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FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 OCT 26 PM 4:26

#63628-6-I

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

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

BRIEF OF APPELLANT

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

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A. Assignments of Error:

1. The trial court erred in entering a default order, granting dismissal under CR 12, to defendants CITIGROUP INC., CITIBANK SOUTH DAKOTA, and CITICORP CREDIT SERVICES, INC. (the Citi defendants). The Order granting dismissal appears to indicate that the Court only read the motion to dismiss and argument of counsel, and not the Verified Complaint. (Complaint verified at CP 97). The Order granting dismissal to the Citi Defendants is at CP 32-33.

2. The trial court erred in failing to vacate the dismissal as to the Citi defendants. (Order Denying Motion to Vacate, at CP 151-152).

3. The trial court erred in granting Summary Judgment to Defendants Suttell and Associates P.S. (CP 408-410) – (The Order Granting Summary Judgment also dismisses the complaint, at CP 410).

4. The Trial Court erred in finding that “plaintiff’s claim under the Washington Consumer Protection Act relates to the professional activities of attorneys engaged in representing their client in a collection lawsuit, and is barred under Washington’s Decisional law, Michael v. Mosquera-Lacy, 165 Wn.2d 595, 604-200 P.3d 695 (2009).” – at CP 410.

B. Issues Pertaining to Assignments of Error:

1. Whether a default order of dismissal should have been granted under CR 12, when the Plaintiffs had not yet served the lawsuit on the Citi defendants, where plaintiffs were pro se and located in Texas, and there was no indication of receipt of the motion to dismiss. (Assignment of Error 1).

2. Whether it was appropriate to grant a CR 12 motion to dismiss with no findings, and apparently without reading the underlying complaint. (Assignment of Error 1).

3. Whether the default dismissal as to the Citi Defendants should have been vacated under CR 60. (Assignments of Error 1 and 2).

3. Whether Summary Judgment was proper as to the Suttell Defendants. (Assignments of Error 3 and 4).

4. Whether Michael v. Mosquera-Lacy, 165 Wn.2d 595, 604-200 P.3d 695 (2009) applies to the Suttell Defendants. (Assignments of Error 3 and 4).

C. Statement of the Case.

Procedure at Trial Court

Appellants, Plaintiffs below, Brent Carter and Oak Harbor Chiropractic Health Center, P.S., commenced suit *in propria persona*, December 31, 2007, against two sets of defendants; the law firm of Suttell and Associates, P.S, and various CitiUsa/ Citigroup entities CP 1. Mr. Carter listed his address as 3610 Alpine Aster, San Antonio, TX 78259. CP 2. The nature of the Complaint was for Unlawful Debt Collection Practices, Wrongful Garnishment, and violations of the Consumer Protection Act. CP 3. Causes of action asserted by Mr. Carter and the Oak Harbor Chiropractic Health Center included violation of RCW 19.16.120 and RCW 19.16.260 (CP 6), violation of RCW 18.235.130(1), (CP 6), abuse of process (CP 7), and others.

On January 25, 2008, defendants Citi USA, Citigroup, Inc., Citibank (South Dakota), N.A., and Citicorp Credit Services, Inc. (hereinafter Citigroup Defendants), moved for dismissal under CR 12, or in the alternative to strike certain paragraphs of the complaint (CP 18) or for more definite statement (see footer notation, CP 17).

The Citigroup Defendants had not been served, prior to filing their motion (CP 17, footnote 1). Neither Plaintiff Carter, nor the remaining defendants, Suttell and Associates, appeared for the hearing on the Citigroup Defendants' motion (CP 31). An order was entered on February 15, 2008 dismissing the Citigroup Defendants with prejudice (CP 32).

Defendants Suttell and Associates P.S. (hereinafter Suttell Defendants) appeared and answered through William Suttell, on March 12, 2008 (CP 34).

Counsel appeared for Plaintiff Carter on July 23, 2008, (CP 41) and, on August 8, 2008, filed a motion to vacate the order of dismissal under CR 60. (CP 49). Counsel's motion was denied on August 28, 2008, upon two grounds as set forth in the order; (1) that Plaintiffs have not shown excusable neglect, and (2) that Plaintiffs have not shown due diligence. (CP 151 and 152). The remaining grounds set forth in the proposed order are not checked, and presumptively the Court did not find either that plaintiffs had not shown a meritorious defense or that plaintiffs had not shown a procedural irregularity which prejudice[d] them. (CP 151

and 152). The Court also directed entry of a final judgment as to the Citi Defendants. (CP 152).¹

Defendants Suttell and Associates filed a motion for Summary Judgment on February 6, 2009 (CP 183), supported by the Declaration of Joel E. Wright, an attorney representing Suttell and Associates (CP 153).

