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No. 69600-9-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

WANDA BUNCH,
on behalf of herself and all others similarly situated,

Respondent/Plaintiff,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY and
DEPOSITORS INSURANCE COMPANY,

Appellants/Defendants.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(THE HON. CATHERINE SHAFFER)

APPELLANTS' REPLY BRIEF

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STATE OF WASHINGTON
COURT OF APPEALS DIVISION I

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I. SUMMARY OF REPLY

Washington's Priority of Action Rule is designed to avoid waste of judicial resources, and the risk of inconsistent decisions. The Washington Supreme Court has made *crystal* clear that the Rule's "identity" requirement boils down to this: If decisions on the merits in the first-filed action will be binding in the second-filed action, then the trial court in the second-filed action *must* either stay or dismiss that action.

Here, there is no genuine dispute about whether decisions on the merits of Bunch's CPA claim made in the federal action will be binding in this action. Those decisions *will* be binding. If Bunch's CPA claim is dismissed by the federal court, her CPA claim in this action must suffer the same fate. And because the federal action is indisputably prior to this action, the trial court erred in refusing to stay this action.

II. ARGUMENT IN REPLY

A. **Under Washington's Priority of Action Rule, the "Identity" Requirement is Satisfied When Decisions on the Merits in the First-Filed Action Will be Binding in the Second-Filed Action. Here, the Federal Court's Decision on the Merits of Bunch's CPA Claim Will be Binding in this Action.**

Bunch argues that the "identity" requirement of Washington's Priority of Action Rule has not been satisfied because the relief she says she seeks in this action (an injunction against future CPA violations) cannot be granted by the federal court. *See* Bunch's Brief of Respondent

at 8. Bunch ignores the clear statements by the Washington Supreme Court that the “identity” requirement is concerned about whether decisions on the merits in the first-filed action will be binding in the second-filed action. As the Supreme Court put the point in *Yakima v. Firefighters Local 469*:

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.

City of Yakima v. Int'l Ass'n of Firefighters Local 469, 117 Wn.2d 655, 675, 818 P.2d 1076 (1991), citing *Sherwin v. Arveson*, 96 Wn.2d 77, 80, 633 P.2d 1335 (1981). And as Nationwide showed in its Opening Brief, the decisions of the Supreme Court and the Court of Appeals are consistent with this understanding of the “identity” requirement. See Opening Brief at 9-11 (discussing the facts and holdings of *Yakima v. Firefighters Local 469* and *State ex rel. Evergreen Freedom Foundation v. Washington Educ. Ass'n*, 111 Wn. App. 586, 49 P.3d 894 (2002)).

Here, the federal court’s decision on the merits of Bunch’s CPA claim will be binding in this action. If Bunch’s CPA claim is dismissed by the federal court because Bunch fails to prove that Nationwide violated the CPA at all, Bunch’s state court claim for an injunction against future violations of the CPA will have to be dismissed. This is not a matter of a “mere...overlap in issues,” as Bunch would have it. See Brief of

Respondent at 9. Bunch's state court action has been brought, she says, for the purpose of getting an injunction against Nationwide under the CPA, and Bunch cannot deny that the basis for any such injunction will vanish should the federal court determine that Nationwide has not violated the CPA.

In the language of the Washington Supreme Court in *City of Yakima*, "the decision of the [CPA] controversy by [the federal] ... tribunal would, as res judicata, bar further [CPA] proceedings in the [state] ... tribunal." Accordingly, the identity requirement has been satisfied, and this action should have been stayed to await the outcome of the federal action.

B. The Fact That the Federal Court Lacked Jurisdiction Over the CPA Injunctive Relief Claim Does Not Render the Priority of Action Rule Inapplicable. To the Contrary -- The Decision of the Federal Court to Dismiss Rather Than Remand the CPA Injunctive Relief Claim Confirms Why the Rule Should Have Been Applied by the Trial Court to Stay This Action.

If the federal court had dismissed the entirety of Bunch's CPA claim because that court could not exercise jurisdiction over it, Bunch's point about the interplay between the Priority of Action Rule and jurisdiction would have merit. But the federal court did not dismiss the entirety of Bunch's CPA claim. That court only dismissed the portion of Bunch's claim in which she prayed for an injunction against future violations.

