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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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BRENT CARTER, a natural person, and OAK HARBOR  
CHIROPRACTIC HEALTH CENTER P.S., a Washington  
Professional Services Corporation,  
Appellants

vs.

SUTTELL AND ASSOCIATES, P.S. d/b/a SUTTELL AND  
ASSOCIATES; CITI USA a/k/a CITIUSA, an unknown entity;  
CITIGROUP INC., a regular corporation, and its wholly owned  
subsidiaries CITIBANK SOUTH DAKOTA, a National Banking  
Association: and CITICORP CREDIT SERVICES, INC. (USA), a  
regular corporation

Respondents

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REPLY BRIEF OF APPELLANT

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Appeal from King County Superior Court  
Case No: 07-2-41145-3 SEA  
The Honorable Judge Washington

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**Answer to Statements of Facts;**

Appellant will rely upon the statement of facts as set forth in the Opening Brief of Appellant. The Statement of Facts by Citi Respondents contains few citations to the record and indeed in great part are in direct contradiction to the actual record, while the statement of facts by Suttell Respondents comprise 10 pages of what is essentially argument without citation to authority. Statements of Facts should not contain argument;

RAP 10.3(b) Brief of Respondent. The brief of respondent should conform to section (a) and answer the brief of appellant or petitioner. A statement of the issues and a statement of the case need not be made if respondent is satisfied with the statement in the brief of appellant or petitioner.

RAP 10.3(a) (5) Statement of the Case. A fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement.

This Court should strike the argumentative Statement of Facts by the Suttell respondents.

**Answer to Citi Respondents' Argument;**

***1. Motion to Vacate was filed within a reasonable time.***

Respondent Citi's argument is made under the vague provision of CR 60(b)(1), that states that a motion is timely if it is filed within a reasonable time and not more than one year from the date of the order or

judgment from which relief is sought. In this case, the motion was brought well under one year, and so the only issue is whether the motion was filed within a “reasonable time”.

The cases cited by Respondent Citi are not contrary to the Appellant’s arguments. Luckett v. Boeing Co., 98 Wn. App. 307, 989 P.2d 1144 (1999) “Major considerations in determining a motion’s timeliness are: (1) prejudice to the nonmoving party due to the delay; and (2) whether the moving party has good reasons for failing to take appropriate action sooner.” However, the Citi Respondents make no showing whatsoever that they were prejudiced due to any delay in filing the CR 60 motion for relief. The denial of CR 60 relief in Luckett v. Boeing was based, not just upon delay, but because the White<sup>1</sup> factors were not included within that CR 60 motion; “[Luckett’s counsel] failed to bring the White factors to the trial court’s attention and did not attempt to persuade the trial court on the merits of her claim, which was her burden”. In the Luckett case, the party was at all times represented by counsel, and counsel had personal reasons for failing to file the CR 60 motion, after having received actual notice of the court order.

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<sup>1</sup> White v. Holm, 73 Wn.2d 348, 438 P.2d 581 (1968). The White court set forth four factors for consideration in determining whether a default judgment should be set aside, including “(4) that no substantial hardship will result to the opposing party.”

In this case, the plaintiffs had made arrangements to retain counsel, but were waiting for all defendants to be properly served, after having originally filed their cause of action pro se. As the record reflects, neither the plaintiffs, nor their attorney anticipated any such activity until all defendants were properly noticed and had opportunity to respond. When plaintiffs attorney became aware of the various irregularities of service and subsequent defendants motion, he diligently updated himself with the case activity and subsequently responded in a timely manner. The court should afford the plaintiffs at least one chance to present the case on its merits, when represented by counsel.

In re Marriage of Thurston, 92 Wn.App. 494, 497, 963 P.2d 947 (1998), review denied, 137 Wn.2d 1023 (1999)), involved a delay of 19 months between the date of judgment, and the date of filing of a CR 60 motion to vacate. The Court stated; “Courts have observed that what constitutes a reasonable time depends on the facts of the case. The mere passage of time between the entry of the judgment and the motion to set it aside is not controlling. Rather, a triggering event for the motion may arise well after entry of the judgment that the moving party seeks to vacate. Major considerations that may be relevant in determining timeliness are whether the nonmoving party is prejudiced by the delay and whether the

moving party has a good reason for failing to take action sooner...”  
(internal citations omitted). Marriage of Thurston, 92 Wn.App. @ 500.

Citi’s citation to a 7th Circuit case, Kagan v. Caterpillar Tractor Co., is missing a number. The correct citation is 795 F.2d 601 (7<sup>th</sup> Cir. 1986). The Kagan case is replete with attorney-caused delay which substantially interfered with the Court’s schedule; “On May 15, almost three weeks after the date the response was due, attorney Gubbins advised the court by letter that the response would be filed "within the week," but a response was never filed. In view of the fact that Kagan's attorney failed to appear at the pretrial conference, the court attempted to contact each of the plaintiff's three attorneys of record, but "no one was available." The day following, the district court issued an oral order dismissing Kagan's action for lack of prosecution, and the plaintiff Kagan failed to appeal the court's dismissal order.” When the Court schedules cases for hearings and trials, the Court has a right to make the parties adhere to its schedule. This concern for the court’s trial and motion calendar is not impacted when a case has just been filed, and, prior to service of the case, the Defendants run in and get a dismissal by default because the plaintiff is out of the country.

Resolution of the case on its merits is preferable to any summary disposition, where the merits are not considered, Griffith v. City of Bellevue, 130 Wn.2d 189, 192, 922 P.2d 83 (1996).

“CR 1 requires Washington courts to interpret the court rules in a manner “that advances the underlying purpose of the rules, which is to reach a just determination in every action.” Burnet v. Spokane Ambulance, 131 Wn.2d 484, 498, 933 P.2d 1036 (1997). The court rules are intended to allow the court to reach the merits of an action. Sheldon v. Fettig, 129 Wn.2d 601, 609, 919 P.2d 1209 (1996). “[W]henver possible, the rules of civil procedure should be applied in such a way that substance will prevail over form.” Griffith v. Bellevue, 130 Wn.2d 189, 192, 922 P.2d 83 (1996) (quoting First Fed. Sav. & Loan Ass'n v. Ekanger, 93 Wn.2d 777, 781, 613 P.2d 129 (1980)).” Spokane County v. Specialty Auto and Truck Painting, Inc., 153 Wn.2d 238, 103 P.3d 792 (2004).

“Finally, a default judgment is normally viewed as proper only when the adversary process has been halted because of an essentially unresponsive party. Gage v. Boeing Co., 55 Wn. App. 157, 160-61, 776 P.2d 991 (citing H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe, 432 F.2d 689, 691 (D.C. Cir. 1970)), review denied, 113 Wn.2d 1028 (1989)”, Norton v. Brown, 99 Wn. App. 118, 126, 992 P.2d 1019 (1999).