Summary Judgment was granted on May 8, 2009, dismissing with prejudice the Plaintiff's complaint against the Suttell Defendants (CP 409-410). The order granting summary judgment crosses out certain proposed findings, including the proposed findings that the claim under RCW 19.16 and claims for abuse of process and wrongful garnishment are barred by the Statute of Limitations. Also crossed out is a proposed finding of insufficient evidence as to abuse of process by Suttell and Associates P.S. (See crossed out paragraphs, CP 409-410).

Defendants Suttell and Associates P.S. admitted that it is a "Washington Corporation law firm engaged in the business of collecting debts which were originally owed another, within the State of Washington." (Complaint, paragraph 2.2 (CP 4), admitted in Answer, CP 35). The Suttell defendants admitted that jurisdiction and venue were both

¹ Such a statement in the order is not dispositive. Appellant has the option of waiting until all issues as to the remaining defendants are resolved, before appealing the order of August 28, 2008 as to Citigroup Defendants.

proper in the King County Superior Court (Complaint, paragraphs 3.1 and 3.2, (CP 5) admitted in Answer, CP 35).

D. Argument.

This suit stems from wrongful garnishment pursuant to a prior judgment, from Island County Superior Court, obtained by Suttell and Associates on behalf of Citibank South Dakota NA. (Complaint, paragraphs 4.1 and 4.5, (CP 5) admitted in Answer, CP 35). The judgment was against Brent Carter (CP 121), but apparently did not involve the Oak Harbor Chiropractic Health Center.

The Suttell defendants then garnished bank accounts at Wells Fargo and Bank of America (Complaint, paragraph 4.6, (CP 5), admitted in Answer, CP 35). As alleged by the plaintiffs, at least one of the accounts thus garnished was property of Oak harbor Chiropractic Center PS (CP 224, line 25). The Suttell defendants admit that, prior to garnishing the two bank accounts, they “did not pursue any supplemental proceedings to determine whether Mr. Carter had non-exempt assets,” and admitted making the following representations to the Island County court in obtaining writs of garnishment;

“On December 1, 2004, William G. Suttell, an employee or principal of Suttell & Associates P.S. filed a declaration for a

writ of garnishment stating: “The plaintiff has reason to believe and does believe that garnishee BANK OF AMERICA, whose address is 800 5th Ave Ste 2550, Seattle, WA 98104: a) has in its possession or under its control personal property or effects belonging to defendant which are not exempted from garnishment by any state or federal law.””

“On November 18, 2004, Catherine M Kelley, an employee of Suttell & Associates P.S. filed a declaration for writ of garnishment stating: “The plaintiff has reason to believe and does believe that garnishee Pacific Northwest Bank, whose address is PO Box 29779, Phoenix, Z 85038: a) has in its possession or under its control personal property or effects belonging to defendant which are not exempted from garnishment by any state or federal law.””

(Complaint, paragraphs 7.2, 7.3, and 7.4 (CP 7), all admitted in Answer, at CP 36).

In moving for dismissal under CR 12, the Citi defendants claimed to be exempt from the requirements of the Washington Collectors Act based on the ‘common ownership exception’, in that the Citi defendants are all affiliated entities with common ownership. (CP 20). The Citi defendants moved to dismiss claims under the Consumer Protection Act, because those claims pertained to actions by the Suttell defendants, and the Citi Defendants claimed that “a client is not vicariously liable for the acts of its attorney-agent that constitute an abuse of process, including wrongful garnishment.” (CP 20, 22). The Citi defendants also alleged expiration of the statute of limitations as to the November 22, 2004 misrepresentations, and consequent garnishments entered on December 1,

2004 (this lawsuit having been filed on December 31, 2007) (CP 23), although no mention is made of the four-year limitations periods applicable to some of the causes of action such as the Consumer Protection Act violations.² Finally, the Citi defendants alleged improper venue, and res judicata. (CP 23, 24). The res judicata claim appears to rely upon the prior Island County collection action, although no specific lawsuits are set forth (CP 24), and none of the Island County suits appear to have included the Oak Harbor Chiropractic Health Center P.S. as a party. Island County Superior Court case no 04-2-00139-5, Complaint is at CP 156, indicates “a certain credit card account “assigned to Citibank South Dakota N.A. bearing number #---2813 which is the property of the plaintiff (Citibank South Dakota N.A....” That “[w]ithin six years immediately last past... said defendant(s) (Carter) became indebted on said Citibank South Dakota N.A. account to the plaintiff (Citibank South Dakota N.A.) for goods and services in agreed amounts, the unpaid balance of which is \$6,575.23 ...[t]hat the sum of \$650 is a reasonable sum as and for plaintiff’s attorney’s fees...” “We are debt collectors, this is an attempt to collect a debt and any information obtained will be used for that purpose.” (Complaint, CP 156-157). The Order of Summary

