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COURT OF APPEALS

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STATE OF WASHINGTON

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NO. 33733-9-II

COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON

OREGON MUTUAL INSURANCE COMPANY, a foreign corporation

Appellant/Defendant

v.

ATLANTIC CASUALTY INSURANCE COMPANY,
A North Carolina Corporation,
Respondent/Defendant,

GORDON CHASE and AUDREY CHASE, husband & wife,
Respondents/Defendants,

BENJAMIN STARKWEATHER and JANE DOE STARKWEATHER,
husband and wife, dba STARKWEATHER ROOFING,

Respondents/Defendants

**BRIEF OF APPELLANT OREGON MUTUAL INSURANCE
COMPANY**

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ORIGINAL

TABLE OF CONTENTS

	PAGE
I. INTRODUCTION	1
II. ASSIGNMENT OF ERROR	3
A. Assignment of Error	3
B. Issues Pertaining to Assignment of Error	3
1. Priority of Action Rule	3
2. Adequate Alternative Remedy	3
III. STATEMENT OF THE CASE	4
A. Starkweather's Faulty Work on the Chases' Home	4
B. OMI's First-In-Time Garnishment Action against Atlantic Casualty and Starkweather	5
C. Proceedings Below	7
IV. ARGUMENT	9
A. Standard of Review	10
B. The Trial Court Erred in Not Dismissing This Second-in-Time Declaratory Judgment Action Under The "Priority of Action" Rule	11
C. The Trial Court Also Erred in Not Dismissing This Declaratory Judgment Action Because The First-In-Time Garnishment Action Is An Adequate	18

TABLE OF CONTENTS

	PAGE
I. INTRODUCTION	1
II. ASSIGNMENT OF ERROR	3
A. Assignment of Error	3
B. Issues Pertaining to Assignment of Error	3
1. Priority of Action Rule	3
2. Adequate Alternative Remedy	3
III. STATEMENT OF THE CASE	4
A. Starkweather's Faulty Work on the Chases' Home	4
B. OMI's First-In-Time Garnishment Action against Atlantic Casualty and Starkweather	5
C. Proceedings Below	7
IV. ARGUMENT	9
A. Standard of Review	10
B. The Trial Court Erred in Not Dismissing This Second-in-Time Declaratory Judgment Action Under The "Priority of Action" Rule	11
C. The Trial Court Also Erred in Not Dismissing This Declaratory Judgment Action Because The First-In-Time Garnishment Action Is An Adequate	18

TABLE OF CONTENTS

	PAGE
Alternative Remedy	
D. OMI Is Entitled To All Of Its Attorney Fees and Costs Because This Action Is Frivolous Under RCW 4.84.185 And Was Filed In Violation of CR 11	20
1. OMI Is Entitled to Fees and Costs In The Trial Court Because Atlantic Casualty's Declaratory Action Is Frivilous Under RCW 4.84.185	20
2. OMI Is Entitled To Its Fees and Costs On This Appeal Because Atlantic Casualty Files This Action In Violation Of CR 11	21
V. CONCLUSION	22

TABLE OF AUTHORITIES

CASES	PAGE
<i>American Mobile Homes of Wash., Inc. v. Seattle-First Nat'l Bank</i> , 115 Wn.2d 307, 796 P.2d 1276 (1990)	2, 3, 11, 12
<i>Burr v. Lane</i> , 10 Wn. App. 661, 517 P.2d 988 (1974)	15, 20
<i>Eakle v. Hayes</i> , 185 Wash. 520, 55 P.2d 1072 (1936)	15, 20
<i>Lu v. King County</i> , 110 Wn. App. 92, 38 P.3d 1040 (2002)	3, 18, 19
<i>Reeder v. King County</i> , 57 Wn.2d 563, 358 P.2d 810 (1961)	3, 19
<i>Sherwin v. Arveson</i> , 96 Wn.2d 77, 633 P.2d 1335 (1981)	10, 11, 12, 18
<i>Smith v. Safeco Ins. Co.</i> , 150 Wn.2d 478, 483, 78 P.3d 1274 (2003)	10
<i>State ex rel. Greenberger v. Superior Court</i> , 134 Wash. 400, 235 P. 957 (1925)	11
<i>Yakima v. International Ass'n of Fire Fighters</i> , 117 Wn.2d 655, 818 P.2d 1076 (1991)	3, 11, 12, 13, 16
<i>Vandercook v. Reece</i> , 120 Wn.App 647, 651, 86 P.3d 206 (2004)	6

STATUTES

RCW 4.84.185	2, 20, 21
RCW 36.70C.030(1)	19

RULES

CR 11	2, 20, 21, 22
CR 56(c)	10
ER 201	6

I. INTRODUCTION

This declaratory judgment action is the mirror image of a garnishment proceeding that was filed eight months earlier and that involves the very same parties, claims and relief as are at issue here. Under the “priority of action” rule, the garnishment court has exclusive jurisdiction over this controversy, and the trial court erred when it refused to dismiss this second-in-time declaratory judgment action.

