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No. 64806-3
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

ZECO DEVELOPMENT, INC.,

Appellant,

v.

AMERICAN TRADITION REAL ESTATE, INC.

Respondent.

REPLY BRIEF OF APPELLANTS

Matthew F. Davis WSBA #20939
DEMCO LAW FIRM, P.S.
5224 Wilson Avenue South, Suite 200
Seattle, WA 98118
(206)203-6000

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I. INTRODUCTION

Coldwell Banker entered into a Tolling Agreement that permitted Zeco to refile its lawsuit after the trial against another defendant. Now that Zeco has exercised that right based largely on the trial testimony of Coldwell Banker's own agents, Coldwell Banker wants to escape the terms of its own agreement. Changing the step in a transaction where Coldwell Banker's negligence occurred does not constitute a new "cause of action," and this Court should reverse the order granting summary judgment.

II. DISCUSSION

For simplicity, this reply follows the outline of Coldwell Banker's brief.

A. Standard of Review

In the *de novo* appeal, Zeco is entitled to the benefit of all reasonable inferences that can be drawn from the evidence. For example, when a contract term is susceptible to two reasonable interpretations, summary judgment must be denied.

In the contract interpretation context, summary judgment is not proper if the parties' written contract, viewed in light of the parties' other objective manifestations, has two or more reasonable but competing meanings.

Go2Net, Inc. v. C I Host, Inc., 115 Wn.App. 73, 83, 60 P.3d 1245, 1250 (2003).

B. Zeco Presented Evidence Supporting Its Interpretation

Coldwell Banker complains that “Zeco did not submit any declarations supporting its interpretations of the Tolling Agreement.” Respondent’s Brief at 11. Zeco did not present evidence of its own subjective understanding of the agreement because any such evidence would be inadmissible. *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wm.2d 493, 504, 115 P.3d 262, 267 (2005) (Thus, when interpreting contracts, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used.”). This appeal is based on the language of the Tolling Agreement, not on Zeco’s subjective understanding.

C. The Tolling Agreement Applies to This Action.

1. The Tolling Agreement Did Not Require Zeco to Refile the Same Complaint.

The Tolling Agreement did limit any new complaint to the same “cause of action.” The question is what the term “cause of action” means. Coldwell Banker offers Black’s law Dictionary as an authoritative source, and cites the 1979 version for a definition of “[t]he fact or facts which give a person a right to judicial relief.” Respondent’s Brief at 13. Coldwell

Bank does not say whether that is the complete definition from the 1979 edition.

Accepting Black's Law Dictionary as an authoritative source, it is helpful perhaps to start with the Fourth Edition from 1968, which defines Cause of Action thusly:

A "cause of action" may mean one thing for one purpose and something different for another.

Appendix 1. This "definition" is followed by a long list of citations illustrating the many varied meanings of the term.

Less prosaically, one could consider the full definition of the current version of Black's Law Dictionary as available on Westlaw.

cause of action. 1. A group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person; CLAIM(4) <after the crash, Aronson had a cause of action>. [Cases: Action 1, 2. C.J.S. Actions §§ 2–9, 11, 17, 21, 26, 31–33, 36.]

"What is a cause of action? Jurists have found it difficult to give a proper definition. It may be defined generally to be a situation or state of facts that entitles a party to maintain an action in a judicial tribunal. This state of facts may be — (a) a primary right of the plaintiff actually violated by the defendant; or (b) the threatened violation of such right, which violation the plaintiff is entitled to restrain or prevent, as in case of actions or suits for injunction; or (c) it may be that there are doubts as to some duty or right, or the right beclouded by some apparent adverse right or claim, which the plaintiff is entitled to have cleared up, that he may safely perform his duty, or enjoy his property." Edwin

E. Bryant, *The Law of Pleading Under the Codes of Civil Procedure* 170 (2d ed.1899).

2. A legal theory of a lawsuit <a malpractice cause of action>. Cf. RIGHT OF ACTION. — Also termed (in senses 1 & 2) *ground of action*.

new cause of action. A claim not arising out of or relating to the conduct, occurrence, or transaction contained in the original pleading. • An amended pleading often relates back to the date when the original pleading was filed.

