

63628-6

63628-6

#63628-6-I

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

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

Appellants

vs.

SUTTELL AND ASSOCIATES, P.S. d.b.a SUTTELL AND
ASSOCIATES; CITI USA aka 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 RESPONDENTS CITI USA, CITIGROUP, INC., CITIBANK
(SOUTH DAKOTA), N.A. AND CITICORP CREDIT SERVICES, INC.
(USA)

Kathryn P. Salyer, WSBA #36492
Attorney for Respondents Citi USA,
Citigroup, Inc., Citibank (South
Dakota), N.A., and Citicorp Credit
Services, Inc. (USA)

FARLEIGH WADA WITT
121 SW Morrison St., Ste. 600
Portland, OR 97204
(503) 228-6044

FILED
COURT OF APPEALS DIV #1
STATE OF WASHINGTON
2018 JAN 14 AM 10:47

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR.....2

 A. Plaintiffs’ Second Assignment.....2

 B. Plaintiffs’ First Assignment.....3

III. STATEMENT OF FACTS4

IV. AUTHORITY AND LEGAL ARGUMENT.....7

 A. Standard of Review.....7

 B. Plaintiffs’ Motion to Vacate Was Properly Denied.....8

 1. Plaintiffs’ Motion to Vacate Was Not Filed Within a Reasonable Time.....8

 2. Plaintiffs’ Motion to Vacate Did Not Comply With CR 60(e)(3) Because It Was Improperly Served.11

 3. Plaintiffs’ Motion to Vacate Was Substantially Deficient Because It Was Not Supported by Appropriate Affidavits..... 12

 4. Plaintiffs’ Motion to Vacate Failed to Make Any of the Requisite Showings Such that Would Entitle Them to Relief..... 13

 C. Plaintiffs’ Claims Were Properly Dismissed Pursuant to CR 12(b)(6). 19

 1. Plaintiffs Cannot State a Claim Against the Citi Defendants for Violation of the Washington Collectors Act.....20

 2. Plaintiffs’ Claims Under the Consumer Protection Act Fail for the Same Reasons.....24

 3. Plaintiffs’ Claims for Abuse of Process Fail Because the Challenged Garnishments Were Used Properly as a Matter of Law.....26

 4. The Citi Defendants Cannot Be Held Vicariously Liable for the Alleged Wrongful Garnishment by Their Attorney.....27

 5. Plaintiffs’ Claims are Barred by Applicable Statutes of Limitations.....29

 6. Plaintiffs’ Fifth Claim is Barred by the Doctrine of Res Judicata.....30

 7. Plaintiffs Fifth Claim Does Not State a Claim for Relief.....33

V. CONCLUSION.....34

TABLE OF AUTHORITIES

Federal Cases

<i>Atchison v. Great Western Malting Co.</i> , 161 Wn.2d 372, 166 P.3d 662 (2007).....	7
<i>Aubert v. American Gen. Fin., Inc.</i> , 137 F.3d 976, 978 (7 th Cir. 1998).....	23
<i>Batten v. Abrams</i> , 28 Wn. App. 737, 626 P.2d 984 (1981)	26
<i>Boss Logger Inc. v. Aetna Casualty Co.</i> , 93 Wn. App. 682 970 P.2d 755 (1998).....	8
<i>Brown v. Citibank (South Dakota), N.A.</i> , No. 5:06-cv-123-FL, 2006 U.S. Dist. LEXIS 82785 (E.D.N.C. Oct. 19, 2006)	24
<i>Cawdry v. Hanson Baker Ludlow Drumheller, P.S.</i> , 129 Wn. App. 810, 817, 120 P.3d 605 (2005) <i>rev. denied</i> , 157 Wn.2d 1004 (2006)	29
<i>Citibank v. Eckmeyer</i> , 2009 WL 1452614, *4 (Ohio App. 11 Dist., May 08, 2009)	21
<i>Corrigal v. Ball & Dodd Funeral Home, Inc.</i> , 89 Wn.2d 959, 961, 577 P.2d 580 (1978).....	20
<i>Dahlhammer v. Citibank (South Dakota) N.A.</i> , No. 05-CV-1749, 2006 WL 3484352 (M.D. Pa. Nov. 30, 2006).....	24
<i>Doherty v. Citibank (South Dakota) N.A.</i> , 375 F. Supp. 2d 158, 161-62 23, 24	
<i>Duncan v. Citibank (South Dakota) N.A.</i> , 2006 WL 4063022, at *3.....	24
<i>Fite v. Lee</i> , 11 Wn.App. 21, 521 P.2d 964 (1974)	25, 27, 28
<i>Griffith v. City of Bellevue</i> , 130 Wn.2d 189, 192, 922 P.2d 82 (1996).....	11
<i>Griggs v. Averbach Realty</i> , 92 Wn.2d 576, 599P.2d 1289 (1979)	11
<i>Gustafson v. Gustafson</i> , 54 Wn. App. 66, 75, 772 P.2d 1031 (1989).....	17
<i>Haller v. Wallis</i> , 89 Wn.2d 539, 547, 573 P.2d 1302 (1978)	14
<i>Hanson v. Aetna Ins.</i> , 26 Wn. App. 290, 612 P.2d 456 (1980).....	26
<i>In re Hibernia Nat'l Bank</i> , 21 S.W.3d 908, 910 (Tex. App. 2000)	21
<i>In re Marriage of Flannagan</i> , 42 Wn. App. 214, 221, 709 P.2d 1247 (1985).....	17
<i>In re Marriage of Thurston</i> , 92 Wn. App. 494, 500, 963 P.2d 947 (1998) <i>review denied</i> , 137 Wn.2d 1023, 980 P.2d 1282 (1999).....	9
<i>Indiana Nat'l Bank v. Roberts</i> , 326 So.2d 802, 802-03 (Miss. 1976)	21
<i>Johnson v. Cash Store</i> , 116 Wn. App. 833, 68 P.3d 1099 (2003)	13, 15
<i>Kagan v. Caterpillar Tractor Co.</i> , 79 F.2d 601, 610 (7th Cir. 1986) ...	9, 10
<i>Kloth v. Citibank (South Dakota), N.A.</i> , 33 F. Supp. 2d 115, 119	24
<i>Lewis v. ACB Bus. Servs, Inc.</i> , 135 F.3d 389, 411 (6 th Cir. 1998)	23
<i>Little v. King</i> , 160 Wn.2d 696, 161 P.3d 345 (2007).....	11, 16
<i>Luckett v. Boeing Co.</i> , 98 Wn. App. 307, 989 P.2d 1144 (1999)	8, 9, 10
<i>Luger v. Littau</i> , 157 Wash. 40, 42, 288 P. 277 (1930).....	16
<i>M.A. Mortenson Co. v. Timberline Software Corp.</i> , 93 Wn. App. 819, 970 P.2d 803 (1999), <i>affirmed</i> , 140 Wn.2d 568, 998 P.2d 305 (2000) .	14, 15
<i>MacDermid v. Discovery Financial Services</i> , 488 F.3d 721 (6 th Cir. 2007)	23
<i>Maguire v. Citicorp Retail Services, Inc.</i> , 147 F.3d 232, 235-36 (2 nd Cir. 1998)	23

