

NO. 64806-3

COURT OF APPEALS STATE OF WASHINGTON

ZECO DEVELOPMENT GROUP, INC., a Washington corporation,

Plaintiff.

v.

AMERICAN TRADITION REAL ESTATE, INC., doing business as
Coldwell Banker American Tradition,

Defendant.

RESPONDENT'S BRIEF

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I. INTRODUCTION

The superior court properly dismissed the complaint of plaintiff-appellant, Zeco Development Group Inc (Zeco), on summary judgment when defendant-respondent, American Tradition Real Estate Inc. (American Tradition), presented undisputed evidence that Zeco's complaint was barred by the statute of limitations and collateral estoppel, and that Zeco failed to establish a breach of duty on the part of American Tradition.

Zeco previously voluntarily dismissed a suit against American Tradition and two of its real estate agents subject to the terms of a Tolling Agreement which provided Zeco with a limited time to refile the existing complaint. Rather than refile a complaint, which Zeco admitted lacked merit, Zeco filed a different complaint which was time barred because it did not fall within the terms of the Tolling Agreement. In the meantime Zeco's lawsuit involving the same transaction against Summersun Greenhouse Corporation proceeded to trial. The resulting Findings of Fact and Conclusions of Law established facts that bar Zeco from prevailing on the merits of the claims asserted in this action. The doctrine of collateral estoppel bars Zeco from relitigating those facts.

Zeco failed to raise a genuine issue for trial on the merits of the claims asserted in this action. There is no support for Zeco's claims that

American Tradition owed Zeco any common law duty or that it breached a statutory duty owed to Zeco.

II. ASSIGNMENTS OF ERROR

Assignments of Error

American Tradition assigns no error to the superior court's ruling.

Issues Pertaining to Assignments of Error

American Tradition disagrees with the assignments of error as stated by Zeco. American Tradition believes that the issues on appeal are more properly stated as follows:

Whether the superior court correctly dismissed Zeco's complaint on summary judgment where:

1. The undisputed facts showed that the three-year statute of limitation barred the Second Complaint, given that (a) the Second Complaint was based on different facts and legal theories than stated in the First Complaint; (b) the Tolling Agreement expressly provides that the statute of limitations is tolled only for the causes of actions stated in the First Complaint; and (c) other provisions of the Tolling Agreement would be rendered superfluous if the agreement was interpreted in the manner that Zeco urges:

2. Zeco failed to raise a genuine issue of material fact showing a breach of common-law or statutory duties, because (a) Zeco

never identified a common-law duty that was breached, and (b) the statutory duties Zeco relied on were either not breached by Mr. Halterman or did not proximately cause Zeco's damages; and

3. The facts on which Zeco bases its negligence allegations against Mr. Halterman were determined in *Summersun v. Zeco*, and all the elements of collateral estoppel bar the relitigation of those facts in this case.

III. STATEMENT OF THE CASE

A. Zeco's claim against American Tradition was part of a prior litigation but was based only on acts of negligence of other agents.

Zeco filed suit in Skagit County under cause number 07-2-00413-3 on March 8, 2007 against Dee Donaldson and John Doe Donaldson, Terri Heyntsen and John Doe Heyntsen, and American Tradition Real Estate Inc., d/b/a Coldwell Banker American Tradition (Real Estate Defendants). An Amended Complaint was filed on March 14, 2007, (the First Complaint), App. 1, alleging generally that the Real Estate Defendants' negligence caused the failure of Zeco's offer to purchase property from Summersun Greenhouse Corporation (Summersun) to become a binding agreement. CP 35-42. Previously pending in Skagit County under cause number 04-2-00837-1 was *Summersun Greenhouse Corp. v. Zeco Dev. Group, Inc.* Summersun sought declaratory judgment that the Real Estate

Purchase and Sale Agreement (REPSA) between Summersun and Zeco was not a binding agreement. CP 43-49. Zeco answered, denying Summersun's allegations and alleging a counterclaim that asked the court to find that the REPSA was a binding agreement and that Summersun had breached it. CP 50-61. Zeco specifically alleged that the REPSA contained the legal descriptions of five parcels when it was given to Summersun's agent, Ron Halterman. CP 57. The two actions arose from the same real estate transaction, and the two actions were consolidated by order dated October 5, 2007. CP 33-34. Mr. Halterman was not a party in either suit.

B. Zeco dismissed the Real Estate Defendants before trial.

As the trial date of the consolidated cases approached, Zeco reached an agreement with the Real Estate Defendants that provided that all claims against the Real Estate Defendants would be dismissed. CP 86. A Stipulation and Order of Partial Dismissal Without Prejudice was filed on April 21, 2008. CP 62-63. This dismissal was based on a Tolling Agreement signed by Zeco and the Real Estate Defendants. CP 64-68. The Tolling Agreement allowed Zeco to dismiss the claims against the Real Estate Defendants, without prejudice, and reserved Zeco's right to refile the action against the Real Estate Defendants within a specified period of time after the resolution of the *Summersun v. Zeco* action.

The trial of the *Summersun v. Zeco* occurred in February 2009. CP 70. The superior court entered Findings of Fact and Conclusions of Law on April 10, 2009. CP 69-81.

C. The Tolling Agreement expressly limited the claims that Zeco could refile to those that Zeco had alleged against the Real Estate Defendants in the First Complaint.

Zeco and the Real Estate Defendants entered into the Tolling Agreement at a time when both were represented by lawyers. *See generally* CP 64-68. The Tolling Agreement expressly limited the claims that Zeco could refile to those claims against the Real Estate Defendants that Zeco had alleged against them in the First Complaint:

The purpose of this agreement is to allow the lawsuit filed by Zeco Development Group Inc., against Coldwell Banker American Tradition Inc., Dee Donaldson and John Doe Donaldson and Terry Heynsten and John Doe Heynsten to be dismissed without prejudice reserving to Zeco a limited right to refile the action against Coldwell Banker American Tradition Inc., Dee Donaldson and John Doe Donaldson and Terry Heynsten and John Doe Heynsten during a limited period of time [.]

...

This agreement permits Zeco to reinstate only those causes of action that it was maintaining at the signing of this Agreement.

App. 2.

D. Zeco filed the Second Complaint, alleging different claims than its First Complaint had alleged.

Zeco filed this action under cause number 09-2-01013-0 on May 8, 2009. (the Second Complaint). CP 3, App. 3. The Second Complaint differs significantly from the First Complaint. The Second Complaint, unlike the First Complaint, was based on the theory that American Tradition was vicariously liable for the negligence of Mr. Halterman. CP 11. The Second Complaint, unlike the First Complaint, did not name Dee Donaldson or Terry Heynsten as defendants. CP 11. The Second Complaint, unlike the First Complaint, did not allege any claims based on the negligence of Ms. Heynsten or Ms. Donaldson, *Id.*, which had been the sole basis for relief in the First Complaint. CP 41-42.

There are significant differences between Zeco's First Complaint and its Second Complaint. The following chart summarizes those many differences.

First Complaint Cause No. 07-2-00413-3	Second Complaint Cause No. 09-2-01013-0	Differences between complaints
Paragraph 1.1 to 1.4 Defendants identified as Dee Donaldson and John Doe Donaldson, husband and wife; Terri Heynsten and John Doe Heynsten husband and wife and Coldwell Banker American Tradition Inc.	Paragraph 3 The only defendant is American Tradition Real Estate Inc.	Dee Donaldson and Terri Heynsten are not named as individual defendants in the Second Complaint because it does not contain any allegations of negligence on their part, while in the First Complaint the allegations of liability

First Complaint Cause No. 07-2-00413-3	Second Complaint Cause No. 09-2-01013-0	Differences between complaints
		of American Tradition were based on the alleged negligent acts of these two real estate agents
	Paragraphs 5, and 7-11, and 19-21, 28-32, and 39 describe the interactions between Mr. Halterman and Mr. Loeb, owner of Summersun	None of the facts in these paragraphs in the Second Complaint were in the First Complaint.
	Paragraphs 16, 18, 23-26, and 38 describe actions of Ms. Heyntsen.	None of the facts in these paragraphs in the Second Complaint were in the First Complaint
	Paragraphs 42-45 describe the content of the REPSA.	None of the facts in these paragraphs in the Second Complaint were in the First Complaint
	Paragraphs 48-49 describe actions of Mr. Halterman	None of the facts in these paragraphs in the Second Complaint were in the First Complaint
	Paragraph 51 describes the outcome of Summersun v. Zeco trial.	None of the facts in these paragraphs in the Second Complaint were in the First Complaint
	Paragraphs 52-60 describe the fault of Mr. Halterman that resulted in the failure of the transaction to result in a binding agreement	None of the facts or theories of liability in these paragraphs in the Second Complaint were in the First Complaint

First Complaint Cause No. 07-2-00413-3	Second Complaint Cause No. 09-2-01013-0	Differences between complaints
Paragraph 2.7 Zeco signed a Real Estate Commission Agreement with Ms. Heyntsen		This fact is not mentioned in the Second Complaint.
Paragraph 2.22 describes the duty of Ms. Donaldson to ensure that the documents prepared by agents are sufficient to protect their client's interests.		None of the facts or theories of liability in the First Complaint are contained in the Second Complaint. The First Complaint did not contain any allegations of negligence based on the actions of Mr. Halterman.
Paragraph 2.23 alleges that Ms. Donaldson and Ms. Heynsten were negligent because they failed to adequately prepare the legal documents.		None of the facts or theories of liability in the First Complaint are contained in the Second Complaint. The First Complaint did not contain any allegations of negligence based on the actions of Mr. Halterman.
Paragraph 2.24 alleges that Ms. Donaldson was negligent in supervising by allowing a conflict of interest to develop and failing to ensure the integrity of documents delivered.		None of the facts or theories of liability in the First Complaint are contained in the Second Complaint. The First Complaint did not contain any allegations of negligence based on the actions of Mr. Halterman.

First Complaint Cause No. 07-2-00413-3	Second Complaint Cause No. 09-2-01013-0	Differences between complaints
Paragraph 2.27 alleges that the transaction failed to close because of the negligence of the Defendants as set forth herein.		None of the facts or theories of liability in the First Complaint are contained in the Second Complaint. The First Complaint did not contain any allegations of negligence based on the actions of Mr. Halterman.

American Tradition moved for summary judgment to dismiss Zeco's complaint. CP 13. On December 14, 2009, the superior court granted American Tradition's Motion for Summary Judgment. CP 139-140. Zeco filed a Notice of Appeal on January 13, 2010.

IV. SUMMARY OF ARGUMENT

There are no material questions of fact that precluded the superior court's decision on summary judgment. American Tradition presented the superior court with three bases for dismissal of the Zeco's Second Complaint, and this court may affirm the superior court's ruling on any one of those grounds.

First, Zeco's Second Complaint asserted new and different causes of action than contained in the First Complaint. The Tolling Agreement provided that the statute of limitations was tolled for only the claims that Zeco had asserted in the First Complaint.