## ***2. Adequate Compliance with CR 60(e)(3).***

The Citi Respondents argue, that the plaintiffs failed to serve their CR 60 motion pursuant to the requirements of CR 60(e)(3). The courts have uniformly held that the service requirements of CR60(e)(3) are not jurisdictional, and that a failure to comply is “inconsequential”;

“In Lindgren v. Lindgren, 58 Wn. App. 588, 593-94, 794 P.2d 526 (1990), the court held that the service requirement of CR 60(e) is not jurisdictional. It reasoned that a motion to vacate

is part of the original suit and does not require independent jurisdictional grounds. While the party in Lindgren had not complied with the procedure for service set out in CR 60(e), the court held the deviation was inconsequential because the opposing party had a meaningful opportunity to be heard and adequate time to prepare. Lindgren, 58 Wn. App. at 594, 794 P.2d 526. Specifically, a copy of the motion had been received by the attorney for the adverse party, that attorney had recently filed papers in the action on behalf of the adverse party, and the party appeared and defended the motion to vacate. Id. at 593, 794 P.2d 526.”

Roberson v. Perez, 123 Wn. App. 320, 338-39, 96 P.3d 420, (2004).

The facts here are similar to those in Lindgren. The plaintiffs served the attorney who had represented Detective Perez and Chief Badgley until they were dismissed from the lawsuit just a short time before the beginning of the second trial in 2001. Counsel appeared at the hearing in 2002 and argued on behalf of Detective Perez and Chief Badgley against the vacation of the 2001 dismissals. In these circumstances, the deviation from CR 60(e)'s requirements was inconsequential.

This argument is made for the first time on appeal. If the argument had been properly presented to the Trial Court, the service could have been corrected. See for example, Griffith v. City of Bellevue, 130 Wash.2d 189, 194, 922 P.2d 83 (1996) (holding that a timely application for a writ of certiorari that contains a verification lacking a signature

should only be dismissed under CR 11 where the appellant fails to sign the verification promptly after the omission is called to his attention).

Not having brought any objection to the service of the motion at the trial court, the City Respondents have waived that argument.

City Respondents have cited no authority for the proposition that the trial court, which clearly already has jurisdiction over the parties, lacks the ability to grant a CR 60 motion merely because the requirements for personal service under CR 60(e)(3) may not have been strictly adhered to. The service requirement is in CR 60, because such motions are often filed many months or years after final judgment, after attorneys have withdrawn, and personal notice to the parties is required. In this case, the City Respondents' attorneys received actual notice of the CR 60 motion, and do not claim any prejudice in the manner in which they were notified.

These arguments should have been made to the Superior Court, in a hearing on the merits, not in a CR 12 dismissal by default.

“Biomed urges us to reach the merits of its appeal although the superior court never reached those merits. We decline to do so.

The superior court took no action on the merits because it dismissed the petition with prejudice. There is no compelling reason for this court to reach the merits without the superior court first ruling on those merits.

We reverse the order of dismissal with prejudice and remand for further proceedings.”

Biomed Comm., Inc. v. Dept. of Health Board of Pharmacy,  
\_\_\_ Wn. App. \_\_\_, 193 P.3d 1093, 1100, (Division 1 No.  
60751-1-I, 2008).

***3. Plaintiff's CR 60 Motion was Sufficiently Supported;***

Citi Respondents next argue, that the affidavits supporting the CR 60 motion were insufficient. Again, literal compliance with CR 60 is not required;

In Griggs v. Averbeck Realty, Inc., 92 Wash.2d 576, 583, 599 P.2d 1289 (1979), the Court of Appeals allowed vacation of a judgment under CR 60, even though the moving party failed “to comply literally with CR 60(e)(1)” – in its affidavit accompanying the CR 60 motion. As that court stated; “[t]here was a violation of CR 60 in this case. But the rules are to be construed to secure the just determination of every action. CR 1.”

City Respondents do not cite to any authority regarding this argument, and this Court should not consider the perfunctory one-paragraph argument, without supporting authority.

Where a party “fails to present any argument on the issue or provide any legal citation, an appellate court will not consider the merits of that issue.” State v. Olson, 126 Wn.2d 315, 321, 893 P.2d 629 (1995), also Ang v. Martin, 154 Wn.2d 477, 487, 114 P.3d 637 (2005).

“A contention not supported by authority or argument need not be considered on appeal. RAP 10.3(a)(5); McKee v. American Home Prods. Corp., 113 Wn.2d 701, 705, 782 P.2d

1045 (1989); Bremerton v. Shreeve, 55 Wn. App. 334, 338, 777 P.2d 568 (1989).”  
Rhinehart v. Seattle Times, 59 Wn. App. 332; 798 P.2d 1155; 1990.

#### ***4. Requisite Showings in CR 60 Motion.***

The bulk of Citi Respondents’ brief argues, that the requisite showings are not made in the CR 60 motion.

This argument is entirely subject to the holdings that literal compliance with CR 60 is not required;

In Griggs v. Averbeck Realty, Inc., 92 Wash.2d 576, 583, 599 P.2d 1289 (1979), the Court of Appeals allowed vacation of a judgment under CR 60, even though the moving party failed “to comply literally with CR 60(e)(1)” – in its affidavit accompanying the CR 60 motion. As that court stated; “[t]here was a violation of CR 60 in this case. But the rules are to be construed to secure the just determination of every action. CR 1.”

“Our primary concern in reviewing a trial court's decision on a motion to vacate is whether that decision is just and equitable. Calhoun v. Merritt, 46 Wash.App. 616, 619, 731 P.2d 1094 (1986). "Justice is not done if hurried defaults are allowed, but neither is it done if continuing delays are permitted." Johnson v. Cash Store, 116 Wash.App. 833, 841, 68 P.3d 1099 (2003). "This system is flexible because “[w]hat is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of the outcome.” Little, 160 Wash.2d 696, 16, 161 P.3d 345 (quoting Griggs, 92 Wash.2d at 582, 599 P.2d 1289).”  
TMT Bear Creek Shopping v PETCO., 140 Wn. App. 191, 165 P.3d 1271, (2007).

*a. Excusable Neglect.*

The “excusable neglect” refers to the failure to file an answer in the original default, not to any delay in filing the CR 60 motion. In this case, the Plaintiffs’ failure to respond to the CR 12 motion, which was granted by default.

Mr. Carter indicated that he believed he had retained counsel, and was out of the country during the time the motion was mailed to the Texas address, and therefore unable to respond (CP 48).

Mr. Carter had left the country shortly after the case was filed, but made arrangements for an attorney, Jason Anderson, to appear in the case “after the complaint was served on the defendants.” (CP 50). Unexpectedly, the Citi defendants did not wait for service of the complaint. The City defendants moved for dismissal under CR 12, prior to service of the complaint, and before attorney Jason Anderson had a chance, to or even the need, to appear in the suit.

This is a case where the motion reached an empty house. There was no way that the plaintiff could have responded.

