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No. 69600-9-I

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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

Respondent/Plaintiff,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY and  
DEPOSITORS INSURANCE COMPANY,

Appellants/Defendants.

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

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APPELLANTS' OPENING BRIEF

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## ASSIGNMENT OF ERROR

Defendants and Appellants Nationwide Mutual Insurance Company and Depositors Insurance Company (collectively “Nationwide”) assign the following error:

The trial court erred in denying Nationwide’s motion to stay proceedings pending the outcome of a parallel and prior federal district court action. *See* CP 223-24 (order).

## STATEMENT OF ISSUE

The following issue pertains to Nationwide’s assignment of error:

1. Priority of Action Rule. Whether a trial court errs in denying a motion to stay, when (1) that motion is based on the Priority of Action Rule, under which a Washington court should stay an action when a prior action’s determinations will be *res judicata* of dispositive issues in the action in which the stay is sought, (2) there is a prior action pending, and (3) that action’s determinations will be *res judicata* of dispositive issues in the action in which the stay is sought.

### I. SUMMARY INTRODUCTION

The Priority of Action rule avoids waste of judicial resources and the risk of inconsistent results. The rule achieves this goal by commanding that trial courts stay or dismiss later-filed actions where determinations in an earlier-filed action will be given preclusive effect.

Here, the trial court disregarded the Priority of Action rule when it refused to stay proceedings, even though the respondent conceded -- and facts not reasonably in dispute demonstrated -- that determinations in an earlier-filed federal action would be dispositive. The trial court abused its discretion when it denied the stay. This Court should reverse and remand with directions that the case should remain stayed pending the outcome of proceedings in the federal action.

## II. STATEMENT OF THE CASE

**A. Plaintiff Files a Class Action in King County Superior Court Which the Defendants Remove to the U.S. District Court for the Western District of Washington. The District Court Denies Plaintiff's Motion to Remand, and Retains Jurisdiction Over All of Plaintiff's Claims Except for a Claim for "Injunctive Relief" Under the Consumer Protection Act. The District Court Dismisses the CPA Injunctive Relief Claim Without Prejudice Rather than Remand It Back to State Court, to Avoid Waste of Judicial Resources and the Risk of Inconsistent Decisions.**

On June 12, 2012, Plaintiff Wanda Bunch, on behalf of herself and a putative class, filed an action in King County Superior Court against Defendants Nationwide Mutual Insurance Company and Depositors Insurance Company (collectively "Nationwide"). CP 26-35 (Complaint for Declaratory, Injunctive, Equitable and Other Relief). In this action (the "First Class Action") Bunch alleged the existence of an "ambiguity" regarding coverage for water damage in her all-risk homeowners' policy. CP 26 (Complaint at 1, ¶ 1). Bunch further alleged that Nationwide

wrongfully denied her water damage claim, *see* CP 27-30 (Complaint at 2-5, ¶¶ 8-25), and that Nationwide’s wrongful denial gave rise to several claims at law and equity including under the Washington Consumer Protection Act, RCW Chapter 19.86. *See* CP 32-34 (Complaint at 7-9). Bunch sought “a declaration of Nationwide’s violations of law and an injunction enjoining future violations.” CP 26-27 (Complaint at 1-2, ¶ 1). Bunch also sought orders directing Nationwide to “readjust her claim” and to “disgorge all amounts that Nationwide has improperly retained by failing to cover her claim.” CP 27 (Complaint at 2, ¶ 1).

Nationwide removed Bunch’s action to the U.S. District Court for the Western District of Washington; Bunch responded by moving to remand. CP 37-48 (motion for remand). Bunch also moved separately for the alternative relief of a partial remand of her Consumer Protection Act claim for injunctive relief. CP 98-106 (motion for partial remand). In the latter motion, Bunch argued that, because she was no longer a Nationwide policyholder, her claim for injunctive relief under the CPA was not cognizable in federal court. CP 100-103 (motion for partial remand at 3-6).

The District Court denied Bunch’s general motion to remand. CP 51 (Order on Motions for Remand and Partial Remand at 1). The court agreed that it could not exercise jurisdiction over Bunch’s injunctive relief

claim. CP 56-57 (Order at 6-7). But the court did not agree it therefore should remand that claim back to state court; instead, the court dismissed the claim without prejudice. CP 57-59 (Order at 7-9).