<i>Meads v. Citicorp Credit Services, Inc.</i> , 686 F. Supp. 330, 333-34 (S.D. Ga. 1988).....	24
<i>Morgan v. Burks</i> , 17 Wn. App. 193, 198, 563 P.2d 1260 (1977).....	8
<i>Morin v. Burris</i> , 160 Wn.2d 745, 161 P.3d 956 (2007).....	7, 11
<i>Mosbrucker v. Greenfield Implement, Inc.</i> , 54 Wn. App. 647, 652, 774 P.2d 1267 (1989).....	17
<i>Murray v. Citibank (South Dakota), N.A and NCO Financial Systems, Inc.</i> , No. 04 C 3294, 2004 WL 2367742 at *2 (N.D. Ill. October 19, 2004)	24
<i>New York Guardian Mortgagee Corp. v. Davis</i> , 193 N.J. Super. 443, 450-51, 474 A.2d. 1101, 1105 (N.J. Super. Ct. Ch. Div. 1984).....	21
<i>Norton v. Brown</i> , 99 Wn. App. 118, 992 P.2d 1019 (1999).....	8, 11
<i>Orwick v. City of Seattle</i> , 103 Wn.2d 249, 254, 692 P.2d 793 (1984).....	19
<i>Pacheco v. Citibank (South Dakota), N.A.</i> , 2007 WL 1241934, *1	23
<i>Panag v. Farmers Ins.</i> , 166 Wn.2d 27, 204 P.3d 885 (2009).....	25
<i>Pavone v. Citicorp Credit Servs., Inc.</i> , 60 F. Supp. 2d 1040, 1047-48 (S.D. Cal. 1997).....	24
<i>Prest v. Am. Bankers Life Assurance Co.</i> , 79 Wn. App. 93, 900 P.2d 595 (1995).....	13, 15
<i>Ray v. Citibank (South Dakota), N.A.</i> , 187 F. Supp. 2d 719, 722 (W.D. Ky. 2001)	24
<i>Rosander v. Nightrunners Transp. Ltd.</i> , 147 Wn. App. 392 196 P.3d 711 (2008).....	8
<i>Sankowski v. Citibank (South Dakota), N.A.</i> , Civil Action No. 06-CV-02469, 2006 WL 2037463 (E.D. Pa. July 14, 2006).....	24
<i>Schmitt v. FMA Alliance</i> , 398 F.3d 995, 998	22
<i>State Nat'l Bank of Connecticut v. Laura</i> , 45 Misc.2d 430, 431-32, 256 N.Y.S.2d 1004, 1006 (N.Y. County Ct. 1965)	21
<i>State v. San Juan County</i> , 102 Wn.2d 311, 686 P.2d 1073 (1984).....	17
<i>Tenore v. AT&T Wireless Servs.</i> , 136 Wn.2d 322, 962 P.2d 104 (1998) .	20
<i>W. Telepage, Inc. v. City of Tacoma</i> , 140 Wn.2d 599, 607, 998 P.2d 884 (2000).....	7
<i>Wadlington v. Credit Acceptance Corp.</i> , 76 F.3d 103, 106 (6 th Cir. 1996)	23
<i>Watkins v. Peterson Enterprises, Inc.</i> , 57 F. Supp. 1102, 1110 n.6 (E.D. WA 1999).....	29
<i>Watters</i> , 127 S. Ct. 1559, 1564-65, 167 L. Ed. 2d 389 (2007)	21
<i>White v. Holm</i> , 73 Wn.2d 348, 438 P.2d 348 (1968).....	19

Statutes

CR 60(b)(11)..... 17
RCW 19.16.100 3
RCW 19.16.100(2)(a) 21
RCW 19.16.100(3)(f)..... 21, 22
RCW 19.86.010 25
RCW 4.16.080 3, 29
RCW 4.28.020 4, 15
RCW 4.28.080 12
RCW 4.32.240 19
RCW 6.27.020 27

Rules

CR 12(b)(6)..... 1, 19, 20
CR 60(b)..... 2, 14
CR 60(b)(1)..... 8, 13, 14, 17
CR 60(e)..... 2, 11, 12
CR 60(e)(1) 7
CR 60(e)(3) 6, 11
LR 7(b)(2)..... 18

Other Authorities

12 U.S.C. § 24 (Fourth) 21

I. INTRODUCTION.

Plaintiffs filed this action against Defendants Citi USA, Citigroup, Inc., Citibank (South Dakota), N.A. (“Citibank”), and Citicorp Credit Services, Inc. (“CCSI”) (collectively referred to herein as “Citi Defendants”)¹ and Suttell and Associates, P.S., (“Suttell”)² a law firm that previously represented Citibank. Plaintiffs’ Complaint purports to allege six separate counts for relief, all of which arises from Citibank’s efforts to obtain, and then collect, a judgment against Plaintiff Brent Carter (“Carter”).

The court dismissed Plaintiffs’ claims against the Citi Defendants pursuant to CR 12(b)(6) because each of the claims failed to state a claim, were barred by the statute of limitations, and/or were barred by res judicata. While Plaintiffs appeal the dismissal, their brief only tangentially addresses these rulings, each of which were proper given the express allegations of Plaintiffs’ Complaint and well established case law.

More than six months after the court entered the dismissal, Plaintiffs filed a Motion to Vacate. Their motion was untimely, and both procedurally and substantively deficient. The court denied relief.

¹ Citi USA is not a legal entity. Citigroup Inc. is the corporate parent of Citibank. CCSI is Citibank’s affiliate, whose function is to service Citibank’s credit card accounts.

² Suttell is now known as Suttell & Hammer, P.S.

II. ASSIGNMENTS OF ERROR.

The Citi Defendants assign no error to the trial court's rulings, but respond as follows to the two Assignments of Error directed to the Citi Defendants.

A. Plaintiffs' Second Assignment.

The trial court properly exercised its discretion in refusing to vacate the dismissal of Plaintiffs' Complaint where Plaintiffs unreasonably delayed filing a motion for relief, failed to act with diligence, failed to serve their motion properly, failed to show that relief would not create hardship and failed to show a procedural irregularity.

Issues related to Plaintiffs' Second Assignment:

1. Given Plaintiffs' failure to explain the six month delay between learning of the dismissal and the filing of Plaintiffs' Motion to Vacate, Plaintiffs' Motion was untimely under CR 60(b), and the trial court properly denied it.

2. Plaintiffs' Motion was procedurally deficient because it was not served in the manner required by CR 60(e).

3. Plaintiffs' Motion was substantively deficient because it failed to show that their failure to respond was due to excusable neglect, that they acted with diligence, that Defendants would not suffer hardship

or that there was a procedural irregularity; thus, Plaintiffs were not entitled to relief from the order.

B. Plaintiffs' First Assignment.

The trial court properly dismissed each of Plaintiffs' Claims for Relief Against the Citi Defendants.