Moreover, in doing so, the federal court made clear that it was concerned about avoiding waste of judicial resources and the risk of inconsistent decisions -- the very things that are the focus of our state's Priority of Action Rule. Judge James Robart could not have been clearer on this point, in explaining why he was dismissing Bunch's CPA injunctive relief request without prejudice, rather than remanding the matter back to proceed under the aegis of the previously-filed state court action:

In *Hardie II*, the court explained: "[I]f the Court were to remand the request for an injunction, this Court and King County Superior Court would simultaneously consider plaintiffs' CPA claim. Doing so would waste judicial resources, lead to inconsistent results, and prejudice defendant."

Out of concern for avoiding the same issues raised in *Hardie II* -- wasting judicial resources, risking inconsistent results, and prejudicing the defendant -- the court concludes that dismissal without prejudice is appropriate with respect to Ms. Bunch's CPA injunction claim, rather than remand.

CP 58-59 (Order at 8-9).¹

If Washington's Priority of Action Rule actually operated the way Bunch claims it does, Judge Robart's choice of a dismissal rather than a

¹ As discussed in Nationwide's Opening Brief, *Hardie v. Countrywide Home Loans Servicing LP*, 2009 WL 210860 (W.D. Wash. 2009), was a class action in which the plaintiff had asserted a claim for injunctive relief under the CPA similar to Bunch's, and the District Court in that case (Hon. Robert Lasnik) had dismissed that claim without prejudice. See Opening Brief at 4. Judge Robart referred to the decision to dismiss as *Hardie II* because Judge Lasnik had previously issued a decision in which he reserved the question of how to deal with the CPA injunctive relief claim. See CP 57 (Order at 7, n.3).

remand was an exercise in futility. (So, too, for that matter, was Judge Lasnik's earlier choice of a dismissal rather than a remand in the *Hardie* litigation.) Of course, neither of these experienced and able jurists was engaged in such an exercise, and Bunch is simply wrong when she suggests that Washington's Priority of Action Rule does not apply when the court in the first-filed action cannot exercise jurisdiction over the subject matter of the second-filed action. Although the purpose of the rule undoubtedly is "to determine which trial court has jurisdiction to control the proceedings," *Seattle Seahawks, Inc. v. King County*, 128 Wn.2d 915, 917-18, 913 P.2d 375 (1996), the cases show that this determination is driven by whether decisions made in the first action will be given preclusive effect in the second action.

Judges Robart and Lasnik clearly understood that to be the case when they chose the path of a dismissal, and for the express purpose of avoiding the waste of judicial resources and the risk of inconsistent decisions. That both Judge Lasnik in *Hardie* and Judge Robart here were prohibited from granting injunctive relief under the CPA is true, but also quite beside the point. Nor do Bunch's Washington authorities support a contrary conclusion. *Trust Fund Services v. Heyman*, 15 Wn. App. 452, 550 P.2d 547 (1976), is a run-of-the-mill concurrent federal-state jurisdiction case (specifically involving concurrent jurisdiction over

certain aspects of federal labor law), in which this Court said nothing about the Priority of Action Rule. Division Two did say, in *Evergreen Freedom Foundation v. WEA* (*supra*), that the rule would not apply if the court in which the action was first filed could not exercise jurisdiction over the claim. *See* 111 Wn. App. at 608. But here the federal court is exercising jurisdiction over the merits of Bunch’s CPA claim, and has left only the subsidiary question of whether Bunch may be entitled to an injunction against future CPA violations to a possible state court action.²

C. Nationwide Has Not “Pivoted” From Arguing the Priority of Action Rule to Arguing *Res Judicata* and Then Collateral Estoppel.