Citi Respondents liken this case to Johnson v. Cash Store, 116 Wn. App. 833, 68 P.3d 1099 (2003), where “a process server personally served the summons and complaint on Laura Fish, manager of the North Pines Road Cash Store in Spokane. Ms. Fish sent the summons and complaint

back to Ms. Johnson's counsel in separate envelopes on November 15. In each envelope she attached a note stating that Ms. Johnson's debts were paid off in November 2000.” In Johnson v. Cash Store, no notice of the motion for default was required. *Ibid*, 839.

Citi's citations to cases of “extended absences from the office” are inapposite, as most lawyers' offices have some person to forward messages to attorneys. No case is cited where the notice was sent to an empty house, the party *pro se* was out of the country, and the attorney's office never received the document, because the attorney had not yet appeared in the case.

Defendants do not cite a single case which indicates that “failure to monitor” the court's on-line web site is not excusable neglect. This Court should note, the Court's on-line databases are not immediately updated, and it can take several days for a filing to appear in the on-line directory. Defendants have not provided any timely print-outs of the Court's web site to indicate when, or if, the motion for default would have appeared on the Internet.

*b. Due Diligence.*

Due diligence to perform an action must be viewed in light of the circumstances. In this case, the attorney had just recently been hired. The

timeliness of a new attorney's response must be measured against similar situations.

The only authority the Citi Respondents cite for the proposition that due diligence requires monitoring an on-line docket (with no showing that the on-line docket is immediate), and requires mail forwarding to an out-of-the-country address – with the delays inherent in that process), is Luger v. Littau, 157 Wash. 40, 288 Pac. 277 (1930). In Luger, the non-moving party had actual notice that a default was sought.

“Summons and complaint in the action were served upon the appellant on May 21, 1929. Within a few days thereafter, he consulted an attorney, not now in the case, and engaged him to defend the action, but paid him nothing. The attorney thus engaged served a general appearance in the action on June 7, 1929, and thereafter, in spite of repeated demands for an answer, did nothing but seek to gain time. On July 9, 1929, respondent's attorneys notified the appellant's then attorney by letter that, unless an answer was served by twelve o'clock noon on July 13, 1929, they would immediately proceed to take default and judgment. No answer being served, the usual motion for default, supported by affidavit and notice of hearing, was served on appellant's attorney, filed on July 16, and an order of default, findings, conclusions and judgment were duly entered on July 17, 1929.

Upon the receipt of the letter of July 9, as well as previous thereto, appellant's then attorney used due diligence in advising his client of the conditions and urging him to come in and give the matter the necessary attention, but without results.

Two or three days before the default was actually entered, appellant procured the papers in the cause from the office of his then attorney, from the stenographer in charge during the attorney's absence, and took them to still another attorney, not now in the case, who seems to have drafted an answer. But

after some telephonic communication with the first attorney, the second attorney appears to have refused to proceed further until a stipulation with the first attorney for substitution should be obtained. There may have been, and probably was, some misunderstanding between these attorneys, but while excusable as to them, we cannot hold that it was excusable as to the appellant. He was promptly given a copy of the letter of July 9, knew that respondent had fixed noon of July 13 as the last moment of grace, and if he chose at that critical time to change attorneys, the burden was on him to give personal attention to the matter and to see that the substitution was properly and promptly made and his answer duly served within the time limited. This he entirely failed to do, and no adequate excuse is offered for his inattention and neglect. Luger v. Littau, 157 Wash. at 41-42.

*c. No Hardship to Citi Respondents.*

Citi Respondents have not asserted any hardship. Citigroup has attorneys on call. They did not indicate that their attorneys had withdrawn, or that they took any action in reliance upon the judgment prior to service of the CR 60 motion.

Citi makes ridiculous assertions that they “incur extraordinary fees to monitor the docket to ensure that Plaintiffs provide copies of the pleadings they file.” This is a claim of prejudice caused by the reinstatement of the litigation – not any claim of prejudice caused by any delay in the filing of the CR 60 motion, and is irrelevant, as well as patently absurd. There is no indication that the Plaintiffs’ attorney, Jason Anderson, had ever failed to serve a copy of any document upon any attorney in this case (or in any other case).

Little v. King, 160 Wn.2d 696, 161 P.3d 345 (WA 2007), the only authority cited in this section, does not discuss the hardship to the non-moving party, except to mention that as a factor.

*d. Irregularity in the Proceedings.*

“Irregularities pursuant to CR 60(b)(1) occur when there is a failure to adhere to some prescribed rule or mode of proceeding, such as when a procedural matter that is necessary for the orderly conduct of trial is omitted or done at an unseasonable time or in an improper manner.” Mosbrucker v. Greenfield Implement, Inc., 54 Wn. App. 647, 774 P.2d 1267 (1989).

Filing a motion to dismiss, prior to any service of the pleadings, is certainly an “unseasonable time”.

Citi does not argue that the proceedings were not in fact irregular, where a motion to dismiss was mailed prior to service of the initial pleadings. There was nothing that would have alerted the plaintiff that something may occur in a lawsuit that had not been served.

Citi then goes on to argue, that the irregularity was not prejudicial. How could not receiving notice of a motion to dismiss, resulting in a dismissal by default, not be prejudicial (especially when all parties had not been served)?

Without filing a cross-appeal, the Citi respondents state that RCW 4.32.240 provides for costs, terms and possibly attorneys’ fees. However, without a cross-appeal, Citi is not entitled to relief.

***5. Dismissal under CR 12(b)(6).***

The Citi Respondents argue that the default was proper – however, the initial determination on whether the motion under CR 12(b)(6) should have been granted should be made at the trial court.

This appeal is not from the CR 12(b)(6) motion, but from the failure to grant relief from that default dismissal under CR 60.

Plaintiff has presented claims which should be heard on their merits at the trial court level.

***1. Washington Collectors Act.***

Appellant discusses the applicability of the Washington Collectors Act in the Opening Brief of Appellant, and will not repeat these arguments here.

Citi Defendants admit that “there are no reported Washington cases construing these definitions” (Brief of Respondent Citi, page 22). This is therefore an issue of first impression, and should be decided on its merits, on a full record and not by default. Clearly, the plaintiffs have the right to have the applicability of the Washington Collectors Act determined under Washington law.

### *2. Consumer Protection Act.*

Citi claims not to be subject to the Washington Consumer Protection Act, without citing any authority for that proposition. Again, plaintiff has a right to have this determined on its merits.

Citi does not respond regarding RCW 19.16.250. In this case, the actions of both, Citi and Suttell included threats to collect additional amounts to which they were not entitled, including collections from bank accounts belonging to Oak Harbor Chiropractic. This was clearly in violation of RCW 19.16.250, and therefore a per se violation of the Consumer Protection Act. The action of collecting funds without authorization violates RCW 19.16.250, were found to be per se violations of the Consumer Protection Act and not exempt from the act because they were committed during the course of a suit, Evergreen Collectors v Holt, 60 Wn. App. 151, 803 P.2d 10, (1991). This means, even if a lawsuit is used to commit such violations, a remedy is still available under the Consumer Protection Act.