In June 2004, appellant Oregon Mutual Insurance Company (“OMI”) sued in Pierce County Superior Court to garnish an insurance policy issued by respondent Atlantic Casualty Insurance Company (“Atlantic Casualty”), after a default judgment was entered against Atlantic Casualty’s insured, Benjamin Starkweather, d/b/a Stark Weather Roofing (“Starkweather”). Atlantic Casualty and Starkweather moved twice in the garnishment action to vacate the default judgment against Starkweather. The first motion was denied on September 16, 2004; the second was denied on February 2, 2005. Atlantic Casualty and Starkweather filed an appeal of those rulings.

On February 22, 2005—only 20 days after the second motion to vacate was denied—Atlantic Casualty also filed this declaratory judgment action—involving the very same parties, claims and relief as are at issue in the garnishment—to collaterally attack the garnishment court’s rulings and

in hopes of obtaining preemptive rulings to use against OMI while the garnishment action was on appeal.

OMI moved the court below to dismiss this second action based on the “priority of action” rule, under which the first-in-time court acquires exclusive jurisdiction over a controversy.¹ The trial court, however, refused to dismiss under the erroneous belief that it somehow had discretion to retain jurisdiction. The trial court’s refusal to dismiss this duplicative lawsuit has forced OMI to litigate the very same controversy in two separate, mirror-image actions: It must defend against Atlantic Casualty’s claims in this declaratory judgment action, and it must also respond to identical claims—in the form of Atlantic Casualty’s defenses—in the first-filed garnishment action. This result flies squarely in the face of the clear mandate of the “priority of action” rule.

The trial court should therefore be reversed and this action should be dismissed in favor of the first-filed garnishment proceeding. In addition, because this duplicative action is frivolous and was filed in an apparent attempt to abuse the judicial process and unreasonably increase OMI’s burden of litigation, OMI requests an award of all fees and costs it has incurred in this case under RCW 4.84.185 and CR 11.

¹ See, e.g., *American Mobile Homes of Wash., Inc. v. Seattle-First Nat’l Bank*, 115 Wn.2d 307, 796 P.2d 1276 (1990).

II. ASSIGNMENT OF ERROR

A. Assignment of Error

The trial court erred in entering the order of August 19, 2005, denying OMI's motion for summary judgment to dismiss this case under the "priority of action" rule.

B. Issues Pertaining to Assignment of Error

1. Priority of Action Rule: Did the trial court err by not dismissing this declaratory judgment action under the "priority of action" rule set forth in *Yakima v. International Ass'n of Fire Fighters*, 117 Wn.2d 655, 675, 818 P.2d 1076 (1991), and *American Mobile Homes of Wash., Inc. v. Seattle-First Nat'l Bank*, 115 Wn.2d 307, 316-17, 796 P.2d 1276 (1990), where the same parties, issues and relief were already before the Pierce County Superior Court in a garnishment action filed by OMI over eight months before Atlantic Casualty filed this action?

2. Adequate Alternative Remedy: Did the trial court err in not dismissing this declaratory judgment action where the first-filed garnishment proceeding is an adequate alternative remedy under *Reeder v. King County*, 57 Wn.2d 563, 564, 358 P.2d 810 (1961), and *Lu v. King County*, 110 Wn. App. 92, 98-99, 38 P.3d 1040 (2002), and where Atlantic Casualty can raise—and indeed has already raised—all of its coverage defenses in the garnishment proceeding?