² The Suttell Defendants had filed Satisfaction of Judgment on January 18, 2005, less than three years prior to the current suit, CP 184, CP 178.

Judgment by Island County in case no 04-2-00139-5 is at CP 160, and enters judgment for \$6,575.23 principal, \$110 costs, and \$850 in attorney fees. Citibank also included an Order of Summary Judgment in Island County case no 03-2-00587-2 (CP 162), but not the complaint from that action. Garnishments were undertaken in island County case no 04-2-00139-5, with declarations at CP 165 and 170, and Writs issued by a Clerk of the Island County Superior Court, at CP 167 and 172. A Full Satisfaction of Judgment was filed by Suttell and Associates, on behalf of Citibank South Dakota N.A., on January 18, 2005, in case no 04-2-00139-5 (CP 178).

Plaintiffs Carter and Oak Harbor Chiropractic Clinic asserted that Suttell and Associates concealed from Brent Carter a defense to the collection of interest and attorney fees during the Island County litigation (CP 182),

CR 12 Dismissal as to Citi Defendants

Plaintiff Carter had filed a verified complaint (verification is at CP 97), on behalf of himself and the Oak Harbor Chiropractic Health Center P.S.. As of the time the CR 12 motion was filed and granted, the Citi defendants had not even been served with the lawsuit. (See declaration of service, dated March 3, 2008, CP 119). The Motion to Dismiss was filed

on January 25, 2008, with a “summary judgment” hearing on February 12, 2008 (Docket, at CP 116). The only appearance that pre-dated the CR 12 motion had been filed by the Suttell defendants, not the Citi Defendants (Docket, CP 116).

Citi Defendants’ CR 12 Dismissal.

The dismissal obtained by the Citi Defendants was in the nature of a ‘default’ judgment, in that Plaintiffs Carter and Oak Harbor Chiropractic Health Center P.S. did not discover the CR 12 motion in time to respond to the motion.

Standard of Review – CR 12 dismissal

Because the case against the Citi defendants was disposed of on a CR 12(b)(6) motion, this Court must review all issues de novo. Mueller v. Miller, 82 Wn. App. 236, 246, 917 P.2d 604 (1996). This Court must accept facts alleged in the complaint as true. Mueller, 82 Wn. App. at 246. This Court must reverse if any set of facts, consistent with the complaint, would entitle the plaintiff to relief. Mueller, 82 Wn. App. at 246. Janicki Logging & Construction Company, Inc., Appellant, v. Schwabe, Williamson & Wyatt, P.C., et al., 109 Wn. App. 655, 37 P.3d 309, (2001).

Standard of Review – Failure to Set Aside CR 12 dismissal

This court reviews a trial court's decision on a motion to set aside a default judgment for abuse of discretion. Yeck v. Dep't of Labor & Indus., 27 Wash.2d 92, 95, 176 P.2d 359 (1947). Among other things, discretion is abused when it is based on untenable grounds, such as a misunderstanding of law. Braam v. State, 150 Wash.2d 689, 706, 81 P.3d 851 (2003). As a general matter, default judgments are not favored because "[i]t is the policy of the law that controversies be determined on the merits rather than by default." Griggs v. Averbeck Realty, Inc., 92 Wash.2d 576, 581, 599 P.2d 1289 (1979)

An abuse of discretion is more likely to be found if the trial court fails to set aside a default judgment, because this denies a trial on the merits. Griggs, 92 Wash.2d at 582, 599 P.2d 1289; White v. Holm, 73 Wash.2d 348, 351-52, 438 P.2d 581 (1968); Haller v. Wallis, 89 Wash.2d 539, 543-44, 573 P.2d 1302 (1978); ("a ruling which sets aside a default will be reviewed more leniently than one which denies a trial on the merits"); Graham v. Yakima Stock Brokers, Inc., 192 Wash. 121, 126, 72 P.2d 1041 (1937), ("a stronger case showing abuse of discretion is required for reversal than where trial on the merits has been denied").