Second, the doctrine of collateral estoppel bars Zeco from arguing that Mr. Halterman was negligent. Zeco litigated and lost the facts that determine this issue in *Summersun v. Zeco*. All four elements of collateral estoppel have been met. The court in *Summersun v. Zeco* found that Mr. Halterman was not given the legal description with the purchase offer and that Zeco and Summersun never reached a meeting of the minds as to what property was to be sold. CP 76-81. These factual findings preclude Zeco's argument that Mr. Halterman acted negligently or that the alleged negligence proximately caused Zeco's damages as alleged in the Second Complaint.

Third, American Tradition presented undisputed evidence that Zeco does not have a cause of action against Mr. Halterman. The Second Complaint alleged that Mr. Halterman was negligent because he did not read the communications from Summersun or did not present legal descriptions with the purchase offer. CP 11. The undisputed evidence shows that Mr. Halterman read communications from Summersun and that he knew which properties were for sale before Zeco's offer. CP 84. Zeco did not establish any common-law duty that Mr. Halterman's conduct breached. Under these undisputed facts, Mr. Halterman did not breach his limited statutory duties to Zeco. Zeco could not have recovered, even if a

duty of reasonable care was breached, because there was never any intent on the part of Summersun to sell the parcels that Zeco wanted to buy.

V. ARGUMENT

A. This court reviews the superior court's order de novo.

The standard of review on appeal of a summary judgment order is de novo; this court performs the same inquiry as the trial court. *Herron v. Tribune Pub. Co.*, 108 Wn.2d 162, 169, 736 P.2d 249 (1987).

B. The issue was ripe for summary judgment, and there were no factual disputes that would preclude summary judgment.

Zeco opposed American Tradition's Motion for Summary Judgment, but Zeco did not argue that there were genuine issues of material fact that precluded summary judgment. CP 85-98. Even now, Zeco maintains this position on appeal. Zeco does not argue that the superior court erred as a result of factual disputes. *See App. Br.* at 9-17. Although Zeco presented a purely legal argument that the court should not interpret the Tolling Agreement as American Tradition argued, Zeco did not submit any declarations supporting its interpretation of the Tolling Agreement. The declaration of Zeco's attorney Matthew Davis did not contain any testimony supporting Zeco's interpretation of the Tolling Agreement. CP 99-100.

The interpretation of an unambiguous contract is a question of law, even if the parties dispute the legal effect of its provisions. *Voorde Poorte v. Evans*, 66 Wn. App. 358, 362, 832 P. 2d 105 (1992), (citing *Barnett v. Buchan Baking Co.*, 45 Wn. App. 152, 159, 724 P.2d 1077 (1986), *aff'd* 108 Wn.2d 405, 738 P.2d 1056 (1987)). Accordingly, the superior court did not err in granting summary judgment.

In its de novo review of a grant of summary judgment, this court may affirm on any ground established by the pleadings and supported by the evidence. *Otis Housing Assoc. v. Ha*, 165 Wn.2d 582, 587, 201 P.3d 309 (2009); *Green v. Am. Pharm. Co.*, 136 Wn.2d 87, 94, 960 P.2d 912 (1998). Therefore this court may affirm the superior court's ruling even if only one of the three bases for summary judgment is affirmed.

C. The Tolling Agreement did not toll the cause of action asserted in the Second Complaint.

- 1. Zeco and American Tradition agreed to a Tolling Agreement tolling the statute of limitations only if Zeco refiled the existing complaint.**

The parties agree that the Tolling Agreement is a contract. The plain language of a contract will be given its ordinary meaning. *Cambridge Townhouses LLC v. Pacific Star Roofing, Inc.*, 166 Wn.2d 475, 487, 209 P.3d 863 (2009). The Tolling Agreement clearly and unambiguously provided that it tolled the statute of limitations for only

those “causes of action” that were part of the existing litigation, and that Zeco could only “refile” the complaint to obtain the benefit of the tolling agreement. CP 64-65. A “cause of action” is “[t]he fact or facts which give a person a right to judicial relief.” Black’s Law Dictionary at 201 (5th ed. 1979). Given their ordinary meaning, the terms of the Tolling Agreement do not toll the statute of limitations for any complaint other than the First Complaint.

2. Zeco’s First Complaint did not state a cause of action based on Mr. Halterman’s negligence.

a. Zeco’s “notice pleading” argument contravenes the terms of the Tolling Agreement.

Zeco admits that the Tolling Agreement preserved its right only to recommence the pending lawsuit. App. Br. at 10. Yet Zeco argues, in the face of the overwhelming evidence to the contrary, that the Tolling Agreement covers the allegations in the Second Complaint. Zeco argues that notice pleading allows evidence at trial to be broader than the outline of issues in the complaint. App. Br. at 10. This argument may be true as a general rule in interpreting pleadings, but it is irrelevant to the issues in the present case, and indeed it contravenes the expressly stated purpose of the Tolling Agreement. According to the Tolling Agreement, the content of the complaint determines whether the statute of limitations is tolled. CP 64-65. The causes of action that Zeco had alleged in the First Complaint

at the time of the signing of the Tolling Agreement were claims of negligence based on the conduct of Zeco's own agent, Terry Heynsten, and American Tradition's broker Dee Donaldson. CP 41. The Second Complaint not only omits these causes of action but also adds new claims of liability based on the conduct of Mr. Halterman. CP 11.

The causes of action based on the alleged negligent conduct of Ms. Donaldson, and Ms. Heynsten, Zeco's real estate agent, are **different causes of action** from those that Zeco now alleges based on the conduct of Mr. Halterman, who was Summersun's real estate agent. CP 4-5. The different defendants owed different duties. *Compare* RCW 18.86.050 (describing buyer's agents' duties and loyalty owed to buyer) and RCW 18.86.040 (describing seller's agents' duties and loyalty owed to seller).

The table set forth the Statement of the Case at § III.C., *supra*, sets out in detail the many differences between the claims that Zeco alleged in the First Complaint and the claims that Zeco alleged in the Second Complaint.

- b. The facts alleged in the Second Complaint create a cause of action, which differs from the cause of action in the First Complaint.**

The facts that support a legal theory of negligence are what create a "cause of action." Black's Law Dictionary at 201; *Adams v. King County*, 164 Wn.2d 640, 657, 192 P.3d 891 (2008). Stated another way,

the cause of action is the act which occasioned the injury, not the damage that flows from the wrong. *McFarling v. Evaneski*, 141 Wn. App. 400, 405, 171 P.3d 497 (2007). Therefore, it does not matter for the purposes of the Tolling Agreement if the Second Complaint would have allowed Zeco to recover the same damages sought in the First Complaint. The cause of action is based on the facts asserted, and the facts asserted in the Second Complaint to state a cause of action are substantially different in the Second Complaint.

c. The First Complaint did not state a cause of action against American Tradition based on Mr. Halterman's negligence.

The First Complaint did not state a cause of action for the negligence of Mr. Halterman. Under Washington law, the pleadings must give notice to the court and opposing parties of the nature of the claim asserted. *See Tumelson v. Todhunter*, 105 Wn.2d 596, 604-05, 716 P.2d 890 (1986). The court has no jurisdiction to grant relief beyond that sought in the complaint. *See Matter of Marriage of Leslie*, 112 Wn.2d 612, 617, 772 P.2d 1013 (1989). **Matters not stated with "fair notice" in a Complaint are excluded from trial testimony as irrelevant under Washington law.** ER 401; *Hedlund v. White*, 67 Wn. App. 409, 413 n.4, 836 P.2d 250 (1992) (a plaintiff could not testify to her emotional distress at trial when she had not asserted a claim for emotional distress in the

complaint); *MacLean v. Bellingham*, 41 Wn. App. 700, 703-04, 705 P.2d 1232 (1985) (“a complaint, even under our liberal rules of pleading, is required to contain direct allegations sufficient to give notice to the court and the opponent of the nature of the plaintiff’s claim”). The First Complaint does not name Mr. Halterman as a defendant; it does not contain any claim that Mr. Halterman owed a duty to Zeco; it does not claim that he breached any duty to Zeco. CP 35-42. The First Complaint did not describe the interactions between Mr. Loeb and Mr. Halterman that are contained in detail in the Second Complaint in paragraphs, 5, 7-11, 19-21 and 28-32. CP 4-6. The First Complaint alleged that there was a written agency contract between Zeco and Ms. Heynsten, CP 39, but made no allegations that Mr. Halterman had a contractual relationship with Zeco. The First Complaint alleged that the transaction did not close because of the allegations of the named defendants, which did not include Mr. Halterman. CP 42. The First Complaint does not give fair notice that Zeco was pursuing any theory of liability of negligence based on the actions of Mr. Halterman.

3. Zeco’s interpretation of the Tolling Agreement would render some of its provisions superfluous.

Several key provisions in the Tolling Agreement support American Tradition’s argument that parties contemplated only refiling of the First Complaint, and nothing more. The consideration for Zeco’s signing the

Tolling Agreement was Zeco's recognition that its claims against the Real Estate Defendants would not prevail at trial. CP 64. Because the dismissal of the Real Estate Defendants was based on Zeco's recognition that the facts developed in the case did not support the specific claims and theories of recovery against the Real Estate Defendants, Zeco's current argument that notice pleading would have allowed a broader claim at trial is contrary to the terms of the agreement. By filing the Second Complaint, Zeco certifies that it has a viable cause of action. CR 11. There was no consideration for dismissal of the First Complaint based on the alleged negligence of Mr. Halterman. Therefore, it is absurd to argue that claims that Zeco now certifies are viable, based on the alleged negligence of Mr. Halterman, were asserted in the First Complaint, which was dismissed because the causes of action were not viable.

The provision in the Tolling Agreement that the parties were to be governed by the discovery schedule and court rulings in the First Complaint supports the interpretation that the Tolling Agreement precludes new causes of action being asserted in a later-filed complaint. Both parties agreed that the discovery rulings made by the court relative to the claims in the First Complaint would be enforced after the case was refiled. The Tolling Agreement even prohibits Zeco from conducting any discovery after the case is refiled. CP 65. A contract should not be

interpreted in such a manner as to render its provisions superfluous. *Shafer v. Board of Trustees*, 76 Wn. App. 267, 276, 883 P.2d 1387 (1994). A construction of a contract that contradicts its general purpose and results in an absurdity is presumed unintended. *Campbell v. Ticor Title Ins. Co.*, 166 Wn.2d 466, 472, 209 P.3d 859 (2009). Interpreting the Tolling Agreement in the manner urged by Zeco would render the discovery provisions meaningless. There would be no need for Zeco to be bound by prior discovery rulings if the Tolling Agreement allowed Zeco to pursue new theories of recovery in a Second Complaint. Because these discovery provisions exist, the Tolling Agreement should be interpreted in a way that makes them affective. That can mean only that Zeco had to refile the complaint as it was written when the Tolling Agreement was signed.

D. The plain language of the Tolling Agreement establishes that it did not toll the claims alleged in the Second Complaint, and therefore the Second Complaint is time-barred.

The transaction giving rise to the claims in the Second Complaint occurred in March 2004. CP 4-10. The Second Complaint was filed on May 8, 2009. CP 4. There is a three-year statute of limitations for negligence. RCW 4.16.080. Because the Tolling Agreement tolled only the causes of action that were part of the First Complaint, and specifically did not revive causes of action that would be time-barred, CP 64-66, the Second Complaint was barred by the statute of limitations.