The court explained it was refusing to remand to avoid the waste of judicial resources and risk of inconsistent decisions that could result if the federal court should allow Bunch to resume prosecution of her injunctive relief claim, under the aegis of her previously filed state court action. The court noted that another judge of the Western District had recently confronted the same situation in *Hardie v. Countrywide Home Loans Servicing LP*, 2009 WL 210860 (W.D. Wash. 2009), a class action in which the plaintiff had similarly asserted a claim for injunctive relief under the CPA. CP 57-58 (Order at 7-8). The District Court explained that in *Hardie II*<sup>1</sup> the court had dismissed the CPA injunctive relief claim without prejudice, rather than remand, to avoid waste of judicial resources and the risk of inconsistent decisions:

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.”

CP 58 (Order at 8).

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<sup>1</sup> The court referred to this decision as *Hardie II*, because the district court in that litigation has previously issued a decision in which the court reserved the question of how to deal with the CPA injunctive relief claim. See CP 57 (Order at 7, n.3).

The District Court went on to observe that Bunch had “not raised any arguments indicating that she would forfeit her CPA injunction claim if the court denies her motion for partial remand and instead dismisses her claim without prejudice.” *Id.* The court then concluded:

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).

**B. Plaintiff Files a Second Class Action in King County Superior Court, Reasserting Her CPA Injunctive Relief Claim. The Superior Court Refuses to Stay the Action, Even Though Plaintiff Admits She Must Prevail on Her Claim of a CPA Violation to Be Entitled to An Injunction, and Does Not Deny that the District Court’s Determinations on CPA Liability Will be *Res Judicata* of the Issue in State Court.**

In response to the District Court’s dismissal of her CPA injunctive relief claim, Bunch filed in King County Superior Court a nearly identical complaint on behalf of the same putative class. CP 1-8. The complaint has the same parties and factual allegations as the First Class Action. *Compare* CP 2-5 (Second Complaint parties and factual allegations) *with* CP 27-30 (First Class Action complaint parties and factual allegations). Bunch alleges in both actions that Nationwide engaged in a pattern and practice of selling “all risk” insurance policies that included an ambiguity regarding coverage provided for water damage. *Compare* CP 5-7 (¶¶ 26

& 34) *with* CP 30-32 (First Class Action, ¶¶ 27 & 35). Bunch also seeks to establish in both actions that Nationwide’s failure to extend coverage in the face of ambiguous policy language violates the CPA. *Compare* CP 7 (¶ 36) *with* CP 33 (First Class Action, ¶ 40) (both alleging that “Nationwide’s actions, as complained of herein, constitute unfair competition or unfair, deceptive or fraudulent acts or practices in violation of the Washington Consumer Protection Act”). Finally, Bunch seeks a finding of “coverage...owed by Nationwide” and “readjustment of water damage coverage claims” in both actions. *Compare* CP 8 (Prayer for Relief, § D) *with* CP 35 (First Class Action, Prayer for Relief, §§ D & E).

Nationwide moved to stay this new state action under Washington’s “Priority of Action” rule. CP 9-20 (motion for stay).

Bunch admitted in her response that her right to injunctive relief under the CPA depended on whether she established that Nationwide violated the CPA. CP 73 (response at 5) (“If Bunch establishes that Nationwide’s failure to extend coverage in the face of ambiguous policy language violates the CPA, [then] she is entitled to an injunction against such conduct under RCW 19.86.090”). Bunch also did not deny that any determination by the District Court on the issue of whether Nationwide violated the CPA would be *res judicata* and controlling in Bunch’s newly-filed state court action.

Bunch instead claimed that granting a stay would somehow prejudice her future ability to pursue her CPA injunctive relief claim in the newly-filed state court action. CP 70 (response at 2) (asserting a stay would “impair Bunch’s ability to seek independent relief”). Bunch also urged the Superior Court “to order the parties to use reasonable efforts to avoid the duplication of expense,” suggesting that “discovery done in one action should not need to be repeated in the other.” *Id.*

The Superior Court denied Nationwide’s motion for a stay. CP 223-24 (order). Instead the court presumed to assume the authority to police discovery in the federal action as well as the action before it. *Id.* (Order at 1, ¶¶ 2 & 3; 2, ¶ 4).