Issues related to Plaintiffs' First Assignment:

1. Plaintiffs' First, Second, and Fifth Claims for Relief were properly dismissed because the allegations of Plaintiffs' Complaint establish that the Citi Defendants are not subject to liability under the Washington Collection Agency Act, RCW 19.16.100 *et seq.* (the "Collection Act").

2. Plaintiffs' Third, Fourth, and Sixth Claims for Relief were properly dismissed because, as a matter of law, the Citi Defendants are not vicariously liable for the acts of their attorney.

3. Plaintiffs' Complaint was barred by RCW 4.16.080 (the statute of limitations applicable to tort claims) because said claims were commenced more than three years after they arose.

4. Plaintiffs' Fifth Claim for Relief was barred by the doctrine of res judicata because Citibank's standing to bring a collection action on the underlying debt was established by prior judgments.

III. STATEMENT OF FACTS

On or about December 31, 2007, Carter filed a Summons and Complaint pro se on his own behalf, and on behalf of Oak Harbor Chiropractic Health Center, a professional services corporation. (Clerk's Papers ("CP") 1). Carter states that he was living "outside of the United States" when he filed this action, and that he infrequently travels to the United States to receive mail. (CP 74). Despite this assertion, the Summons which he prepared and which Plaintiffs filed provided an address in San Antonio, Texas, and directed the Defendants to respond to that address. (CP 2). Upon the filing of the Complaint, the court acquired jurisdiction and control over further proceedings, RCW 4.28.020, without regard to whether the Complaint had been formally served.

Unbeknownst to the Citi Defendants, Plaintiffs filed their Complaint with no intent to prosecute their claims promptly. Instead, Plaintiffs apparently intended to wait for some undisclosed period before taking further action purportedly because Carter was minding other undisclosed matters. However, when Plaintiffs filed their Complaint, they set the wheels of justice in motion and no longer had the right to ignore their case for months on end. This is true whether they served their Complaint or not. Citi Defendants received actual notice of the Summons and Complaint, and believed that a response was required. On January 25,

2008, the Citi Defendants filed their Motion to Dismiss (CP 17), noted it appropriately (CP 29-30), and served it on Plaintiffs on January 22, 2008, at the address in San Antonio, Texas, that Plaintiffs provided in their Summons for response. (CP 28).

Plaintiffs did not file a response to the Citi Defendants' Motion. A hearing was held on February 15, 2008, at which Plaintiffs (who were still pro se of record) did not appear. (CP 31-32). The court then entered its Order Granting Defendants Citi USA, Citigroup Inc., Citibank South Dakota and Citicorp Credit Services' Motion to Dismiss Plaintiffs' Claims. ("Dismissal Order") (CP 32-33).

Just five days later, on February 20, 2008, Plaintiffs formally served their Summons and Complaint. (CP 123). In response to the Summons, Citi Defendants wrote to Plaintiffs and informed them of the dismissal. (CP 123). Although the Citi Defendants were now formally served, the attorney that Plaintiffs assert they retained to handle this matter "once it was served" (CP 48) did not file an appearance until July 23, 2008 (CP 41-43). Plaintiffs offer no explanation as to why they did not provide the court system with a current address, or failing that, why they did not implement procedures to ensure that mail or legal documents sent to the address they selected were forwarded for response. They also do not explain why they effected service on the Citi Defendants on February 20,

2008, but then waited more than five months to check the court docket to ascertain if Citi Defendants had responded.

On August 8, 2008, more than six months after the entry of the Dismissal Order, and more than five months after having been notified by the Citi Defendants of its entry, Plaintiffs filed their Motion to Vacate, arguing that their inattention to this case for more than eight months was justified by “excusable neglect.” (CP 49). In a continuing disregard for the rules of procedure, Plaintiffs failed to serve their Motion to Vacate and related Order to Show Cause in the manner required by CR 60(e)(3).³ Moreover, Plaintiffs waited another 12 days after receiving the Order to Show Cause before they mailed it to the Citi Defendants’ attorneys on August 20, 2008 (CP 76-77), just days before the matter was scheduled to be heard.

Tellingly, neither of the declarations which purport to support Plaintiffs’ Motion to Vacate offer any excuse for their neglect of this case between December 2007 (when they filed their Complaint) and August 2008 (when they filed their Motion). Plaintiffs do not explain why they were unable to appear at a hearing on February 15, but were able to effect service of their Summons and Complaint just five days later, on February

³ CR 60(e)(3) requires that an action for relief from judgment or order be served “in the same manner as in the case of a summons in a civil action.”

20. And, Plaintiffs have never explained why, after serving their Complaint, they waited another five months before bringing their Motion to Vacate. During this time period, did Plaintiffs or their attorneys not once check the court docket (much less their mailbox) to confirm the status of their case, or the status of Citi Defendants' response?

Finally, the supporting declarations do not provide, as CR 60(e)(1) requires, "a concise statement of the facts or errors upon which the motion is based." Instead, Carter's declaration simply recites that he was out of the country. (CP 74). His attorney's declaration merely attaches 4 exhibits (the pleadings already on file in this case), but offers no explanation as to what errors are purportedly contained therein. (CP 80). Based on this record, the court denied Plaintiffs' Motion.

IV. AUTHORITY AND LEGAL ARGUMENT

A. Standard of Review.

An appellant court reviews a trial court's ruling on a motion to vacate for abuse of discretion. *Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007). An appellate court reviews rulings on a motion to dismiss *de novo*. *Atchison v. Great Western Malting Co.*, 161 Wn.2d 372, 166 P.3d 662 (2007). Statutory interpretation is a question of law and is also reviewed *de novo*. *W. Telepage, Inc. v. City of Tacoma*, 140 Wn.2d 599, 607, 998 P.2d 884 (2000).

B. Plaintiffs' Motion to Vacate Was Properly Denied.

A trial court's ruling on a motion to vacate a judgment will not be disturbed on appeal unless the trial court manifestly abused its discretion. *Rosander v. Nightrunners Transp. Ltd.*, 147 Wn. App. 392 196 P.3d 711 (2008); *Norton v. Brown*, 99 Wn. App. 118, 992 P.2d 1019 (1999). An abuse of discretion exists only when no reasonable person would take the position adopted by the trial court. *Morgan v. Burks*, 17 Wn. App. 193, 198, 563 P.2d 1260 (1977). Stated another way, abuse of discretion means that the trial court exercised its discretion on untenable grounds or for untenable reasons, or that the discretionary act was manifestly unreasonable. Thus, if the trial court's decision is based upon tenable grounds or is within the bounds of reasonableness, it must be upheld. *Boss Logger Inc. v. Aetna Casualty Co.*, 93 Wn. App. 682 970 P.2d 755 (1998).

1. Plaintiffs' Motion to Vacate Was Not Filed Within a Reasonable Time.

A motion brought under CR 60(b)(1) is timely only 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. *Luckett v. Boeing Co.*, 98 Wn. App. 307, 989 P.2d 1144 (1999). The critical period in determining whether a motion to vacate is brought within a reasonable time is the period between when the moving party became aware of the order or

judgment and the filing of the motion to vacate. *Id.* What constitutes a reasonable time depends on the facts and circumstances of each case. *In re Marriage of Thurston*, 92 Wn. App. 494, 500, 963 P.2d 947 (1998) *review denied*, 137 Wn.2d 1023, 980 P.2d 1282 (1999). The major consideration in determining a motion's timeliness is whether the moving party has good reasons for failing to take appropriate action sooner. *Luckett*, 98 Wn. App. at 313 (*citing Kagan v. Caterpillar Tractor Co.*, 79 F.2d 601, 610 (7th Cir. 1986) (in determining what constitutes a reasonable time, the court should consider the facts of each case, the interest in finality, the reason for the delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties).