III. STATEMENT OF THE CASE

A. Starkweather's Faulty Work on the Chases' Home.

Starkweather contracted with Audrey and Gordon Chase to replace the roof on the Chases' home. **CP 39, lines 14-15.** Starkweather performed the work in a negligent and defective manner, resulting in significant water intrusion and property damage to the Chases' home and property. **CP 39, lines 15-17.** The Chases tendered the loss to OMI, their homeowner's insurance company. **CP 39, lines 17-18.** OMI worked extensively with the Chases to repair the damage to their home, and it paid considerable amounts for the repair and replacement of the Chases' damaged property. **CP 39, lines 18-19.**

The Chases also demanded compensation from Starkweather for their losses caused by Starkweather's negligence. **CP 39, lines 20-21.** Starkweather tendered the Chases' claim to his liability insurer, Atlantic Casualty. *See CP 53-55.* Atlantic Casualty, however, denied Starkweather's claim based on a "Roofing Limitation Endorsement," which purports to exclude coverage for losses caused by water intrusion if the insured fails to install a "suitable temporary covering, able to withstand the normal elements" at a project. **CP 54-55.** Significantly, Atlantic Casualty's letter to Starkweather denying coverage expressly

concedes that Starkweather had, in fact, “cover[ed] the entire roof” with a membrane product called triflex. *See CP 55.*

Moreover, Atlantic Casualty’s letter also told Starkweather that he was on his own if the Chases filed suit: “Our decision [to deny coverage also] includes a refusal to either indemnify you or to defend your interests in connection with any litigation filed against you in this particular matter.” **CP 55.**

The Chases thereafter sued Starkweather and, after Starkweather failed to answer or appear, they obtained a default judgment against him on February 9, 2004. **CP 57-58.**

B. OMI’s First-In-Time Garnishment Action against Atlantic Casualty and Starkweather.

On June 23, 2004 OMI, as assignee/subrogee of the Chases, filed a garnishment action in Pierce County Superior Court against Starkweather (as judgment debtor) and Atlantic Casualty (as garnishee), to recover the amounts OMI paid for the damage caused by Starkweather. **CP 60-63.** In its answer to the writ of garnishment, Atlantic Casualty alleged, *inter alia*, that it owed no coverage because Starkweather failed to provide Atlantic Casualty with timely notice of the Chases’ suit. **CP 68, lines 12-18.**

Atlantic Casualty also alleged that the default judgment was void because

Starkweather had not been properly served in the Chases' lawsuit. **CP 67, lines 6-20.**

Although Starkweather's whereabouts were unknown, Atlantic Casualty hired attorney Alan Hughes to represent him in the garnishment, with an eye toward vacating the default judgment for which Atlantic Casualty would ultimately be liable. **CP 7, lines 4-17.** Starkweather's insurer-funded attorney filed two motions challenging the default judgment on the ground that service was improper. The first was heard on September 16, 2004 by Pierce County Superior Court Judge Bruce Cohoe, who denied the motion without prejudice. **CP 130-32.** Starkweather's second motion to vacate was denied with prejudice on February 2, 2005 by Judge Gary Steiner. **CP 134-36.**

Starkweather's counsel Hughes then filed an appeal in this Court under Case No. 33105-5-II, challenging Judge Steiner's denial of Starkweather's motion to vacate. In an unpublished opinion filed on April 25, 2006, this Court affirmed and ruled that service on Starkweather was proper.² Thus, the default judgment against Starkweather stands, and Atlantic Casualty's claim of improper service is no longer valid.

² OMI respectfully requests that this Court take judicial notice of the proceedings in the garnishment appeal. See ER 201; *Vandercook v. Reece*, 120 Wn. App. 647, 651, 86 P.3d 206 (2004).

C. Proceedings Below.

After losing two successive motions to vacate the default judgment in the garnishment proceeding, and after asserting its defenses to coverage in that proceeding, Atlantic Casualty filed this declaratory judgment action on February 22, 2005 in Pierce County Superior Court—the same court in which the garnishment was pending. This declaratory action names Starkweather, the Chases and OMI as defendants. *See CP 1.* Moreover, in its complaint for declaratory judgment, Atlantic Casualty raises the very same defenses it previously raised in the garnishment: that there is no coverage because Starkweather failed to provide notice of the Chases' suit and failed to cooperate, and that the default judgment against Starkweather is void because of insufficient service of process. *See CP 8, 16.*

In short, Atlantic Casualty's second-in-time declaratory judgment action includes the same parties as are in the first-filed garnishment, and it also raises the very same issue that is already before the garnishment court, *i.e.*, whether Atlantic Casualty's insurance policy must satisfy the default judgment against Starkweather.³

