

NO: 33733-9-II  
COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON

FILED  
COURT OF APPEALS  
06 JUN -7 PM 1:40  
STATE OF WASHINGTON  
BY  CLERK  
SECURITY

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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.

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**RESPONDENT ATLANTIC CASUALTY, INC. CO.'S  
OPPOSITION TO APPELLANT OREGON MUTUAL INS. CO.'S  
PRIORITY OF ACTION BRIEF**

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**ORIGINAL**

TABLE OF CONTENTS

I. INTRODUCTION ..... 1

II. ASSIGNMENT OF ERROR ..... 2

Issues Pertaining to Assignments of Error

1. Whether The Priority Of Action Rule Applies and Mandates Dismissal Of This Declaratory Judgment Action If The Garnishment Trial Court Does Not Review The Insurance Policy Or Consider All Of Atlantic Casualty’s Coverage Defenses In The Parallel Action. .... 2

2. Whether An Insurer, Which Files A Declaratory Judgment Action To Determine Its Equitable Coverage Obligations, May Be Compelled To Participate In A Post-Default Judgment Garnishment Proceeding At Law Without A Formal Adjudication Of Its Duty To Defend Or Indemnify Its Insured? ..... 2

3. Whether A Third Party Garnishing Creditor Is Entitled To A Presumption Of Bad Faith Against A Garnishee Insurer If The Garnishing Creditor Files A Writ Of Garnishment Before The Insurer Receives Notice Of Either The Lawsuit Or Default Judgment Against Its Insured And, Upon Notice, Files A Declaratory Judgment Action To Ascertain Its Coverage Obligations? ..... 3

4. Whether A Garnishment Action That Does Not Construe An Insurance Policy Before Imposing A Coverage Obligation Upon The Insurer Presents An Adequate Alternative Remedy To A Declaratory Judgment Action? ..... 3

5. Whether An Insurer, Which Filed A Declaratory Judgment Action After A Trial Court In Another Proceeding Declined To Vacate A Default Judgment And Entered Judgment Against The Insurer Before Construing The Insurer’s Coverage Obligations Under The Insurance Policy, Commits A Frivolous And Sanctionable Act By Filing A Declaratory Judgment Action To Determine Its Equitable Coverage Obligations? ..... 3

III.	STATEMENT OF THE CASE	
	A.	Procedural Background Facts ..... 3
	B.	Writ of Garnishment Background Facts ..... 5
	C.	Atlantic Casualty Files a Declaratory Action ..... 9
	D.	Declaratory Review Background Facts. .... 10
IV.	ARGUMENT	
	A.	This Court Reviews The Trial Court’s Order <i>De Novo</i> With No Deference Given To The Trial Court’s Commentary ..... 10
	B.	Oregon Mutual’s Reliance Upon The Priority Of Action Rule To Compel Dismissal Of This Declaratory Judgment Action Is Misplaced ..... 11
	C.	Benjamin Starkweather Did Not Tender the Chase Complaint to Atlantic Casualty; Upon Notice of the Lawsuit and the Garnishment Court’s Failure to Construe the Insurance Policy, Atlantic Casualty Filed a Declaratory Judgment Action ..... 17
	D.	The Garnishment Action Is Not An Adequate Remedy To A Declaratory Action ..... 20
	E.	Atlantic Casualty Did Not File Its Declaratory Judgment Action Until the Garnishment Trial Court Issued Orders Denying Vacation of Default and Entry of Judgment Against Atlantic Casualty Without Construing The Insurance Policy ..... 23
III.	CONCLUSION	..... 25-26

TABLE OF AUTHORITIES

**Cases**

*Alaska National Ins. Co. v. Bryan, et al.*, 125 Wn. App. 24; 104 P.3d 1  
(2004) ..... 23, 24

*American Mobile Homes v. Seattle-First*, 115 Wn.2d 307, 796 P.2d 1276  
(1990) ..... 14-16

*Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298  
(1993) ..... 10

*Erhardt v. Havens, Inc.*, 53 Wn.2d 103, 330 P.2d 1010 (1958) ..... 13

*Federated Serv. Ins. Co. v. R.E.W., Inc.*, 53 Wn. App. 730, 733-34, 770  
P.2d 654 (1989) ..... 19

*Hill v. Cox*, 110 Wn.App. 394, 402, 41 P.3d 495 (2002) ..... 10

*Hubbard v. Spokane County*, 146 Wn.2d 699, 706 n.14, 50 P.3d 602  
(2002) ..... 11

*Huff v. Budbill*, 141 Wn.2d 1, 7, 1 P.3d 1138 (2003) ..... 11

*Murray v. Mossman*, 56 Wn.2d 909, 355 P.2d 965 (1960) ..... 1

*Mutual of Enumclaw Ins. Co. v. Paulson Construction, Inc.*, 132 Wn. App.  
803, 811-813, -- P.3d – (2006).....23

*Postlewaite Constr., Inc. v. Great American Ins. Co.*, 106 Wn.2d 96, 702  
P.2d 805 (1986) ..... 25