### *3. Abuse of Process.*

An appeal from the failure to grant a CR 60 motion is not meant as an issue-by-issue discussion of the underlying case. Plaintiff has a right to have this issue determined on its merits. Process has been abused in this

case, because of the irregularities in the proceedings, against both of the plaintiffs.

#### *4. Wrongful Garnishment.*

Garnishment was not conducted by the Suttell defendants on their own behalf, but, rather, at the instance of Citi. Citi does not claim that Suttell owned the judgment. The Citi Respondents do not claim that Suttell Respondents were not authorized to garnish, on behalf of Citi.

Citi cites Fite v. Lee, 11 Wn. App. 21, 521 P.2d 964, for the proposition that abuse of process is beyond “the scope of the attorney’s implied authority as an agent”. In this case, the authority was not “implied,” there was actual authority for the garnishment.

Fite v. Lee determined that garnishment of an excessive amount, if authorized by the court and otherwise procedurally proper, was not abuse of process. However, in this case, we have garnishment against the wrong party, not the circumstance of Fite v. Lee.

### **3. Answer to Suttell Issue 2, and Citi Issue 5. Statutes of Limitations.**

Both Suttell Respondents and Citi Respondents’ only claim is of at three- year Statute of Limitations. However, as cited in the Opening Brief of Appellant, some of the claims have four-year periods of Statutes of Limitations. This is not disputed by Citi Respondents.

The continuing garnishments were a continuing tort, and therefore, the Statute of Limitations begins to run from the conclusion of the garnishments, not the commencement of garnishments. This brings the claims within even the three-year Statute of Limitations. The Satisfaction of Judgment concluding the collection process was actually filed on January 18, 2005, less than three years prior to the current suit, CP 184, CP 178.

Suttell Respondents even give the following citation, on pages 12 and 13 of their Brief; “statute begins to run against such an action from the termination of the acts which constitute the abuse complained of.” That is precisely our point, the statute runs from the *termination* of Suttell’s and Citi’s abusive garnishments, i.e., from the date of the Satisfaction of Judgment (that date is carefully omitted from the Suttell Brief, page 13 – but is within the Statute of Limitations).

#### **4. Res Judicata.**

Appellant points out in the Opening Brief, that the Citi respondents are unclear, what lawsuits they use to claim res judicata. It is assumed that respondents are attempting to use one or both of the Island County suits, where default judgments were obtained against one of the appellants herein.

Citi Respondents never claim that the prior Island County suits addressed any issues on the merits, and cite no authority for the proposition that res judicata can be applied on the basis of prior judgments, where the debt collector's standing to sue was never adjudicated. As argued in the Brief of Appellant, "There appears to be no basis for res judicata to apply, the Island County judgments do not include Oak Harbor Chiropractic Health Center as a party (no identity of parties), and there is no indication that Brent Carter appeared or defended the Island County cases or that the judgments went to the merits rather than merely granting the amount sought in the complaint, by default." - Brief of Appellant, page 14, footnote 5.

The Citi Respondents cite to Corbin v. Madison, 12 Wn. App. 318, 529 P.2d 1145 (1974), where the Court specifically found that the party subject to res judicata had participated in the prior suit; "[h]aving appeared in this prior condemnation litigation, which finally and conclusively adjudicated the respective rights of the parties, the Madisons are now barred by the doctrine of res judicata from relitigating the issues by way of a cross complaint in the instant action for libel and for an accounting." Corbin v. Madison, 12 Wn. App at 324.

In Norris v. Norris, 95 Wn.2d 124, 622 P.2d 816, (1980), the court held that a probate decree had res judicata effect over a later quiet title action,

specifically because of that party's "actions in the probate proceedings". In Kelly-Hansen v. Kelly-Hansen, 87 Wn. App. 320, 941 P.2d 1108 (1997), the Court found res judicata based upon a prior dissolution decree, in which both parties participated.

The Citi Respondents miss-cite Lenzi v. Redland, 140 Wn.2d 267, 996 P.2d 603, (2000). Citi indicates that an insurer was barred by res judicata based upon a prior proceeding in which the insurer had an opportunity to intervene. The actual holding, as written by Justice Talmadge, is "we hold the UIM insurer is bound by the default judgment where it had timely notice of the filing of the lawsuit by its insureds and ample opportunity to intervene in the lawsuit to protect its interests, but declined to do so." The operative word is declined. The insurance company had ample notice, and declined to intervene. In this case, there is no such showing as to the default judgments entered in Island County.

Respondents do not make any showing that there was identity of claims, identity of parties, or a resolution of any issues on the merits in the prior Island County actions, so res judicata cannot apply.

The parties are not the same, because the corporation was not a party to the prior actions. In order to apply res judicata, the prior actions must have been resolved on their merits. Citi Respondents do not cite any

authority that a judgment against an individual may serve as res judicata to a subsequent suit by a corporation for wrongful garnishment.

”The whole philosophy of the doctrine of res adjudicata is summed up in the simple statement that a matter once decided is finally decided.’ and that it if appears that a judgment upon the merits was in fact rendered, it is conclusive in a subsequent action where the subject-matter and the parties are the same.”

Nunn v. Mather, 60 Wash. 484, 487, 111 P. 566 (1910).

Citi Respondents do not state, which of the claims from this litigation were actually decided on the merits in the prior Island County suits. The fact that actions may pertain to the same “account” does not mean that there is identity of subject matter, or that any of the issues set forth in this case were decided on their merits. Citi Respondents do not argue that any of the plaintiff’s claims in this action would have been mandatory counterclaims in the prior Island County suits. In fact, this suit pertains to matters occurring after the prior lawsuits were completed, therefore, no res judicata effect can be claimed; in Hilltop Terrace Assn v. Island County, 126 Wn.2d 22, 891 P.2d 29, (1995), the Court held that res judicata would not apply, and “a second application may be considered if there is a substantial change in circumstances or conditions relevant to the application or a substantial change in the application itself”.

In this case, the lawsuit is not regarding the credit card, or the debt claimed by Citi, rather, the suit is regarding the collection process itself,

which took place after entry of the judgments for which res judicata is sought. Other issues in this suit concern subjects which were not mandatory counterclaims, and not adjudicated on their merits in the prior suits.