Grounds for CR 60 relief as to Citi Defendants' CR 12 Dismissal.

A party moving to vacate a default judgment must ordinarily be prepared to show (1) that there is substantial evidence supporting a prima facie defense; (2) that the failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect; (3) that the defendant acted with due diligence after notice of the default judgment; and (4) that the plaintiff will not suffer a substantial hardship if the default judgment is vacated. White v. Holm, 73 Wash.2d 348, 352, 438 P.2d 581 (1968) (citing Hull v. Vining, 17 Wash. 352, 49 P. 537 (1897)).

The Order Denying CR 60 relief in this case cites only two of the four elements, those of excusable neglect and due diligence. (See CP 151, 152). Since the trial court did not find either a lack of meritorious defense or a lack of procedural irregularity, the court's order should be considered to have found those two elements in the plaintiffs' favor.

The first element concerns a meritorious defense. When a default is entered against the plaintiff, the plaintiff is not required to make a showing of a meritorious defense, in order to seek vacation of the default;

“As plaintiffs, they were not required to make a showing of merit in addition to that set out in their complaint.”

Graham, 192 Wash. at 127. (citing Harringer v. Keenan, 117 Wash. 311, 201 P. 306)

The Order Denying Motion to Vacate does not indicate any lack of meritorious defense (CP 151), therefore, the first element need not be discussed further. However, in an abundance of caution, Mr. Carter's counsel did provide defenses to Citi's CR 12 motion (at CP 55 – 57). Plaintiff had alleged that Citi did not in fact own the credit card account, but was merely the servicer and therefore subject to Washington Collector Act.³ Plaintiff further alleged that the Statute of Limitations had not expired, because the applicable Statutes of Limitations were 4 years, not 3 years as asserted by the Citi defendants. Plaintiff further asserted that if venue was improper, the proper remedy would be transfer, not dismissal.⁴

³ See explanation in, Federal Reserve Bank of Philadelphia, An Overview of Credit Card Asset-Backed Securities, (2002) 'A card issuer sells a group of receivables to a trust. The trust then issues securities backed by those receivables...Despite this, the issuer continues to "service" the accounts. In exchange for servicing the accounts, the trust pays the issuer a servicing fee. The services provided typically include mailing customers their statements, answering phone calls, and collecting past-due balances.'" CP 137, 144).

⁴ One of the grounds the Citi defendants gave for dismissal was that venue should have been Island County – but the Suttell Defendants admitted jurisdiction and venue was proper in King County Superior Court (CP 35, Answer, admitting paragraphs 3.1 and 3.2 of complaint). Venue only needs to be sufficient as to one of several defendants.

Finally, plaintiff Carter argued that the doctrine of *res judicata* did not apply to his claims.⁵

The second element requires “mistake, inadvertence, surprise, or excusable neglect.” Mr. Carter indicated that he believed he had retained counsel, and was out of the country during the time the motion was mailed to his 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 Anderson had a chance to appear in the suit.

Misunderstanding as to which law firm was to defend a motion was sufficient grounds to vacate a default, in Graham, *Supra*;

⁵ 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. (See Judgments, attached to Declaration of Suttells’ attorney, at CP 160, 162).

“Whether the delay in serving a reply to the affirmative matter of respondent's answer was chargeable to the appellants themselves or attributable to the confusion ensuing from the change of attorneys, nevertheless they acted diligently when advised of the state of the pleadings by receipt from the Tacoma lawyers of the motion for default. This was forwarded to Cheney & Hutcheson in Yakima, who immediately informed the attorneys for the respondent of their substitution, although doing so informally in not having the signature of MacMahon & Poe.”
Graham, 192 Wash. at 127.

Relief was sought under CR 60(b)(1) for excusable neglect, and for “irregularity”⁶ of the proceedings, in that the motion to dismiss had been filed before Mr. Carter had served the defendants with the lawsuit, and therefore before he and his newly hired counsel were ready to appear and prosecute the case.

Another indication of irregularity in the proceedings was noted by plaintiff at CP 57, arguing that the motion for dismissal was in effect a motion for Summary Judgment, and should have been noted following the procedure in CR 56. If the procedure for Summary Judgment had been followed, the Plaintiff would have had several more days in which to return home and discover that a motion was pending.

⁶ “An irregularity is defined to be the want of adherence to some prescribed rule or mode of proceeding; and it consists either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unseasonable time or improper manner.” Port of Port Angeles v. CMC Real Estate Corp., 114 Wash.2d 670, 674, 790 P.2d 145 (1990).