Thus, a plaintiff may add claims to a suit without facing a statute-of-limitations bar, as long as the original pleading was filed in time to satisfy the statute. But if the amended pleading adds a claim that arises out of a different transaction or occurrence, or out of different alleged conduct, the amendment does not relate back to the date when the original pleading was filed. Fed. R. Civ. P. 15(c).

3. Loosely, a lawsuit <there are four defendants in the pending cause of action>.

Black's Law Dictionary (8th Ed. 2004) (Appendix 2). According to the current version of the authority cited by Coldwell Bank, the term "cause of action" may mean "the legal theory of a lawsuit." The legal theory of the lawsuit was and is negligence in conveying and communicating the offer.

Washington courts appear to most commonly use the term "cause of action" to describe a legal theory, not a set of factual allegations.

Ferguson and McLellan sued Zellmer for wrongful death, alleging several causes of action including negligence, negligent supervision, willful and wanton misconduct, breach of contract, negligent infliction of emotional distress, and outrage.

Zellmer v. Zellmer, 164 Wn.2d 147, 151, 188 P.3d 497, 498 (2008).

The Court of Appeals accepted review on the five remaining causes of action (negligence, outrage, breach of contract, negligent misrepresentation and fraud).

Cutler v. Phillips Petroleum, 124 Wn.2d 749, 755, 881 P.2d 216 (1994).

Historically, one of the most confusing areas of product liability tort law involves the variety of causes of actions—such as negligence, warranty and strict liability—available to the plaintiff seeking recovery for injuries allegedly resulting from a defective product.

Washington Water Power Co. v. Graybar Elec. Co., 112 Wn.2d 847, 854, 774 P.2d 1199, 1204 (1989).

Actual loss or damage is an essential element in the formulation of the traditional elements necessary for a cause of action in negligence.

Gazija v. Nicholas Jerns Co., 86 Wn.2d 215, 219, 543 P.2d 338 (1975).

The Homeowners brought the following causes of action: outrage, fraud, unfair business practices act violation, negligence for personal injury and property damage, negligent misrepresentation, rescission, and breach of warranty.

Townsend v. Quadrant Corp., 153 Wn.App. 870, 886, 224 P.3d 818 (2009).

A cause of action for negligence requires the plaintiff to show (1) that the defendant owed a duty to the plaintiff, (2) breach of that duty, (3) an injury, and (4) a proximate cause between the breach and the injury.

Travis v. Bohannon, 128 Wn.App. 231, 237, 115 P.3d 342, 345 (2005).

Both complaints assert a cause of action for negligence arising out of the same course of conduct in the same transaction. Coldwell Banker is not entitled to its strained, narrow definition on summary judgment.

2. Zeco's First Complaint Stated a Cause of Action Against Coldwell Banker for Negligence.

a. Coldwell Banker's Negligence Was Specifically Pled

Coldwell Banker asks the Court to parse Zeco's prior complaint into tiny parts and then to ignore the whole of those parts. It is true that Zeco did not allege any specific acts of Halterman in its prior complaint, but it did name Coldwell Banker and its broker, Dee Donaldson, as parties. CP 36 at ¶¶ 1.2, 1.4. It includes a broad allegation of Donaldson's (and therefore Coldwell Banker's) negligence. CP 40-41 at ¶¶2.23-2.25.. The Complaint in this action names only Coldwell Banker as an entity, but a plaintiff may sue only the principal for the torts of its agents. *Orwick v. Fox*, 65 Wn.App. 71, 81, 828 P.2d 12, 18 (1992).

In its attempt to make the claims in the two complaints look different, Coldwell Banker wrongly asserts that the claims are based on different provisions of the agency statute. Coldwell Banker was a dual agent. RCW 18.86.020(2). While the duties of the Halterman and Heyntsen might have been limited, Coldwell Banker as the brokerage owed Zeco every single duty set forth in the statute. RCW 18.86.060.