The trial court did not abuse its discretion in denying Plaintiffs' Motion to Vacate under the facts of this case. By their own admission, Plaintiffs became actually aware that the action had been dismissed no later than May 2009 (CP 74). They offer no explanation as to why either they or their attorney failed to check their mailboxes or the court docket between December 2007 and May 2008, despite the fact they had served their Summons and Complaint formally, and should have anticipated a response. More importantly, they offer no explanation for why they took no action for nearly four months after they learned their case had been

dismissed. Plaintiffs failed to put forth any reason, much less an excusable one, for their delay in bringing their Motion to Vacate. The failure in this regard is critical and is the reason their Motion to Vacate was properly denied.

Where no valid reason for delay is offered, a trial court does not excuse its discretion when it refuses to excuse a party's delay. In fact, the Washington Supreme Court has held that a trial court did not abuse its discretion in refusing to set aside a judgment where there was a four month delay between learning of the judgment and filing the motion to vacate it. In *Luckett*, the court stated: "We do not think that Luckett's attorney's inner turmoil over his lack of diligence justifies a four month delay in bringing a motion to vacate a dismissal order." *See also Kagan*, 795 F.2d at 611 (affirming the trial court's denial of a motion to vacate a dismissal order brought less than four months after the plaintiff learned of the order where the case had been dismissed for lack of prosecution because plaintiff failed to respond to the motion to dismiss and failed to appear for the pretrial conference). As in *Luckett and Kagan*, the trial court properly exercised its discretion in determining the Motion was not brought within a reasonable time where there was a poor excuse (*Luckett*) or no excuse (*Kagan*).

Washington courts admittedly show a preference for deciding cases on the merits, but Washington courts also recognize that this preference must be weighed against the need for a structured and orderly judicial system. *See Griffith v. City of Bellevue*, 130 Wn.2d 189, 192, 922 P.2d 82 (1996); *Griggs v. Averbach Realty*, 92 Wn.2d 576, 599P.2d 1289 (1979). To be sure, Washington courts “value an organized, responsive, and responsible judicial system where litigants acknowledge the jurisdiction of the court to decide their cases and comply with court rules.” *Little v. King*, 160 Wn.2d 696, 161 P.3d 345 (2007). As the Supreme Court recently noted, “... litigation is inherently formal. All parties are burdened by formal time limits and procedures.” *Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007). “When the adversary process has been halted because of an essentially unresponsive party...,” judgment is appropriate. *Norton v. Brown*, 99 Wn. App. 118, 123, 992 P.2d 1019 (1999).

2. Plaintiffs’ Motion to Vacate Did Not Comply With CR 60(e)(3) Because It Was Improperly Served.

Plaintiffs’ Motion was defective and insufficient in both substance and procedure, and demonstrated a continuing disregard of court rules. CR 60(e) expressly requires that motions for relief be supported by an affidavit showing the “error” and be served “in the same manner as in the

case of summons in a civil action at such time before the date fixed for the hearing as the order shall provide.” Plaintiffs obtained their order requiring the Citi Defendants to show cause on August 8, 2008. They did not promptly serve it in the manner of a summons, but instead waited two weeks, and then, on August 21, 2008, Plaintiffs’ mailed it to Citi Defendants’ last attorney of record.⁴ (CR 76-77). This delay created significant hardship on the Citi Defendants’ attorneys to prepare a timely response, and it evidences Plaintiffs’ continuing failure to recognize the obligations inherent to the judicial process.

3. Plaintiffs’ Motion to Vacate Was Substantially Deficient Because It Was Not Supported by Appropriate Affidavits.

Plaintiffs’ Motion did not make the showing necessary to obtain the relief sought. CR 60(e) expressly requires an affidavit “setting forth a concise statement of the facts or error upon which the motion is based.” Plaintiffs’ affidavits establish nothing more than Carter’s absence from the country and his failure to implement procedures to ensure that he kept abreast of his case. These facts do not show a court error. To the contrary, they establish Plaintiffs’ neglect.

⁴ RCW 4.28.080 governs service. Various methods apply to the Citi Defendants, but under no circumstance is mailing a summons to the last known attorney of record authorized.

4. Plaintiffs' Motion to Vacate Failed to Make Any of the Requisite Showings Such that Would Entitle Them to Relief.

To be entitled to relief under CR 60(b)(1), the party must show either excusable neglect, mistake, surprise, or unjust procedural irregularity, that they acted with due diligence, and that no substantial hardship will result to the opposing party. *TMT Bear Creek Shopping v. PETCO*, 140 Wn. App. 191, 200-01, 165 P.3d 1271 (2007). Plaintiffs fail to make any of the requisite showings.

a. Plaintiffs' Neglect Is Willful, Not Excusable.

To be entitled to relief from a judgment due to excusable neglect, a party must show that the neglect was actually excused by some factor, and was not the result of mere failure to act. *Johnson v. Cash Store*, 116 Wn. App. 833, 68 P.3d 1099 (2003) (failure of store manager to forward summons and complaint to in-house counsel not excusable neglect). In fact, Washington courts have frequently considered claims of “excusable neglect” which arise as a result of failure to respond to a summons or complaint because of extended absences from the office, including trips out of town, and they consistently find that neglect of this variety is not excusable. *Prest v. Am. Bankers Life Assurance Co.*, 79 Wn. App. 93, 900 P.2d 595 (1995) (neglect inexcusable when summons and complaint were “mislaidd” while general counsel was out of town); *Petco*, 140 Wn. App. at

200-01 (where company failed to ensure that the legal assistant responsible for entering the deadline into the calendaring system did so before she left on an extended vacation, subsequently failed to ensure that employees hired to replace that assistant were trained on the calendaring system and competent in operating it, and failed to institute any other procedures necessary to ensure that Petco's general counsel received notice of the dispute, the neglect was inexcusable). Moreover, an attorney's negligence or neglect does not constitute grounds for vacating a judgment under CR 60(b). *Haller v. Wallis*, 89 Wn.2d 539, 547, 573 P.2d 1302 (1978); *M.A. Mortenson Co. v. Timberline Software Corp.*, 93 Wn. App. 819, 970 P.2d 803 (1999), *affirmed*, 140 Wn.2d 568, 998 P.2d 305 (2000) (also rejecting arguments that attorney negligence constitutes a "mistake" or "irregularity" under CR 60(b)(1)).

Plaintiffs offered no evidence to excuse their neglect and they made virtually no legal argument that their neglect was excusable. Instead, Plaintiffs argued that this court should not scrutinize their neglect because of the purportedly strong merits of their claims, an argument which is addressed below. Because Plaintiffs' claims have no merit, this court is to evaluate the nature of their neglect.