Nationwide sought discretionary review, which was granted on January 30, 2013. *See* Commissioner’s ruling (on file).<sup>2</sup> The Superior Court action is now stayed pending the outcome of this appeal. CP 229-230.

### III. STANDARD OF REVIEW

A trial court’s decision on a motion for stay is reviewed for an abuse of discretion. *King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 348, n.6, 16 P.3d 45 (2000) (citing *State v. Music*, 79 Wn.2d 699, 716, 489

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<sup>2</sup> Bunch moved to modify, and that motion remains pending at the time of the filing of this brief.

P.2d 159 (1971), *judgment vacated in part*, 408 U.S. 940, 92 S. Ct. 2877, 33 L. Ed. 2d 764 (1972)) (vacating denial of stay). This discretion is abused when based on untenable grounds, including an error of law. *King*, 104 Wn. App. at 348, 355, n. 35 (citing *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997); *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)).

#### IV. ARGUMENT

**A. Under Washington's Priority of Action Rule, A Subsequently Filed Action Should Yield to a Prior Filed Action Where the Two Actions Are Sufficiently Related Such That Determinations in the First Action Will Be *Res Judicata* and Conclusive of Issues in the Second Action.**

The "Priority of Action" rule is a well-established judicial doctrine. Its purpose is to avoid waste of judicial resources and inconsistent decisions. When two actions involve an "identity" of parties, subject matter, and relief, the second filed action must yield to the first, either by outright dismissal or a stay of proceedings pending the outcome of the first filed action.

As the Washington Supreme Court has explained, the reason for the Priority of Action rule "is that it tends to prevent unseemly, expensive, and dangerous conflicts of jurisdiction and of process." *City of Yakima v. Int'l Ass'n of Firefighters Local 469*, 117 Wn.2d 655, 675, 818 P.2d 1076 (1991). The Washington Supreme Court has further explained that the

rule's identity requirement is principally concerned with whether a final adjudication in the first filed case would preclude further proceedings in the later filed case:

This identity must be such that a final adjudication of the case by the court in which it first became pending would, as *res judicata*, be a bar to further proceedings in a court of concurrent jurisdiction.

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

The decisions of the Supreme Court and the Court of Appeals confirm the centrality of this principle for the application of our state's Priority of Action rule:

- In *Yakima v. Firefighters' Local 469* (*supra*), firefighters filed an unfair labor practice complaint with the Public Employees Relations Commission ("PERC"), alleging the City of Yakima had wrongfully failed to collectively bargain. The City then filed a declaratory judgment action seeking a declaration that the City had no duty to collectively bargain with the Fire Fighters. The declaratory judgment action was dismissed based in part on the Priority of Action rule, and in part because the City had failed to exhaust its administrative remedies.

While the PERC proceeding was pending, the firefighters' contract expired, and the City filed a second declaratory judgment action, now claiming it had no duty to collectively bargain over a prospective contract. The trial court refused to dismiss the second action, reasoning that because

the first lawsuit had involved a refusal to bargain over an existing contract while the second lawsuit involved a refusal to bargain over a prospective contract, there was not the requisite identity of subject matter. The Supreme Court reversed, holding the “issue in controversy” in both cases was whether the City had a duty to bargain with the union, and the trial court therefore should have declined to accept jurisdiction over the second action just as it had declined to accept jurisdiction over the first. 117 Wn.2d at 676. The Supreme Court explained that “[t]he identity must be such that a decision of the controversy by one tribunal would, as res judicata, bar further proceedings in the other tribunal.” *Id.* at 675, n. 47 (citing *Sherwin*). Because the original PERC proceeding was still ongoing, the trial court should have deferred to that proceeding and dismissed the second declaratory judgment action, just as it had dismissed the first declaratory judgment action. *Id.* at 676.<sup>3</sup>