OMI moved the court below under CR 12 to dismiss this second action under the "priority of action" rule, which requires dismissal of a

³ After this action was filed, Starkweather filed for bankruptcy protection, and he was discharged on August 18, 2005. Starkweather's discharge has no impact on Atlantic Casualty's responsibilities under its insurance policy.

later-filed lawsuit because the first-in-time court is vested with exclusive jurisdiction. OMI also requested dismissal because the garnishment provided an adequate alternative remedy to Atlantic Casualty's second-in-time declaratory judgment action. *See CP 38-137.*

As part of its response to OMI's motion, Atlantic Casualty moved to strike on the ground that OMI's motion was, in fact, a motion for summary judgment requiring 28 days' notice. *See CP 344-50.* Pierce County Superior Court Judge Thomas Larkin granted Atlantic Casualty's motion to strike. *CP 174-75.* OMI then re-filed its motion as a summary judgment motion, expressly incorporating the argument and evidence submitted in its prior motion to dismiss. *CP 176-82.*

On August 19, 2005, Judge Larkin refused to dismiss this action and denied OMI's motion. *CP 294-96.* According to Judge Larkin, the court had "discretion" to retain jurisdiction over Atlantic Casualty's duplicative declaratory judgment action:

THE COURT: Well, I have a certain amount of discretion in this as to what to do, and you both recognize that.

...

* * *

I've spent a lot of time involved in this case. I'm going to deny the Motion for Summary Judgment. It's going to stay here, we'll litigate the issues here, and we'll get it resolved hopefully in a fair way.

RP 08/19/05 at 16, lines 16-18, and at 17, lines 8-11.

Significantly, Judge Larkin refused to dismiss even though he recognized that prior rulings by Judges Cohoe and Steiner in the garnishment proceeding would be *res judicata* in the declaratory judgment action, and that these parallel actions would be problematic:

MS. HANSEN: You raised the question about the fact that Judge Steiner and Judge Cohoe already determined the improper service issue.

THE COURT: Right.

MS. HANSEN: It is at the Court of Appeals. Assuming the Court of Appeals affirms the ruling, what do we do here?

THE COURT: Well, I'm going to say, whatever the end result of that decision is here, I'm not going to change, okay? . . .

* * *

THE COURT: *That's res judicata to me as well, I believe.*

* * *

MS. HANSEN: Your Honor, I just wanted to make the point that that's why parallel actions or splitting causes of action creates problems.

THE COURT: *Yes, it does present a lot of problems,* and, as a result, we spend a lot of time arguing over it. . . .

RP 08/19/05 at 18, lines 7-23, and at 20, lines 13-18 (emphasis added).

IV. ARGUMENT

The trial court's erroneous refusal to dismiss this duplicative, second-in-time action contravenes the clear mandate of the "priority of

action” rule, requires OMI to litigate the very same issues in two separate actions, and effectively ratifies Atlantic Casualty’s improper attempt to manipulate the judicial process in hopes of obtaining contradictory rulings to use against OMI in the garnishment. This also flies squarely in the face of the policies underlying that rule: to avoid vexatious, duplicative litigation and contradictory decisions from different courts on the same issues, and “to prevent unseemly, expensive, and dangerous conflicts of jurisdiction and of process.”⁴

Reversal is therefore necessary to bring this case into compliance with Washington law, to stop any further misuse of the judicial process by Atlantic Casualty, and to prevent the jurisdictional conflicts that will inevitably flow from two mirror-image actions proceeding in the same court.

A. Standard of Review.

Review of an order of summary judgment is *de novo*, and the appellate court performs the same inquiry as the trial court.⁵ A motion for summary judgment is properly granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.⁶

⁴ *Sherwin v. Arveson*, 96 Wn.2d 77, 80, 633 P.2d 1335 (1981).

⁵ *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003).

⁶ *Id.* at 485; CR 56(c).

B. The Trial Court Erred in Not Dismissing This Second-In-Time Declaratory Judgment Action Under The “Priority Of Action” Rule.