*Reeder v. King County*, 57 Wn.2d 563, 358 P.2d 810 (1961) ..... 21-22

*Rushlight v. McClain*, 28 Wn.2d 189, 182 P.2d 62 (1947) ..... 13

*Ryan v. Sea Air., Inc.*, 902 F. Supp. 1064, 1068 (D. Alaska 1995) . ..... 24

*Sheng-Yen Lu v. King County*, 110 Wn. App. 92, 38 P.3d 1040 (2002) .21-  
22

*Sherwin v. Arveson*, 96 Wn.2d 77, 80, 633 P.2d 1335 (1981) ..... 11-12

*Shurgard Mini-Storage v. Department of Rev.*, 40 Wn. App. 721, 723, 700  
P.2d 1176 (1985) ..... 21

*State ex rel. Lyon v. Board of County Com'rs*, 31 Wn.2d 363, 370, 196  
P.2d 997 (1948) ..... 22

*Tank v. State Farm Fire & Cas.Co.*, 105 Wn.2d 381, 393, 715 P.2d 1133  
(1986) ..... 1

*Time Oil Co. v. Cigna Prop. & Case. Ins.*, 743 F. Supp. 1400 (W.D. Wash.  
1990) ..... 18

*Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wn.2d 751, 58 P.3d 276  
(2002) ..... 17, 24

*Unigard Ins. Co. v. Leven*, 97 Wn.App. 417, 983 P.2d 1155 (1999) .. 17-18

*Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 233, 405 A.2d 788, 790-92 (1979) .  
..... 19

<i>Westman Indus. Co. v. Hartford Ins. Group</i> , 51 Wn. App. 72, 80-81, 751 P.2d 1242, rev. denied, 110 Wn.2d 1036 (1988) .....	19
<i>Yakima v. Int'l Ass'n. of Fire Fighters</i> , 117 Wn.2d 655, 675, 818 P.2d 1076 (1991) .....	14-15

**Statutes**

RCW 4.84.185. ....	23-24, 26
RCW 6.27.et seq. ....	8, 22
RCW 6.27.010. ....	12
RCW 6.27.220 .....	6-7,13
RCW 6.27.230. ....	15
RCW 7.24.090. ....	22
RCW 7.24.010-030 .....	8, 12

**Constitutions**

Wash. St. Constitution Art. I, § 3.....	22
---	----

**Rules**

RAP 2.3(b)(4) .....	9
RAP 2.5(a) . ....	10
RAP 9.12.....	10
CR 11 .....	23-24, 26

## I. INTRODUCTION

At issue on discretionary review is the certified question whether the trial court properly declined to dismiss Defendant/Respondent Atlantic Casualty Insurance Company's ("Atlantic Casualty") declaratory judgment action under the priority of action rule because Plaintiff/Petitioner Oregon Mutual Insurance Company ("Oregon Mutual") did not show an identity of subject matter, relief and parties between its garnishment action and Atlantic Casualty's declaratory judgment action.

Oregon Mutual erroneously argues that Atlantic Casualty's bad faith estops it from asserting coverage defenses as to Benjamin Starkweather, and compels it to pay the proceeds of its policy to Oregon Mutual. *See Oregon Mutual Brief, pp. 3, 13-15.* Assuming *arguendo* that Atlantic Casualty acted in bad faith concerning Mr. Starkweather's pre-suit notice of claim, Oregon Mutual cannot maintain a direct right of action against Atlantic Casualty for bad faith. *See Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 393, 715 P.2d 1133 (1986); *accord, Murray v. Mossman*, 56 Wn.2d 909, 355 P.2d 965 (1960)(finding a judgment creditor may not establish an insurer's bad faith in a garnishment action). Furthermore, Oregon Mutual has previously represented to the trial court that it did not acquire any bad faith rights by subrogation or assignment

from Benjamin Starkweather against Atlantic Casualty. *See RP 8/19/05, p. 16:4-11.* Consequently, Oregon Mutual should be precluded as a matter of law from asserting any bad faith arguments against Atlantic Casualty in this proceeding. Oregon Mutual's bad faith arguments are admittedly unfounded, highly prejudicial and improper. Atlantic Casualty hereby moves to strike and requests that this court disregard all "bad faith" argument and conjecture advanced by Oregon Mutual in its opening brief.

## **II. ASSIGNMENTS OF ERROR**

In its August 19, 2005 order denying Oregon Mutual's motion for summary judgment, the trial court appropriately concluded that plaintiff had failed to show that dismissal of Atlantic Casualty's declaratory judgment action under the priority of action rule was required because Oregon Mutual's garnishment action was first-filed.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the priority of action rule applies to and mandates dismissal of this declaratory judgment action if the garnishment trial court does not review the insurance policy or consider all of Atlantic Casualty's coverage defenses in that action.

2. Whether an insurer, which files a declaratory judgment action to determine its equitable coverage obligations, may be compelled

to participate in a post-default judgment garnishment proceeding at law without any adjudication of its duty to defend or indemnify its insured?

3. Whether a third party garnishing creditor is entitled to a presumption of bad faith against a garnishee insurer if the garnishing creditor files a Writ of Garnishment before the insurer receives notice of either the lawsuit or default judgment against its insured and, upon notice, files a declaratory judgment action to ascertain its coverage obligations?