Bunch argues that Nationwide “pivoted” from arguing the Priority of Action Rule before the trial court to arguing *res judicata* in its motion

² As for *Travelers Indemnity Co. v. Madonna*, 914 F.2d 1364 (9th Cir. 1990), Bunch ignores that statements of the sort found in federal court decisions such as *Travelers*, about how it is appropriate to proceed despite the pendency of a parallel and earlier-filed state action, are rooted in the federal jurisdictional rule dating back to Chief Justice Marshall’s opinion in *Osborne v. Bank of the United States*, 22 U.S. (9 Wheat.) 738; 6 L. Ed. 204 (1824), under which federal courts are *obligated* to exercise their jurisdiction and may only abstain from doing so in very limited circumstances. *See, e.g., Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941) (a federal court may abstain where a state court decision may allow resolution of the case on state law grounds and thereby avoid a federal constitutional issue); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) (a federal court may abstain where the issue has been committed under state law to a specific court that has developed expertise in the field). Parallelism and priority of action consequently only rarely support abstention by a federal court. *See generally Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), as applied by the Ninth Circuit in *Travelers*, 914 F.2d at 1367-1372 (finding the “exceptional circumstances” for abstention under *Colorado River* not satisfied). State courts are not subject to this imperative, and thus have been able to develop a priority of action doctrine that has been foreclosed to federal courts by *Osborne* and its progeny.

for discretionary review, and “pivoted” again to arguing collateral estoppel in its opening brief. *See* Brief of Respondent at 11-17. But Nationwide has not “pivoted.” The cases make clear that the core of Washington’s Priority of Action Rule is concern about waste of judicial resources and the risk of inconsistent results -- the same concerns that underlie what our Supreme Court has described as the “*kindred* doctrines” of *res judicata* and collateral estoppel. *Bordeaux v. Ingersoll Rand Company*, 71 Wn.2d 392, 395, 429 P.2d 207 (1967) (emphasis added). These doctrines are designed to prevent relitigation of “already determined causes” and the Supreme Court has acknowledged that they “are at times indistinguishable and frequently interchangeable.” *Id.*

The functional overlap between the Priority of Action Rule, *res judicata*, and collateral estoppel is well-illustrated by the Supreme Court’s decision in *Yakima v. Firefighters Local 469 (supra)*, in which the Supreme Court found the Priority of Action Rule applied in a matter involving two different suits, in different venues, with different causes of action, because the “issue in controversy” in both cases was the same. The Fire Fighters kicked things off by filing an unfair labor practice complaint with the Public Employees Relations Commission (PERC), alleging the City of Yakima failed to collectively bargain with them as it was required to do. 117 Wn.2d at 660. Then the City filed a declaratory

relief action in Superior Court against the Fire Fighters, seeking a declaration that the City had no duty to collectively bargain with the Fire Fighters. *Id.* at 660-61. The declaratory judgment action was dismissed by the trial court in December of 1989 for violation of the Priority of Action Rule, and because the City had failed to exhaust its administrative remedies. *Id.* at 661. Soon after that, the Fire Fighters' contract expired, and the City filed another declaratory judgment action, this time claiming that it had no duty to collectively bargain with respect to the *prospective* contract. *Id.* at 661-62. The trial court refused to dismiss under the Priority of Action Rule because the two actions were different: The 1989 lawsuit involved a refusal to bargain with respect to an existing contract and the 1990 lawsuit involved a refusal to bargain with respect to a prospective contract. *Id.* at 662. The Supreme Court held that because the "issue in controversy" in both cases was whether the City had a duty to bargain with the union, the subject matter was thus identical and the trial court therefore should have declined to accept jurisdiction of the 1990 declaratory judgment action. *Id.* at 676.

Here, the "issue in controversy" in both cases is whether Nationwide has violated the Consumer Protection Act. If the federal court finds no violation of the CPA, Bunch's request in state court for an injunction to enjoin future violations should be dismissed. Whether one

labels this an application of *res judicata* or collateral estoppel makes no difference to the outcome.