Plaintiffs filed this action pro se (and allegedly while residing outside of the country). At the time the action was filed, Plaintiffs were

aware that the attorney they contacted was otherwise engaged and unable to respond. Despite Carter's purported residence abroad, the court documents filed by Plaintiffs reflect a San Antonio, Texas, address. Plaintiffs offer no explanation for why they did not implement procedures to ensure that mail or legal documents sent to this address were forwarded to someone for response. Similarly, Plaintiffs offer no explanation for why they did not provide the court system with a current address (abroad or otherwise). Plaintiffs' failure to implement any procedures whatsoever after filing their Complaint appears willful and intentional, and certainly cannot constitute excusable neglect under *Johnson*, *Prest*, or *Petco*. Moreover, if the neglect was due to their attorney's conduct, it is also inexcusable under *Haller* and *Mortenson*.

Indeed, Plaintiffs do not cite even a single case which (1) excuses conduct even remotely similar to that presented by Plaintiffs' Motion, or (2) which found that a plaintiff's neglect of his own pending case was excusable. This Court is not reviewing a typical scenario where a *defendant* does not respond to a complaint. Plaintiffs commenced this action and certainly had notice that from the date of filing their Complaint, the court controlled this proceeding. See RCW 4.28.020. Plaintiffs' failure to monitor their case and respond to the pleadings filed in it is simply not excusable neglect.

b. Plaintiffs Have Not Shown Due Diligence.

Plaintiffs argue that they have acted with due diligence because they brought their Motion within one year of entry of the dismissal. By rule, one year is the outer limits of a motion for relief. Simply meeting that outer limit does not establish diligence. Indeed, Plaintiffs have shown no evidence of any diligence. They did not monitor the docket, they did not implement procedures to forward their mail, they did not respond to Citi Defendants' Motion to Dismiss and they did not promptly move for relief. As noted by the Washington Supreme Court in *Luger v. Littau*, 157 Wash. 40, 42, 288 P. 277 (1930), "there is no reason to excuse palpable indifference and neglect."

c. Plaintiffs Have Not Shown that Defendants Will Not Suffer Hardship.

A third factor which Plaintiffs are required to demonstrate to be entitled to relief is that the defendant will not be prejudiced or suffer hardship. *Little*, 160 Wn2d at 698. While Plaintiffs pay lip service to this requirement by suggesting that the only hardship the Citi Defendants will suffer is defending this claim on the merits, Plaintiffs ignore the fact that they have already proved they will not adhere to court rules, service requirements or time deadlines, causing Citi Defendants to incur extraordinary fees to monitor the docket to ensure that Plaintiffs provide copies of the pleadings they file. In addition, as noted below, Citi

Defendant briefed their opposition to Plaintiffs' Motion to Vacate on short notice and attended two court hearings at considerable expense. .

d. The "Irregularity" Cited by Plaintiffs Is Immaterial.

"Irregularities pursuant to CR 60(b)(1) occur when there is a failure to adhere to some prescribed rule or mode of proceeding." *Mosbrucker v. Greenfield Implement, Inc.*, 54 Wn. App. 647, 652, 774 P.2d 1267 (1989) (failure to annex the lease to the complaint, or to provide it when the default judgment was obtained, could significantly impact the proceedings because an alteration in the document raised a question as to whether the defendant had any liability for the judgment).

Washington courts have made clear that the use of CR 60(b)(11) should be confined to situations involving extraordinary circumstances not covered by any other section of the rule. *Gustafson v. Gustafson*, 54 Wn. App. 66, 75, 772 P.2d 1031 (1989) (quoting *In re Marriage of Flannagan*, 42 Wn. App. 214, 221, 709 P.2d 1247 (1985)). Moreover, Washington courts have repeatedly recognized that relief for procedural irregularities should not be given where the irregularity was not prejudicial. *See State v. San Juan County*, 102 Wn.2d 311, 686 P.2d 1073 (1984). While it is difficult to understand Plaintiffs' claim of irregularity, it is clear that the

purported irregularity (if there was one) did not prejudice them or effect the proceedings.

Plaintiffs' claim of procedural irregularity is based on the fact that the court calendar listed the hearing as one for summary judgment. Plaintiffs claim that as a result of what may have been a clerk error, the Citi Defendants should have been required to follow the timing and evidentiary requirements applicable to a motion for summary judgment, as opposed to those applicable to motions to dismiss. However, by Plaintiffs' implicit admission, even these longer time limits would not have helped them because they were still out of the country and not checking their mailbox or the court docket.

The Citi Defendants' Motion to Dismiss was captioned as a motion to dismiss, and the notice for hearing, which was served on Plaintiffs, states under the nature of the motion "Motion to Dismiss." (CP 29). The notice of hearing was docketed as a "Mt to Dismiss"). (CP 116), but on the date of the hearing the docket reads "Summary Judgment Hearing." Oral argument on this Motion was requested and allowed pursuant to LR 7(b)(2) because the motion was dispositive. (CP 116). The entry which follows the summary judgment entry on the same date notes that the order was an Order of Dismissal. (CP 116). The Citi Defendants cannot

understand why the court's ultimate docketing statement reflects that the hearing on February 15, 2008, was a summary judgment hearing.

Whether this was a summary judgment motion or a motion to dismiss makes no difference. In either event, Plaintiffs had an obligation to attend to the litigation which they commenced. There is no basis for Plaintiffs' argument that the Citi Defendants were required to follow the procedural rules applicable to summary judgment motions simply because the clerk's office noted that the hearing was a summary judgment hearing. The Citi Defendants properly followed the procedures applicable to the Motion they filed. Plaintiffs have shown no irregularity, much less any harm from a purported irregularity.

In the event this Court determined that the dismissal order should be set aside, RCW 4.32.240 provides that costs and terms, including the payment of attorneys' fees, may be imposed. *White v. Holm*, 73 Wn.2d 348, 438 P.2d 348 (1968).

C. Plaintiffs' Claims Were Properly Dismissed Pursuant to CR 12(b)(6).

Dismissal of a claim pursuant to CR 12(b)(6) is appropriate if "it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief." *Orwick v. City of Seattle*, 103 Wn.2d 249, 254, 692 P.2d 793 (1984) (quoting

Corrigal v. Ball & Dodd Funeral Home, Inc., 89 Wn.2d 959, 961, 577 P.2d 580 (1978)). While CR 12(b)(6) motions should be granted with care, they are appropriate in cases where plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief. *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 962 P.2d 104 (1998).

1. Plaintiffs Cannot State a Claim Against the Citi Defendants for Violation of the Washington Collectors Act.

Three of the “counts” in Plaintiffs’ Complaint (First, Second, and Fifth) purport to allege claims against the Citi Defendants which are predicated on violations of the Collections Act. The First Count alleges that Defendant CCSI violated the Collection Act by failing to obtain a license. (CP 6; Complaint, ¶ 5.3). The Second Count alleges that Citi Defendants violated the Collection Act by concealing or failing to disclose the alleged activities of Defendant CCSI in connection with the collection of the debt. (CP 6; Complaint, ¶¶ 6.1 and 6.2). The Fifth Count alleges that Citi Defendants violated the Collection Act by attempting to collect a debt when Citi USA nor Citibank were the proper party to bring suit because these entities did not own the debt. (CP 12; Complaint, ¶ 9.11).