4. Whether a garnishment action that does not construe an insurance policy before imposing a coverage obligation upon the insurer presents an adequate alternative remedy to a declaratory judgment action?

5. Whether an insurer, which filed a declaratory judgment action after a trial court in another proceeding declined to vacate a default judgment and entered judgment against the insurer before construing the insurer's coverage obligations under the insurance policy, commits a frivolous and sanctionable act by filing a declaratory judgment action to determine its equitable coverage obligations?

### **III. STATEMENT OF THE CASE**

#### **A. Procedural Background Facts**

This matter arises out of an October 23, 2003 lawsuit filed by Gordon and Audrey Chase, Pierce County Superior Court Cause No. 03-2-12532-1, against Benjamin Starkweather d/b/a Starkweather Roofing for

breach of contract. CP 253-260. The Chases entered into a contract with Benjamin Starkweather to repair the roof on their home for a total contract price of \$8,125. CP 256-257, ¶ 7; CP 262. The Chases alleged that Benjamin Starkweather's performance under contract resulted in faulty installation and completion of the roof work. CP 257, ¶ 8. The Chases tendered the loss to their insurance company, Oregon Mutual, which paid for repairs to the Chase residence. CP 39. In their complaint, the Chases sought breach of contract damages in the amount of \$19,716.00. CP 257, ¶ 8.

The parties contended whether the Chases perfected service of process by serving one copy of the Summons and Complaint upon Dennis Starkweather Sr. at his residence in Moses Lake, Washington, the alleged usual place of abode of Benjamin Starkweather. CP 80-81; 121-128. Benjamin and Dennis Starkweather Sr. filed declarations stating that the Moses Lake residence was not Benjamin's usual place of abode and that he did not live there. CP 121-128. The trial court, in part, found the double hearsay statement of a neighbor contained in the process server's Affidavit of Service to be more credible than the Starkweather declarations for establishing the Moses Lake residence as Benjamin's usual place of abode. CP 130-137. The trial court, over Starkweather's timely hearsay objection, also relied upon address information in two Yakima Municipal

Court records as conclusive evidence that Benjamin lived at the Moses Lake residence.

Benjamin Starkweather stated that he did not receive service of process. Therefore, he filed neither a Notice of Appearance nor an Answer to the Chases' complaint. CP 16. He also did not receive notice of entry of the Order of Default Judgment. CP 16. The trial court issued an Order of Default Judgment against Benjamin and Jane Doe Starkweather on February 9, 2004 and assessed a judgment of \$240,750.55 in breach of contract damages. In addition, the court awarded the Chases statutory costs and attorney's fees. CP 57-58.

Benjamin Starkweather failed to tender defense of the lawsuit to Atlantic Casualty, which did not learn of the Chases' lawsuit and default judgment until April 8, 2004. CP 16-17. Atlantic Casualty appointed defense counsel, who filed an appearance on Starkweather's behalf and moved to vacate the default judgment.

#### **B. Writ of Garnishment Background Facts**

By paying for home repairs to the Chase residence, Oregon Mutual became subrogated to the Chases' interest in their default judgment against Benjamin Starkweather. On June 23, 2004, Oregon Mutual filed a Writ of Garnishment against Benjamin Starkweather and his general liability insurer, Atlantic Casualty. CP 60-63.

Atlantic Casualty filed an Answer to the Writ of Garnishment. CP 65-72. On June 2, 2005, Oregon Mutual filed a Note for Hearing to Determine If Trial Is Necessary (RCW 6.27.220). CP 337-343. Therein, Oregon Mutual argued that a trial was unnecessary under RCW 6.27.220 and prayed for entry of judgment on the Writ of Garnishment against Atlantic Casualty. CP 338:8-9; CP 340:13-14; CP 341:18-342:11; CP 152-157. Oregon Mutual presumptively concluded that Atlantic Casualty had denied in bad faith Benjamin Starkweather's tender of claims in the Chase complaint and was thus liable to him and Oregon Mutual under coverage by estoppel. CP 152-157. Atlantic Casualty, *inter alia*, directly challenged Oregon Mutual's bad faith argument. CP 288-293.

Oregon Mutual moved the trial court for summary judgment on the issue whether the priority of action rule confers exclusive jurisdiction upon the garnishment trial court to determine Atlantic Casualty's coverage obligation. CP 176-181. Oregon Mutual relied upon several faulty presumptions in advancing its argument that the priority of action rule applies instantly to mandate dismissal of Atlantic Casualty's declaratory judgment action. Oregon Mutual presumed that Benjamin Starkweather was entitled to coverage under the Atlantic Casualty policy. No such ruling has issued from either court.

Oregon Mutual also presumed that Benjamin Starkweather properly tendered the defense of the Chase lawsuit to Atlantic Casualty. CP 153:16; CP 181:6; *see also* CP 156:22, and *Oregon Mutual Brief*, p. 4 (*citing* CP 53-55). Oregon Mutual further presumed that Atlantic Casualty denied Starkweather's claim in bad faith. CP 31:10-12; CP 34:18-20. Lastly, Oregon Mutual presumed that its garnishment action is identical in scope, parties and relief to Atlantic Casualty's declaratory judgment action. CP 34:1-6. Atlantic Casualty contests each of these assertions.