The trial court erred in not dismissing Atlantic Casualty’s duplicative declaratory judgment action because, under Washington’s “priority of action” rule, “the first court to obtain jurisdiction over a case possesses exclusive jurisdiction to the exclusion of other coordinate courts.”⁷

The rule is based on the principle that,

when a court of competent jurisdiction has become possessed of a case, its authority continues, subject only to the appellate authority, until the matter is finally and completely disposed of, and no court of co-ordinate authority is at liberty to interfere with its action.⁸

The reason for the rule is clear: to avoid contradictory decisions from different courts on the same issues, and “to prevent unseemly, expensive, and dangerous conflicts of jurisdiction and of process.”⁹

The “priority of action” rule applies where:

the two cases involved are identical as to (1) subject matter; (2) parties; and (3) relief. The identity must be such that a decision of the controversy by one tribunal would, as res judicata, bar further proceedings in the other tribunal.¹⁰

⁷ *American Mobile Homes of Wash., Inc. v. Seattle-First Nat’l Bank*, 115 Wn.2d 307, 317, 796 P.2d 1276 (1990) (emphasis added).

⁸ *Id.* at 316 (quoting *State ex rel. Greenberger v. Superior Court*, 134 Wash. 400, 401, 235 P. 957 (1925)) (emphasis added).

⁹ *Sherwin v. Arveson*, 96 Wn.2d 77, 80, 633 P.2d 1335 (1981).

¹⁰ *Yakima v. International Ass’n of Fire Fighters*, 117 Wn.2d 655, 675, 818 P.2d 1076 (1991) (emphasis added).

If all three elements are satisfied, “the court which first gains jurisdiction of a cause retains the exclusive authority to deal with the action until the controversy is resolved.”¹¹

The rule is enforced “either by the first court enjoining its parties from further action in the second court, or by the second court dismissing or staying the proceedings pending in the second court.”¹² In either event, however, the later-filed action cannot go forward.¹³

Moreover, the “priority of action” rule may apply even though there may not be complete identity of parties, subject matter and relief, if certain factors warrant application of the rule, *e.g.*, whether the first action was filed as a “preemptive strike” in anticipation of the second action, whether the parties’ contract includes a “forum-selection” clause, and the convenience of witnesses.¹⁴ These same considerations may also determine which action is dismissed and which survives.¹⁵

Yakima v. International Ass'n of Fire Fighters,¹⁶ is instructive. In that case, two related declaratory judgment actions were filed in a Superior Court in 1989 and 1990. A separate administrative proceeding was

¹¹ *Sherwin v. Arveson*, *supra*, 96 Wn.2d at 80 (emphasis added).

¹² *American Mobile Homes*, *supra*, 115 Wn.2d at 317.

¹³ *Id.*

¹⁴ *See id.*, at 320-21.

¹⁵ *Id.*

¹⁶ 117 Wn.2d 655, 818 P.2d 1076 (1991).

already pending between the same parties which involved the same issues and sought the same relief. The trial courts dismissed the 1989 action, but declined to dismiss the 1990 action. The Washington Supreme Court ruled that *both* declaratory judgment actions should have been dismissed in favor of the administrative proceeding:

The issue in controversy in both [declaratory judgment] cases was whether the City had a duty to bargain with the union[.] The subject matter of the actions thus was identical. The distinction drawn between the two actions by the trial court was not, in our view, sufficient to support the Superior Court's acceptance of jurisdiction *in view of the identity of legal issues and the parties involved, the identity of the remedies requested* as well as the fact that the action was filed just 1 day after the City's first effort to have the court resolve the same conflict had failed. *Under the priority of action rule, we conclude that the trial court erred in not recognizing that the cause was pending before [an administrative commission] and it should have declined to accept jurisdiction of the 1990 declaratory judgment action.*¹⁷

Accordingly, the two subsequent declaratory judgment actions were dismissed in favor of the first-filed administrative proceeding.¹⁸

The two mirror-image actions at issue in this case easily satisfy all three prongs of the "priority of action" rule. First, both involve the very same subject matter, *i.e.*, a dispute as to whether Atlantic Casualty must pay the default judgment entered against Starkweather. Significantly, Atlantic Casualty's answer in the garnishment proceeding contains

¹⁷ *Id.* at 676 (footnote omitted; emphasis added).