The duty that Coldwell Banker owed to Zeco is exactly the same under both complaints.

b. Zeco Has a Single Cause of Action

Coldwell Banker cites *McFarling v. Evaneski*, 141 Wn.App. 400, 171 P.3d 497 (2007) for the proposition that “the cause of action is the act which occasioned the injury, not the damage that flows from the wrong.” Respondent’s brief at 15. *McFarling* certainly is helpful, but not for the reasons asserted by Coldwell Banker.

In *McFarling*, the plaintiff sought to pursue a personal injury claim that he had not disclosed in a prior bankruptcy. *Id.* at 402. The trial court dismissed the action under the judicial estoppel doctrine. *Id.* at 403. On appeal, *McFarling* argued that his claim for damages incurred after his discharge should be segregated and allowed to proceed. The court disagreed, stating: “Mr. *McFarling* has only one personal injury claim, which accrued before his bankruptcy petition.” *Id.* at 405. Similarly, Zeco has only one negligence claim against Coldwell Banker arising out of the transaction.

Zeco could not have filed a separate lawsuit against Halterman because it would be claim splitting. *Landry v. Luscher*, 95 Wn.App. 779, 782, 976 P.2d 1274, 1277 (1999). The claim splitting rule exists to protect defendants from multiple lawsuits over the same transaction, not to

prevent plaintiffs from asserting the claim in the first place. *See Id.* at 786.

Coldwell Banker is attempting to use a shield as a sword.

b. Zeco Has a Single Cause of Action

Coldwell Banker's assertion that a cause of action is limited to the facts pled in the Complaint harkens back to the era of code pleading. The concept of notice pleading is relevant because it helps to define a cause of action. Under the civil rules, "pleadings are primarily intended to give notice to the court and the opponent of the general nature of the claim asserted." *Lightner v. Balow*, 59 Wn.2d 856, 858, 370 P.2d 982, 984 (1962). In *Adams v. King County*, 164 Wn.2d 640, 657, 192 P.3d 891, 899 (2008), for example the court held that a claim pled under the restatement was sufficient for the plaintiff to proceed under a slightly different common law theory. Here, the complaints both allege a single cause of action or negligence arising out of the same transaction.

c. Halterman and Coldwell Banker Are Not Separate

Coldwell Banker argues at length that Halterman was not a defendant in the prior Complaint, but the fact is that he is not a defendant now. Zeco did not add any defendants in its current Complaint. It changed only the identity of the culpable agent of Coldwell Banker, and

the First Complaint does name Coldwell Banker as a defendant. CP 36 at ¶ 1.4.

Coldwell Banker next argues that the First Complaint “does not contain any claim that Halterman owed a duty to Zeco.” Respondent’s Brief at 16. However, it does allege that Coldwell Banker owed Zeco a duty. CP 40 at ¶¶2.22, 2.25

Coldwell Banker also argues that the First Complaint “does not claim that [Halterman] breached any duty to Zeco. Respondent’s Brief at 16. However, it does allege that Coldwell Banker breached a duty to Zeco. CP 40 at ¶¶ 2.23, 2.24; CP 41 at CP 2.27.

Coldwell Banker never even attempts to explain why the Complaint did not “give notice . . . of the nature of plaintiff’s claim.” Respondent’s Brief at 16. That is because the First Complaint did give notice of a claim for negligence in Coldwell Banker’s handling of the transaction. Zeco’s cause of action for negligence encompasses the specific facts alleged in both complaints.

3. The Tolling Agreement Is Not Superfluous.

Coldwell Banker asserts that the parties’ agreement to preclude any further discovery and the recitation that the claim was unlikely to succeed would be superfluous unless Zeco were strictly limited to the facts alleged in the First Complaint. That makes no sense. The agreement was

struck shortly before trial, and discovery was complete. Zeco has not sought any discovery in the new action, nor has it indicated any intention to do so. The fact that Zeco can prosecute its claims without conducting any further discovery only demonstrates that the two Complaints are so closely related to each other and should be considered the same cause of action.