- In *State ex rel. Evergreen Freedom Foundation v. Washington Educ. Ass'n*, 111 Wn. App. 586, 49 P.3d 894 (2002), a public interest group challenged the actions of the Washington Education Association (“WEA”) in opposing two initiatives favored by the group. Following proceedings before the Public Disclosure Commission (“PDC”)

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<sup>3</sup> Having disposed of the case under the Priority of Action rule, the Supreme Court ruled it need not reach and decide the exhaustion of remedies issue. *See* 117 Wn.2d at 676.

in which the WEA prevailed, the group sought to bring citizens claims against the WEA. The trial court ruled the claims were barred by the Priority of Action rule. The group argued the rule did not apply because the penalties the PDC could have imposed on the WEA were more limited than those a superior court could impose in a citizens' suit -- hence there was not the requisite identity of relief between the PDC proceeding and a citizens' suit. 111 Wn. App. at 607.

The Court of Appeals held the Priority of Action rule barred the second action. The Court of Appeals recognized that the "policy behind the priority of action doctrine" is "the ability to apply res judicata to a later action[.]" See 111 Wn. App. at 606-607 (citing *Yakima v. Firefighters Local 460*). The Court of Appeals concluded that res judicata did apply, because the four elements for application of that doctrine were satisfied, and affirmed the trial court's ruling that the Priority of Action rule barred the group's citizens' suit. *Id.* at 608-609.

In sum, the identity requirement of Washington's Priority of Action rule looks to whether the first action's determinations will have preclusive effect in the second action. If they will, then the court in the second action should order an end to proceedings (either by dismissal or stay), to avoid the waste of judicial resources and the risk of inconsistent results that would otherwise result.

**B. The Superior Court Erred in Refusing to Stay Plaintiff's Second State Court Class Action. The Federal District Court's Determinations on the Question of Whether Nationwide Violated the CPA Will be *Res Judicata* and Binding in Plaintiff's Second State Court Action. The Superior Court's Refusal of a Stay Risks Precisely the Evils -- Waste of Resources, Inconsistent Results -- that the Priority of Action Rule is Designed to Prevent.**

The linchpin of Bunch's case against a stay has been her assertion that she is pursuing a form of *relief* (an injunction) on her CPA claim which the federal District Court cannot grant. Her complaint in the state court action, however, asks for the same thing she asks for in the federal action: (1) a finding of "coverage...owed by Nationwide"; and (2) "readjustment of water damage coverage claims[.]" *Compare* CP 8 (State Court Complaint at 8, "Prayer for Relief," Subpart D) *with* CP 35 (Federal Prayer for Relief, §§ D & E). The only difference is that the federal action asks for a "[d]eclaratory and injunctive judgment" on these two points, *see* CP 35 (Prayer for Relief, § D) (emphasis added), while the state action truncates this request to one for an "[i]njunctive [sic.] judgment[.]" CP 8 (Prayer for Relief, § D).

In her opposition to Nationwide's stay motion, Bunch did not dispute that the District Court has retained jurisdiction to resolve whether Nationwide has breached any duty owed to Bunch under Washington law, including under the CPA. Bunch also admitted *her right to injunctive relief depends upon whether Bunch establishes that Nationwide violated*

*the CPA.* See CP 73 (response at 5) (“*If* Bunch establishes that Nationwide’s failure to extend coverage in the face of ambiguous policy language violates the CPA, [*then*] she is entitled to an injunction against such conduct under RCW 19.86.090” (emphasis added)). Finally, Bunch did not dispute that, if she lost on the threshold question of breach of the CPA in the District Court action, principles of *res judicata* would compel the dismissal of her state law injunctive relief request.

Only during oral argument before the Commissioner did Bunch suggest, for the first time, that the District Court’s decision on CPA liability could not be *res judicata* of Bunch’s CPA claim in the state court action. If Bunch revives this claim in her brief on the merits,<sup>4</sup> this Court should reject it. The precise issue presented is whether a District Court finding of no violation of the CPA should preclude Bunch from relitigating the issue in the state court action. If it should, this would lead ineluctably -- as Bunch effectively admitted in her briefing to the trial court -- to the dismissal of her state court action, because she would have no basis for continuing to pursue injunctive relief under the CPA. See CP 73 (Bunch’s response at 5) (admitting that Bunch is entitled to an

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<sup>4</sup> Bunch has made this belated suggestion the core of her argument for depriving Nationwide of the interlocutory appeal granted by the Commissioner, in her motion to modify the Commissioner’s ruling granting discretionary review, which (as noted) remains pending as of the filing of this brief.

injunction under the CPA only if she “establishes that Nationwide’s failure to extend coverage in the face of ambiguous policy language violates the CPA”).