E. Zeco’s claim based on the negligence of Mr. Halterman is barred by collateral estoppel.

1. Collateral estoppel prevents relitigation of determinative facts.

The doctrine of collateral estoppel precludes relitigation of issues once they have been litigated and determined between the parties, even though a different claim or cause of action is asserted. *Christensen v. Grant County Hosp.*, 152 Wn.2d 299, 306, 96 P.3d 957 (2004). Collateral estoppel differs from res judicata in that the actions need not be identical, and the party invoking the defense need not have been a party to the underlying action. *Lucas v. Velikanje*, 2 Wn. App. 888, 471 P.2d 103 (1970). “Collateral estoppel promotes the policy of ending disputes by preventing the relitigation of an issue or **determinative fact** after the party estopped has had a full and fair opportunity to present a case.” *McDaniels v. Carlson*, 108 Wn.2d 299, 303, 738 P.2d 254 (1987) (emphasis added); *Nielson v. Spanaway*, 135 Wn.2d 255, 262, 956 P.2d 312 (1998) (collateral estoppel is a means of preventing the endless relitigation of issues); accord, *Christensen*, 152 Wn.2d at 306. Collateral estoppel “prevents a second litigation of the issues between the parties even though a different claim or cause of action is asserted.” *Seattle-First Natl. Bank v. Kawachi*, 91 Wn.2d. 223, 226, 588 P.2d 725 (1978). To establish collateral estoppel, the following questions must be answered

affirmatively: (1) Was the issue decided in the prior adjudication identical with the one presented in this action? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? (4) Will application of the doctrine not work an injustice on the party against whom the doctrine is to be applied? *Christensen*, 152 Wn.2d at 307. The evidence presented by American Tradition established all the elements of collateral estoppel.

2. The first element of collateral estoppel has been satisfied.

a. Zeco's argument confuses claim preclusion with issue preclusion.

Zeco argued that American Tradition failed to show that the claims presented in *Summersun v. Zeco* were identical to the claims that would be presented in this Second Complaint. Zeco takes an overly simplistic view of collateral estoppel, relying on *Nielson*, 135 Wn.2d at 263, in which the party against whom collateral estoppel was asserted admitted that the issues were identical in the two cases. Zeco also confuses claim preclusion with issue preclusion, just as did the defendant in *Robinson v. Hamed*, 62 Wn. App. 92, 813 P.2d 171, *rev. denied*, 118 Wn.2d 1002 (1991). In *Robinson*, the plaintiff sued for civil assault, and the defendant, Hamed, counterclaimed for defamation and tortious interference. The two parties had been employees at Boeing who became involved in a physical

altercation at the airport on the end of a business trip. They both reported the incident to their superiors at work. Hamed was terminated from his employment as a result of the employer's investigation. Hamed pursued his right of appeal through arbitration, and it was determined at arbitration that the employer had just cause for the termination of Hamed's employment. The arbitrator determined the facts of what occurred in the altercation to reach the conclusion that there was just reason for the termination of employment. In the later civil suit, Robinson alleged that Hamed was collaterally estopped from asserting defamation claims because the arbitrator determined what occurred in Robinson's favor, so that Robinson's description of the incident was not defamatory. Hamed argued that the arbitration did not decide an identical issue for purposes of collateral estoppel because the arbitrator only decided that Hamed acted in an unreasonable manner, and did not decide intent, privilege or falsity of statements which are issues in defamation. The court disagreed:

The arbitrator did not address the issues of Robinson's intent or privilege, but he did specifically address the issue of which version of the events at the airport was true. ... Whether Robinson was telling the truth was an ultimate fact in the arbitrator's decision just as it would necessarily be in the defamation action.

Robinson, 62 Wn. App. at 99-100. The court reiterated that the focus must be on the factual determination made in the initial hearing, rather than the

names of the claims presented. Thus, when deciding whether collateral estoppel applies in this case, this court must focus on the ultimate facts decided in *Summersun v. Zeco*.

b. The facts on which Zeco bases its current negligence claim against Mr. Halterman were directly at issue in *Summersun*.

The ultimate legal issue in *Summersun v. Zeco* was whether a binding contract was created. An ultimate fact is one directly at issue upon which the claim rests. *Seattle-First*, 91 Wn.2d. at 229. One of the ultimate factual determinations that was necessary to establish the legal issue was whether Summersun's representative, Mr. Halterman, was presented with a written offer with legal descriptions attached by Zeco's agent, Ms. Heynsten. Summersun alleged in paragraph 3.6 of its First Complaint that when the purchase agreement was delivered to it, there were no legal descriptions attached. CP 44. Summersun also alleged that there was a dispute whether a binding agreement had been reached. CP 47. Zeco disputed this contention, alleging in its Answer and Counterclaim that "The Purchase and Sale Agreement, together with the initialed exhibits were delivered to Summersun's agent, Ron Halterman by Teri Heynsten on March 9, 2004." CP 57. Zeco asserted that there was a binding agreement. CP 60. As a result of these conflicting allegations, the factual issue of whether the legal descriptions were delivered by

Ms. Heynsten to Mr. Halterman needed to be resolved in *Summersun v. Zeco*.

c. The court determined that Ms. Heynsten did not deliver the legal descriptions to Mr. Halterman.

Zeco argues that American Tradition sought to “rewrite” the Findings of Fact and Conclusions of Law when it argued that collateral estoppel precluded Zeco’s claims of negligence based on Mr. Halterman’s conduct. Rather, it is Zeco that tries to rewrite those Findings and Conclusions, when it argues that Judge Cowsert concluded that Mr. Halterman received but yet failed to present the legal descriptions to Mr. Loeb. In contrast, the Findings of Fact and Conclusions of Law provide:

40. Both Heynsten and Halterman were aware of the Coldwell Banker office policy and understood that all pages and text changes needed to be initialed or executed. Both Halterman and Heynsten advised their respective parties (Summersun and Zeco) of the necessity at the time of execution that all pages of the purchase agreement and exhibits and changes be initialed.

45. The testimony of Loeb and Halterman was that the Exhibits were not with the Purchase Option at the time it was reviewed and executed by Loeb. Heynsten testified that she did not hand the Purchase Offer to Halterman, but rather placed what she felt was a complete package of the Purchase Offer and Exhibits in Halterman’s office.

46. The Court does not find that the Exhibits were with the Purchase Offer at the time Loeb reviewed the same. Facts leading to this conclusion include:

(i) Loeb did not initial any Exhibit claimed to be with the Purchase Offer, but executed/initialed all pages of the Purchase Offer except Page 6;

(ii) If the Original Acquisition Documents had altered Site Plan would have been included as Exhibits at the time Loeb executed the Purchase Option, it would have been obvious to him that the legal descriptions were inaccurate, and referred to five parcels, and that the Site Plan he had submitted to identify the sale property had been altered into the Altered Site Plan which included the Retail Parcel he had specifically excluded.

CP 76-77.

The superior court further found that:

52. On the morning of March 15, 2004, Halterman reviewed the Purchase Offer and all Exhibits provided to him by Heynsten. (Exhibit 9). Halterman immediately observed there were issues with the legal descriptions and properties to be sold. Halterman went to Land Title and discussed the issues by Bill Ronhaar, who advised him that the Original Acquisition Documents attached as legal descriptions included property that Summersun did not own.....

CP 78-79.

The superior court further found that:

60. The Purchase Offer never became a completed Purchase Agreement because:

(i) The Exhibits were not initialed by both buyer and seller. Therefore the Buyer (sic) did not know, nor could he have discovered from the offer documents presented to him, that buyer was offering to purchase all five parcels;

CP 80.

The *Summersun v. Zeco* matter raised the factual issue of what documents Ms. Heynsten had provided to Mr. Halterman for Mr. Loeb's review and consideration. Judge Cowsert decided the issue of who was telling the truth about whether the legal description exhibits were ever given to Mr. Halterman by Ms. Heynsten. He found that the facts did not support a finding that the exhibits were given to Mr. Halterman by Ms. Heynsten. CP 77. Judge Cowsert was not required to make a negative finding of fact. *Schmitt v. Matthews*, 12 Wn. App. 654, 659, 531 P.2d 309 (1975). It follows that the superior court did not have to expressly state in the findings of fact that Zeco failed to prove that Mr. Halterman received the legal descriptions with the offer documents from Ms. Heynsten.

d. The issue of whether Ms Heynsten delivered the legal descriptions to Mr. Halterman would have to be relitigated.

Zeco alleges in the Second Complaint that Ms. Heynsten presented the offer and all legal descriptions to Mr. Halterman. CP 7. In order to prove that Mr. Halterman was negligent in failing to present legal descriptions with the rest of the purchase offer to Mr. Loeb, the court would have to first conclude that Mr. Halterman was given the legal descriptions by Ms. Heynsten. Zeco had a full and fair opportunity to litigate that issue in *Summersun v. Zeco*. Judge Cowsert decided that Zeco had not met its burden to prove that Ms. Heynsten delivered the legal

descriptions. It would require relitigation of the same fact in this Second Complaint to reach the point where Zeco wants to start – with the assumption that Mr. Halterman was given the Purchase Agreement with all the legal descriptions attached. Given that Judge Cowser concluded that Mr. Halterman was not given the legal descriptions, it necessarily follows that Mr. Halterman cannot be found negligent for failing to present them to Mr. Loeb as alleged in the Second Complaint. CP 11.

While the superior court in *Summersun v. Zeco* matter may not have addressed the negligence of Mr. Halterman as a specific claim, it did decide the facts on which such a claim necessarily rests, and the finding has a collateral-estoppel effect. *Seattle-First*, 91 Wn.2d at 226. Just as in *Robinson*, the determining fact of whether Mr. Halterman was given the legal descriptions was at issue in *Summersun v. Zeco* and would be at issue in Zeco's Second Complaint. Consequently, the first element of collateral estoppel applies in this case.

e. *Summersun v. Zeco* resolved the factual issue of whether Summersun would have signed the offer that Zeco made.

The doctrine of collateral estoppel also applies to the Findings of Fact and Conclusions of Law as they pertain to whether Mr. Loeb would have signed Zeco's offer, but for Mr. Halterman's negligence. In order for Zeco to recover for the negligence of Mr. Halterman, Zeco must show that

the offer it gave to Mr. Halterman to present to Summersun would have resulted in a binding agreement. *Brink v. Martin*, 50 Wn.2d 256, 310 P.2d 870 (1957). The trial of *Summersun v. Zeco* directly addressed and answered that factual issue in the negative. Judge Cowsert found:

27. At no time did Summersun ever intend to sell the Retail Parcel as part of the transaction for the Color Spot Parcels. At all times Summersun referred to the sale property as the Color Spot Parcels and/or the property leased to Color Spot.

CP 74.

51. On March 12, 2004, Loeb advised Halterman of the desire to remove the fourth parcel from the Purchase Offer, and that he was willing to make financial accommodations to Zeco to do so. ...

CP 78.

56. Loeb responded that the Retail Parcel was never for sale, and therefore there was no agreement. ...

CP 79.

64. The Parties never reached agreement on the terms and conditions of a binding purchase and sale agreement.

CP 80.