D. The Claims Are Timely Under the Tolling Agreement.

The claims in the new Complaint are timely to the extent that the Tolling Agreement applies. If the Tolling Agreement does not apply, then the claims would be time barred.

E. Collateral Estoppel Does Not Apply.

Coldwell Banker's Collateral Estoppel argument is pure fiction. The argument is based on Coldwell Banker's assertion that Judge Cowser "found that the facts did not support a finding that the exhibits were given to Mr. Halterman by Ms. Heyntsen." Respondent's brief at 25. That assertion is blatantly false.

Judge Coswert carefully and deliberately found that the legal descriptions were not "with the Purchase Offer at the time Loeb reviewed and executed the same." CP 72 at ¶ 46 (emphasis added). The only finding that Judge Cowser made was that the legal descriptions were not attached when Loeb reviewed the agreement. He made no finding,

express or implied, whether the legal description was delivered from Heyntsen to Halterman.

Coldwell Banker also argues that the Court should apply collateral estoppel to the determination that Loeb would not have signed the agreement. This argument was not raised in any form below and should be disregarded under RAP 2.5(a). *See* CP 14-30, 121-38. In any event, the new Complaint does not allege that Loeb would have signed that agreement, but instead alleges:

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

CP 11 at ¶ 54. Even if Zeco were collaterally estopped on that point, it is not part of the case.

F. Halterman Was Negligent

Coldwell Banker appears to argue that an excerpt of Halterman's trial testimony proves that he was not negligent. Respondent's brief at 30. This section of the brief contains no authority whatsoever and therefore should be disregarded. *Collins v. Clark County Fire Dist. No. 5*, 155 Wash.App. 48, ___ P.3d ___ (2010).

G. Coldwell Banker Owed Duties to Zeco.

Coldwell Banker claims that under the real estate agency statute, it owed no duty whatsoever to Zeco. The theory is that agents only owe the duties in RCW 18.86.030 to “parties to whom the licensee renders real estate brokerage services,” and that this necessarily is restricted to parties the agent represents. This specious argument has circulated for years, and it should be definitively rejected once and for all.

RCW 18.86 expressly does not limit itself to agency relationships: “Regardless of whether the licensee is an agent, a licensee owes to all parties to whom the licensee renders real estate brokerage services the following duties, which may not be waived.” RCW 18.86.030(1) (emphasis added).

Zeco further argues that any duty “must arise from some specific contact with Zeco.” Respondent’s Brief at 37. Coldwell Banker offers no authority for this proposition, and none exists. Halterman presented an offer from Zeco to Loeb and a counteroffer from Loeb to Zeco. The fact that Halterman’s direct contact was with Zeco’s agent does not alter the fact that he was rendering real estate brokerage services to Zeco. *See State v. Parada*, 75 Wn.App. 224, 230-231, 877 P.2d 231, 236 (1994) (“Under agency law, notice given to and knowledge acquired by an agent are imputed to its principal as a matter of law.”).

Under Coldwell Banker's view of the law, a seller's real estate agent would not owe the buyer a duty to disclose material facts or even to deal honestly and in good faith. RCW 18.86.030(1)(b), (d). Nothing in the statute indicates that it was intended to relieve agents of these well established duties, and the Court should reject Coldwell Banker's argument.

With regard to a specific duty that was breached, the Court need look no further than RCW 18.86.030(1)(c), which requires agents to present all written offers in a timely manner. The evidence establishes that Heyntsen delivered the offer with the legal descriptions to Halterman, but that the legal descriptions were not with the offer when Halterman presented it to Loeb. A reasonable inference from this evidence is that Halterman received the legal descriptions, but did not present them to Loeb in direct violation of the statute.