On equitable considerations, Oregon Mutual urged the trial court to overlook the fact that Atlantic Casualty did not receive notice of the Chase complaint. CP 156:6-14.

The garnishment statute provides that if a trial is required, no pleadings shall be necessary on the issue to be tried other than the affidavit of the plaintiff, the answer of the garnishee and the reply of the plaintiff or defendant controverting such answer, unless otherwise ordered by the court. *See* RCW 6.27.220. The garnishment court, however, did not conduct a trial on Atlantic Casualty's contest to the writ of garnishment and did not address the issue of Atlantic Casualty's coverage obligations. In neither this action nor the garnishment action, did Oregon Mutual put into evidence a copy of the Atlantic Casualty insurance policy that underlies its claims for anticipatory breach of contract, bad faith refusal to

defend and coverage by estoppel. Neither court in the underlying actions reviewed the language of the insurance policy nor received argument on the appropriate construction of the policy to ascertain whether the conditions for coverage were satisfied, whether the insuring agreement provided coverage and/or whether any exclusions or exceptions to coverage were applicable. Oregon Mutual has not cited to clerk's papers or produced testamentary evidence identifying the scope of review of the Atlantic Casualty policy that will occur in the garnishment action should this court reverse the trial court. In fact, the Atlantic Casualty insurance policy does not appear in the clerk's papers submitted to this court, a fact that instantly precludes review of the language in the policy and a *de novo* determination of Atlantic Casualty's coverage obligations.

The declaratory tribunal is aptly suited for those specific determinations. *See RCW 7.24.010-030*. The garnishment statute, *RCW 6.27.et seq.*, severely limits the pleadings and grants discretion to the courts to deny garnishee defendants the right to a jury trial. A coverage determination in either tribunal requires, at a minimum, review of the Atlantic Casualty policy. It is not part of either record below. *See CP 1-363; see also, Division II - Court of Appeals Cause No. 33105-5, CP 1-660*. Oregon Mutual has the affirmative burden to show this court that the garnishment tribunal can and will afford Atlantic Casualty the same

procedural and legal relief that it could obtain under the declaratory judgment act. Under RCW 7.24, Atlantic Casualty is entitled to a jury trial. Oregon Mutual cannot assure this court that the garnishment court will grant a trial or permit a jury trial.

Notwithstanding this distinction, Oregon Mutual hastily implores this court to dismiss Atlantic Casualty's declaratory judgment action because it is "duplicative, frivolous, abusive of the judicial process and litigiously burdensome." See *Brief of Appellant Oregon Mutual Insurance Company, p. 2* ("*Oregon Mutual Brief*"). These claims are unfounded.

**C. Atlantic Casualty Files A Declaratory Action**

On February 22, 2005, Atlantic Casualty filed a Complaint for Declaratory Relief. CP 1-22. Atlantic Casualty acknowledged that, on November 6, 2002, it issued a commercial general liability policy L065000407 to Benjamin Starkweather d/b/a Starkweather Roofing. CP 11:6-10. On or about August 31, 2003, Atlantic Casualty cancelled the Starkweather policy because of non-payment of premium. CP 11:19-21.

**D. Discretionary Review Background Facts**

On August 19, 2005, the trial court certified its summary judgment order for immediate appeal under RAP 2.3(b)(4). CP 297-298. On November 22, 2005, this Court determined that the trial court's

certification was appropriate and granted Oregon Mutual's motion for discretionary review because the application of the priority of action rule involves a controlling question of law as to which there is substantial ground for a difference of opinion. This Court further found that immediate review of the order may materially advance the ultimate termination of the litigation. Notably, this Court observed that the garnishment action and declaratory judgment action are not so clearly identical that the trial court committed obvious or probable error in failing to apply the priority of action rule. *See Order* at 5.

#### IV. ARGUMENT

##### A. **This Court Reviews the Trial Court's Order *De Novo* with No Deference Given to the Trial Court's Commentary**

This Court reviews *de novo* all questions of law, including the trial court's order denying summary judgment. *Hill v. Cox*, 110 Wn. App. 394, 402, 41 P.3d 495 (2002). Summary judgment is appropriate if, from all the evidence viewed in the light most favorable to the nonmoving party, reasonable persons could reach but one conclusion. *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993); CR 56.

When reviewing a summary judgment order, this Court is to consider "evidence and issues" called to the attention of the trial court. RAP 9.12; *see also* RAP 2.5(a). Thus, this Court is to engage in the same

inquiry as the trial court with no deference afforded to the trial court's stated reasons for granting summary judgment. *Huff v. Budbill*, 141 Wn.2d 1, 7, 1 P.3d 1138 (2000). Any oral or written findings of fact and corresponding commentary made by the trial court are superfluous and are not to be considered by the appellate court. *See, e.g., Hubbard v. Spokane County*, 146 Wn.2d 699, 706 n.14, 50 P.3d 602 (2002).