The third element for relief from default requires “due diligence after notice of the default judgment.” Due diligence has not been questioned in cases where the one-year deadline of CR 60 is met, as it is in this case. The declaration of Brent Carter indicates he had been out of the country since October, 2007, and did not return, or receive the motion to dismiss, until the end of May, 2008 (CP 74). After May, 2008, the appearance of Jason Anderson, the Motion and order to Show Cause, and the Motion to Vacate under CR 60 were all filed in a relatively short period of time, indicating due diligence.

Citi admits that they never gave notice to the plaintiffs that they had an order of dismissal. The order was not mailed to the plaintiff, until more than two weeks after it was entered (CP 123);

“The court then entered its dismissal order.

Just two weeks later, Plaintiffs formally served their Summons and Complaint. *In response to the Summons, Citi Defendants wrote to Plaintiffs and informed them of the dismissal. . .*” (emphasis added)

(Citi Opposition to Plaintiff Motion to Vacate Order of Dismissal – CP 123).

The final element for relief from default requires that the Citi defendants “will not suffer a substantial hardship if the default judgment is vacated”. In this case, the default entry of a dismissal is not the final judgment in the lawsuit. The Citi defendants did not have any expectation

that the suit was concluded, and any order regarding the Citi defendants remains appealable until the conclusion of suit with the remaining defendants. Citi cannot show substantial hardship. The only “hardship” claimed by the Citi defendants was that they had to rush to get their response to the CR 60 motion filed, and that they would incur attorneys’ fees in defendant the lawsuit. (CP 127-128). That is not “substantial hardship” within the meaning of CR 60, as these are costs that would be incurred in any suit.

Summary Judgment Dismissing Suttell Defendants

Standard of Review – Summary Judgment.

This court reviews a trial court's decision on a motion for Summary Judgment, We review an order granting summary judgment de novo. York v. Wahkiakum Sch. Dist. No. 200, 163 Wn.2d 297, 302, 178 P.3d 995 (2008). Under CR 56(c), summary judgment is appropriate if the record presents no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Oltman v. Holland Line USA, Inc., 163 Wn.2d 236, 243, 178 P.3d 981 (2008). This Court must view all facts, and draw reasonable inferences therefrom in the light most favorable to the nonmoving party. Viking Props., Inc. v. Holm, 155 Wn.2d 112, 119, 118 P.3d 322 (2005).

Issues Presented in Suttell's Motion for Summary Judgment.

*Both Sets of Defendants are Collection Agencies,
for which Licenses are Required and a
Prerequisite to Suit.*

The Suttell Defendants filed for summary judgment, asserting that the Washington Collector's Act exempts the Suttell Defendants, as lawyers, from the definition of "Collection agency" under RCW 19.16.010(3)(c) (CP 187).⁷ However, Suttells' own stationary admits they are a collection agency, see for example a letter from Dennis Nissen, Collections Manager for Suttell and Associates, which states, at the bottom of the stationery as well as in the body of the letter over Mr. Nissen's signature, "We are debt collectors. Any information obtained will be used for that purpose." (CP 227, 228). The same warning was contained in the Complaint that Suttell and Associates filed on Citibank's behalf in Island County, (CP 157)⁸. Dennis Nissen, engaging in debt collection on the stationary of Suttell and Associates, was not an attorney (See declaration of Jason Anderson, who had searched Bar Association

⁷ RCW 19.16.010 appears to have been repealed in 1971, see note in the RCWs as to Dispositions; "Sections 19.16.010 through 19.16.050 [1929 c 90 §§ 1-5; RRS §§ 5847-4–5847-8.] **Repealed** by 1971 ex.s. c 253 § 43."

⁸ This warning is required by the FDCPA, Fair Debt Collection Practices Act, 15 USC §1692g(a).

records in vain for any license of Dennis Nissen to practice law, CP 198, CP 230).

The definition of “collection agency” relied upon by Suttell appears to have been repealed⁹, and no *current* law exempting Suttell from the collection agency regulations is provided.

The Citi defendants, as well as the Suttell defendants violated RCW 19.16.110 when each of them acted as a collection agency within the State of Washington without first obtaining a license. Pursuant to RCW 19.16.100(2)(a), a “collection agency” means “any person directly or indirectly engaged in soliciting claims for collection, or collecting or attempting to collect claims owed or due or asserted to be owed or due another person.” In this case, the Citi defendants have attempted to collect a claim asserted to be owned by a trust which has purchased and holds credit card securities, leaving Citi as merely a servicer. Suttell and Associates were collecting debts on behalf of Citi and/or Citi’s assignee, the trust.