H. The Court Should Not Ignore the Allegations Against the Broker.

Finally, Coldwell Banker argues that the Court should disregard the reference to the allegations against Coldwell Banker in the First Complaint. Coldwell Banker apparently misunderstands the significance of those allegations.

Coldwell Banker is seeking to limit this action to the facts pled in the First Complaint. It therefore is necessary to consider the breadth of those allegations. Coldwell Banker concedes that “Facts supporting allegations of negligence of the broker were made in the First Complaint.” Respondent’s Brief at 42.

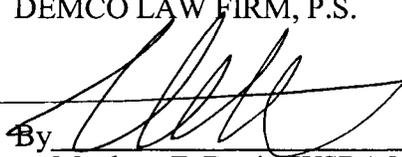
Coldwell Banker even cites to paragraph 2.24 of the First Complaint, which alleged that Coldwell Banker was negligent “in the failure to insure the integrity of the delivery and receipt of documents from one agent to the other.” Respondent’s Brief at 42. That is exactly the basis of this action.

III. CONCLUSION

If Coldwell Banker had wanted to limit the refiling to exactly the same Complaint, it could have negotiated for such an agreement. Instead, the parties agreed to limit any new complaint to the same cause of action. This Court should reject Coldwell Banker’s narrow definition of that term and reverse the order granting summary judgment.

DATED this 17th day of June 2010.

DEMCO LAW FIRM, P.S.

By 

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

DECLARATION OF SERVICE

I, Leslie Rothbaum, state:

On this day I caused to be delivered the REPLY BRIEF OF APPELLANTS by ABC Legal Messengers for delivery on June 17, 2010, to the Court of Appeals Division I and to

DONNA M. YOUNG
LEE SMART
1800 ONE CONVENTION PLACE
701 PIKE ST
SEATTLE WA 98101 -3929

Declarant is a resident of the State of Washington and over the age of eighteen (18) years. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 17th day of June, 2010 at Seattle, Washington.


Leslie Rothbaum

APPENDIX 1

BLACK'S LAW DICTIONARY

Definitions of the Terms and Phrases of
American and English Jurisprudence,
Ancient and Modern

By

HENRY CAMPBELL BLACK, M. A.

Author of Treatises on Judgments, Tax Titles, Intoxicating Liquors,
Bankruptcy, Mortgages, Constitutional Law, Interpretation
of Laws, Rescission and Cancellation of Contracts, Etc.

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Means, Metropolitan Life Ins. Co. v. Funderburk, Tex.Civ.App., 81 S.W.2d 132, 137. Motive, In re Canal Bank & Trust Co.'s Liquidation, 178 La. 575, 152 So. 297, 298. Probable cause, State v. Brockman, 231 Wis. 634, 283 N.W. 338, 340. Producing cause, Traders & General Insurance Co. v. Ray, Tex.Civ.App., 128 S.W.2d 80, 84. Sum of antecedents of an event, Burns v. Eminger, 84 Mont. 397, 276 P. 437, 442; Griffin v. Anderson Motor Service Co., 227 Mo.App. 855, 59 S.W.2d 805, 808. That which produces an effect; whatever moves, impels or leads. Weinberg v. Richardson, 291 Ill. App. 618, 10 N.E.2d 893; Merlo v. Public Service Co. of Northern Illinois, 381 Ill. 300, 45 N.E.2d 665, 675; State v. Craig, 161 S.C. 232, 159 S.E. 559, 560. The origin or foundation of a thing, as of a suit or action; a ground of action. State v. Dougherty, 4 Or. 203.

As used with reference to the removal of an officer or employee, "cause" means a just, not arbitrary, cause; one relating to a material matter, or affecting the public interest. Brokaw v. Burk, 89 N.J.Law, 132, 98 A. 11, 12; a cause relating to and affecting administration of office and of substantial nature directly affecting public's rights and interests, State ex rel. Rockwell v. State Board of Education, 213 Minn. 184, 6 N.W.2d 251, 260, 143 A.L.R. 503.