#### **5. Citi Lack of Standing to Sue.**

Citibank cites to two cases, from Idaho and Texas District (trial) Court, which are not authority for this Court, do not help the Citi Respondents in this case. In the Idaho case, that court specifically said, “Because Citibank was the sole owner of Carroll’s account at the time it brought suit, it is entitled to recovery of the funds on that account and, therefore, has standing to sue.” (Citibank v. Carrol, Attachment One). So, under that case, the ownership of the account at the time of suit is dispositive, and this is a factual question which has not been determined. Plaintiff has the right to conduct discovery, to discover ownership at the precise time of suit. The second case cited by Citi, from the U.S. District Court, Western District of Texas, is inapposite because it concerns Citibank’s ownership of credit card portfolios in Texas, in 2009; “Citibank has provided summary judgment evidence that it retains ownership of credit card accounts in which the receivables are sold to the master trust. In support of its motion, Citibank included its *Prospectus Supplement*

*Dated March 19, 2009, to the Prospectus Dated March 18, 2009, that discusses the Citibank Credit Card Issuance Trust.” (Tostado v. Citibank, WD Texas, Civil Action No. SA-09-CV-549-XR, Order Granting Motion to Dismiss, 01/04/2010, as cited by Citi). Notably, in the Texas District Court case, there was no claim for wrongful garnishment, only a claim for non-ownership of the account.*

In this case, no discovery was conducted due to the immediate dismissal obtained by Citi Respondents, and Citi has not provided any evidence of its ownership of the accounts in question as of the time of the Island County lawsuits, judgments, and/or garnishment actions.

#### **6. Law Firms Subject to Washington Act.**

Suttell Respondents first argue that their reliance on a repealed statute was a typographical error. This does not change the fact, the Summary Judgment was based upon a repealed statute.

Suttell respondents rely on the definition section of RCW 19.16.100(3)(c);

RCW 19.16.100(3) "Collection agency" does not mean and does not include:

...

(c) Any person whose collection activities are carried on in his, her, or its true name and are confined and are directly related to the operation of a business other than that of a collection agency, such as but not limited to: Trust companies;

savings and loan associations; building and loan associations; abstract companies doing an escrow business; real estate brokers; property management companies collecting assessments, charges, or fines on behalf of condominium unit owners associations, associations of apartment owners, or homeowners' associations; public officers acting in their official capacities; persons acting under court order; lawyers; insurance companies; credit unions; loan or finance companies; mortgage banks; and banks;

It is important to read the entire paragraph. Lawyers are exempt if they, like banks, brokers, and homeowners' associations, collect debts owed to themselves, in their own name. Suttell Respondents have never claimed to own any debts associated with credit cards or securities. Suttell respondents cannot come under the exception in RCW 19.16.100(3)(c).

For example, to be exempt under RCW 19.16.100(3)(c), a law firm's trust fund had to "collect debts related to the [law] firm's business". Trust Fund Services v. Aro Glass Co., 89 Wash. 2d 758, 763, 575 P. 2d 716, 719 (1978). In this case, the law firm collects on behalf of others, not debts related to its own business, therefore, the exception in RCW 19.16.100(3)(c) does not apply.

Suttell Respondents bring forward no set of facts that would make them anything other than a collection action. They scorn the evidence from their own stationery, letterhead, and their own activities, as "subjective" – but this clearly is documentary, objective evidence. Suttell Respondents could easily show one client that is not a collection action,

but have not done so – because they in fact do not practice law, other than to act as collection agents.

The Washington State Department of Revenue offices show a business entitled “Suttell Collection Services, Inc., where the principal is William Suttell, UBI Number 601688688, located at 1450 114<sup>th</sup> Ave SE Ste 240, Bellevue, WA 98004 which is the office address for the Suttell and Hammer law firm. Nonetheless, Mr. Suttell, nor either of his companies, has a license as a collection agency.

Suttell Respondents cite to cases involving clients who sue their own attorneys, as standing for the proposition that the plaintiffs herein have no cause of action against Suttell and Associates (Now known as Suttell & Hammer PS). These cases are inapposite, as the Suttell Respondents never represented the plaintiffs, and this is not a client’s malpractice claim.

Panag v. Farmers Ins. Co. of Wash., 166 Wn.2d 27, 204 P.3d 885 (2009), has been miss-cited by the Suttell Respondents, in that they misleadingly omit the operative language from the footnote partially quoted at page 19. The Panag court held;

“[w]e hold that a private CPA action may be brought by one who is not in a consumer or other business relationship with the actor against whom the suit is brought. We further hold that there is no adversarial exemption from suit under the CPA. When established, the five Hangman Ridge elements of

a CPA citizen suit assure that the plaintiff is a proper party to bring suit . . . As noted, the debtor who receives a letter masquerading as a bona fide collection notice from a regulated collection agency may be lulled into believing he or she is protected by the regulations generally applicable to debt collection.

We conclude the CPA is applicable to deceptive insurance subrogation collection activities, considering the broad legislative mandate that the business of insurance is vital to the public interest, the public policies favoring honest debt collection, and the statutory mandate to liberally construe the CPA in order to protect the public from inventive attempts to engage in unfair and deceptive business practices . . .

(fn 14) CCS raises the specter of CPA claims filed against attorneys who send demand letters on behalf of their clients. The United States Supreme Court brushed aside similar concerns in deciding the FDCPA applies to attorneys who regularly engage in debt collection. Heintz v. Jenkins, 514 U.S. 291, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995). The Court's rejection of a litigation exception to the FDCPA prevents regulated entities from evading regulation by conscripting lawyers to accomplish indirectly what they may not do directly. Attorneys who engage in bona fide collection activities on behalf of their clients have no need to fear suit. Moreover, this court has concluded that the CPA has no application to the performance of legal services. See Michael v. Mosquera-Lacy & Bright Now! Dental, Inc., 165 Wash.2d 595, 200 P.3d 695 (2009); Short, 103 Wash.2d at 61, 691 P.2d 163 (CPA applies only to entrepreneurial aspects of legal practice such setting price of legal services, billing and collection, and obtaining, retaining, and dismissing clients).”

Panag v. Farmers Ins. Co. of Wash, 166 Wn.2d 27, 204 P.3d 885 (2009),

This comment, in a footnote in the Panag case, affirms that the Federal Debt Collection Practices Act applies to attorneys who regularly engage in debt collection. To have no fear of suit, attorneys must engage

in “bona fide collection activities” – in other words, suit can be brought when the collection activities are unfair and deceptive.

**7. Oak Harbor Chiropractic Health Center P.S. as a Dissolved Corporation.**

For the first time on appeal, the Suttell Respondents make the argument that Oak Harbor Chiropractic Health Center P.S. could not maintain an action because it was a dissolved corporation. This claim was not made at the trial court, and is being made for the first time on appeal. Generally issues not raised in the trial court may not be raised for the first time on appeal. RAP 2.5(a). Suttell Respondents do not cite to any authority that would raise this issue to a Constitutional dimension, such that this issue would be allowed for the first time on appeal.

Suttell Respondents assert that Oak Harbor Chiropractic Health Center was dissolved as a corporation on August 1, 2007, and this suit was filed December 31, 2007. Suttell attaches a “Certificate of Administrative Dissolution”, as an exhibit, even though this was not part of the trial court record. This Court should strike any documentary exhibits which are not part of the trial court record.

Administrative Dissolution can be repaired, if brought to a party’s attention in a timely fashion.