Suttell and Associates argued in the Trial Court that it fell outside the definition of a “collection agency” under RCW 19.16.010 – however that statute has apparently been repealed.

⁹ See Footnote 7, above, regarding repealed RCW 19.16.010.

If Suttell is permitted to update its argument to current statutory language, it may argue that it is not a “collection agency” because RCW 19.16.100(3)(c) excludes from that term “[a]ny 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 . . . lawyers”

When read as a whole and in light of the interpreting case law, Washington’s Collection Agency Act applies to entities such as Suttell and Associates which seek to collect debts that are unrelated to Suttell’s (or its affiliated company’s) non-debt collector business. If, for example, Suttell and Associates were seeking to recover fees owed to it by a client for legal services rendered, such activities would not make Suttell and Associates a “collection agency.” The same result would probably arise if Suttell and Associates were collecting debts owed to an affiliated company as long as those debts arose from a business other than the collection of debts. See RCW 19.16.100(3)(f); Trust Fund Servs. v. Aro Glass Co., 89 Wn.2d 758, 761-62, 575 P.2d 716 (1978). The debt that Suttell and Associates sought to collect from plaintiffs is not “directly related to the operation of a business other than that of a collection agency” – Suttell and Associates have no “business other than that of a collection agency”, and admit as much on their own stationery which s used to collect debts, and even in

their own complaint, as filed with Island County. Despite the fact that Suttell and Associates is a law firm, its actions in this case are those of a collection agency subject to regulation under the Collection Agency Act.

If in fact either the Citi defendants or Suttell and Associates were required to hold collection agency licenses, (and both failed to be so licensed), then the Island County proceedings were void.

A collection agency license is a prerequisite to suit, under RCW 19.16.260;

RCW 19.16.260 - Licensing prerequisite to suit.

No collection agency or out-of-state collection agency may bring or maintain an action in any court of this state involving the collection of a claim of any third party without alleging and proving that he or it is duly licensed under this chapter and has satisfied the bonding requirements hereof, if applicable: . . .

This provision was discussed in Trust Fund Servs. v. Aro Glass Co., 89 Wn.2d 758, 761, 575 P.2d 716 (1978), where the Court declined to resolve the issue of whether the clear prerequisite to suit in RCW 19.16.260 is also a *jurisdictional* prerequisite for the courts to render any valid judgment;

“Aro's motion to dismiss under CR 12(b)(6) was premised on RCW 19.16.260, which makes the possession of a license a prerequisite to suit by a collection agency: . . . we do not decide whether the possession of a license is necessary for the court's jurisdiction over the subject matter or whether it merely involves a party's capacity to sue.”

Trust Fund Servs. v. Aro Glass Co., 89 Wn.2d 758, 761, 575 P.2d 716 (1978).

Clearly, without a collection agency license, neither Citi nor Suttell had the capacity to sue. This court should hold that, additionally, the Island County Court had no jurisdiction to enter a judgment for the non-licensed collection activities, and that therefore the judgments, and all of the garnishment actions were void.

The Plaintiffs' claims are not Time-Barred.

Suttell's second ground for dismissal was its allegation that the collection agency act claims are time barred. This does not take into account the fact that 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. There were holds placed on Carter's and Oak Harbor's bank accounts that "were not lifted until the second week of January 2005" and bank fees incurred during January 2005. (Interrogatory answers, CP 217). The January, 2005 collection activities would bring Suttell's actions well within three years of the filing of this suit, (this lawsuit was filed on December 31, 2007) (CP 23).

Suttell's third ground for dismissal the claims of abuse of process or wrongful garnishment are time-barred, but again, this does not take into account the fact that 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, or the fact that holds had been placed upon bank accounts of Oak Harbor and/or Carter until the second week of January 2005 as well as bank fees incurred during January 2005 (CP 217), within three years of the December 31, 2007 filing date for this suit.

Finally, There is no time limitation on challenging a void judgment, Mueller v. Miller, 82 Wn. App. 236, 248, 917 P.2d 604 (1996), so, to the extent the Island County Proceedings were void for the failure of either Citi or Suttell to hold a collection agency license, this suit to challenge the resulting void proceedings is timely.

Violation of Consumer Protection Act.