Conduct indicating unworthy or illegal motives or improper administration of power, Voorhees v. Kopler, 239 App.Div. 83, 265 N.Y.S. 532, 533; Tappan v. Helena Federal Savings & Loan Ass'n of Helena, Ark., 193 Ark. 1023, 104 S.W.2d 458, 459; Zurich General Accident & Liability Ins. Co. v. Kinsler, 12 Cal.2d 98, 81 P.2d 913, 915; misfeasance or nonfeasance, Schoonover v. City of Viroqua, 244 Wis. 615, 12 N.W.2d 912, 914; As used in fraternal benefit society by-law authorizing suspension of subordinate council and dissolution of its charter, "cause," means legal cause or just cause, a substantial, reasonable, or just cause. Wichita Council No. 120 of Security Ben. Ass'n v. Security Ben. Ass'n, 138 Kan. 841, 28 P.2d 976, 979, 94 A.L.R. 629.

"Cause" and "consequence" are correlative terms. Kelley v. Rebuzzini, 87 Conn. 556, 89 A. 170, 171, 52 L.R.A., N.S., 103; In re Benson, 178 Okl. 299, 62 P.2d 962, 965.

Clause for termination of employment for "any cause" held to refer to cause justifying termination for employee's breach of contract, not arbitrarily. Parsil v. Emery, 242 App.Div. 653, 272 N.Y.S. 439, 440.

Statute permitting an award to be set aside for "cause" means for good cause or some such cause as fraud or surprise, Eisenpeter v. Potvin, 213 Minn. 129, 5 N.W.2d 499, 501.

In Civil and Scotch Law

The consideration of a contract, that is, the inducement to it, or motive of the contracting party for entering into it. Dig. 2, 14, 7; Toullier, liv. 3, tit. 3, c. 2, § 4; 1 Abb. 28; Bell, Dict.

The civilians use the term "cause," in relation to obligations, in the same sense as the word "consideration" is used in the jurisprudence of England and the United States. It means the motive, the inducement to the agreement,—*id quod inducet ad contrahendum*. Mouton v. Noble, 1 La. Ann. 192. But see Ames, 3 Sel. Essays in Anglo-Amer. Leg. Hist. 279; Poll. Contr. 74.

Used also in the civil law in the sense of *res* (a thing). *Non porcellum, non agnellum nec alia causa* (not a hog, not a lamb, nor other thing). Du Cange.

In Pleading

Reason; motive; matter of excuse or justification. See 8 Co. 67; 11 East 451; 1 Chit. Pl. 585.

In Practice

A suit, litigation, or action. Any question, civil or criminal, litigated or contested before a court of justice.

As used in venue statute, "cause" means "cause of action", which means the right which a party has to institute a judicial proceeding. Bergin v. Temple, 111 Mont. 539, 111 P.2d 286, 289, 133 A.L.R. 1115.

Cause imports a judicial proceeding entire, and is nearly synonymous with *lis* in Latin, or suit in English. "Case" not infrequently has a more limited signification, importing a collection of facts, with the conclusion of law thereon. See Shirts v. Irons, 47 Ind. 445; Erwin v. U. S., D.C. Ga., 37 Fed. 470, 2 L.R.A. 229. But "cause" and "case" are often synonymous. Zilz v. Wilcox, 190 Mich. 486, 157 N.W. 77, 80; Schmalz v. Arnwine, 118 Or. 300, 246 P. 718, 719; Cheney v. Richards, 130 Me. 288, 155 A. 642, 644.

A distinction is sometimes taken between "cause" and "action." Burrill observes that a cause is not, like an action or suit, said to be commenced, nor is an action, like a cause, said to be tried. But, if there is any substantial difference between these terms, it must lie in the fact that "action" refers more peculiarly to the *legal procedure* of a controversy; "cause" to its *merits* or the state of facts involved. Thus, we cannot say "the cause should have been replevin." Nor would it be correct to say "the plaintiff pleaded his own action."