**B. Oregon Mutual's Reliance Upon The Priority of Action Rule to Compel Dismissal of This Declaratory Judgment Action Is Misplaced**

On appeal, Oregon Mutual seeks reversal of the trial court's August 19, 2005 order denying Oregon Mutual's motion seeking dismissal of this declaratory judgment action under application of the priority of action rule. Oregon Mutual contends that the priority of action rule mandates dismissal of this lawsuit that was filed second-in-time to Oregon Mutual's garnishment action. The priority of action rule posits that:

the court which first gains jurisdiction of a cause retains the exclusive authority to deal with the action until the controversy is resolved. The reason for the doctrine is that it tends to prevent unseemly, expensive, and dangerous conflicts of jurisdiction and of process.

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

Oregon Mutual's reliance upon the priority of action rule is misplaced for several reasons. The matters before the garnishment trial

court and the court adjudicating the declaratory judgment action are different in the relief sought.<sup>1</sup>

### 1. IDENTITY OF RELIEF IS DIFFERENT

The relief to be sought in a declaratory judgment action is limited to a declaration of rights, status and other legal relations whether or not further relief is or could be claimed. *See RCW 7.24.010*. The final relief to be had under the garnishment statute is payment of a debt due. *See RCW 6.27.010*.

In *Sherwin v. Arveson*, 96 Wn.2d 77, 80, 633 P.2d 1335 (1981), one of the authorities Oregon Mutual relies upon, the Supreme Court concluded that the priority of action rule did not apply where the subject matter in the two actions was the same but the identity of relief differed where the first court could grant the relief requested in the second court if such relief had not been sought there. The priority of action rule does not apply instantly because the identity of relief sought in Atlantic Casualty's declaratory judgment action is different than the relief sought by Oregon Mutual in its garnishment action. In a declaratory judgment action, once the trial court issues a declaration on policy construction it has the force and effect of a final judgment or decree and terminates the inquiry *sub*

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<sup>1</sup> The subject matter of the garnishment (compelling payment) and declaratory judgment (contract construction) actions also differs markedly, especially since the garnishment trial court did not construe the Atlantic Casualty policy.

*judice. See RCW 7.24.010.* In the garnishment action, Oregon Mutual, the judgment creditor, seeks to compel the payment by a third party garnishee (Atlantic Casualty) of the policy proceeds held in trust on behalf of the judgment debtor, Mr. Starkweather.

Here, the garnishment trial court did not construe the Atlantic Casualty insurance policy – in fact, construction was impossible when the garnishment court was not even provided an opportunity to review the insurance policy. Oregon Mutual sought to exploit this advantage by filing a Note for Hearing under RCW 6.27.220 declaring that a trial was unnecessary and requesting findings as a matter of law against Atlantic Casualty of anticipatory breach of contract, bad faith, and coverage by estoppel. Now, Oregon Mutual argues that the garnishment action provides Atlantic Casualty with a completely adequate alternative remedy to the declaratory action. *See Oregon Mutual Brief, pp.18-20.* Oregon Mutual should be judicially estopped from taking directly oppositional positions in this litigation. *See Erhardt v. Havens, Inc.*, 53 Wn.2d 103, 330 P.2d 1010 (1958); *Rushlight v. McClain*, 28 Wn.2d 189, 182 P.2d 62 (1947).

The garnishment action did not involve a review and interpretation of the policy. The court there only determined the fact and conditions of the garnishment. The findings in that garnishment action could only be

*res judicata* in the declaratory judgment action if the garnishment court construed the insurance policy, which it failed to do. However, the damage to Atlantic Casualty from an improper ruling could not be redressed in the declaratory judgment action, which provides different relief. Conversely, a declaratory order construing the insurance policy would be *res judicata* to “further proceedings” in the garnishment action. See *Oregon Mutual Brief*, p. 11, n. 10 (and text)(quoting *Yakima v. Int’l Ass’n. of Fire Fighters*, 117 Wn.2d 655, 675, 818 P.2d 1076 (1991)). The garnishment proceeding would progress beyond, but still be reliant upon, an interpretation of the insurance policy to identify whether Atlantic Casualty is properly a garnishee, identify the amount to be garnished and order the garnishee defendant to make payment.

## **2. COUNTERVAILING EQUITABLE CONSIDERATIONS MILITATE AGAINST APPLICATION OF THE PRIORITY OF ACTION RULE**

Despite the failure of identity of relief, Oregon Mutual also offers evidence of countervailing equitable considerations to support application of the priority of action rule. In *American Mobile Homes v. Seattle-First*, 115 Wn.2d 307, 320, 796 P.2d 1276 (1990), the Supreme Court relied upon several countervailing equitable considerations as factors *militating against* automatic application of the priority of action rule. (emphasis added). As one equitable consideration, Oregon Mutual ascribes a forum-

shopping animus to Atlantic Casualty's filing of a declaratory action to interpret and construe its insurance contract. *See Oregon Mutual Brief*, pp. 11-12, 16. The legal authorities Oregon Mutual relies upon in support of its forum shopping argument turn upon second-in-time actions filed to exclude necessary parties, gain an unfair advantage and avoid the venue requirements for indispensable parties. *See American Mobile Homes v. Seattle-First*, 115 Wn.2d 307, 796 P.2d 1276 (1990); *Yakima v. International Ass'n of Fire Fighters*, 117 Wn.2d 655, 818 P.2d 1076 (1991). Atlantic Casualty did not file the declaratory action in pursuit of any of these impermissible motives.