¹⁸ *Id.*

allegations that are virtually identical to the allegations in its complaint in this declaratory judgment action:

<u>Atlantic Casualty's Garnishment Answer</u>	<u>Atlantic Casualty's Declaratory Judgment Complaint</u>
<p>“The <u>failure to effect service of process</u> of the Summons and Complaint over Defendant Benjamin Starkweather <u>deprives the Court of in personam jurisdiction</u> over Starkweather, rendering [sic] the February 9, 2004 Judgment void for <u>lack of subject matter [sic] jurisdiction over the defendant . . .</u>” CP 67 at lines 14-18 (emphasis added).</p>	<p>“It remains Atlantic Casualty Insurance Company’s position that the Judgment entered against its insured, Benjamin Starkweather on February 9, 2004 is void arising out of <u>improper residence abode service of process</u>, and hence the Court <u>acquired no jurisdiction</u> to adjudicate the claims of the Chases over and against Benjamin Starkweather.” CP 8, lines 17-22 (emphasis added).</p>
<p>“Atlantic Mutual [sic] Insurance Company has both contractual, procedural and substantive defenses on the merits to the Writ of Garnishment <u>arising out of a lack of pre-judgment notification by its insured</u>, Benjamin Starkweather as to the commencement or service of the Summons and Complaint by the Chases, the <u>failure to cooperate by its insured as</u> required under the policy, and <u>a consequent lack of timely notice to Atlantic Casualty Insurance Company</u> of the pending litigation against its insured.” CP 68 at lines 12-17 (emphasis added).</p>	<p>“Atlantic Casualty Insurance Company’s <u>relevant policy provisions condition coverage</u> upon <u>timely notice of the pending litigation, cooperation on the part of it’s named insured</u>, and the opportunity to provide and control a defense in response to the claims against its insured.” CP 16, lines 13-17 (emphasis added).</p>

<u>Atlantic Casualty's Garnishment Answer</u>	<u>Atlantic Casualty's Declaratory Judgment Complaint</u>
<p>“[Starkweather’s] substantial and material non-compliance with policy conditions and provisions . . . raises a policy defense . . . <u>based upon actual prejudice.</u>” CP 68 line 21 – CP 69 line 1 (emphasis added).</p>	<p>“[Atlantic Casualty] has been deprived of the opportunity to defend the claim against its insured [and] <u>should accordingly be relieved, excused and released from any contractual duty to indemnify and defend Benjamin Starkweather . . . based upon the absence of timely notice, lack of cooperation and the irreparable prejudice and harm to Atlantic Casualty.</u>” CP 17, lines 9-15 (emphasis added).</p>

Thus, Atlantic Casualty’s claims in this declaratory judgment action are the same as the defenses it previously raised in the first-filed garnishment.¹⁹

Second, both actions involve the very same parties. The parties to the garnishment are Atlantic Casualty, OMI, Starkweather and the Chases. **See CP 65.** Likewise, in this declaratory judgment action, the parties are Atlantic Casualty, OMI, Starkweather and the Chases. **See CP 1.** There is, therefore, complete identity of the parties.

¹⁹ Although its allegation of improper service is now moot because of this Court’s ruling in the garnishment appeal, Atlantic Casualty’s remaining claims based on lack of notice, lack of cooperation and prejudice can all be adjudicated as defenses in the garnishment proceeding. *See Burr v. Lane*, 10 Wn. App. 661, 517 P.2d 988 (1974) (insurer asserted defenses of lack of notice and failure to cooperate in garnishment proceeding). *See also Eakle v. Hayes*, 185 Wash. 520, 523, 55 P.2d 1072 (1936) (an insurer can assert the insured’s breach of policy conditions to avoid liability in a garnishment action).

Third, the relief being sought in the two actions is identical.

Atlantic Casualty contends that the relief sought by OMI in the garnishment is simply a determination that it is indebted to Starkweather. On the other hand, it has purported to characterize the relief sought in its declaratory judgment action as something different: the construction and validity of the policy issued to Starkweather. This position, however, ignores the fact that the basis for determining Atlantic Casualty's indebtedness to Starkweather in the garnishment is the same as the basis for determining its rights and obligations under the policy in this declaratory action. In either action, the relief being sought is a determination of whether Atlantic Casualty's policy covers the default judgment against Starkweather.

Hence, there is complete identity between the garnishment action and this action as to parties, subject matter, and relief. The trial court below expressly recognized the identity of the two actions when it ruled that matters decided in the garnishment will be *res judicata* in the declaratory relief action. **See RP 08/15/05 at 18, lines 7-23.**²⁰

Significantly, Atlantic Casualty candidly admits that it filed this duplicative lawsuit to obtain controlling rulings while the garnishment

²⁰ Cf. *Yakima v. International Ass'n of Fire Fighters supra*, 117 Wn.2d at 675 ("priority of action" rule applies where decision by one tribunal would be *res judicata* as to proceedings in the other).

proceeding was on appeal, in hopes of using those rulings offensively against OMI in the garnishment:

Nor is there any prejudice to Oregon Mutual Insurance Company to proceed with the declaratory judgment action. All rights of all parties will be decided in that action. . . .