As a preliminary matter, Citibank, as a national bank, is exempt from state licensing requirements, so the First Count against it was

properly dismissed on that basis alone.⁵ Moreover, the Collection Act only regulates the activities of “collection agencies” as defined therein and is not a statute of general applicability. Importantly, entities collecting their own debt do not come within the purview of the definition of collection agency, which is limited to persons collecting or attempting to collect claims “owed or due to another person.” RCW 19.16.100(2)(a). Similarly, entities collecting debts on behalf of affiliated entities with common ownership are also not “collection agencies” under the statutory definition set forth in RCW 19.16.100(3)(f). That section provides:

“Collection agency” does not mean and does not include:

* * *

(f) Any person while acting as a debt collector for another person both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt

⁵ Courts across the country have expressly recognized the authority granted to national banks under the NBA, including 12 U.S.C. § 24 (Fourth), to conduct business without regard to state law licensing and registration requirements. *See, e.g., Watters*, 127 S. Ct. 1559, 1564-65, 167 L. Ed. 2d 389 (2007) (reaffirming the long-held principle that national banks are subject to regulation exclusively by the OCC and are not subject to the “to the licensing, reporting, and visitorial regimes” of the states in which national banks transact business); *Citibank v. Eckmeyer*, 2009 WL 1452614, *4 (Ohio App. 11 Dist., May 08, 2009) (holding that NBA preempted state law requirements for business not qualified to do business in Ohio in order to file suit) *In re Hibernia Nat’l Bank*, 21 S.W.3d 908, 910 (Tex. App. 2000) (state law certification requirement for filing suit was preempted by 12 U.S.C. § 24 (Fourth)); *New York Guardian Mortgagee Corp. v. Davis*, 193 N.J. Super. 443, 450-51, 474 A.2d. 1101, 1105 (N.J. Super. Ct. Ch. Div. 1984); *Indiana Nat’l Bank v. Roberts*, 326 So.2d 802, 802-03 (Miss. 1976); *State Nat’l Bank of Connecticut v. Laura*, 45 Misc.2d 430, 431-32, 256 N.Y.S.2d 1004, 1006 (N.Y. County Ct. 1965) (same).

collector does so only for persons to who it is so related or affiliated and if the principal business of the person is not the collection of debts.

According to the allegations of Plaintiffs' Complaint, Defendant CCSI "is engaged in the business of collecting debts" on behalf of Citibank (Complaint, ¶¶ 2.9 and 4.2) and is an affiliate of both Citibank and Citigroup. (Complaint, ¶ 2.7). Consequently, even if Defendants CCSI or Citigroup were otherwise engaged in the activities of a collection agent, which the Citi Defendants deny, they are exempt from the Collection Act based on the common ownership exception of RCW 19.16.100(3)(f). Similarly, Defendant Citibank is itself alleged to be a judgment creditor of Carter. (CP 4; Complaint, ¶ 2.5). Thus, according to the express allegations of Plaintiffs' Complaint, the Citi Defendants are not subject to the Collections Act.

While there are no reported Washington cases construing these definitions, these provisions are similar to those contained in the Federal Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq* ("FDCPA"). There, as here, "[a] distinction between creditors and debt collectors is fundamental," as the FDCPA "does not regulate creditors' activities at all." *Schmitt v. FMA Alliance*, 398 F.3d 995, 998 (8th Cir. 2005) Indeed, a "plain reading of the statute reveals that generally, as a matter of law,

creditors are not subject to the FDCPA." *Doherty v. Citibank (South Dakota) N.A.*, 375 F. Supp. 2d 158, 161-62 (E.D.N.Y. 2005).

It is well established that a company collecting debts owed to itself, like Citibank here, is not a debt collector. *See, e.g., Aubert v. American Gen. Fin., Inc.*, 137 F.3d 976, 978 (7th Cir. 1998) (creditors who collect in their own name and whose principal business is not debt collection are not subject to the FDCPA); *Wadlington v. Credit Acceptance Corp.*, 76 F.3d 103, 106 (6th Cir. 1996) ("a debt collector does not include the consumer's creditors"); *Maguire v. Citicorp Retail Services, Inc.*, 147 F.3d 232, 235-36 (2nd Cir. 1998). Applying this black letter law, courts routinely dismiss FDCPA claims against credit card companies involved in the collection of their own debt. *E.g., MacDermid v. Discovery Financial Services*, 488 F.3d 721 (6th Cir. 2007) (credit card company attempting to collect its account is not a debt collector subject to the FDCPA); *Lewis v. ACB Bus. Servs, Inc.*, 135 F.3d 389, 411 (6th Cir. 1998) (credit card company "is primarily in the business of extending credit" rather than collecting debt and thus is not a debt collector under the FDCPA). Indeed, courts around the country have routinely dismissed cases brought against Citibank and its affiliates under the FDCPA for the very reason that Citibank is not a "debt collector." *See, e.g., Pacheco v. Citibank (South Dakota), N.A.*, 2007 WL 1241934, *1; *Doherty v.*

Citibank (South Dakota) N.A., 375 F. Supp. 2d at 162; *Duncan v. Citibank (South Dakota) N.A.*, 2006 WL 4063022, at *3; *Kloth v. Citibank (South Dakota), N.A.*, 33 F. Supp. 2d 115, 119 (D. Conn. 1998); *Meads v. Citicorp Credit Services, Inc.*, 686 F. Supp. 330, 333-34 (S.D. Ga. 1988); *Murray v. Citibank (South Dakota), N.A. and NCO Financial Systems, Inc.*, No. 04 C 3294, 2004 WL 2367742 at *2 (N.D. Ill. October 19, 2004); *Ray v. Citibank (South Dakota), N.A.*, 187 F. Supp. 2d 719, 722 (W.D. Ky. 2001); *Pavone v. Citicorp Credit Servs., Inc.*, 60 F. Supp. 2d 1040, 1047-48 (S.D. Cal. 1997); *Sankowski v. Citibank (South Dakota), N.A.*, Civil Action No. 06-CV-02469, 2006 WL 2037463 (E.D. Pa. July 14, 2006); *Dahlhammer v. Citibank (South Dakota) N.A.*, No. 05-CV-1749, 2006 WL 3484352 (M.D. Pa. Nov. 30, 2006); *Brown v. Citibank (South Dakota), N.A.*, No. 5:06-cv-123-FL, 2006 U.S. Dist. LEXIS 82785 (E.D.N.C. Oct. 19, 2006). In contrast to these decisions, Plaintiffs fail to cite a single case where Citi Defendants have been deemed a "debt collector" or collection agency.

Because the activities of the Citi Defendants are not subject to the Collection Act, each of the counts arising under the Collection Act were properly dismissed.