Suttell's next ground for seeking dismissal is a lengthy discussion of the Consumer Protection Act. This argument has been entirely eclipsed by the Supreme Court's en banc decision in Panag v. Farmers Ins. Co of Wa., ___ Wn.2d ___, 204 P.3d 885 (WA en banc, April 2, 2009);

"Consumer debt collection is a highly regulated field. When a violation of debt collection regulations occurs, it constitutes a per se violation of the CPA and the FTCA under state and federal law, reflecting the public policy significance of this industry. 15 U.S.C. § 1692 l; Jeter¹⁰, 760 F.2d at 1174 (violation of FDCPA is a per se "unfair or deceptive" act or practice for purposes of the FTCA); RCW 19.16.100;

¹⁰ Jeter v. Credit Bureau, Inc., 760 F.2d 1168, 1174 (11th Cir.1985)

Evergreen Collectors v. Holt, 60 Wash.App. 151, 155, 803 P.2d 10 (1991) (violation of CAA is a per se violation of the CPA).

The FDCPA strictly regulates communications between collection agencies and debtors. It prohibits collection agencies from misrepresenting the legal status of a debt, falsely threatening legal action, and making other false representations to debtors. 15 U.S.C. § 1692e; see, e.g., Irwin v. Mascott, 370 F.3d 924 (9th Cir.2004) (threatening to sue violates the act where there is no intent to sue); Kimber v. Fed. Fin. Corp., 668 F.Supp. 1480 (M.D.Ala.1987) (threatening to file collection action when collector knows claim is time barred violates the act); Dutton v. Wolhar, 809 F.Supp. 1130 (D.Del. 1992) (representation that plaintiff was legally obligated to pay debt of her mother was false representation of character or legal status of debt); In re Scrimpsheer, 17 B.R. 999 (Bankr.N.D.N.Y.1982) (debt collection letter masquerading as a telegram is deceptive under the FDCPA). See generally Kevin W. Brown, Annotation, What Constitutes False, Deceptive, or Misleading Representation or Means in Connection with Collection of Debt Proscribed by Provisions of Fair Debt Collection Practices Act (15 USCA § 1692e), 67 A.L.R. Fed. 974 (1984).

The CAA is our state's counterpart to the FDCPA. Like the FDCPA, it prohibits collection agencies from making false representations as to the legal status of a debt, threatening the debtor with impairment of credit rating, attempting to collect amounts not actually owed, or implying legal liability for costs not actually recoverable, such as attorney fees or investigation fees, among other practices. See RCW 19.16.250 (prohibited practices).

The business of debt collection affects the public interest, and collection agencies are subject to strict regulation to ensure they deal fairly and honestly with alleged debtors. The strong public policy underlying state and federal law regulating the practice of debt collection also applies where collection practices do not fall within the laws' prohibitions. That the collection of subrogation claims is beyond the scope of the CAA does not mean deceptive subrogation collection practices

are exempt from suit under the broader scope of the CPA. See, e.g., DIRECTV, Inc. v. Cephas, 294 F.Supp.2d 760 (M.D.N.C.2003) (allowing consumer protection claim to proceed even though state fair debt collection practices act did not apply to deceptive attempts to recover alleged tort damages).(footnote omitted) A central purpose of the CPA is to provide "an efficient and effective method of filling the gaps" in the common law and statutes. Short,¹¹ 103 Wash.2d at 62, 691 P.2d 163 (quoting Craig C. Beles & Daniel Wm. Wyckoff, The Washington Consumer Protection Act v. The Learned Professional, 10 Gonz. L.Rev. 435, 437 (1975)). Like the FTCA, the CPA is intended to provide broader protection than exists under the common law or statute. Accordingly, debt collection activities that are not regulated under the CAA may constitute unfair and deceptive practices under the broader scope of the CPA when a collection agency holds itself out as collecting a liquidated debt when, in fact, it is pursuing recovery of an unadjudicated insurance subrogation claim.

Panag v. Farmers Ins. Co of Wa., ____ Wn.2d ____, 204 P.3d 885, 897-898, (WA en banc, April 2, 2009).

Actions of a collection agency that violated RCW 19.16.250, including any threat of continued legal action to collect additional fees or costs to which it is not entitled,¹² 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).

¹¹ Short v. Demopolis, 103 Wash.2d 52, 61, 691 P.2d 163 (1984).

¹² This is a violation of RCW 19.16.250(14).

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.

Island County Suits are Not a basis for res judicata, laches, or waiver, due to void judgment, and claim of Oak Harbor Chiropractic Health Center, P.S.