. . . The only rulings will be from the Declaratory Judgment action because the garnishment case is stayed until the Court of Appeals has made a decision on the appeal as well as the bankruptcy has been asked for relief from its stay. . . . In fact, it is beneficial to all parties to have the declaratory judgment action decided so that action will make a determination whether the garnishment will need to go forward. In the event that the declaratory judgment action finds that Atlantic Casualty Insurance Company has no responsibility to Mr. Starkweather under the policy then there would be no need to garnish Atlantic Casualty Insurance Company for any funds as there would be none due to Mr. Starkweather.²¹

Atlantic Casualty obviously intends to use rulings in this case as *res judicata* against OMI's claims in the garnishment. This effectively concedes the identity of the two actions.

Atlantic Casualty has already begun laying the groundwork for this strategy. Before this Court accepted review, Atlantic Casualty requested and was granted an order of default against Starkweather in the court below which will be the prerequisite to a finding that Atlantic Casualty

²¹ Respondent/Defendant Atlantic Casualty Insurance Company's Response to Appellant Oregon Mutual Insurance Company's Motion for Discretionary Review, at pp. 13-15 (filed in this appeal on October 3, 2005).

owes no coverage to Starkweather for the Chases' claim. *See* CP 358-60.

This strategy is a purposeful misuse of the judicial process designed to flout the policies underlying the "priority of action" rule: to avoid contradictory decisions by different courts and "to prevent unseemly, expensive, and dangerous conflicts of jurisdiction and of process."²²

This Court should therefore reverse the trial court in the declaratory action to prevent further duplicative and expensive litigation, and to avoid the confusion and jurisdictional conflicts that will inevitably result from two simultaneous, duplicative actions. Dismissal of this second-in-time declaratory judgment action will leave a single proceeding before a court that has exclusive jurisdiction over this controversy and that can provide complete relief to all of the parties.

C. **The Trial Court Also Erred in Not Dismissing This Declaratory Judgment Action Because The First-In-Time Garnishment Action Is An Adequate Alternative Remedy.**

The trial court also erred in refusing to dismiss this declaratory judgment action because the garnishment action is an adequate remedy that precludes declaratory relief. Washington courts recognize that a plaintiff may not maintain a declaratory judgment action where there is an adequate alternative remedy available.²³ Where a plaintiff has a

²² *Sherwin v. Arveson, supra*, 96 Wn.2d at 80.

²³ *Lu v. King County*, 110 Wn. App. 92, 98-99, 38 P.3d 1040 (2002).

“completely adequate remedy available,” apart from a declaratory action, that plaintiff “is not entitled to relief by way of a declaratory judgment.”²⁴ Moreover, “while declaratory relief may be available if the court finds that the other available remedies are unsatisfactory, such situations justifying exceptional treatment are *very rare*.”²⁵

For example, in *Reeder v. King County*,²⁶ the Washington Supreme Court affirmed dismissal of the plaintiffs’ declaratory judgment action because the plaintiffs could challenge the county’s zoning decisions by writ of certiorari, which “would have afforded them all relief to which they may be entitled” under a declaratory judgment.²⁷ Similarly, in *Lu v. King County*,²⁸ the appellate court affirmed the dismissal of a declaratory judgment action where the plaintiff had an adequate administrative remedy under the Land Use Petition Act, RCW 36.70C.030(1).

Here, an adequate alternative remedy—involving the very same parties and issues—already exists in the pending garnishment action. In that action Atlantic Casualty can raise—and, indeed, it has already raised—all coverage defenses it may have to paying the default judgment

²⁴ *Reeder v. King County*, 57 Wn.2d 563, 564, 358 P.2d 810 (1961).

²⁵ *Lu, supra*, 110 Wn. App. at 106 (emphasis added).

²⁶ 57 Wn.2d 563, 358 P.2d 810 (1961).

²⁷ *Id.* at 564.

²⁸ 110 Wn. App. 92, 38 P.3d 1040 (2002).

against Starkweather. This effectively dooms any possible justification for this second, mirror-image declaratory action.