Bunch also says there is no certainly that the federal court will find no violation of the CPA, and therefore asserts that she should be allowed to proceed with her state court action at the same time as the federal action. *See* Brief of Respondent at 14 (“Even if Bunch were to lose in federal court, it would be true to say only that her CPA injunction claim *might* be subject to a motion to dismiss”). First, Bunch is wrong -- it *is* certain that Bunch’s request for an injunction will be dismissed if the federal court finds no violation of the CPA, for the obvious reason that there would be no basis for imposing an injunction against Nationwide when Nationwide has been exonerated of the charge of violating the CPA in the first place. Moreover, Bunch ignores that Washington Priority of Action case law requires the stay or dismissal of the second-filed action if there is a *risk* of inconsistent decisions, and also to avoid the waste of judicial resources involved in allowing two actions like those here to proceed towards a decision on the merits. Bunch’s argument at most justifies a trial court choosing to stay her state court action, rather than dismiss it outright. Yes, things may unfold in federal court such that Bunch should at some point be allowed to resume her pursuit of an injunction. But under Washington Priority of Action law, it makes no

sense to allow Bunch to chase an injunction when the outcome of the federal action may foreclose an injunction, and Bunch cannot plausibly deny that there is a risk of such an outcome.³

Incredibly, Bunch *concedes* that “if either court determined ...whether Nationwide engaged in an unfair or deceptive act or practice...the determination would have *collateral estoppel* effect in the other action.” See Brief of Respondent at 16. Bunch nonetheless insists that the Priority of Action Rule does not apply because this preclusive effect would result from the application of the preclusion doctrine of collateral estoppel, and the Priority of Action Rule only applies if the preclusive effect can be characterized as resulting from the application of the preclusion doctrine of *res judicata*. Nothing in the cases supports adopting such a formalistic approach to a rule that is concerned above all with the highly pragmatic goals of avoiding waste of resources and the risk of inconsistent decisions. Bunch’s approach ignores the kindred nature of the two preclusion rules themselves, expressly recognized by our

³ Nothing in *Civil Service Commission of Kelso v. City of Kelso*, 137 Wn.2d 166, 969 P.2d 474 (1999), supports a contrary conclusion. There the Supreme Court ruled the Priority of Action Rule did not apply because of the difference in the *claims* pending before the Civil Service Commission and before the collective bargaining agreement arbitrator. See 137 Wn.2d at 174-75 (“[T]he civil service hearing was based on a statutory right, while the arbitration was based on a more expansive contractual right. A statutory cause of action and a claim based upon the terms of a contract may, in some circumstances, be sufficiently similar to require the application of *res judicata* principles. However, this court has previously stressed *the fundamental difference between such causes of action.*” (emphasis added)).

Supreme Court in *Bordeaux*. “Vigilan[ce] in preserving the distinction” between these rules, *see Hisle v. Todd Shipyards Corp.*, 151 Wn.2d 853, 872, 93 P.2d 108 (2004), does not justify ignoring their “interchangeab[ility],” *see Bordeaux*, 71 Wn.2d at 395, and Bunch’s approach ignores that interchangeability, and to the detriment of the policies underlying the Priority of Action Rule.

Bunch closes her discussion of *res judicata* and collateral estoppel with the assertion that her state court case should be allowed to proceed because it might turn out that the state court will decide the merits of her CPA claim first, and that such a finding “would have collateral estoppel effect in federal court as well.” But that is exactly why the trial court should have stayed the state court action. Bunch is describing allowing the two actions to proceed on parallel tracks, with indifference as to which reaches the merits finish line. But doing that produces precisely the evils that the Priority of Action Rule is designed to prevent. That a decision on the merits by the state court reached before the federal court would have preclusive effect in that court is no reason to suffer the evils of the process required to reach such an end.

D. Bunch’s Ability to Pursue Her Injunctive Relief Claim is Not Prejudiced by Staying this Action.

The Superior Court’s denial of Nationwide’s motion for stay unleashed Bunch to compel Nationwide to race to see whether the federal

or state court would reach a decision on the merits of Bunch's CPA claim. The very fact of this race deprived Nationwide of the benefit of its preferred federal forum. And it insured the waste of judicial resources and risk of inconsistent decisions which motivated the District Court to dismiss instead of remanding Bunch's CPA injunctive relief claim.⁴

Bunch claims that "there is no good reason why Bunch should have to spend years trying to prove actual damages in the federal courts[.]" See Brief of Respondent at 19. First, Bunch continues to ignore that, under the CPA, she is only required to prove "injury" rather than "damages." See Nationwide's Opening Brief at 18 (discussing the CPA's "injury" showing requirement, and distinguishing that requirement from damages). Nor can the federal court unilaterally impose a damages requirement, because the substantive content of a CPA claim is a matter controlled by Washington law, and under well-established *Erie*⁵ principles that law must be applied as it stands by the federal court. Moreover, whether one speaks of injury or damages, what difference does it make if Bunch is litigating the issue in federal court, or in state court?