Suttell's final ground for seeking dismissal rest on doctrines of res judicata, laches, and waiver, all apparently relying upon prior law suits in island County, wherein judgments were obtained against Mr. Carter. However, no mention is made by the Suttell Defendants as to how any of these doctrines would apply to the Oak Harbor Chiropractic Health Center, P.S., which apparently had never been named a party in the Island County suits.

Similarly, no mention is made of the fact that the judgments in Island County may well have been void *ab initio*, due to the lack of any license as a collection agency.

Finally, 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.

***No Authority to Garnish Account Belonging to
Oak Harbor Chiropractic Health Center, P.S.***

In rendering summary judgment in favor of Suttell and Associates, the trial court also makes no mention of the claims of Oak Harbor Chiropractic Health Center, P.S., whose accounts were garnished without any authorization.

When an action is taken without authority, that action is void. For example, in Mueller v. Miller, 82 Wn. App. 236, 248, 917 P.2d 604 (1996), the Court held that a sheriff's sale, conducted after the 10-year judgment lien period had expired, was void;

Mueller is correct that the sheriff's sale on August 14, 1992, occurred after the 10-year period of the judgment lien, which expired on July 14, 1992. A sale that occurs after the lien has expired is void because "[t]here being no lien in existence, there could have been no authority for the sale in any execution that might have been issued." Hardin v. Day, 29 Wash. 664, 665, 70 P. 118 (1902)(affirming trial court's refusal to confirm sale that occurred after the judgment lien expired) (quoting Packwood v. Briggs, 25 Wash. 530, 535, 65 P. 846 (1901)(competing mortgage and judgment liens, held execution void because lien ceased to exist prior to sale)). Thus, the sheriff's sale was void at the outset. Mueller v. Miller, 82 Wn. App. 236, 248, 917 P.2d 604 (1996).

In this case, neither the Island County Court nor its Clerk had authority to issue writs of garnishment for bank accounts belonging to Oak Harbor Chiropractic, therefore the writs were void. There is no time limitation on challenging a void judgment, Mueller v. Miller, 82 Wn. App. 236, 248, 917 P.2d 604 (1996).

No Authority to Garnish Account Belonging to Oak Harbor Chiropractic Health Center, P.S.

The Trial Court erred in finding that “plaintiff’s claim under the Washington Consumer Protection Act relates to the professional activities of attorneys engaged in representing their client in a collection lawsuit, and is barred under Washington’s Decisional law, Michael v. Mosquera-Lacy, 165 Wn.2d 595, 604-200 P.3d 695 (2009).” – at CP 410.

Michael v. Mosquera-Lacy was a dental malpractice case. After a careful, fact-intensive analysis, the Court decided that the dentist’s patient should not be allowed to maintain a suit under the Consumer Protection Act because the malpractice was a private tort, and the patient could not “show that his lawsuit would serve the public interest”. As the Michael v. Mosquera-Lacy court held;

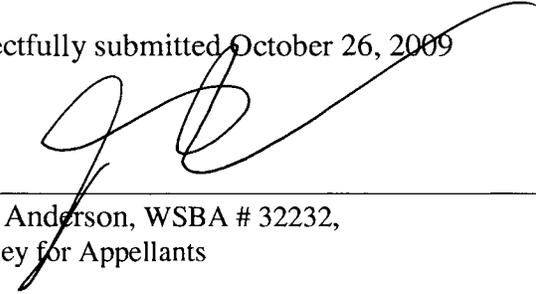
Bright Now [the dentist] was undeniably acting within the scope of its business. Bright Now offers dental care and periodontal services to the general public, and Bright Now provided periodontal services to Michael when her claim

consumer debt collection activities involve litigation, the Collection Agency Act applies, and, therefore, the Consumer Protection Act applies to Suttell and Associates.

E. Conclusion, Relief Sought.

Appellants request that this Court reverse the Trial Court's decisions and remand this case to the trial court.

Respectfully submitted October 26, 2009



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 October 26, 2009, a true copy of this document was sent for service via:

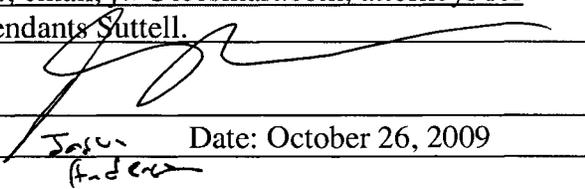
- Legal Messenger
- Fax or electronic transmission
- US Mail, postage prepaid

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By:  Date: October 26, 2009