There was no ambiguity in Judge Cowert's Findings of Fact and Conclusions of Law. Judge Cowsert found that Summersun never intended to sell the retail parcel so that there was never a meeting of the minds about which parcels would be part of the transaction. Under *Brink*,

Zeco has to show that Summersun would have accepted the offer for five parcels. The *Summersun v. Zeco* matter resolved the factual issue about which parcels Summersun intended to sell, finding that Summersun would not have accepted the REPSA even if Mr. Halterman had presented it with the five legal descriptions attached. Therefore, in this suit based on the Second Complaint, Zeco cannot establish that a properly presented offer would have resulted in a binding agreement. When a plaintiff is without proof of proximate cause for damages, summary judgment is properly granted. *Id.*

3. Zeco concedes the last three elements of collateral estoppel.

Zeco's appeal focuses only on the first of the four elements of the collateral estoppel. The other three elements clearly apply. The second element was shown by the Tolling Agreement itself. The Tolling Agreement provides that a final decision is defined as one of three actions, which included entry of the findings of fact and conclusions of law by the court. CP 65. Judge Cowser filed Findings of Fact and Conclusions of Law on April 10, 2009. CP 69. According to the Tolling Agreement, a final decision has been reached for the purposes of collateral estoppel. The Findings of Fact and Conclusions of Law also meet the standard for a final judgment on the merits as set forth in *Cunningham v. State*, 61 Wn. App. 562, 566, 811 P.2d 225 (1991).

The third element of collateral estoppel requires a showing that the party against whom collateral estoppel is used was a party to or in privity with a party in the prior adjudication. Here, Zeco was a party to the prior adjudication. Therefore the third element of collateral estoppel has been satisfied.

The fourth element of collateral estoppel requires a showing that there would be no injustice to the estopped party. The Findings of Fact and Conclusions of Law show that Zeco had a full and fair opportunity to litigate its claim with Summersun. The trial was three days long and included testimony from representatives of Zeco and Summersun, and both real estate agents, Ms. Heynsten and Mr. Halterman, and the broker, Ms. Donaldson, and others. CP 70. Zeco even relies on the Findings of Fact and Conclusions of Law and asserts them as facts in the Second Complaint. CP 51-52. Zeco had a fair opportunity to litigate the factual issues relating to the real estate transaction, and it is not unjust to apply the doctrine to Zeco.

F. Zeco failed to raise a genuine factual dispute regarding Mr. Halterman's alleged negligence.

The Second Complaint alleges two theories of negligence by Mr. Halterman. Zeco claims that Mr. Halterman (1) failed to read the communications from his client and determine what property was for sale

and (2) failed to present the full purchase offer, including legal descriptions, to Summersun. CP 11.

In support of its motion for summary judgment, American Tradition submitted excerpts from the transcript of Mr. Halterman, CP 82-84, and the Findings of Fact and Conclusions of Law, CP 69-81, to show that Mr. Halterman had read communications from Summersun, informing him about the parcels that were for sale. CP 74, 84. Mr. Halterman testified:

Q. Where did you get the parcel numbers, from what source?

A. From Carl Loeb.

Q. Is that the map that you have Page 16, Exhibit 4, ignoring the circles, is that a copy of the map you received?

A. Yes.

Q. And it's your testimony that only four of those were circled by Mr. Loeb.?

A. Yes.

Q. And when did you receive the map?

A. I think I received it about the third or fourth of March, the fourth of March.

CP 84. Although Zeco filed excerpts from the deposition and trial testimony of Mr. Halterman in opposition to the motion for summary judgment, none of that testimony rebutted the evidence submitted by

American Tradition showing that Mr. Halterman read the communications from Summersun. It is therefore undisputed that Mr. Halterman opened and read the communication from Mr. Loeb which identified the specific parcels for sale. Zeco failed to create a genuine issue of fact based on the negligent failure to read a client's communications. Accordingly the superior court properly granted summary judgment dismissal of the claim against American Tradition on this issue.

G. American Tradition, through the actions of Mr. Halterman, did not breach any duty owed to Zeco.

1. Zeco does not show how the actions of Halterman violated any statutory or common-law duty.

On summary judgment, American Tradition argued that Mr. Halterman did not owe a duty to Zeco on the basis of the facts alleged in the complaint. In response, Zeco argued that RCW 18.85 and RCW 18.86 established a duty owed by Mr. Halterman to Zeco. In addition, Zeco argues that Mr. Halterman owed common-law duties to Zeco. App. Br. at 14. While these are fine generalities, the details of the facts alleged control whether the duties, to the extent they may exist, were breached. Zeco failed to raise a genuine issue of fact for trial.

2. No common-law duty was breached.

Zeco never specifies what common-law duty was owed by Mr. Halterman to Zeco or how it was breached by Mr. Halterman. App.

Br. at 14. Zeco relies on *Jackowski v. Borchelt*, 151 Wn. App. 1, 209 P.3d 514 (2009), for the proposition that the buyer has a cause of action against the seller's agent for common-law negligence. *Jackowski* involved a suit by a buyer against the buyer's own agent, not the seller's agent. Although *Jackowski* holds that common-law duties, not inconsistent with the RCW 18.83, are not precluded by the statute, the court specifically pointed out that common-law duties arise from the privity of contract established by the contractual relationship between the buyer and his agent. *Jackowski*, 151 Wn. App. at 14. No fiduciary relationship arises unless an agency relationship is created. *Mullen v. North Pacific Bank*, 25 Wn. App. 864, 877, 610 P.2d 949, *rev. denied*, 94 Wn.2d 1009 (1980).

Furthermore, this court should not rely on *Jackowski* for the specious notion that common-law duties remain after the January 1, 1997 effective date of RCW 18.86. The Supreme Court has accepted review of *Jackowski*. *Jackowski v. Borchelt*, 168 Wn.2d 1001, 226 P.3d 780 (2010). Professor William Stoebuck, the drafter of the 18 *Wash. Prac.* Ch. 15 treatise on the law governing real estate professionals in Washington, concludes that common-law duties were replaced with statutory duties. In this treatise, he notes that RCW 18.86:

redefined the relationships real estate brokers have to clients and among themselves, especially the agency and subagency relationships. The provisions of Chapter 18.86

may affect many aspects of brokers' duties and relationships.

Id. at § 15.1. In explaining the ways in which the statute altered duties possessed by real estate professionals, he observed:

Before the legislature intervened in 1996, Washington common law regarded the selling broker as a subagent of the listing broker, who of course is the seller's agent. Thus, the selling broker was a fiduciary of the seller, with the same legal duties to that person as the listing broker. This relationship, though sound on common law principles, was contrary to the assumptions of most buyers[.] ... In 1996, at the urging of the Washington Association of Realtors, the legislature adopted what is now RCW Chapter 18.86[.] ... In addition to the relationships that are involved in sales through multiple listing agencies, Chapter 18.86 clarifies and modifies a number of other aspects of brokerage agency relationships.

Id. at § 15.5. *See also id.* at § 15.10 (RCW 18.86 “appears to alter, if not nullify, the rules adopted in *Hoffman v. Connall* and the other cases cited in this section”).

RCW 18.86.030, .040, .050, and .060 enumerate all the duties that real estate professionals owe. Common-law duties — including fiduciary duties that predated the statute — that the statute does not enumerate are necessarily inconsistent with the statute and thus superseded. “Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *Davis v. Dept. of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (quoting

Whatcom County v. City of Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996)).

In this case the undisputed facts are that Zeco had a contractual relationship with Terry Heyntsen, as its real estate agent. CP 5. Zeco has never alleged that it had a contractual or agency relationship with Mr. Halterman. CP 1-11. Accordingly, there is no factual basis, *i.e.* no privity of contract, from which the court could infer a fiduciary duty owed to Zeco by Mr. Halterman. The seller's agent deals at arm's length with the buyer. *Reynolds v. Hancock Jr.*, 53 Wn.2d 682, 684, 335 P.2d 817 (1959). The seller's agent owes the duty to the seller to submit offers, not a duty to the buyer. *Id.*

Zeco cites *Svendsen v. Stock*, 143 Wn.2d 546, 23 P.3d 455 (2001) and *McRae v. Bolstad*, 101 Wn.2d 161, 676 P.2d 496 (1984), for the proposition that a seller's agent owes common-law duties to the buyer. However, the specific duties mentioned in *Svendsen* and *McRae* do not support a cause of action based on the facts presented in the Second Complaint.

In *Svendsen*, the seller's real estate agent knew that the seller's property had flooding problems, and along with the seller, fraudulently concealed that fact from the buyer. The court allowed the buyer to recover from the seller's agent, for fraudulent concealment and breach of the

Consumer Protection Act. *Svensden*, 143 Wn. 2d at 558-59. Similarly, in *McRae*, the buyers in a real estate transaction alleged that the seller's real estate agent withheld information about material defects in the property and committed common-law fraud. *McRae*, 101 Wn.2d at 163-64. Neither of these two cases deals with the issue of fact presented by the Second Complaint. The Second Complaint does not assert a claim for common-law fraud, nor does it assert a claim for misrepresentation or fraudulent concealment of known defects in the condition of the premises for sale. Accordingly, the common-law duties discussed in *McRae* are not relevant to the claims of negligence asserted by Zeco.

Zeco also cites *Boguch v. Landover, Corp.* 153 Wn. App. 595, 224 P.3d 795 (2009) for the proposition that a real estate agent owes common-law duties. However, *Boguch* concerns a claim by a seller against his own agent. *Boguch* does not stand for the proposition that the seller's agent owes the buyer any common-law duties that apply to the facts of this case. Rather the court states that "a real estate agent 'retains common law duties' **owed to clients.**" *Boguch*, 153 Wn. App. at 610. The *Boguch* court based this conclusion on only one case, *Jackowski*, 151 Wn. App. at 14, and the *Jackowski* court itself cited absolutely no authority for this conclusion. Because it is undisputed that Zeco was not Mr. Halterman's

client, the holdings of *Boguch* and *Jackowski*, do not support Zeco's argument.

Zeco has simply not presented any authority that Mr. Halterman breached a common law duty to Zeco, even assuming he was negligent in opening his mail, or in failing to present the legal descriptions to the seller.

3. Under these facts, Mr. Halterman owed a duty solely to Summersun.

a. Mr. Halterman was not a dual agent, and so he did not owe a duty to Zeco.

Zeco refers to RCW 18.86.020(2), which governs the situation of dual agency, but then completely ignores the language of the statute and its relationship to the facts presented in the current suit.

In a transaction in which different licensees affiliate with the same broker represent different parties, **the broker is a dual agent**, and must obtain the written consent of both parties as required under RCW 18.86.060. **In such a case, each licensee shall solely represent the party with whom the licensee has an agency relationship**, unless all parties agree in writing that both licensees are dual agents.

RCW 18.86.020(2) (emphasis added). As the emphasized language shows, in the situation of a dual agency the broker is the dual agent, and the licensee, Mr. Halterman, is to solely represent the seller, Summersun. Mr. Halterman's sole duty to Summersun circumscribes the other duties found in other sections of the statute.

b. As a seller's agent, Mr. Halterman owed a statutory duty only to Summersun.