2. Plaintiffs' Claims Under the Consumer Protection Act Fail for the Same Reasons.

In addition to the claims under the Collection Act, two of Plaintiffs' Counts (Four and Five) purport to allege breaches of the Consumer Protection Act, RCW 19.86.010 (the "CPA"). Whether a particular act violates the CPA is a question of law. *Panag v. Farmers Ins.*, 166 Wn.2d 27, 204 P.3d 885 (2009). Each of the breaches alleged by Plaintiffs is predicated either on the alleged violations of the Collections Act (discussed above), or on allegations of abuse of process and wrongful garnishment (discussed below). As set forth above, the Citi Defendants are not subject to the Collections Act and, to the extent that Plaintiffs' CPA claims are based on violations of the Collections Act, they were properly dismissed as to the Citi Defendants.

To the extent Plaintiffs' claims are based on the allegations of abuse of process and "wrongful garnishment," they seek to hold the Citi Defendants vicariously liable for the acts of its attorney-agents. As discussed in Section 4 below, the Washington courts have expressly held that a client is not vicariously liable for the acts of its attorney-agent that constitute an abuse of process, including abuse of process wrongful garnishment. *Fite v. Lee*, 11 Wn.App. 21, 521 P.2d 964 (1974). As a result, the CPA claims which are predicated on the allegations of abuse of process and wrongful garnishment were properly dismissed as to the Citi Defendants.

3. Plaintiffs' Claims for Abuse of Process Fail Because the Challenged Garnishments Were Used Properly as a Matter of Law.

Plaintiffs' Third Count purports to allege a common law claim for abuse of process. The Washington Court of Appeals has identified the essential elements of a claim for abuse of process as: "(1) the existence of an ulterior purpose – to accomplish an object not within the proper scope of the process – and (2) an act in the use of legal process not proper in the regular prosecution of the proceedings." *Hanson v. Aetna Ins.*, 26 Wn. App. 290, 612 P.2d 456 (1980).

Washington cases establish that no abuse of process occurs unless the plaintiff, after commencing an action, uses the legal process to achieve an end which is not within the proper scope of prosecution of the action. *Batten v. Abrams*, 28 Wn. App. 737, 626 P.2d 984 (1981). Stated another way, "the gist of the action is the misuse or misapplication of the process, AFTER IT HAS ONCE BEEN ISSUED, for an end other than that which it was designed to accomplish." *Batten*, 28 Wn. App. at 745.

In the specific context of a wrongful garnishment proceeding, the Washington courts have stated that the proper test for abuse of process is whether the process has been used to accomplish some unlawful end, or to compel the adverse party to do some collateral thing which he could not

legally be compelled to do. *Fite v. Lee*, 11 Wn. App. 21, 521 P.2d 964 (1974).

Plaintiffs' abuse of process claim alleges variously that Citi Defendants acted "without good faith" (CP 7; Complaint, ¶ 7.1), omitted required disclosures, (CP 8; Complaint, ¶ 7.8), and issued garnishments to pressure Plaintiff Brent Carter to "pay the judgments." (CP 8; Complaint, ¶ 7). Tellingly, Plaintiffs do not allege that the garnishment process was used to accomplish some unlawful end, or to compel Plaintiffs to do some collateral thing which they could not legally be compelled to do. Plaintiffs' allegations establish that there was a judgment debt, and that the purpose of the garnishments was to effectuate payment of that judgment. By their very nature, garnishments are a process used to obtain collection of a judgment debt. *See* RCW 6.27.020. There is no allegation that the garnishment process was employed for a purpose other than to effectuate payment. Somewhat ironically, rather than stating a claim for abuse of process, these allegations establish, as a matter of law, that no abuse of process occurred. As a result, Plaintiffs' claim for abuse of process fails and was properly dismissed.

4. The Citi Defendants Cannot Be Held Vicariously Liable for the Alleged Wrongful Garnishment by Their Attorney.

Plaintiffs' Sixth Count purports to allege a claim for wrongful garnishment. As set forth below, as to the Citi Defendants, this claim fails because Washington cases establish that a client may not be held vicariously liable for the acts of an attorney which constitute an abuse of process, such as wrongful garnishment. The Washington Court of Appeals explained the rationale for this rule as follows:

An attorney in discharging his professional duties acts in a dual capacity. In a limited or restricted sense he is an agent of his client. But he has powers, including those to issue judicial process, far superior to those of an ordinary agent.

As an officer of the court, his duties are both private and public. Where the duties to his client to afford zealous representation conflict with his duties as an officer of the court to further the administration of justice, the private duty must yield to the public duty. He therefore occupies what might be termed a "quasi-judicial office."

* * * * *

By its very nature, an abuse of legal process by an attorney as defined above violates an attorney's oath, his canons of ethics, and his duty to the public as an officer of the court. Accordingly, the scope of the attorney's implied authority as an agent should not, as a matter of law, extend to acts which constitute an abuse of legal process. (Citations Omitted).

Fite, 11 Wn. App. at 29 (emphasis applied).

Plaintiffs' allegations assert that the garnishments were obtained based on allegedly false statements made in declarations of counsel for Citibank. As a matter of law, the Citi Defendants are not vicariously

liable for the acts of their counsel which constitute an abuse of process or wrongful garnishment. Plaintiffs' Sixth Count was properly dismissed as to the Citi Defendants.

5. Plaintiffs' Claims are Barred by Applicable Statutes of Limitations.

RCW 4.16.080 is the "general tort" statute of limitations and it provides that actions for personal injury, as well as actions for a liability which does not arise out of written instrument, shall be commenced within three years. Claims under the Collections Act are also subject to this three year statute. *Watkins v. Peterson Enterprises, Inc.*, 57 F. Supp. 1102, 1110 n.6 (E.D.WA 1999). Washington law is clear that the statute of limitations begins to run when the plaintiff has knowledge of predicate facts leading to a cause of action. *Cawdry v. Hanson Baker Ludlow Drumheller*, P.S., 129 Wn. App. 810, 817, 120 P.3d 605 (2005) *rev. denied*, 157 Wn.2d 1004 (2006) (limitations period begins to run when plaintiffs becomes aware of facts underlying the claim).

According to the allegations of the Plaintiffs' Complaint, the collection activities about which Plaintiffs' complain occurred in 2004. (CP 4). Indeed, according to the Complaint, the post judgment garnishments about which Plaintiffs complain were issued by the Superior Court of Island County on December 1, 2004, (CP 4; Complaint, ¶ 2.5),

based on alleged misstatements made in declarations dated November 22, 2004. *Id.*

Plaintiffs' Complaint in this case was filed December 31, 2007, more than three years following the collection activities and issuance of the complained of garnishment. Plaintiffs' Complaint was first served February 20, 2008. Because the claims were not commenced until more than three years following the time that the cause of action arose, they were untimely and were properly dismissed.

6. Plaintiffs' Fifth Claim is Barred by the Doctrine of Res Judicata.

Plaintiffs' Fifth Claim for Relief purports to allege a claim for Breach of the CPA and the Collection Act, asserting that the Citi Defendants "were not the proper party" to bring the underlying collection lawsuits as a result of certain securitization transactions in which the Citi Defendants are alleged to have been engaged. (CP 8, 9; Complaint, ¶ 9.1 through 9.18). While unclear, these allegations appear to assert that Citibank did not have standing to bring the underlying collection lawsuits because of the alleged securitization transactions. In addition to the fact that these allegations do not state a claim against the Citi Defendants, any such claim/issue is barred by the doctrine of res judicata.

