment of benefits to participants and for "reasonable expenses of plan administration." While some of the authority cited by Carlson indicates that the payment of a judgment against the plan may be considered a "reasonable expense", Carlson's argument reads the term "reasonable" out of the statute. Carlson argues that any payment of a judgment against a plan is an administrative expense, reasonable or not. Payment of a judgement that renders the plan insolvent violates the entire public policy of both ERISA and Washington's exemption provision.

> It is the policy of the State of Washington to ensure the well being of its citizens by protecting retirement income to which they are or may become entitled. . . .

RCW 6.15.020(1).

B. If Carlson's and the trial courts reading of the last sentence of RCW 6.15.020(3) is correct, it contravenes ERISA and is therefore preempted by ERISA/

ERISA only permits pension benefit plan assets to be used for distributions to plan participants or for reasonable expenses of plan administration. 29 U.S.C. §§ 1104(a)(1)(A)(i) and (ii). Carlson argues that these provisions to not apply to a judgment against an ERISA pension

[2] The *Mackey* case was discussed at length in Key's opening brief at page 6 and pages 8-12.

benefit plan itself and therefore the last sentence of RCW 6.15.020(3) which states that the exemption statute itself does not prohibit a suit against a pension plan for "valid obligations incurred for the benefit of the plan" is not preempted by ERISA and all of the assets of the pension are available to satisfy the judgment.

The *Mackay* court clearly held that a state statute that directly mentions of singles out ERISA pension plans is preempted by ERISA. A state statute that is in conflict with ERISA, regardless if ERISA is mentioned in the state statute, is also preempted by ERISA. State law cannot allow something that ERISA would not allow when it deals with an ERISA pension plan. *Mackey,* 486 U.S. at 836. Because ERISA only allows pension benefits to be used for distribution to participants or reasonable expenses of plan administration, if the provision in Washington's exemption statute relied on by Carlson means that any judgment in any amount and for any reason against an ERISA pension benefit plan can be satisfied from what remains of the the pension plan fund, whether reasonable or not, then Key submits that such an interpretation is directly in conflict with ERISA and is preempted. Given the strong public policy enunciated in ERISA (the Employee Retirement Income Security Act) to protect the stream of income due plan participants, allowing a judgment creditor to wipe out the entire stream of retirement income surely cannot be allowed.

C. **Carlson's argument that plan assets only belong to plan participants when they are distributed to the participant renders RCW 6.15.020(3) useless.**

At page 13 of the Respondents' brief, Carlson, relying on *Milgram* – a case brought under the express provisions of ERISA – argues that plan assets are not plan benefits belonging to a plan participant until actually distributed to plan participants. If that is so, why does Washington have an exemption statute that exempts pension benefits in a pension plan from execution by a participant's judgment creditors? If undistributed pension assets do not belong to the participant, then execution, attachment, garnishment or seizure of funds held by a plan should not be available for execution by a judgment creditor of a plan participant. In 2012 the Washington Supreme Court held that an exemption provision in the Law Enforcement Officers and Firefighters Retirement System (LEOFF) does not exempt pension benefits once they are in the hands of the participant (distributed). *Anthis v. Copland,* 173 Wn.2d 752, 270 P.3d 574 (2012). The Court noted that unlike the exemption provision in RCW 6.15.020(2) which exempts pension benefits that are in the actual hands of the beneficiary, the exemption under LEOFF(Chapter 41.26 RCW), the Public Employee Retirement System (PERS, Chapter 41.40 RCW) and RCW

6.15.020(3) exempt pension funds only before they are distributed. If, as Carlson argues, the pension in Key's checking account don't belong to the plan participants but are rather "plan assets" and those assets are not protected by RCW 6.15.020(3), once they are distributed, what exactly does RCW 6.15.020(3) exempt under Carlson's theory of the law?

The law, however,is not as Carlson would hope. The undistributed pension funds are what the legislature deemed worthy of protection.

> The right of a person to a pension, annuity, or retirement allowance, or death benefits, or any optional benefit, or any right accrued or accruing to any citizen of the state of Washington under any employee benefit plan, and any fund created by such a plan or arrangement, shall be exempt from execution, attachment, garnishment, or seizure by or under any legal process whatsoever.

RCW 6.15.020(3). As noted in Key's opening brief, the remaining plan participants are both past retirement age and fully vested and the only reason that the plan has not paid out the remaining assets is that the money that is deposited into the plan bank account is from payments made on promissory notes that are not yet due in full. There is no cash held by the plan or any other investments of the plan. When the money from these payments is received it is paid immediately to the plan participants. Carlson wants to take the pension money from the hands of these plan participants to which they are or may become entitled contrary to this state's clear policy.

III. CONCLUSION

For the reasons set forth above and in Key's opening brief, this Court should reverse the trial court, remand with instructions to allow Key's claim of exemption, and to award attorney's fees and costs to Key in the trial court. Key should also be awarded its fees and costs for this appeal.

RESPECTFULLY SUBMITTED this 27th day of June, 2016

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