The duties of the seller's agent to the seller are set out in RCW 18.86.040. Because Zeco is not the seller, Mr. Halterman did not owe Zeco any of the duties listed in RCW 18.86.040.

RCW 18.86.040 also states that a seller's agent's duties include the duties set forth in RCW 18.86.030. This section enumerates limited duties and specifies that the duties are owed "to whom the licensee renders real estate brokerage services." Here, it is undisputed that Mr. Halterman owed his sole duty to Summersun and therefore was rendering real estate brokerage services solely to Summersun. Therefore, the duties under RCW 18.86.030 are duties that Mr. Halterman owed to Summersun, not to Zeco.

Zeco refers to RCW 18.85.010 for the definition of real estate brokerage services and argues that those services are rendered to Zeco by Mr. Halterman. While it is true that Mr. Halterman was offering property for sale, RCW 18.85.010(1)(a), and negotiating for the sale of real estate RCW 18.85.010(1)(b), the duty, if it exists to Zeco, must arise from some specific contact with Zeco. Here, the facts alleged to form the basis of Mr. Halterman's liability to Zeco are not interactions between Zeco and Mr. Halterman, but are interactions between Mr. Halterman and Summersun. Zeco does not explain how it has a cause of action for

alleged failures of communications between Mr. Halterman and Summersun.

c. American Tradition is not liable for Mr. Halterman's alleged breaches of RCW 18.86.030.

i. Zeco argued three bases for liability before the superior court.

On appeal, Zeco does not address which specific statutory subsection Mr. Halterman is supposed to have violated. App. Br. at 12-14. On summary judgment, Zeco discussed three sections of RCW 18.86.030 in which all real estate licensees owe a duty: "(a) to exercise reasonable care, (b) deal honestly and in good faith, and (c) to present all written offers ... in a timely manner[.]" CP 90-95.

ii. Zeco did not allege facts establishing a duty under RCW 18.86.030(b).

Zeco's Second Complaint did not allege that Mr. Halterman violated RCW 18.86.030(b). The allegations in the complaint are only the negligence of Mr. Halterman relating to (1) reading his correspondence to determine the identity of the property that Mr. Loeb intended to sell, and (2) presenting the legal descriptions with Zeco's offer to Mr. Loeb. There are no allegations of fraud or misrepresentation in the Second Complaint that could form the basis of a claim under RCW 18.86.030(b). Nothing in the evidence presented by Zeco in opposition to summary judgment,

shows that Mr. Halterman was not dealing honestly and in good faith with Zeco.

iii. Zeco did not allege facts establishing a duty under RCW 18.86.030(c).

Zeco's Second Complaint did not allege that Mr. Halterman violated RCW 18.86.030(c). As for timeliness of presentation of offers, the undisputed facts are that Ms. Heynsten left the offer in Mr. Halterman's office on the evening of March 9, and Mr. Halterman met with his client the following morning to present the offer. These facts are alleged in the Second Complaint and were established as facts by Judge Cowsert. CP 7, 75-76. There was clearly a timely presentation of Zeco's offer and not a violation of RCW 18.86.030(c). Nothing in the evidence presented by Zeco in response to the summary judgment created a question of fact. Mr. Halterman did not make a timely presentation of the offer to Summersun. Therefore, even if Mr. Halterman owed this duty to Zeco, Zeco failed to raise a question of fact for trial on this issue.

iv. The facts are insufficient to support a claim based on RCW 18.86.030(a).

The only allegation in the Second Complaint is that Mr. Halterman was negligent, CP 11, which corresponds to the statutory duty to exercise reasonable care. RCW 18.86.030(a). However, the duty of reasonable

care must apply to some conduct in order to be actionable. For example, there is a duty to use reasonable care to follow the client's instructions. *Cultum v. Heritage House Realtors*, 103 Wn.2d 623, 632, 694 P.2d 630 (1985). The Second Complaint only alleges the failure to exercise reasonable care with respect to "reading correspondence" and "presenting legal descriptions." As noted above, the undisputed evidence shows that Mr. Halterman reviewed communications from Mr. Loeb, and was aware before Zeco's offer was made, of the parcels Summersun intended to sell. CP 84.

One of the bases of negligence is that Mr. Halterman failed to present the legal descriptions with Zeco's offer to Mr. Loeb. Even if this is true, Zeco cannot prevail. Zeco complains that its offer did not result in a binding agreement to sell as a result of this negligence. CP 9. In order to prove negligence, plaintiff must establish the following: (1) the existence of a duty owed; (2) a breach of that duty; (3) resulting damages; and (4) that the claimed breach was the proximate cause of the injury. *Hansen v. Friend*, 118 Wn.2d 476, 479, 824 P.2d 483 (1992). In circumstances where the plaintiff fails to show proof of causation in response to defendant's motion for summary judgment, the court properly grants summary judgment to the defendant. *Lynn v. Labor Ready Inc.*, 136 Wn. App. 295, 307, 151 P.3d 201 (2006). As pointed out in *Brink*, 50

Wn.2d at 258, if there is no evidence that the offer would have been signed by the seller; the buyer may not recover against the agent or the broker. Zeco acknowledges this fact when the Second Complaint alleges that Mr. Loeb decided not to sell one of the parcels. CP 10. Just as in *Brink*, there is no evidence that Mr. Loeb would have signed the offer for the five parcels that Zeco intended its purchase offer to cover because Judge Cowser found that Mr. Loeb never intended to sell the retail parcel. CP 79-80. There was no mention of the retail business in any of the transaction documents. CP 77. Later Mr. Loeb stated that he only wanted to sell three parcels. CP 78. Under these circumstances there was no meeting of the minds regarding Zeco's offer. CP 80. Because the offer Zeco presented could not have resulted in an enforceable agreement, Zeco has no cause of action for negligent presentation of the offer. Accordingly, the superior court did not err in dismissing the Second Complaint.

H. The court should disregard Zeco's argument that its complaint states a cause of action against the broker.

For the first time on appeal, Zeco makes the argument that American Tradition is liable for breach of the duties owed by its broker. App. Br. at 14. Zeco never argued before the superior court that the case should not have been dismissed because of the negligence of the broker. CP 90-98. The broker, Dee Donaldson, was not named in the Second

Complaint, and the Second Complaint does not allege that she was negligent or violated any statutory duties owed to Zeco. CP 1-12. Facts supporting allegations of negligence of the broker were made in the First Complaint in paragraphs 2.22 and 2.24, CP 41, but are conspicuously absent in the Second Complaint. Legal arguments raised for the first time on appeal, will not be considered by the court. *Charlton v. Day Island Marina Inc.*, 46 Wn. App. 784, 790, 732 P.2d 1008 (1987); *Wilson v. Steinbach*, 98 Wn.2d 434, 440, 656 P.2d 1030 (1980). RAP 2.5(a).

VI. CONCLUSION

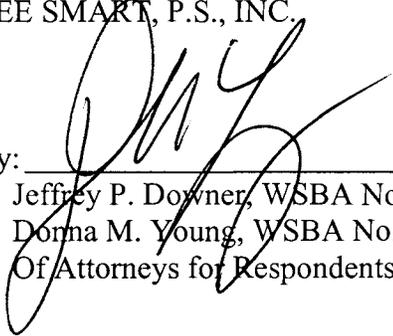
Zeco failed to raise a genuine issue of material fact that would have precluded summary judgment. When the terms of the Tolling Agreement are given their ordinary meaning and the agreement is interpreted to give meaning to all its provisions, the only reasonable interpretation is that the agreement tolls the statute of limitations only in the limited circumstance that Zeco refiled the First Complaint as it existed at the time the Tolling Agreement was signed. The Second Complaint differs significantly from the First Complaint, so that the three year statute of limitation bars the Second Complaint. Even if not barred by the statute of limitations, collateral estoppel bars the claims against Mr. Halterman asserted in the Second Complaint because the facts on which the negligence claims are based were determined in *Summersun v. Zeco*, and

the determined facts do not support the claims in the Second Complaint. American Tradition is not vicariously liable to Zeco for Mr. Halterman's actions because no common-law duty existed or was breached, and there is no proximate cause between Mr. Halterman's alleged negligence and Zeco's damages. This court can affirm the dismissal of Zeco's complaint on anyone of the three bases submitted.

American Tradition requests that this court affirm the superior court's Order Granting Summary Judgment and Dismissing Complaint with Prejudice.

Respectfully submitted this 17 day of May, 2010.

LEE SMART, P.S., INC.

By: 

Jeffrey P. Downer, WSBA No. 12625
Donna M. Young, WSBA No. 15455
Of Attorneys for Respondents

CERTIFICATE OF SERVICE

I, the undersigned, certify under penalty of perjury and the laws of the State of Washington that on May 17, 2010, I caused service of the foregoing on each and every attorney of record herein:

VIA LEGAL MESSENGER

Matthew F. Davis
Demco Law Firm, P.S.
5224 Wilson Avenue South, Suite 200
Seattle, WA 98118

DATED this 17th day of May 2010 at Seattle, Washington.


Wendy Larson, Legal Assistant

2010 MAY 18 PM 4:27
APR 20 10 50 AM '10

APPENDIX

1. Zeco's Amended Complaint cause number 07-2-00413-3,
the First Complaint.
2. Tolling Agreement
3. Zeco's Complaint on this action, cause number 09-2-
01013-0; the Second Complaint.

APPENDIX 1

From: NICOLE

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03/18/2007 10:47

#332 P. 013/018

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SKAGIT COUNTY

ZECO DEVELOPMENT GROUP, INC., a
Washington corporation,

Plaintiff,

NO. 07-2-00413-3

vs.

DEE DONALDSON and JOHN DOE,
DONALDSON, husband and wife; TERRI
HEYNSTEN and JOHN DOE HEYNSTEN,
husband and wife; AMERICAN TRADITION
REAL ESTATE, INC., dba COLDWELL
BANKER AMERICAN TRADITION,
Washington corporation,

Defendants.

FIRST AMENDED COMPLAINT
FOR DAMAGES

COMES NOW PLAINTIFF ZECO DEVELOPMENT GROUP, INC. and as complaint
against Defendants alleges as follows:

I
PARTIES and JURISDICTION

1.1 Zeco Development Group, Inc. ("Zeco") is a Washington corporation, maintaining
its principal office in Burlington, Washington. At all times pertinent hereto, Corey Zambruski was

FIRST AMENDED COMPLAINT
FOR DAMAGES - 1

Law office of
Wm. G. Knudsen, P.S.
119 N. Commercial Street, Suite 1240
03/19/2007 1:52PM

EXHIBIT

From: NICOLE

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03/18/2007 10:47

#332 P.014/019

1 President of Zeco and authorized to act on its behalf in all matters relating to this lawsuit.

2 1.2. Dee Donaldson is a licensed real estate broker under the laws of the State of
3 Washington and at all times pertinent hereto was an owner and designated broker of American
4 Tradition Real Estate, Inc. dba Coldwell Banker American Tradition. ("Coldwell Banker"), a real
5 estate agency located in Burlington, Washington. Dee Donaldson on information and belief is
6 married to John Doe Donaldson, constituting a marital community under the laws of the State of
7 Washington. Dee Donaldson acted at all times as alleged herein for and on behalf of the marital
8 community comprised of Dee Donaldson and John Doe Donaldson whose exact name is unknown
9 to Plaintiff.