As to "Probable Cause" and "Proximate Cause," see those titles. As to challenge "for cause," see "Challenge."

CAUSE-BOOKS. Books kept in the central office of the English supreme court, in which are entered all writs of summons issued in the office. Rules of Court, v 8.

CAUSE LIST. In English practice. A printed roll of actions, to be tried in the order of their entry, with the names of the solicitors for each litigant. Similar to the calendar of causes, or docket, used in American courts.

CAUSE OF ACTION. A "cause of action" may mean one thing for one purpose and something different for another. Venezuelan Meat Export Co. v. U. S., D.C.Md., 12 F.Supp. 379, 383; U. S. v. Memphis Cotton Oil Co., Ct.Cl., 288 U.S. 62, 53 S. Ct. 278, 280, 77 L.Ed. 619.

It may mean: accident, Maryland Casualty Co. v. Gerlaske, C.C.A.Tex., 68 F.2d 497, 499; act causing injury, Fiscus v. Kansas City Public Service Co., 153 Kan. 493, 112 P.2d 83, 85; action, Wattman v. St. Luke's Hospital Ass'n, 314 Ill.App. 244, 41 N.E.2d 314, 319; averment of facts sufficient to justify a court in rendering a judgment, Mobley v. Smith, 24 Ala.App. 553, 138 So. 551; Vickers v. Vickers, 45 Nev. 274, 202 P. 31, 32; breach of contract or agreement, Press v. Davis, Tex.Civ.App., 118 S.W.2d 982, 989, 990; breach of duty, Shapiro v. McCarthy, 279 Mass. 425, 181 N.E. 842, 844; case, Colla v. Carmichael U-Drive Autos, 111 Cal.App. 378, 294 P. 378, 380; claim, Bishop v. Jensen, 212 Wis. 30, 248 N.W. 771, 772; East Side Mill & Lumber Co. v. Southeast Portland Lumber Co., 155 Or. 367, 64 P.2d 625, 627, 628; concept of law of remedies. Rooney v. Maczko, 315 Pa. 113, 172 A. 151, 153; U. S. v. Memphis Cotton Oil Co., Ct.Cl., 288 U.S. 62, 53 S.Ct. 278, 280, 77 L.Ed. 619; concurrence of the facts giving rise to enforceable claim, United States v. Standard Oil Co. of California, D.C.Cal., 21 F.Supp. 645, 660; contract, Stone Fort Nat. Bank of Nacogdoches v. Forbes, 126 Tex. 568, 91 S.W.2d 674; demand, State v. Vincent, 152 Or. 205, 52 P.2d 203, 206; every fact which it is necessary to establish to support right or obtain judgment, Beale v. Cherrymhomes, Tex.Civ.App., 21 S.W.2d 65, 66; Dublin Mill & Elevator Co. v. Cornelius, Tex.Civ.App., 5 S.W.2d 1027, 1028; fact, or a state of facts to which law, sought to be enforced against a person or thing, applies. Gulf, C. & S. F. Ry. Co. v. Cities Service Co., D.C.Del., 270 F. 994, 995; Condor Pe-