The garnishment plainly provides an adequate alternative remedy, and the trial court erred by not dismissing this declaratory action. Reversal is therefore warranted, and this action should be dismissed.

D. OMI Is Entitled To All Of Its Attorney Fees And Costs Because This Action Is Frivolous Under RCW 4.84.185 And Was Filed In Violation Of CR 11.

1. OMI Is Entitled To Fees And Costs In The Trial Court Because Atlantic Casualty's Declaratory Action Is Frivolous Under RCW 4.84.185.

Under RCW 4.84.185, a party is entitled to its reasonable attorney fees and costs incurred in opposing a claim or defense that is “frivolous and advanced without reasonable cause.” As set forth above, under longstanding Washington law Atlantic Casualty could have asserted (and, indeed, did assert) all of its defenses to coverage in the first-filed garnishment proceeding.²⁹ Nonetheless, Atlantic Casualty filed this mirror-image lawsuit after the garnishment court twice denied Starkweather's motion to vacate and after Starkweather filed an appeal of those decisions. Atlantic Casualty candidly admits that it filed this second suit to obtain rulings that it hoped to use against OMI while the garnishment was on appeal. It is also apparent that Atlantic Casualty also

²⁹ See *Eakle v. Hayes, supra*; *Burr v. Lane, supra*.

filed this duplicative lawsuit to collaterally attack the unfavorable rulings by the garnishment court and to unreasonably increase OMI's burden of litigation by requiring it to litigate the same issues in two separate proceedings.³⁰

This action is, therefore, frivolous and was filed without any reasonable or legally-supportable cause whatsoever. OMI is therefore entitled to recover its fees and costs incurred at the trial court level under RCW 4.84.185.

2. OMI Is Entitled To Its Fees And Costs On This Appeal Because Atlantic Casualty Filed This Action In Violation Of CR 11.

The signature of an attorney on a pleading constitutes a certificate that, among other things, the pleading "is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." CR 11(a). If a pleading is signed in violation of the rule, the court may impose "an appropriate sanction, which may include an order to pay to the other party or parties the amount

³⁰ Atlantic Casualty filed at least 8 motions in the trial court, and the parties attended at least four hearings in connection with them. (*See* Appellant Oregon Mutual Insurance Company's Emergency Motion for Stay of Underlying Action at pp. 4-5, filed in this appeal on October 5, 2005. Even *after* this Court accepted discretionary review, Atlantic Casualty attempted to continue taking discovery in the trial court. (*See* Appellant Oregon Mutual Insurance Company's Motion for Clarification, filed in this appeal on December 2, 2005.) It is irrefutable that the resources of the parties and the court are being abused under the current circumstances.

of the reasonable expenses incurred because of the filing of the pleading, . . . including a reasonable attorney fee.” *Id.*

For the same reasons set forth in Section IV.D.1., above, OMI is entitled to its attorney fees and costs incurred in this appeal under CR 11.

V. CONCLUSION

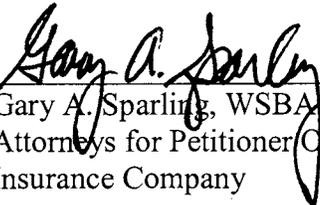
The trial court erred in not dismissing this duplicative, second-in-time declaratory action. In so doing, the court disregarded the clear mandate of the “priority of action” rule, which provides that the first court to acquire jurisdiction is vested with exclusive authority to adjudicate that controversy. The trial court’s decision has brought about the very evil that the “priority of action” rule is designed to avoid: duplicative lawsuits, jurisdictional conflicts, and a “race to the courthouse” wherein one party seeks to obtain favorable, preemptive rulings for use in another pending case.

The trial court’s refusal to dismiss this lawsuit was also error because the garnishment proceeding is an adequate alternative remedy that precludes the declaratory relief Atlantic Casualty seeks in this case.

OMI, therefore, respectfully requests that this court reverse the trial court’s rulings *in toto* and dismiss this action under the “priority of action” rule in favor of OMI’s first-in-time garnishment proceeding. OMI also requests its attorney fees incurred in the trial court and in this appeal.

Respectfully submitted this 8th day of May, 2006.

SOHA & LANG, P.S.

By 

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**I declare under penalty of perjury under the laws of the State
of Washington that the above is true and correct.**

Executed at Seattle, Washington this 8th day of May, 2006.



Linda J. Vandiver
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