11 1.3 Terri Heynsten at all times pertinent hereto was a licensed real estate agent under the
12 laws of the State of Washington and was licensed through Coldwell Banker. She acted at all times
13 under the direction and control of Broker Dee Donaldson. Terri Heynsten on information and
14 belief is married to John Doe Heynsten whose exact name is unknown to Plaintiff at this time.
15 Terri Heynsten and John Doe Heynsten constituted a marital community under the laws of the
16 State of Washington. At all times alleged herein Terri Heynsten acted for and on behalf of the
17 marital community.

19 1.4 American Tradition Real Estate, Inc. is a Washington Corporation doing business as
20 Coldwell Banker American Tradition.

22 1.5 All acts complained of herein took place in Skagit County, Washington. Dee
23 Donaldson's residence is in Skagit County, Washington. Terri Heynsten is a resident of Skagit
24 County, Washington.

25
26
FIRST AMENDED COMPLAINT
FOR DAMAGES - 2

Low office of
Wm. G. Knudsen, P.S.
119 N. Commercial Street, Suite 1340
Seattle, Washington 98101
03/19/2007 11:52PM

From: NICOLE

3604249212

03/19/2007 10:48

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II
FACTS AND CIRCUMSTANCES

2.1 Zeco is a Washington corporation engaged in real estate acquisition and development. Corey Zembruski was at all times the President of Zeco and authorized to act for and on behalf of the corporation. Zeco was at all times pertinent hereto a corporation in good standing with all licenses and fees paid.

2.2 During the early part of 2004, Ms. Heynsten was employed as an agent for Defendant Coldwell Banker. Ms. Heynsten had acted for Mr. Zembruski in the purchase of his personal residence and knew that Mr. Zembruski, acting through Zeco, was looking for real estate development projects in Skagit County.

2.3 In early 2004, Ron Halterman was also an agent at the Coldwell Banker office where Ms. Heynsten was employed. Both Mr. Halterman and Ms. Heynsten worked under the direction and control of Ms. Donaldson who was the designated broker for Coldwell Banker.

2.4 In late February 2004, Mr. Halterman informed the other agents at the Coldwell Banker office that his client, Carl Loeb, the owner of Summersun Greenhouse Corporation, had several parcels of land that he wished to offer for sale. No formal listing had yet been prepared, but Mr. Halterman was authorized by Mr. Loeb to solicit offers on the property.

2.5 As Ms. Heynsten knew that Zeco was interested in such an opportunity, she contacted Mr. Halterman to obtain further details. She was advised by Mr. Halterman that the property consisted of five parcels located on College Way, including and adjacent to the Summersun Green House business located at 4100 College Way, Mount Vernon, Washington.

2.6 Ms. Heynsten contacted Mr. Zembruski and advised him of the purchase opportunity and the asking price.

FIRST AMENDED COMPLAINT
FOR DAMAGES - 3

Law office of
Wm. G. Knudsen, P.S.
119 N. Commercial Street, Suite 1340
03/19/2007 1:52PM

From: NICOLE

3604245212

03/19/2007 10:48

8332 P. 016/019

1 2.7 Ms. Heynsten then prepared a real estate commission agreement on behalf of
2 Coldwell Banker with Mr. Zembruski under which Zeco agreed to pay Coldwell Banker a real
3 state commission of \$61,250 in exchange for agency services in representing Zeco in the real
4 estate transaction. This agreement was approved by Broker Dee Donaldson and was executed
5 March 8, 2004.

6
7 2.8 After gathering further information, Ms. Heynsten prepared a purchase offer on
8 behalf of Zeco for presentation to Agent Ron Halterman who represented Carl Loeb and
9 Summersun Greenhouse Corporation. Mr. Zembruski signed the offer and initialed each page at
10 the direction of Ms. Heynsten on March 9, 2004.

11 2.9 Dee Donaldson, as Broker of Coldwell Banker, is responsible for both Ms. Heynsten
12 and Mr. Halterman as agents under her direction and control.

13 2.10 Ms. Donaldson failed to review and correct the legal documents that were prepared,
14 including the offer and subsequent counteroffer generated by the agents within her office. Ms.
15 Donaldson failed to seek the advice of legal counsel on the adequacy or legal effect of the
16 documents prepared by the agents in her office concerning this transaction.

17
18 2.11 On or about March 10, 2004, Ms. Heynsten presented the offer to Mr. Halterman,
19 fully executed by Mr. Zembruski, together with a \$100,000 Promissory Note to be held as earnest
20 money. Ms. Heynsten represented to Mr. Zembruski that the purchase offer was a complete and
21 binding document which, if accepted by Mr. Loeb, would constitute a binding contract.

22
23 2.12 The following day Mr. Loeb responded to the offer with a counteroffer established by
24 various interlineations and notations on the offer submitted by Ms. Heynsten. At the time the
25 counteroffer was received by Ms. Heynsten, Mr. Zembruski was in eastern Washington. Ms.
26

FIRST AMENDED COMPLAINT
FOR DAMAGES - 4

Law office of
Wm. G. Knudson, P.S.
119 N. Commercial Street, Suite 1340
03/19/2007 1:52PM

From: NICOLE

3804249212

03/19/2007 10:49

#332 P.017/018

1 Heynsten then conferred with Mr. Zembruski and transmitted to Mr. Zembruski those pages of the
2 counteroffer that in her opinion required Mr. Zembruski's initials and approval.

3 2.13 Mr. Zembruski approved the terms of the counteroffer, initialed the pages provided to
4 him by Ms. Heynsten and returned them to the Coldwell Banker office within the time frame
5 provided for accepting the counteroffer.

6 2.14 Mr. Loeb had interlineated certain provisions of Paragraph 12 of the Purchase and
7 Sale Agreement but had not specifically initialed the interlineations. When Mr. Zembruski
8 inquired of Ms. Heynsten regarding the interlineations, she advised him he did not need to initial
9 those, as Mr. Loeb had not initialed them.

10 2.15 Mr. Zembruski accepted the counteroffer as presented indicating his approval by his
11 signature on the Purchase and Sale Agreement on March 11, 2004. Ms. Heynsten advised Mr.
12 Zembruski that he had a binding contract for the purchase of the property.

13 2.16 Approximately one week later Mr. Loeb refused to go forward with the transaction
14 and notified Mr. Zembruski in writing that he considered the contract to be null and void. Mr.
15 Loeb claimed that he intended to sell only four parcels, not the five parcels that were indicated in
16 the attachments to the Purchase and Sale Agreement.

17 2.17 Mr. Loeb and Mr. Halterman claim that the attachments, including a plat map
18 showing five parcels and five legal descriptions initialed by Mr. Zembruski and submitted to Mr.
19 Halterman by Ms. Heynsten as part of the purchase offer, were never attached to the purchase
20 offer and were never approved by Mr. Loeb.

21 2.18 Broker Dee Donaldson informed Mr. Zembruski that there was no binding agreement
22 because he had not initialed the interlineations at Paragraph 12.

26

FIRST AMENDED COMPLAINT
FOR DAMAGES - 5

Law office of
Wm. G. Knudsen, P.S.
119 N. Commercial Street, Suite 1340
03/19/2007 1:52PM

From: NICOLE

3604248212

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1 2.19 In a lawsuit between Summersun and Zeco, Zeco seeks to enforce the agreement.
 2 Ms. Donaldson testified against Zeco asserting that the documents prepared under her supervision
 3 by her agents did not form a binding contract.

4 2.20 Subsequently, Mr. Loeb sold three of the five parcels identified in the Purchase and
 5 Sale Agreement for approximately \$700,000 more than the amount he had agreed to sell the
 6 properties to Zeco Development.

7 2.21 Real estate agents and brokers are held to the same standard of care as an attorney
 8 licensed to practice law in the State of Washington in the drafting of legal documents and
 9 providing advice as to their meaning and execution.
 10

11 2.22 Broker Dee Donaldson had a duty to assure the documents prepared by agents
 12 working under her direction and control were sufficient to protect the interests and expectations of
 13 the clients of the office being represented by her agents, and that the directions and advice
 14 concerning the documents was correct.

15 2.23 Ms. Donaldson and Ms. Heynsten were negligent in failing to adequately prepare and
 16 complete legal documents affecting the rights of Zeco Development and in giving advice on legal
 17 matters.
 18

19 2.24 Ms. Donaldson was negligent in not adequately supervising the transaction taking
 20 place in her office by (1) allowing the development of a conflict of interest (2) in the failure to
 21 insure the integrity of the delivery and receipt of documents from one agent to the other and (3)
 22 the advice and direction given Zeco.
 23

24 2.25 As the broker for the Coldwell Banker office, Ms. Donaldson is responsible for the
 25 conduct of the agents over whom she retains rights of direction and control for their preparation
 26

FIRST AMENDED COMPLAINT
FOR DAMAGES - 6

Law office of
Wm. G. Knudsen, P.S.
119 N. Commercial Street, Suite 1340
03/19/2007 1:52PM

From: NICOLE

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1 of documents and providing advice and direction concerning the prepared documents.

2 2.26 Zeco Development was authorized and ready to proceed to complete the transaction
3 with Summersun Greenhouse Corporation.

4 2.27 The transaction failed to close due to the negligence of Defendants as set forth herein.

5 2.28 As the direct and proximate cause of the Defendants' negligence, Zeco Development
6 was prevented from realizing a business opportunity through the purchase of the Summersun
7 property suffering damages in such amount as shall be established at trial.

8 WHEREFORE, PLAINTIFF PRAYS FOR THE FOLLOWING RELIEF:

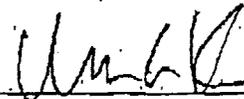
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10 1. For judgment against Defendants and each of them for damages sustained by reason of
11 the Defendants' negligence in such amount as shall be established at trial.

12 2. For Plaintiff's costs and attorney's fees pursuant to contract, or as otherwise provided by
13 law.

14 3. For leave to amend Plaintiff's Complaint following completion of discovery.

15 4. For such other relief as the Court deems just and equitable.

16 DATED this 13th day of March, 2007.
17
18
19

20 
21 WILLIAM G. KNUDSEN, WSBA NO. 6064
22 Attorney for Plaintiff
23
24
25
26

FIRST AMENDED COMPLAINT
FOR DAMAGES - 7

Law office of
Wm. G. Knudsen, P.S.
119 N. Commercial Street, Suite 1340
03/19/2007 1:52PM

APPENDIX 2

TOLLING AGREEMENT

Parties:

This Agreement is entered into by and between Zeco Development Group Inc., and Coldwell Banker American Tradition Inc., Dee Donaldson and John Doe Donaldson and Terri Heynsten and John Doe Heynsten, hereinafter cumulatively "the parties." The parties agree as follows:

Recitals:

1. The litigation affected by this Agreement is the lawsuit originally filed by Zeco Development Group Inc., against Coldwell Banker American Tradition Inc., Dee Donaldson and John Doe Donaldson and Terri Heynsten and John Doe Heynsten, in Skagit County Superior Court under Cause No. 07-2-00413-3, which was later consolidated into Cause No.,04-2-00837-1.