Bunch has also argued that Nationwide has confused *res judicata* (claim preclusion) with collateral estoppel (issue preclusion). *See* Reply In Support Of Motion to Modify at 8. She implies, without authority, that collateral estoppel is insufficient to trigger application of the Priority of Action rule, quoting *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 872 (sic), 93 P.3d 108 (2004), for the proposition that “[w]e must be vigilant in preserving the distinction between these two defenses.” Yet the Supreme Court in *Hisle* described the two doctrines in a way that highlighted their similarities rather than their differences: It noted that the doctrine of collateral estoppel prevented a second litigation of issues between the parties, even though a different claim or cause of action is asserted, while *res judicata* applied to every point that properly belonged to the subject of litigation, whether raised or not. *Id.* at 865-866. However great the distinction between the doctrines -- surely a debatable proposition -- the Priority of Action rule arose at a time when our courts viewed *res judicata* and collateral estoppel as “kindred doctrines designed to prevent relitigation of already determined causes” and considered the doctrines “at times indistinguishable and frequently interchangeable.”

*Bordeaux v. Ingersoll Rand Company*, 71 Wn.2d 392, 395, 429 P.2d 207 (1967).

Indeed, the treatment of the Priority of Action rule by our courts suggests that the distinction is without difference. In *City of Yakima v. Firefighters Local 469* (*supra*), the Supreme Court held that follow-on superior court declaratory judgment actions should be dismissed because the PERC's resolution of the controlling issue would be dispositive in any superior court action. See § IV.A, *supra* (discussing details of *Yakima v. Firefighters* decision). This appears to be an application of collateral estoppel. In *Evergreen Freedom Foundation v. WEA* (*supra*), the Court of Appeals applied *Yakima v. Firefighters Local 469* to uphold a trial court's determination that the PDC's rejection of the activist group's claims foreclosed the group's attempt to pursue a follow-on superior court penalties action against the WEA. The court held that *res judicata* barred the follow-on action, even though the full scope of relief sought could not have been obtained before the PDC. Bunch's crabbed reading of the term "res judicata," when used by these and other Washington decisions applying the Priority of Action rule, would frustrate the rule's declared purpose of preventing the waste of judicial resources and avoiding the risk of inconsistent decisions.

In *Hadley v. Maxwell*, 144 Wn.2d 306, 27 P.3d 600 (2001), the Washington Supreme Court reviewed when a party should be precluded from relitigating an issue. The Supreme Court observed that the doctrine of collateral estoppel:

...is well known to Washington law as a means of preventing the endless relitigation of issues already actually litigated by the parties and decided by a competent tribunal. Collateral estoppel promotes judicial economy and prevents inconvenience, and even harassment, of parties.

144 Wn.2d at 311 (quoting *Reninger v. Dep't of Corrections*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998), in turn citing *Hanson v. City of Snohomish*, 121 Wn.2d 552, 561, 852 P.2d 295 (1993)). The court continued by outlining the four part test that Washington courts employ to determine whether a party should be collaterally estopped:

“(1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied.”

144 Wn.2d at 311-12 (quoting *Southcenter Joint Venture v. Nat'l Democratic Policy Comm.*, 113 Wn.2d 413, 418, 780 P.2d 1282 (1989), in turn quoting *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507, 745 P.2d 858 (1987)).

Here, the issue is whether a final judgment of the District Court, entered following a determination that Nationwide did not violate the

CPA, should collaterally estop Bunch from relitigating that same issue in her state court action against Nationwide. This implicates whether application of the doctrine would work an injustice against Bunch, which in turn requires a court to determine whether “the party against whom the estoppel is asserted [had] interests at stake that would call for a full litigational effort.” 14 Lewis H. Orland & Karl B. Tegland, *Washington Practice: Trial Practice, Civil* § 373, at 763 (5th ed.1996), as cited and quoted with approval in *Hadley*, 144 Wn.2d at 312.