As admitted by the Suttell Respondents, an administratively dissolved corporation can still maintain an action for two years after its dissolution. This suit was filed prior to expiration of the two-year time period for administrative dissolution, during a time when the corporation could have been reinstated. Since the Suttell Respondents failed to bring up this issue in the suit, when at all times the corporation could still have been reinstated, they should be stopped from bringing this issue in this appeal.

**Conclusion.**

The denial of the CR 60 motion for relief from Citi's default judgment of dismissal should be reversed.

The Suttell Respondents request, at page 22 of their brief, a remand to the trial court for further findings. Since Suttell Respondents never presented facts to the Trial Court to indicate that they were not in fact a collection agency, the remand should be for new trial, to allow discovery of both, the Citi and Suttell Respondents.

Respectfully submitted this Feb 16, 2010



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Jason Anderson, WSBA # 32232,  
Attorney for Appellants

**CERTIFICATE OF SERVICE**

Under penalty of perjury under the laws of the state of Washington, I declare that on 4/16/2010, a true copy of this document was sent for service via:

- Legal Messenger
- Fax or electronic transmission
- US Mail, postage prepaid

upon the following:

Kathryn P. Salyer, Farleigh Wada Witt, 212 SW Morrison St., Suite 600 portland, OR 97204-3136, Fax: 503-228-1741. email, ksalyer@fwwlaw.com, attorney for Citi Defendants

William R. Kiendl, Suttell & Associates, 1450 – 114<sup>th</sup> Ave SE. Ste. 240, Bellevue, WA 98004, email, wrk@leesmart.com,

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JS 4/16/2010  
By: \_\_\_\_\_ Date: \_\_\_\_\_

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 35053

CITIBANK (SOUTH DAKOTA), N.A.,	)	
	)	
Plaintiff-Respondent,	)	Boise, November 2009 Term
	)	
vs.	)	2009 Opinion No. 139
	)	
MIRIAM G. CARROLL,	)	Filed: November 25, 2009
	)	
Defendant-Appellant.	)	Stephen W. Kenyon, Clerk
_____	)	

Appeal from the District Court of the Second Judicial District of the State of Idaho, Idaho County. Hon. John H. Bradbury, District Judge.

The district court's summary judgment order is affirmed.

Miriam G. Carroll, Kamiah, appellant pro se.

Stroock & Stroock & Lavan LLP, Los Angeles, California, and Hawley Troxell Ennis & Hawley LLP, Boise, for respondent. Sheila R. Schwager argued.

\_\_\_\_\_  
J. JONES, Justice.

This is an appeal from the district court's grant of summary judgment against Miriam Carroll in Citibank (South Dakota), N.A.'s collection action. We affirm.

**I.  
Factual and Procedural Summary**

Carroll requested and received a credit card from Citibank in 1999, and she regularly used the card until December 2004. Carroll had a zero balance on her account as of September 9, 2003. However, between December 22, 2003, and February 12, 2004, Carroll transferred balances in the amount of \$24,800 from other accounts to her Citibank account. Carroll continued to make the minimum payment on her account during this time and immediately after the balance transfers. However, on November 29, 2004, Carroll made her last minimum payment

on the account, making no payments after that date, despite the fact that her account had a balance due of \$20,884.30.

On January 3, 2005, Citibank received a letter from Carroll that questioned the accuracy of her account balance but did not allege any specific charge that was in dispute.<sup>1</sup> Citibank responded by letter on January 7, 2005, reminding Carroll that it had engaged in a lawful extension of credit under federal and state law, Carroll was obligated to pay her account balance according to the terms of the credit card agreement, there was a balance due and owing, and the account was closed as the result of her default. Carroll never responded to Citibank's letter and made no further payments on her account.

As a result of Carroll's nonpayment, Citibank filed suit against her seeking recovery of the account balance, plus interest and attorney fees. Carroll answered pro se, asserting the existence of billing errors in the account and denying that she was in default. Carroll also asserted a number of affirmative defenses, including violations of the Truth in Lending Act (TILA) and the Fair Credit Reporting Act (FCRA), and negligence per se. Citibank filed a motion for summary judgment, seeking a monetary judgment against Carroll on the account.

In opposition to Citibank's motion for summary judgment, Carroll abandoned her billing error and the TILA/FCRA arguments, instead focusing on the fact that Citibank was not licensed under the Idaho Collection Agency Act (ICAA) and that it lacked standing, i.e., that it had engaged in asset securitization, assigning the receivables from Carroll's account to a trust in order to sell account-backed securities, and no longer owned the account. Citibank argued that, despite the fact that it had assigned the receivables from Carroll's account to a trust, it was still the owner of the account and contractually entitled to collect the account balance. Citibank also argued that, because it was a national bank, it was governed by federal law and, thus, not required to register under the ICAA. After voluminous briefing and multiple hearings and

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<sup>1</sup> The letter Carroll sent to Citibank was based on forms obtained from a now defunct corporation, Dynamic Solutions, Inc. The letter claimed that the credit card company made a billing error because it failed to credit the account holder for a signed note, essentially a promissory note, that was entered into at the time of the application for, and issuance of, the credit card. The theory lacks any basis in law because, even were a promissory note given in satisfaction of the credit card debt, of which there is no evidence in this case, Citibank would still be entitled to seek collection of the amount owing under the promissory note. If the application for credit were a promissory note, as Carroll argues, then it would be collectible under the terms of the credit agreement entered into in this case, meaning that Citibank would be entitled to send a statement that reflects the amount owing on the note.

depositions, the district court agreed, finding that Citibank was entitled to judgment as a matter of law.

Carroll immediately filed a motion for reconsideration pursuant to I.R.C.P. 11(a)(2)(B). Carroll again argued that Citibank was not a real party in interest as required by I.R.C.P. 17(a), Citibank misrepresented the amount of the debt, and evidence was improperly admitted and considered in support of the summary judgment motion. Carroll also filed a document, simply styled "Objections," in which she argued that the court should not have granted Citibank's summary judgment motion because it had not yet ruled on Carroll's motion to dismiss for lack of standing. Carroll also argued the I.R.C.P. 17(a) real-party-in-interest issue in her Objections document. Citibank, in turn, filed memoranda in opposition to Carroll's motions, and also moved for entry of judgment on the summary judgment motion, along with an award of attorney fees and costs.

Ultimately, after several attempts at continuance, extension of discovery, and other dilatory tactics by Carroll, the district court denied Carroll's motion to reconsider and entered judgment for Citibank, along with an award of attorney fees and costs. The court also issued a protective order against further discovery because of Carroll's continuing requests for discovery and service of subpoenas throughout the pendency of the motion for reconsideration. Carroll filed a timely appeal to this Court.

## **II. Issues on Appeal**

The following issues are presented on appeal: (1) whether the issue of ICAA governance can properly be reviewed by this Court; (2) whether the district court erred in determining that Citibank was a real party in interest with standing to pursue the collection claim against Carroll; (3) whether Citibank is entitled to attorney fees and costs on appeal; and (4) whether Carroll's husband, David F. Capps, engaged in the unauthorized practice of law.