2. The purpose of this agreement is to allow the lawsuit filed by Zeco Development Group Inc., against Coldwell Banker American Tradition Inc., Dee Donaldson and John Doe Donaldson and Terri Heynsten and John Doe Heynsten, to be dismissed without prejudice reserving to Zeco a limited right to refile the action against Coldwell Banker American Tradition Inc., Dee Donaldson and John Doe Donaldson and Terri Heynsten and John Doe Heynsten, during a limited period of time following the resolution of the suit between Zeco Development Group Inc. and Summersun Greenhouse Corp. filed in Skagit County Superior Court cause No. 04-2-00837-1.

3. It is expressly recognized by the parties that should the case of Zeco Development Group Inc. against Coldwell Banker American Tradition Inc., Dee Donaldson and John Doe Donaldson and Terri Heynsten and John Doe Heynsten go to trial that it is likely the defendants would prevail on the merits. The parties recognize that there is sufficient consideration to enter into this agreement.

Agreement:

1. Inadmissibility of Agreement. Evidence of this Agreement shall not be admissible or used in any way in any other future action or proceeding, except in a proceeding to enforce its terms.

2. Prospective Tolling of Statutes of Limitations. Zeco Development Group Inc., will dismiss all claims against Coldwell Banker American Tradition Inc., Dee Donaldson and John Doe Donaldson and Terri Heynsten and John Doe Heynsten **without prejudice and without costs no later than April 18, 2008.** Subject to the terms and conditions of this Agreement, any and all statutes of limitations and contractual limitations periods relating to the claims asserted by Zeco in its first Amended Complaint filed March 14, 2007, shall be suspended or tolled during the effective period of this Agreement, as defined herein. The passage of time

during the effective period of this Agreement, but not before nor after, shall not be asserted or relied upon in any way as a defense to any claim brought by one party to this Agreement against another party to this Agreement, nor shall such passage of time be used as a basis for calculating any legal or equitable defense. This Agreement permits Zeco to reinstate only those causes of action that it was maintaining at the signing of this Agreement. Nothing contained herein shall constitute a revival of claims or causes of action already time barred prior to the filing of the litigation affected by this agreement, or those causes of action that may have become time barred between March 14, 2007 and the signing of this Agreement.

3. Effective Period if this Agreement. The tolling of all such provisions and statutes shall be for thirty days following a **final decision** in the suit between Summersun Greenhouse Corporation and Zeco Development Group Inc., filed in Skagit County Superior Court cause No. 04-2-00837-1. The thirty days begin to run on the day following the final decision. Upon expiration of the thirty-day period, if suit is not refiled by Zeco, Zeco Development Group Inc, shall execute a stipulation and order of dismissal with prejudice in favor of Coldwell Banker American Tradition Inc., Dee Donaldson and John Doe Donaldson and Terri Heynsten and John Doe Heynsten in Cause No.,04-2-00837-1.

4. Final decision: In the suit between Summersun Greenhouse Corporation and Zeco Development Group Inc., a final decision shall occur when the **earliest** of the following events occurs: (1) dismissal with or without prejudice of Zeco's counter-claims against Summersun, (2) entry of findings of fact and conclusions of law by the court after trial of Summersun v. Zeco, or (3) a settlement resulting in a dismissal of all claims of all parties in Summersun v. Zeco.

5. Reservation of Rights. The parties hereto specifically reserve any and all rights, together with any and all defenses, that either party may have against the other with respect to claims, demands, causes of action, expenses or the like arising out of or in connection with the claims between the parties in the litigation affected by the Agreement. Notwithstanding this reservation, Zeco Development Group Inc, is bound by the Court Order regarding the admissibility of expert witness testimony and is further limited to introducing in evidence at trial the evidence which was disclosed in response to discovery as of April 11, 2008. Should the case be refiled by Zeco, Zeco would be prohibited from conducting discovery, but the Coldwell Banker defendants would be entitled to depose Chris Benson prior to trial.

6. No Admission or Waiver. The execution of this Agreement by any party shall in no way operate as an admission of liability or responsibility on any cause of action or on any claims brought against such party.

7. Modification of Agreement. This Agreement may be modified only with a written consent of all parties hereto.

8. Counterparts: Entire Agreement. This Agreement contains the entire agreement between the parties as to its subject matter. This Agreement may be signed in any number of multiple counterparts, each of which shall be considered a duplicate original, so as to avoid the necessity of circulation of one physical original for signature by each of the parties. All such counterparts shall be considered originals and shall be considered one and the same instrument.

9. Choice of Law. This Agreement shall be construed in accordance with the laws of the state of Washington and shall be binding upon the successors and assigns of the parties. If a dispute arises under this Agreement or in any subsequent litigation between the parties, jurisdiction and venue shall be to the courts of the State of Washington. Jurisdiction and venue as set forth herein shall be exclusive.

10. Notices. Any notice required or permitted to be delivered hereunder shall be in writing, transmitted by U. S. Mail, personal delivery, or by traceable overnight delivery service. Such notice shall be deemed to be delivered on the date it is received. The notices shall be to such person(s) or such address(es) as set forth below.

11. Captions. The captions within this agreement are meant to be solely guide posts for the reader and are not meant to nor should they be accorded any substance. They are not to be interpreted as modifying in any way the text of the provisions which follow them.

12. Neutral Interpretation. This Agreement shall be deemed to have been drafted jointly by the Parties, and any rule that a document shall be interpreted against the drafter shall not apply to this Agreement.

13. Neither this agreement for the course of conduct of the parties pursuant hereto shall be construed to establish the rights of any person or entity not a party to this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement on the day and year below.

Name: Zeco Development Group Inc.

Address: 16695 Peterson Road
Burlington WA 98230

Zeco Development Group Inc.

By Corey Zembruski
Corey Zembruski, Its duly authorized officer
or agent

Date: April 15, 2008

Name: Coldwell Banker American Tradition Inc. Coldwell Banker American Tradition Inc.

Address: 120 E. George Hopper Road
Burlington WA 98233

By _____
Rick Schleicher, Its duly authorized officer
or agent

Date: _____

Name: Dee Donaldson
Address: 120 E. George Hopper Road

Dee Donaldson

9. Choice of Law. This Agreement shall be construed in accordance with the laws of the state of Washington and shall be binding upon the successors and assigns of the parties. If a dispute arises under this Agreement or in any subsequent litigation between the parties, jurisdiction and venue shall be to the courts of the State of Washington. Jurisdiction and venue as set forth herein shall be exclusive.

10. Notices. Any notice required or permitted to be delivered hereunder shall be in writing, transmitted by U. S. Mail, personal delivery, or by traceable overnight delivery service. Such notice shall be deemed to be delivered on the date it is received. The notices shall be to such person(s) or such address(es) as set forth below.

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12. Neutral Interpretation. This Agreement shall be deemed to have been drafted jointly by the Parties, and any rule that a document shall be interpreted against the drafter shall not apply to this Agreement.

13. Neither this agreement for the course of conduct of the parties pursuant hereto shall be construed to establish the rights of any person or entity not a party to this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement on the day and year below.

Name: Zeco Development Group Inc.

Zeco Development Group Inc.

Address: 16695 Peterson Road
Burlington WA 98230

By _____
Corey Zembruski, Its duly authorized officer
or agent
Date: _____

Name: Coldwell Banker American Tradition
Inc.

Coldwell Banker American Tradition Inc.

Address: 120 E. George Hopper Road
Burlington WA 98233

By Rick Schleicher - President
Rick Schleicher, Its duly authorized officer
or agent

Date: 4-15-08

Name: Dee Donaldson

Dee Donaldson

Address: 120 E. George Hopper Road

Burlington WA 98233

By *[Signature]*

Date: 4-15-08

Name: Terri Heynsten.

Terri Heynsten.

Address: 120 E. George Hopper Road
Burlington WA 98233

By *Terri Heynsten*

Date: 4-15-08

Date: _____

LEE SMART, P.S., INC.
701 Pike St. Suite 1800
Seattle WA 98101

By: *[Signature]*
Donna M. Young, WSBA NO. 15455
Of Attorneys for Defendants, Coldwell Banker
Et.al.

Date: _____

DEMCO LAW FIRM, P.S.
5224 Wilson Ave. S. Suite 200
Seattle WA 98118

By: _____
Matthew F. Davis, WSBA No. 20939
Of Attorneys for Zeco

APPENDIX 3

FILED
SKAGIT COUNTY CLERK
SKAGIT COUNTY, WA

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SKAGIT

ZECO DEVELOPMENT GROUP, INC., a
Washington corporation,

Plaintiff,

v.

AMERICAN TRADITION REAL ESTATE,
INC., doing business as COLDWELL
BANKER AMERICAN TRADITION,

Defendants,

NO. **09 2 01013 0**

COMPLAINT

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FOR ITS COMPLAINT, Zeco Development, Inc. alleges as follows:

I. PARTIES

- 1. This court has personal and subject matter jurisdiction and venue is proper in this court.
- 2. Plaintiff Zeco Development Group, Inc. ("Zeco"), is a corporation registered in Washington.
- 3. Defendant American Tradition Real Estate, Inc., doing business as Coldwell Banker American Tradition, Inc. ("CBAT") is a corporation registered in Washington.

II. JURISDICTION AND VENUE

- 4. This court has personal and subject matter jurisdiction and venue is proper in this court.

COMPLAINT - 1

DEMCO LAW FIRM, P.S.
5224 WILSON AVE. S., SUITE 200
SEATTLE, WASHINGTON 98118
(206) 203-6000
FAX: (206) 203-6001

1 email a Microsoft Excel spreadsheet named "Analysis of College Way buyout.xls" and discussed
2 this attachment in the email itself. Halterman either did not read this email or did not notice that
3 the spreadsheet was attached.

4 12. Terri Heyntsen ("Heyntsen") is, and at all relevant times was, a real estate
5 salesperson licensed to CBAT. Heyntsen and Halterman worked in the same office under their
6 designated broker, Dee Donaldson ("Donaldson").

7 13. In mid-February of 2004, Halterman informed Heyntsen that he had a client
8 interested in selling a parcel of land for development. He identified the property as 47 acres on
9 College Way with some wetlands areas and an asking price of \$2.45 million. Heyntsen had
10 previously sold a house to Corey Zemruski ("Zemruski") and informed him of the opportunity.
11 Zemruski stated that he was interested. Heyntsen then told Halterman that she did have a client
12 who was interested in the property.

13 14. Over the following days, Heyntsen obtained additional information from
14 Halterman, including the identity of the property (the Summersun greenhouse on East College
15 Way) and the fact that the property was subject to a lease through the year 2010.

16 15. On or about February 20, 2004, Halterman, Heyntsen, Robin Price ("Price") and
17 Zemruski met at the CBAT office to discuss the property. In that meeting, Halterman touted
18 the value of the commercial property fronting on College Way and discussed the possibility that
19 Zeco might build a strip mall there. Halterman again said that the price for all five parcels was
20 \$2.45 million.