There is no question that Bunch has interests at stake in the Federal action that call for a full litigational effort. Her CPA damages claims remain pending before the District Court, and she must establish Nationwide violated the CPA recover such damages. She admitted to the trial court, even as she opposed a stay, that her right to pursue injunctive relief under the CPA depends upon establishing Nationwide violated the CPA. CP 73 (response at 5). Finally, the District Court certainly constitutes a competent tribunal for adjudicating the threshold question of whether Nationwide violated the CPA.

In short, under well-established Washington law, if Bunch loses the issue of CPA violation in the District Court, she should be precluded from relitigating that issue in state court. And as her right to injunctive relief under the CPA requires a finding that Nationwide violated the CPA,

losing the issue of CPA violation in federal court will mandate the dismissal of her state court action.

Bunch has previously attempted to evade this manifestly clear implication of Washington law by arguing that, to prevail on her CPA claim in federal court she must prove actual damages, while she need only show injury under her state court injunction claim. *See* Motion to Modify at 13. This is simply wrong. To prevail in a private CPA claim, whether for injunctive relief or damages, a plaintiff need only prove injury to a person's business or property. *Panag v. Farmers Insurance Company of Washington*, 166 Wn.2d 27, 37, 204 P.3d 885 (2009), citing *Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784, 719 P.2d 531 (1986). Whether seeking injunctive relief, or a simple claim for violation of the CPA, specific monetary damages need not be proved; unquantifiable damages may suffice. *Panag* at 58. An injury cognizable under the Act will sustain an award of attorneys' fees, and while treble damages are based upon actual damages awarded, failing to prove actual damages does not, in and of itself, defeat the claim. *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 855, 792 P.2d 142 (1990). Bunch's claim, that her federal CPA claim requires a higher showing than her state court CPA injunctive relief claim, is incorrect.

Moreover, under long-established Washington injunctive relief law, the purpose of injunctive relief is to prevent “future mischief.” *E.g.*, *State ex rel. Dept. of Public Works v. Skagit River Nav. & Trading Co.*, 181 Wash. 642, 645, 45 P.2d 27 (1935) (citation omitted) (reversing judgment granting injunction). If there has been no misconduct by Nationwide under the CPA, there can be no basis for imposing an injunction against Nationwide. Accordingly, if the District Court finds no violation of the CPA, there will be no basis for ordering an injunction and Bunch’s Superior Court action would have to be dismissed under clearly established principles of *res judicata*.

The Superior Court’s refusal to stay in this situation cannot be upheld as a tenable exercise of discretion. Instead of suspending the proceedings before it, the Superior Court presumed to install itself as the arbiter between Bunch’s state court action and the federal action. Such an assertion of authority over how the parties conduct themselves in federal court cannot be reconciled with the respect due the federal court, any more than the federal court presuming to act in such a fashion could be reconciled with the respect due a state trial court. And by allowing Bunch to proceed in state court, the Superior Court has authorized exactly the kind of race to the finish line which the Priority of Action rule is intended to prevent.

**IV. CONCLUSION**

This Court should reverse the trial court's denial of a stay, and remand with directions that the case should remain stayed pending the outcome of proceedings in the federal action.

RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of May, 2013.

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NO. 69600-9-I

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION 1

WANDA BUNCH,

Respondent/Plaintiff,

vs.

NATIONWIDE MUTUAL  
INSURANCE COMPANY and  
DEPOSITORS INSURANCE  
COMPANY,

Petitioners- Defendants.

DECLARATION OF SERVICE

Claire Uhler certifies 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. On the 10<sup>th</sup> of May, 2013, I caused to be delivered a true and correct copy of

- Appellants' Opening Brief; and
- this Certificate of Service

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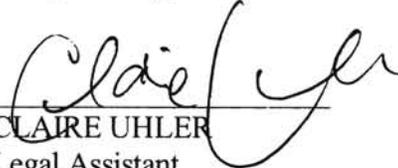
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