The forum-shopping argument glosses over the garnishment trial court's failure to construe Atlantic Casualty's insurance policy before finding a coverage obligation existed – as evidenced by the garnishment court's order compelling Atlantic Casualty to pay statutory attorney's fees and expenses to Oregon Mutual pursuant to RCW 6.27.230. *See Washington Court of Appeals, ' No. 33105-5-II, April 25, 2006 Opinion Affirming the Trial Court's Order Denying Appellant Benjamin Starkweather's Motion to Vacate Default Judgment.* Given the garnishment court's failure to review or construe the insurance policy, Atlantic Casualty's only recourse was to seek a declaration of the policy's terms and applicability in a separate action.

Atlantic Casualty did not elect to exclude any necessary parties from the declaratory judgment action to gain an unfair advantage nor did it file the declaratory judgment action in a different county to avoid a disfavorable venue. *See American Mobile Homes v. Seattle-First*, 115 Wn.2d at 322. The party litigants in both actions are *de facto* identical. Venue in both actions is reposed in Pierce County. Overall, the facts underlying the Supreme Court's decision in *American Mobile Homes* – *i.e.*, consolidation of cases pending in different counties and a superior court's transfer to itself of a case pending in another county – are not present instantly. Therefore, *American Mobile Homes* does not mandate application of the priority of action rule here and Oregon Mutual's impermissible motive arguments fail.

**C. Benjamin Starkweather Did Not Tender the Chase Complaint to Atlantic Casualty; Upon Notice of the Lawsuit and the Garnishment Court's Failure to Construe the Insurance Policy, Atlantic Casualty Filed a Declaratory Judgment Action**

Benjamin Starkweather claimed to not have received notice of the Chase lawsuit. Although his motion to vacate the default judgment for defective service of process was twice denied, the fact remains undisputed

that he did not tender defense of the Chase lawsuit to Atlantic Casualty. Accordingly, Atlantic Casualty's duty to defend was never triggered.<sup>2</sup>

The duty to defend is distinct from the duty to indemnify. In Washington, an insurer must evaluate the entire contract as a whole in assessing whether it has a duty to defend. *Truck Ins. Exch. v. Vanport Homes, Inc.*, 147 Wn.2d 751, 58 P.3d 276 (2002). In that case, the Washington Supreme Court stated:

The duty to defend arises at the time an action is first brought, and is based on the potential for liability. The duty to defend "arises when a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy's coverage." Only if the alleged claim is clearly not covered by the policy is the insurer relieved of its duty to defend. If the complaint is ambiguous, it will be liberally construed in favor of triggering the insurer's duty to defend.

*Truck Ins. Exch. v. Vanport*, 147 Wn.2d at 760. Having not received notice of the lawsuit or a copy of the complaint, Atlantic Casualty was denied the opportunity to assess its duty to defend Starkweather.

In Washington, insurers pursue declaratory judgment actions to ascertain proper construction of insurance contracts issued to their insureds either before or after there has been a breach. In *Unigard Ins. Co. v. Leven*, 97 Wn. App. 417, 983 P.2d 1155 (1999), the court of appeals declined to follow other courts that had held that a tender is sufficient as

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<sup>2</sup> Notwithstanding this fact, Atlantic Casualty provided Mr. Starkweather with a defense and, after the garnishment trial court upheld the default judgment on February 2, 2005, filed a declaratory judgment action on February 22, 2005. CP 134-36, CP 1.

long as it “puts the insurer on notice of a claim.” Adhering to a federal court decision, *Time Oil Co. v. Cigna Prop. & Case. Ins.*, 743 F. Supp. 1400 (W.D. Wash. 1990), the *Unigard* court reasoned that “an insurer cannot be expected to anticipate when or if an insured will make a claim for coverage.” The *Unigard* court further concluded that the insurer’s duty does not arise until the policyholder “specifically asks the insurer to undertake the defense of the lawsuit.” *Id.* at 426-27.

Oregon Mutual argues that Benjamin Starkweather tendered the defense of the Oregon Mutual claim to Atlantic Casualty, in response to which Atlantic Casualty allegedly issued a pre-suit declination letter. *See Oregon Mutual Brief*, pp. 4-5 (citing CP 53-55). Oregon Mutual misconstrues the Atlantic Casualty letter and ignores the fact that Benjamin Starkweather did not tender defense of the Oregon Mutual lawsuit to Atlantic Casualty. Mr. Starkweather’s pre-suit notice of a potential claim is not equivalent to a post-suit tender of defense. Washington is not a notice-only jurisdiction. *See Unigard, supra*, p. 427, n. 18. Benjamin Starkweather never tendered defense of the Oregon Mutual lawsuit to Atlantic Casualty, therefore Atlantic Casualty never incurred an obligation to defend or indemnify Starkweather for any judgment entered as a result of the lawsuit.