### **A. Standard of Review**

This Court exercises free review over constitutional issues, such as issues of standing and federal preemption. *See Fisk v. Royal Caribbean Cruise Lines, Ltd*, 141 Idaho 290, 292, 108 P.3d 990, 992 (2005). When reviewing the grant of a motion for summary judgment, this Court applies the same standard used by the district court in ruling on the motion. *Van v. Portneuf Med.*

*Ctr.*, 147 Idaho 552, 556, 212 P.3d 982, 986 (2009). “Summary judgment is properly granted when ‘the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.’” *Id.* (quoting Idaho R. Civ. P. 56(c)). The burden of demonstrating the absence of a genuine issue of material fact is on the moving party. *Id.* This Court must construe the record in favor of the nonmoving party, drawing all reasonable inferences in that party’s favor. *Id.* If a court finds that reasonable minds could differ on conclusions drawn from the evidence presented, the motion must be denied. *Id.* However, the nonmoving party must respond to the motion with facts that specifically show there is an issue for trial; the showing of a mere scintilla of evidence will be insufficient to meet that burden. *Id.* The denial of a motion for reconsideration is reviewed for abuse of discretion. *Id.* at 560, 212 P.3d at 990.

**B.**

Throughout the proceedings in the district court and in her notice of appeal, Carroll argued that Citibank should not be able to collect her debt because it has failed to register with the State of Idaho, as required by the ICAA (Idaho Code sections 26-2221 to 2251). However, Carroll makes no mention of the ICAA argument in her opening brief. This Court will not consider an issue not “supported by argument and authority in the opening brief.” *Jorgensen v. Coppedge*, 145 Idaho 524, 528, 181 P.3d 450, 454 (2008); *see also* Idaho App. R. 35(a)(6) (“The argument shall contain the contentions of the appellant with respect to the issues presented on appeal, the reasons therefor, with citations to authorities, statutes and parts of the transcript and the record relied upon.”) Here, because Carroll has failed to make any argument or cite any authority in her opening brief to support her argument on the application of the ICAA, this Court need not consider the applicability of the ICAA to Citibank and the credit obligation in question.

**C.**

Carroll argues that Citibank’s action should be dismissed because it is not a real party in interest. Carroll has two bases for this contention. First, Carroll argues that Citibank’s assignment of the receivables from her account to a trust, as a part of an asset-securitization transaction, deprives Citibank of the right to sue because an assignor is not a real party in interest. Second, Carroll argues that because Citibank is not entitled to retain the receivables if recovered, it has suffered no injury and therefore lacks standing to sue. As a result, Carroll argues that the district court should not have granted summary judgment to Citibank because its

real-party-in-interest status and standing to bring suit present questions of material fact that should have been presented to a jury. Citibank, in turn, argues that it only made a partial assignment of its interest in Carroll's account and, because of its extensive role in controlling and servicing the account, it has a sufficient stake in the account to allow for a finding of real-party-in-interest status and standing as a matter of law. It also footnoted in its brief that despite the partial assignment, it was the sole owner of the account at the time this action was commenced because any interest of the trust had theretofore reverted back.

1.

"Every action shall be prosecuted in the name of the real party in interest." Idaho R. Civ. P. 17(a). A real party in interest is "one who has a real, actual, material, or substantial interest in the subject matter of the action." *Caughey v. George Jensen & Sons*, 74 Idaho 132, 134–35, 258 P.2d 357, 359 (1953). The main purpose of the real-party-in-interest rule is to ensure that the defendant will not be subjected to multiple obligations, and that the party bringing the action has the ability to protect the defendant from subsequent suits concerning the same obligation. *Id.* at 135, 258 P.2d at 359. "A party may have capacity to sue without being a real party in interest." 59 AM. JUR. 2D *Parties* § 43 (2009). However, where real-party-in-interest status has been made mandatory by statute or rule, as it has in Idaho, real-party-in-interest status must be demonstrated before a suit can proceed. *See* Idaho R. Civ. P. 17(a) ("Every action *shall* be prosecuted in the name of a real party in interest.") (emphasis added). Generally, the holder of legal title to the subject matter of a cause of action is a real party in interest. *Caughey*, 74 Idaho at 135, 258 P.2d at 3359. Legal title is defined as "title that evidences apparent ownership but does not necessarily signify full and complete title or a beneficial interest." BLACK'S LAW DICTIONARY 1523 (8th ed. 2004).

It is unnecessary to address Carroll's arguments about Citibank's status as a real party in interest, as the plain language of Citibank's agreement with the trust to which it made the partial assignment shows that Citibank held full title to Carroll's account at the time it brought suit against her. The agreement between Carroll and Citibank gives the following terms for default:

You default under this Agreement if you fail to pay the minimum payment listed on each billing statement when due, fail to make payment to any other creditor when due . . . exceed your credit line without permission, . . . . If you default, we may close your account and demand immediate payment of the full balance.

Carroll made the last payment on her account on November 29, 2004. The amended complaint in this matter was not filed until July 10, 2006, over one-and-one-half years after Carroll made her last payment, meaning that she had been in default for almost eighteen months when Citibank filed suit. Furthermore, Citibank sent Carroll a letter in January 2005, responding to her billing error letter and notifying her that her account had been closed for failure to make payment, which is an event of default under the agreement between Citibank and Carroll. Billing statements sent to Carroll after December 2004 also made clear that Carroll's account was in default.

Under Citibank's agreement with the trust, any account that is delinquent for 185 days "shall be deemed a Defaulted Receivable" unless the obligor/debtor has declared bankruptcy or become insolvent at some earlier time. "Delinquent," in the context of a credit obligation, simply means "past due or unperformed." BLACK'S LAW DICTIONARY 460 (8th ed. 2004). "Deemed" means "[t]o treat something as if (1) it were really something else, or (2) it had qualities that it does not have," essentially, to establish an operative legal fiction. *Id.* at 446. Accordingly, the language of the defaulted-receivable provision of the trust agreement shows that it is triggered automatically once an account had been in default for 185 days, rendering the receivable from the account a defaulted receivable, despite the fact that other underlying conditions for defaulted-receivable status have not been met.