⁴ Bunch points to the state trial court's announced willingness to police the discovery process between the federal and state court actions as supposedly assuring there will be no waste of resources. See Brief of Respondent at 20-21. How this could actually work in practice remains a mystery that Bunch has manifestly failed to elucidate.

⁵ The reference is, of course, to the federal doctrine governing when a federal court is bound to apply state law, which, which originated with the U.S. Supreme Court's landmark decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

Bunch also asserts she has been prejudiced because she is being forced to litigate class certification under the more demanding standards of Federal Rule of Civil Procedure 23(b)(3). *See* Brief of Respondent at 18-19. This argument, however, only serves to raise questions about what Bunch really seeks to litigate in the state court action. If her re-filed state court action is truly just intended to preserve her ability to pursue an injunction against future CPA violations, as she has previously claimed, the outcome of class certification proceedings in federal court is irrelevant.

The District Court observed that Bunch could not show that her CPA injunction relief request would be in any way prejudiced if that claim was dismissed without prejudice rather than remanded. *See* CP 58-59 (Order at 8-9). Bunch has manifestly failed to do now what she failed to do then, when she tried to persuade the District Court to remand her CPA injunctive relief request, rather than dismiss it without prejudice -- show how her injunctive relief request would be prejudiced by having her prosecution of it stayed, to await the outcome in federal court of the controlling question of whether Nationwide violated the CPA.

E. The Abuse of Discretion Standard of Review Cannot Save the Trial Court's Ruling.

Bunch argues that trial courts have discretion to apply equitable standards. *See* Brief of Respondent at 17. While this statement is accurate as far as it goes, Bunch fails to grasp that a correct application of

Washington's Priority of Action Rule left the trial court, as a matter of law, with the choice between staying or dismissing her action. When the trial court chose instead to allow Bunch to proceed with her action, the court exceeded its authority, and therefore abused its discretion. Relabeling that authority as "equitable" cannot save the trial court's decision from the reversal that must otherwise flow from that court's legal error.

III. CONCLUSION

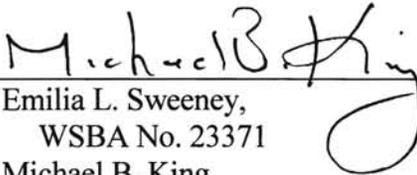
Nationwide does not ask this Court to "rewrite" Washington's Priority of Action Rule. *See* Brief of Respondent at 22. What Nationwide does seek is a ruling that vindicates its right to the federal forum that it was entitled to choose, and did choose. Bunch's ability to pursue an injunction for future violations of the CPA is fully preserved.

Nor has Nationwide "concede[d]" that Bunch has a right to a decision on the merits in state court of her CPA injunctive relief request. *See* Brief of Respondent at 25. Under Washington's Priority of Action Rule Bunch has *no* "right" to subject Nationwide to a race to a decision on the merits of Bunch's CPA claim, pitting the federal action against a later filed state court action. That will waste judicial resources, and risk inconsistent decisions.

A stay of Bunch's later-filed state court action is mandated by Washington's Priority of Action Rule. This Court should reverse the trial court, and imposed such a stay.

RESPECTFULLY SUBMITTED this 22nd day of August, 2013.

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DECLARATION OF SERVICE

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COURT OF APPEALS
STATE OF WASHINGTON

I certify under penalty of perjury under the laws of the State of Washington that I am over the age of 18 years, not a party to this action and competent to be a witness herein. I caused to be delivered a true and correct copy of Appellant's Reply Brief; and this Certificate of Service to the following attorneys of record:

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