Since neither trial court in the garnishment and declaratory actions has construed the insurance policy nor properly adjudicated the issue of Atlantic Casualty's contractual coverage obligations, this court may not entertain this issue for the first time on appeal, especially where the subject insurance policy is not part of the record below in either action.

Oregon Mutual tries to circumvent this failure to construe the policy by focusing on the similarity of Atlantic Casualty's defenses to the Oregon Mutual Writ of Garnishment and its asserted bases for relief in the declaratory action. *See Oregon Mutual Brief, pp. 13-15.* Oregon Mutual illogically avers that Atlantic Casualty's CGL policy provides coverage for (1) substandard performance and (2) incomplete work by Starkweather. *See CP 253-260, passim.* Those two assertions provide the factual basis for relief in the Chase complaint. Neither trial court made a determination that the policy's insuring agreement granted coverage for the Chases' claimed loss.

A CGL policy is designed to provide coverage for tort liability for injury to third parties and other property; it is not designed for contract liability resulting from the fact the product or completed work is not that for which the damaged party bargained. *See Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 233, 405 A.2d 788, 790-92 (1979). Stated differently, a CGL policy is not a form of performance bond or malpractice insurance

designed to shield a contractor from claims for faulty workmanship or a defective product. *Federated Serv. Ins. Co. v. R.E.W., Inc.*, 53 Wn. App. 730, 733-34, 770 P.2d 654 (1989); *Westman Indus. Co. v. Hartford Ins. Group*, 51 Wn. App. 72, 80-81, 751 P.2d 1242, *rev. denied*, 110 Wn.2d 1036 (1988). The Atlantic Casualty policy is a commercial general liability policy that does not insure against faulty workmanship and incomplete performance, which are the *only* factual allegations underlying the claims in the Chase complaint. Therefore, under no circumstances will Atlantic Casualty be held obligated to satisfy Benjamin Starkweather's liability arising from the Chase complaint.

Thus, this Court must affirm the trial court's denial of Oregon Mutual's motion for summary judgment.

**D. The Garnishment Action Is Not An Adequate Alternative Remedy To a Declaratory Action**

Oregon Mutual claims error in the trial court's refusal to dismiss this declaratory action because the garnishment action is an adequate alternative remedy that precludes declaratory relief. This argument presupposes that: (1) the garnishment court construed the Atlantic Casualty insurance policy, which it could not have done without reviewing that policy; and (2) the garnishment action grants Atlantic Casualty procedural and legal relief identical to relief available in declaratory

actions. To reach this result, Oregon Mutual assumed and concluded that the garnishment court determined that Mr. Starkweather was entitled to coverage, all of the conditions precedent had been satisfied, none of the exclusions to coverage applied, and/or Atlantic Casualty committed pre-suit bad faith. Washington appellate courts may affirm on any ground within the proof before the trial court. *See Shurgard Mini-Storage v. Department of Rev.*, 40 Wn. App. 721, 723, 700 P.2d 1176 (1985).

In the absence of any evidence of record that the garnishment court construed the policy, this Court must find that the garnishment action is not an adequate alternative remedy to the declaratory action.

Oregon Mutual relies upon case law involving actions under the Declaratory Judgment Act initiated concurrently with statutory actions that either provide the exclusive means of judicial review, *Sheng-Yen Lu v. King County*, 110 Wn. App. 92, 38 P.3d 1040 (2002), or require a commission's ruling appealable as of right on writ of certiorari, *Reeder v. King County*, 57 Wn. 2d 563, 358 P.2d 810 (1961). *See Oregon Mutual Brief*, pp. 3, 19. In *Lu v. King County*, Division One dismissed the declaratory action in favor of a legislative directive for the exhaustion of administrative remedies that vested superior courts with jurisdiction only after a final determination had been made on land use decisions. *Id.* at 101. In *Reeder v. King County*, the Supreme Court upheld dismissal of the

appellants' declaratory action filed in the Superior Court seeking reversal of a re-zoning denial by the county zoning commission because the right of appeal was granted pursuant to a "special law for special purposes." *Id.* at 564 (referring to *State ex rel. Lyon v. Board of County Com'rs*, 31 Wn.2d 363, 370, 196 P.2d 997 (1948)). These cases are inapposite.

To apply *Lu* and *Reeder* instantly, the garnishment statute would either have to grant Atlantic Casualty an appeal of right of the garnishment ruling by writ of certiorari or require Atlantic Casualty to exhaust its administrative remedies before filing a declaratory action. There is no proscription in the garnishment statute mandating an appeal of right by writ of certiorari. Moreover, the garnishment statute is enforceable at law; it does not contain any administrative remedies. Additionally, the Uniform Declaratory Judgment Act provides for a trial by jury; the garnishment statute does not. *See RCW 7.24.090; RCW 6.27.et seq.* This denial of a right to a jury trial deprives Atlantic Casualty of constitutional due process under Art. I, § 3 of the Washington Constitution. The garnishment court failed to review, let alone construe, the insurance policy and did not provide an adequate alternative remedy to Atlantic Casualty's declaratory action.