The doctrine of res judicata was judicially created to prevent the relitigation of matters between parties who have had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction. *Corbin v. Madison*, 12 Wn. App. 318, 323, 529 P.2d 1145 (1974). “Res judicata acts to prevent relitigation of claims that were or should have been decided among the parties in an earlier proceeding.” *Norris v. Norris*, 95 Wn.2d 124, 130, 622 P.2d 816 (1980). The doctrine ““applies ... to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at that time.”” *Kelly-Hansen v. Kelly-Hansen*, 87 Wn. App. 320, 329, 941 P.2d 1108 (1997). If a party could have raised an issue or challenge and litigated them in the prior proceeding, res judicata precludes the party from raising the issue in a subsequent proceeding. *See Lenzi v. Redland Ins. Co.*, 140 Wn.2d 267, 280, 996 P.2d 603 (2000) (finding claim barred by doctrine of res judicata based upon default judgment obtained in prior proceeding in which insurer had an opportunity to intervene). A court applies the ruling of an earlier case to a later one if it finds that both cases have common (1) subject matter, (2) cause of action, (3) persons and parties, and (4) quality of persons for or against whom the claim is made. *Hilltop Terrace Homeowner’s Ass’n v. Island Co.*, 126 Wn.2d 22, 32, 891 P.2d 29 (1995).

Here, all four of these elements are satisfied. The subject matter of the claims are the same, the account owed to Citibank by Plaintiffs. The cause of action Plaintiffs are asserting lacks standing and could have been raised in the prior matter, and indeed was central to the judgment obtained in that matter, as Citibank would not have obtained a judgment if it did not have standing to bring the claims.

Finally, despite the addition of numerous affiliates of Citibank to Plaintiffs' instant claims, the persons and parties are the same in both actions, and their "quality," that of adversaries, is identical. This is true because, "[i]dentity of parties is not a mere matter of form, but of substance. [P]arties nominally different may be, in legal effect, the same." *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402, 84 L. Ed. 1263, 60 S. Ct. 907 (1940); *see also Centralia College Educ. Ass'n v. Board of Trustees*, 82 Wn.2d 128, 129, 508 P.2d 1357 (1973) (state and various state agencies were the same party). Thus, because all four elements are satisfied, Plaintiffs' Fifth Count was properly dismissed based on the doctrine of res judicata.

In their Motion to Vacate, Plaintiffs cited to a series of foreclosure cases from the Southern District of Ohio where the foreclosure complaints were dismissed, without prejudice, because the court questioned whether those plaintiffs could show that they were the holder of the note and

mortgage in question, such that they had standing to foreclose. The court dismissed the cases without prejudice to allow plaintiffs an opportunity to produce evidence that they had the required assignments. Notably, the standing arguments were raised as a defense in the foreclosure cases, not in subsequent cases asserting affirmative claims of wrongful collection activities.

These foreclosure cases do not even remotely support Plaintiffs' argument and indeed establish that their purported standing defense "properly belonged" and should have been raised in the underlying Island County collection cases. Any claims as to standing are barred by res judicata.

7. Plaintiffs Fifth Claim Does Not State a Claim for Relief.

Apart from the fact that the claim is barred by res judicata, Plaintiffs' Fifth Claim fails because Citibank had standing to pursue the collection actions.. At least two courts, including the Supreme Court of Idaho, have expressly rejected challenges to Citibank's standing to pursue collection actions on credit card debt which has allegedly been securitized. In *Citibank v. Carrol*, __ P3rd ___, 2009 WL 406 7870 (Idaho) the Idaho Supreme Court held that Citibank had standing to bring an action to collect the underlying debt and rejected plaintiff's argument that Citibank

was not the real party in interest. Even more recently, a district court in Texas reached a similar conclusion. There the plaintiff alleged that Citibank's assignment of receivables from his credit card account into a trust as part of an asset securitization transaction prevents Citibank from collecting on the credit card account. The court granted summary judgment in favor of Citibank. *Tostado v. Citibank*, 2010 WL 55976 (WD Tex).⁶ As held in both *Carroll* and *Tostado*, Citibank had standing to pursue the debt against Carter.

V. CONCLUSION

Plaintiffs failed to make any of the showings required for relief from judgment. The trial court did not abuse its discretion when it determined that an unjustified delay of six months between learning of judgment and filing of Plaintiffs' Motion to Vacate is not reasonable. As a result of Plaintiffs' willful neglect, they were required to make a strong showing of a merit in order to obtain relief. Plaintiffs fail to even address the merits of the vast majority of their claims, and the one claim they label as meritorious was defeated by the express allegations of their Complaint and was barred by res judicata. Moreover, given that Plaintiffs' claims are

⁶ Both of these opinions were only recently issued and only the WL citations are available at the time of filing this Brief.

not meritorious, providing relief would be futile and would work an injustice on the Citi Defendants.

Additionally, the trial court properly granted Citi Defendants' Motion to Dismiss. Plaintiffs' claims were predicated on statutory violations which do not apply to the Citi Defendants, were barred by the statute of limitations and or were barred by res judicata. Under these circumstances, the court did not err.

Dated: January 13, 2010.

FARLEIGH WADA WITT

By: 
Kathryn P. Salyer, WSBA #36492
(503) 228-6044
ksalyer@fwwlaw.com
Of Attorneys for Defendants Citi USA,
Citigroup, Inc. Citibank (South Dakota)
N.A.

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on January 13, 2010 I served the foregoing **BRIEF OF**
3 **RESPONDENTS CITIBANK (SOUTH DAKOTA), N.A. AND CITICORP CREDIT**
4 **SERVICES, INC. (USA)** on the following individuals by mailing overnight mail to said
5 individuals a true copy thereof, addressed to their last known regular address and deposited in the
6 Post Office at Portland, Oregon:

7 Joel E. Wright
8 William R. Kiendl
9 Lee Smart P.S., Inc.
10 1800 One Convention Place
11 701 Pike Street
12 Seattle, WA 98101

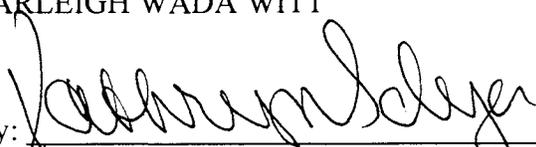
Jason E. Anderson
Attorney and Counsel at Law
8015 – 15th Avenue NW, Suite 5
Seattle, WA 98117

Of Attorneys for Appellants

Of Attorneys for Respondent
Suttell & Hammer, P.S.

13 Dated: January 13, 2010.

14 FARLEIGH WADA WITT

15
16 By: 

17 Kathryn P. Salyer, WSBA NO. 36492
18 (503) 228-6044
19 ksalyer@fwwlaw.com
20 Attorneys for Respondents Citi USA,
21 Citigroup, Inc., Citibank (South Dakota),
22 N.A. and Citicorp Credit Services, Inc.
23
24
25
26