21 16. After additional discussions, Halterman told Heyntsen that Loeb wanted an offer
22 to purchase the property. Heyntsen and Zemruski asked for additional information, including
23 the lease. Halterman provided an unsigned copy of the lease and an amendment to the lease, but
24 said that the signed lease would not be provided until Zeco was conducting its feasibility
25 investigation.
26

COMPLAINT - 3

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1 17. Some time before March 2, 2004, Heyntsen asked Halterman for tax parcel
2 numbers so that she could prepare an offer for the property. Halterman orally told her the
3 numbers, and Heyntsen wrote them down.

4 18. On March 2, 2004, Heyntsen asked Land Title Company of Skagit County for a
5 listing package (also known as a property profile report) for the 5 tax parcel numbers that she
6 had been given by Halterman. She received the listing package on March 2, 2004.

7 19. On March 5, 2004, Loeb sent Halterman an email regarding the property. This
8 email was sent in response to a conversation between Loeb and Halterman in which Halterman
9 had asked about access to the property from College Way. In the email, Loeb stated that "Parcel
10 number P24832 that fronts College Way is the retail store, not included."

11 20. With the email, Loeb delivered an overview of the property to Halterman ("the
12 Overview"). The Overview depicted the parcels and had the parcels numbers of the four parcels
13 that Loeb intended to sell circled. The retail parcel number was not circled.

14 21. Halterman received the Overview but either did not read or ignored it. Loeb's
15 March 5 email contradicted Halterman's fundamental understanding of the transaction.

16 22. Around March 8 and 9, Heyntsen prepared a Commercial and Investment Real
17 Estate Purchase and Sale Agreement for all five parcels. Heyntsen consulted with her broker,
18 Donaldson, for assistance and obtained corporate permission to use the commercial form.
19 Donaldson reminded Heyntsen about the need for legal descriptions and the need to identify the
20 attachments to the offer.

21 23. While Heyntsen was in the process of preparing the offer, Halterman gave her a
22 copy of the Overview and said that it was a clearer copy. Halterman did not tell Heyntsen that
23 Loeb had not circled the retail parcel or that Loeb intended to exclude the retail parcel because
24 he still did not know.

25 24. Heyntsen took the copy of the Overview but did not immediately look at it. Later,
26 when she was preparing the offer, she noticed that the parcel number of the retail parcel had not

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1 been circled. Because she had never been told that Loeb intended to exclude the retail parcel,
2 she then circled that tax parcel number and made the modified map an exhibit to the offer.

3 25. Heyntsen then completed the offer. The offer prepared by Heyntsen included the
4 attachments legal descriptions for all five parcels.

5 26. Heyntsen put the completed offer in a folder and showed it to Donaldson.
6 Donaldson briefly reviewed the documents and confirmed that it had attachments.

7 27. Heyntsen presented the offer to Zemruski, who signed it on behalf of Zeco.
8 Heyntsen then put the offer on Halterman's desk. She then called Halterman at his home and
9 told him that the offer had been signed and was on his desk.

10 28. Halterman called Loeb and told him that an offer was at the CBAT offices.
11 Halterman and Loeb agreed to meet the next morning, March 10, to review the offer.

12 29. When Halterman arrived at the CBAT office the next morning, the offer with the
13 legal descriptions and attachments was on Halterman's desk.

14 30. Halterman and Loeb reviewed the multiple listing forms in the offer, but did not
15 review the attachments. Halterman did not consider the legal descriptions to be important, and
16 Loeb relied on Halterman to ensure that the agreement identified the properties that Loeb
17 intended to sell.

18 31. Loeb modified the price from \$2.45 million to \$2.75 million to be consistent with
19 his expected price. Loeb initialed the change to the purchase price.

20 32. Loeb also lined out several of the warranties contained in paragraph 12 of the
21 Agreement. He did not separately initial this modification.

22 33. Halterman then gave the modified agreement with the attachments and legal
23 descriptions back to Heyntsen and informed her that Loeb had modified the price and had
24 stricken some of the warranties.

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1 34. When the offer was returned to Heyntsen, Price was at the CBAT office and
2 Zembruski was in eastern Washington. When Heyntsen told Price about the increase in the
3 purchase price, Price stated that she needed to speak with Zembruski to decide how to proceed.

4 35. Price and Heyntsen decided it would be best to have Halterman explain the
5 increase in a conference call. Later on March 10, Halterman, Heyntsen, Price and Zembruski
6 held a conference call to discuss the price increase. During that conference call, Halterman

7 stated that the transaction was still a good deal for several reasons, including the commercial
8 property and the frontage on College Street.

9 36. Zembruski agreed to the price increase, and the first page of the agreement was
10 faxed to him for his initials. Zembruski initialed the paragraph and returned it to Heyntsen.
11 Zembruski and Price instructed Heyntsen to return the agreement to Halterman as their
12 acceptance of the agreement, and Heyntsen did so.

13 37. Price saw the changes to the warranty, knew they were included in the response to
14 Loeb's counteroffer and agreed to them on behalf of Zeco.

15 38. Afterwards, when Heyntsen reviewed the agreement in preparation for turning it
16 in to Donaldson as a pending transaction, she noticed that Loeb had not signed page 6 of the
17 Agreement. Heyntsen then gave that page back to Halterman and asked him to get Loeb's
18 signature.

19 39. The following morning, March 11, Halterman faxed page 6 to Loeb, who signed
20 and returned it by fax. Heyntsen then showed the executed page 6 to Price and faxed it to
21 Zembruski for his signature. Zembruski then signed page 6 and returned it by fax to Heyntsen.

22 40. Zeco accepted the agreement as executed by Loeb on March 11, 2004.

23 41. Once Zembruski had signed and returned page 6 of Exhibit 9 on March 11, all of
24 the parties understood and believed that they had a contract for the sale of real property.
25 However, Zeco and Loeb had different subjective understandings about what property was
26

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1 included in the agreement. Zeco believed that all five parcels were included, while Loeb
2 believed that the retail parcel had been excluded.

3 42. The legal descriptions attached to the purchase and sale agreement describe all
4 five parcels plus some additional land that was conveyed by Loeb after his initial acquisition of
5 the property. These included a Montessori school and some strips of land bordering the roads on
6 the north, south and west sides of the property.

7 43. Paragraph 6 of the agreement provides that the seller authorizes the real estate
8 agents or closing agent to order a preliminary title commitment. The buyer then has ten days to
9 notify seller of any objectionable matters. If the seller did not clear those objections within
10 fifteen days, the agreement terminated unless the buyer waived the objection. If the buyer
11 waived or did not make an objection, the sale would close subject to that exception.

12 44. The additional land described in the attachments to the agreements would have
13 been either exceptions to the legal description or special exceptions to a preliminary
14 commitment. Zeco would have had the right to either object to those exceptions or to waive
15 them. Under the circumstances of this transaction, Zeco would have waived those exceptions.

16 45. Paragraph 5 of the agreement provides for an inspection contingency. This
17 paragraph provides that within 10 days after mutual acceptance, the seller would make available
18 for inspection "all documents available to Seller relating to the ownership, operation, renovation
19 or development of the property." The agreement contemplates that the Buyer will not be given
20 these documents until after mutual acceptance and will review them during the inspection period.
21 The Buyer then "shall determine within the contingency period . . . whether it wishes and is able
22 to assume, as of closing, all of the foregoing leases, contracts and agreements which have terms
23 extending beyond closing." Unless the Buyer gives written notice removing this contingency
24 within 30 days after mutual acceptance, the agreement terminates. Buyer may terminate unless it
25 "is satisfied, in Buyer's reasonable discretion, concerning all aspects of the property."
26

1 46. Later on March 11, 2004, Loeb informed his son about the transaction. Loeb's
2 son stated that he wanted to retain parcel P113507, which was the smallest of the parcels.

3 47. Loeb then called Halterman and told him that he wanted to renegotiate the
4 transaction without parcel P113507. Loeb stated that he was willing to compensate Zeco for the
5 change to the agreement.

6 48. The morning of March 12, 2004, Halterman called the CBAT office and conveyed
7 Loeb's request. Later that day, Heyntsen called Halterman and asked him why. Halterman said
8 that Loeb's son wanted to retain one of the parcels. A meeting was then scheduled for the
9 morning of Monday, March 15, 2004 to discuss Loeb's request.

10 49. On March 12, 2004, Halterman took the legal descriptions to Bill Ronhaar at
11 Land Title Company of Skagit County. Ronhaar noticed that the parcel number of the retail
12 parcel had been circled in a different color than the other parcels and informed Halterman that
13 the legal descriptions in the agreement were outdated. Combined with Loeb's request to retain
14 parcel P113507, which is completely surrounded by other parts of the property, this led
15 Halterman to realize for the first time that Loeb did not intend to sell the retail parcel.

16 50. When Loeb arrived for the March 15 meeting, he expected to discuss only a
17 modification of the agreement to keep parcel P113507. Before the meeting, Halterman informed
18 Loeb that a mistake had been made and that Zeco believed the retail parcel was included in the
19 transaction. Loeb then insisted that he had never agreed to sell the retail parcel and would not go
20 forward unless it was excluded. The parties were unable to resolve the issue, but did schedule
21 another meeting for Thursday, March 18, 2004.

22 51. Loeb and Zeco disputed whether the retail parcel was included and whether they
23 had an agreement at all. Loeb and Zeco each commenced action, which were consolidated and
24 tried on February 17-19, 2009. The Court found for Loeb because "The Court does not find that
25 the Exhibits were with the Purchase Offer at the time Loeb reviewed and executed the same."
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1 The trial court did not make a finding whether or not the legal descriptions were received by
2 Halterman.

3 52. As a result, Zeco was unable to enforce its agreement with Loeb and is liable to
4 Loeb for attorney fees.

5 53. If Halterman had informed Zeco that the retail parcel was not included, Zeco
6 would have omitted the retail parcel from its offer.

7 54. If Halterman had shown Loeb the legal descriptions that were attached to the
8 offer, Loeb would have removed the retail parcel from the agreement. Zeco would have accepted that
9 modification.

10 55. As a result of Halterman's failure to inform Zeco that the retail parcel was not
11 included in the agreement, Zeco was prevented from purchasing the rest of the property.

12 56. As a result of Halterman's failure to present the legal descriptions in Zeco offer,
13 Zeco was prevented from purchasing the rest of the property.

14 **IV. CAUSE OF ACTION**

15 ***Negligence***

16 57. Halterman's failure to read correspondence and determine the identity of the
17 property that Loeb intended to sell was negligent.

18 58. Halterman's failure to present the legal descriptions with Zeco's Offer to Loeb
19 was negligent.

20 59. CBAT is vicariously liable for Halterman's negligence.

21 60. Zeco was damaged by Halterman's negligence in an amount to be proven at trial.

22 **V. RELIEF REQUESTED**

23 Plaintiff requests entry of judgment as follows:

- 24 1. An award of damages against CBAT in an amount to be proven at trial;
25 2. Costs, disbursements and reasonable attorney's fees to the extent provided by
26 contract or law; and

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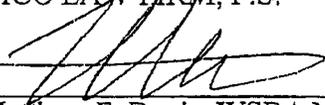
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3. Such other relief as the court may deem appropriate.

DATED this 7th day of May, 2009.

DEMCO LAW FIRM, P.S.

By 

Matthew F. Davis, WSBA No. 20939
Attorneys for Plaintiffs

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