Oregon Mutual's adequate alternative remedy argument fails for the foregoing reasons.

**E. Oregon Mutual Is Not Entitled To Sanctions Because Atlantic Casualty Did Not File Its Declaratory Judgment Action Until The Garnishment Trial Court Refused to Vacate Default Judgment Against Starkweather and Failed to Construe The Insurance Policy.**

Oregon Mutual seeks CR 11 sanctions and RCW 4.84.185 expenses because Atlantic Casualty filed a declaratory judgment action as required under Washington law to ascertain coverage. Atlantic Casualty did not frivolously pursue declaratory relief; rather, it pursued declaratory relief in accordance with legal precedent requiring insurers to file declaratory judgment actions to construe insurance policies and ascertain coverage obligations. Therefore, Atlantic Casualty should not be sanctioned in accordance with CR 11 or charged with attorney's fees and costs pursuant to RCW 4.84.185.

The propriety of filing a declaratory judgment action is condoned by Washington courts. *See Mutual of Enumclaw Ins. Co. v. Paulson Construction, Inc.*, 132 Wn. App. 803, 811-813, -- P.3d -- (2006). In *Alaska National Ins. Co. v. Bryan, et al.*, 125 Wn. App. 24; 104 P.3d 1 (2004), Division One found that an insurer should have filed a separate declaratory action to determine coverage. There, the court stated:

Under Washington law, an insurer is authorized to file a declaratory judgment action to determine coverage:

If the insurer is unsure of its obligation to defend in a given instance, it may defend under a reservation of

rights while seeking a declaratory judgment that it has no duty to defend. A reservation of rights is a means by which the insurer avoids breaching its duty to defend while seeking to avoid waiver and estoppel.

*Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 761, 58 P.3d 276 (2002) (citation omitted). Additionally, declaratory judgment actions are the proper way to determine coverage under Alaska law:

The Supreme Court of Alaska has resolved this problem by concluding that where, as here, there is a dispute over coverage, the tort litigation will not determine any relevant fact, and the parties, unless they settle their dispute, will always be required to litigate in a separate proceeding, i.e., a declaratory judgment proceeding.

*Ryan v. Sea Air, Inc.*, 902 F. Supp. 1064, 1068 (D. Alaska 1995). Thus, the only reasonable interpretation of the reservation of rights letters is that Alaska National reserved the right to deny coverage if it was judicially determined that Bryan was not acting in the business and personal affairs of Wards Cove. Alaska National took the appropriate action and sought determination of whether it had a duty to defend. There is no authority to support the argument that the coverage determination must be made in the underlying lawsuit.

*See Alaska National*, 125 Wn. App. at 35 (emphasis added).

As a third party, Oregon Mutual has challenged the propriety of Atlantic Casualty's purported declination letter to Mr. Starkweather, alleged bad faith against Atlantic Casualty, and claimed entitlement to the proceeds of the Starkweather insurance policy in a garnishment action. Under Washington law, Oregon Mutual cannot obtain a ruling determining

Atlantic Casualty acted in bad faith. *See Postlewaite Constr., Inc. v. Great American Ins. Co.*, 106 Wn.2d 96, 702 P.2d 805 (1986)(finding that a third party cannot sue an insurer for bad faith). Now, Oregon Mutual has demanded the imposition of sanctions against Atlantic Casualty for its institution of a declaratory action to determine its coverage obligations. In accordance with Washington law, there is no authority (and Oregon Mutual cites to none) to support the argument that the coverage determination must be made in the underlying lawsuit. Atlantic Casualty's actions were neither frivolous nor advanced without reasonable cause and Washington law permits declaratory actions in this context. Oregon Mutual's demand for sanctions and expenses is inappropriate and should be denied.

### **III. CONCLUSION**

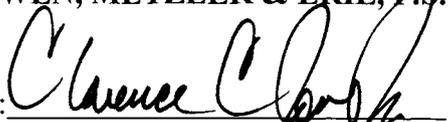
On the basis of the foregoing, Atlantic Casualty respectfully requests that this court: (1) uphold the trial court's order denying Oregon Mutual's motion for summary judgment based upon the priority of action rule; (2) remand this matter to the declaratory trial court to permit a declaration on the construction and interpretation of the Atlantic Casualty insurance policy; (3) find that Atlantic Casualty has not been adjudged to have acted in bad faith by either lower trial court; (4) find that the garnishment action does not provide Atlantic Casualty with an adequate

alternative remedy to its declaratory action; and (5) find that Atlantic Casualty did not engage in sanctionable conduct and deny Oregon Mutual's prayer for CR 11 sanctions and RCW 4.84.185 expenses, including attorney's fees.

DATED this 7<sup>th</sup> day of June, 2006.

Respectfully submitted,

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I certify under penalty of perjury under the Laws of the State of  
Washington that the foregoing is true and correct.

Dated at Tacoma, Washington this 7th day of July, 2006.

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