The "deemed" language of the trust agreement is important because of the way in which the agreement defines "defaulted receivables." The trust agreement defines "defaulted receivables" as accounts that "are charged off as uncollectible" in Citibank's files. While this may seem to require an affirmative action on the part of Citibank to characterize the account as a defaulted receivable, the deeming language in the agreement converts the receivable to a defaulted receivable after 185 days of default without affirmative action by Citibank. The trust agreement also provides that on the date that a receivable becomes a defaulted receivable, it will *automatically* be transferred back to the seller (Citibank) without any further action on the part of the trust or Citibank.<sup>2</sup>

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<sup>2</sup> The relevant clause reads:

[O]n the date when any Receivable in an Account becomes a Defaulted Receivable the Trust shall automatically and without further action or consideration be deemed to transfer, assign, set over and otherwise convey to the applicable Seller, without recourse, representation or warranty, all right, title and

In this case, Carroll's account was 185 days in default at some point in mid-2005, and the amended complaint was not filed until 2006, meaning that all interest in Carroll's account reverted to Citibank under the terms of the trust agreement before Citibank filed suit. Because all interest held by the trust in Carroll's account was transferred to Citibank before it sued Carroll, it held legal title to all aspects of the account, including the right to payment. As the holder of legal title, Citibank is a real party in interest, entitled to bring suit under I.R.C.P. 17(a) and the *Caughey* standard. As noted in *Caughey*, the purpose of the real-party-in-interest rule is to ensure that the defendant is not subjected to multiple obligations because both an assignee and assignor are seeking recovery. Because title to Carroll's account was vested entirely in Citibank at the time it brought suit and the trust had no legal interest in Carroll's account, there is no danger that Carroll will be subject to multiple obligations. Thus, because the plain language of the trust agreement demonstrates that Citibank was the real party in interest, and that no other party had any interest in Carroll's account at the time it brought suit, Citibank's real-party-in-interest status does not create a question of fact that would preclude the district court's grant of summary judgment.<sup>3</sup>

2.

Because Citibank was the sole owner of Carroll's account at the time it brought suit, it is entitled to recovery of the funds on that account and, therefore, has standing to sue. Questions of standing must be decided by this Court before reaching the merits of the case. *Taylor v. Maile*, 146 Idaho 705, 709, 201 P.3d 1282, 1286 (2009). Standing inquiries focus on the party seeking relief. *Id.* In order to demonstrate standing, a party must be able to "allege or demonstrate an injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury." *Id.*

Citibank has suffered an injury in this case because it has not been paid under its agreement with Carroll. Carroll's argument that Citibank lacked standing is largely focused on

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interest of the Trust in and to the Defaulted Receivables arising in such Account,  
all monies due and to become due with respect thereto and all proceeds thereof

<sup>3</sup> Carroll also argued that Citibank had not yet regained title to her account at the time of suit because it was required to generate paperwork when the account was transferred back from the trust to Citibank. This argument evidences a misunderstanding of the terms of the trust agreement. Provisions that require the generation of paperwork concern "ineligible receivables" rather than the "defaulted receivables" that are at issue in this case. Further, even were there a requirement that some paperwork be generated, the requirement would be irrelevant in light of the deeming language contained in section 2.09 of the trust agreement, providing that the interest transfers automatically on default without any action by either party.

her contention that, even if Citibank recovered in this suit, it would be contractually obligated to pay any recovery it received to the trust. Carroll argued that because Citibank was not entitled to retain any recovery it might be awarded on the account, it had failed to demonstrate any proof of damage. As discussed above, Citibank was vested with all with all interest in Carroll's account by the terms of the trust agreement when her account became more than 185 days delinquent; accordingly, Citibank is entitled to retain any recovery that is awarded in this action. Additionally, the record is replete with evidence demonstrating Citibank's entitlement to recovery on the account in the amount of the judgment entered by the district court. Thus, were Citibank to collect the amount shown to be due in this case, it would be entitled to that amount.

Therefore, Citibank has demonstrated that it has standing to sue because it suffered an injury that will be redressed by the relief awarded by the district court's grant of summary judgment. Accordingly, the district court's grant of summary judgment is affirmed.

**D.**

Citibank argues that it is entitled to an award of attorney fees and costs pursuant to Idaho Code sections 12-120(3), 12-121, and 12-123, as well as Idaho Appellate Rule 41 and the contractual provisions in the agreement between Carroll and Citibank. Carroll does not address the issue of attorney fees. Citibank is entitled to its attorney fees and costs on appeal according to the agreement between the parties. The agreement between Citibank and Carroll provides "[i]f we refer collection of your account to a lawyer who is not our salaried employee, you will have to pay our attorney's fees and court costs or any other fees, to the extent permitted by law." Idaho Rule of Civil Procedure 54(e)(1) allows for attorney fees to be awarded when provided for by the contract between the parties. Idaho R. Civ. P. 54(e)(1); *Indian Springs, L.L.C. v. Indian Springs Land Inv., L.L.C.*, 147 Idaho 737, 751, 215 P.3d 457, 471 (2009). In order to be entitled to fees under the agreement, Citibank is required to show that it retained an attorney that was not its salaried employee to collect on Carroll's account. This showing is apparent in the record from the affidavits in support of the fee award entered in the district court, as well as the averments in the amended complaint. Accordingly, Citibank is entitled to an award of attorney fees and costs under the agreement between the parties. Its other bases for attorney fees need not be addressed.

**E.**

Although not raised by the parties as an issue on appeal, this Court cannot ignore the fact that Carroll's husband, David F. Capps, engaged in the unauthorized practice of law in this

matter, over Citibank's repeated objections and with the approval of the district court judge. The practice of law has been defined as "doing or performing services in a court of justice, in any matter . . . in a larger sense, it includes legal advice and counsel, and the preparation of instruments and contracts through which legal rights are secured . . ." *In re Matthews*, 58 Idaho 772, 776, 79 P.2d 535, 537 (1938). The practice of law must be something beyond merely filling in blanks on preprepared forms. *Id.* A person who engages in the practice of law without a license may be held in contempt of court, fined up to \$500, and sentenced to up to six months in prison. I.C. §§ 3-104, 3-420. We reiterate our recent holding in *Indian Springs* that while a person has a right to represent himself or herself pro se, the right does not extend to the representation of other persons or entities. 147 Idaho at 734–35, 215 P.3d at 464–65; *see also Weston v. Gritman Mem. Hosp.*, 99 Idaho 717, 720, 587 P.2d 1252, 1255 (1978).

In this case, the record clearly shows that Capps, who is not licensed to practice law, represented Carroll. Carroll admitted in her response to requests for admissions that Capps had drafted the pleadings and papers that were filed on her behalf in this case. Capps himself made similar admissions on the record during a court proceeding, indicating that he was drafting a brief that would be filed with the district court. Capps argued in motion hearings before the district court, over Citibank's objection, with the approval of the district judge.

The integrity of our court system depends on adherence of judicial officers to the laws, as written by the Legislature and interpreted by this Court. In district court, the district judge is the gatekeeper. The district judge is responsible for seeing that the parties comply with the law, even though the judge may disagree with the provisions adopted by the Legislature or may find them burdensome to apply. It is surprising that a district judge would allow an individual appearing before him to violate legislative dictates prohibiting the unauthorized practice of law, despite repeated objections of counsel representing the opposing party. The Court must strongly emphasize that this type of conduct is not to be permitted. After all, we are a State and Nation of laws, not individuals who can disregard duly enacted laws as they see fit.

### III.

We affirm the district court's order granting summary judgment in favor of Citibank and award Citibank its costs and attorney fees on appeal.

Chief Justice EISMANN, and Justices BURDICK, W. JONES and HORTON CONCUR.