CAUSE OF ACTION

roleum Co. v. Greene, Tex.Civ.App., 164 S.W.2d 713, 718; Burns v. Duncan, 23 Tenn.App. 374, 133 S.W.2d 1000, 1004; facts constituting wrong, Whalen v. Strong, 230 App.Div. 617, 246 N.Y.S. 40, 45; facts which give rise to one or more relations of right-duty between two or more persons, Elliott v. Mosgrove, 162 Or. 507, 93 P.2d 1070, 1072, 1073, 1076; failure to perform legal obligation to do, or refrain from performance of, some act, In re Canfield's Will, 165 Misc. 66, 300 N.Y.S. 502; ground on which an action may be maintained or sustained, ground or reason for an action, East Side Mill & Lumber Co. v. Southeast Portland Lumber Co., 155 Or. 367, 64 P.2d 625, 627, 628. Juncture of wrong and damage, City of Newport v. Rawlings, 289 Ky. 203, 158 S.W.2d 12, 14; legal duty and breach of duty, Alford v. Zeigler, 65 Ga.App. 294, 16 S.E.2d 69, 74; legal liability arising out of facts, White v. Nemours Trading Corporation, D.C.Mass., 290 F. 250, 252; legal obligation, Hartford Accident & Indemnity Co. v. Clegg, 103 Utah 414, 135 P.2d 919, 922, 923; legal right in plaintiff and duty in defendant and violation or breach of right or duty, Evans v. Williams, 291 Ky. 484, 165 S.W.2d 52, 54; legal right of action. Inhabitants of Town of Milo v. Milo Water Co., 129 Me. 463, 152 A. 616, 617; legal right violated, Howard v. Brown, 172 Okl. 308, 44 P.2d 959, 961; legal wrong threatened or committed, Connor v. Williams, 187 S.C. 119, 197 S.E. 211, 214; matter for which action may be brought, Ex parte Teeters, 130 Or. 631, 280 P. 660, 662; Williams v. City of Dallas, Tex.Civ.App., 52 S.W.2d 373, 375; negligent act or omission, Cox v. Wilkes-Barre R. Corporation, 334 Pa. 568, 6 A. 538, 539; obligation, United States v. Standard Oil Co., California, D.C.Cal., 21 F.Supp. 645, 660; occurrence which gives rise to litigation, Maryland Casualty Co. v. Gaske, C.C.A.Tex., 68 F.2d 497, 499; particular matter for which suit is brought, Severance v. Heyl & Patterson, 115 Pa.Super. 36, 174 A. 787, 789; power to enforce obligation, Woods v. Cook, 14 Cal.App.2d 560, 58 P.2d 965, 966; primary right and corresponding duty and delict or wrong, Vasu v. Kohlers, Inc., 145 Ohio St. 321, 61 N.E.2d 707, 714; redressible wrong, Meshek v. Cordes, 164 Okl. 40, 22 P.2d 921, 926; or breach of duty by defendant, Skalowski v. Joe Fisher, Inc., 152 S.C. 108, 149 S.E. 340, 344, 65 A. L.R. 1427; American Nat. Ins. Co. v. Warnock, Tex.Civ. App., 143 S.W.2d 624, 628; right of action or right of recovery, Williams v. City of Dallas, Tex.Civ.App., 52 S.W. 2d 373, 375; Graham v. Scripture, 26 How.Prac., N.Y., 501; right to bring suit, Viers v. Webb, 76 Mont. 38, 245 P. 257, 259; Grenada Bank v. Petty, 174 Miss. 415, 164 So. 316, 318; right to enforce obligations, Woods v. Cook, 14 Cal.App.2d 560, 58 P.2d 965, 966; right to prosecute an action with effect, Travelers' Ins. Co. v. Louis Padula Co., 224 N.Y. 397, 121 N.E. 348, 350; right to recover something from another, Universal Oil Products Co. v. Standard Oil Co. of Indiana, D.C.Mo., 6 F.Supp. 37, 39; right to relief in court, Kittinger v. Churchill Evangelistic Ass'n, 239 App.Div. 253, 267 N.Y.S. 719, 722; Mulligan v. Bond & Mortgage Guarantee Co., 193 App.Div. 741, 184 N.Y.S. 429, 431; subject matter of the controversy, Johnson v. Jordan, D.C.Okl., 22 F.Supp. 286, 289; subject-matter on which plaintiff grounds his right of recovery, Zeien v. Domestic Industries, 131 Neb. 123, 267 N.W. 352, 354; East Side Mill & Lumber Co. v. Southeast Portland Lumber Co., 155 Or. 367, 64 P.2d 625, 627, 628; that which creates necessity for bringing action, Brevick v. Cunard S. S. Co., 63 N.D. 210, 247 N.W. 373, 375; that which produces or effects result complained of, Jacobson v. Mutual Ben. Health & Accident Ass'n, 73 N.D. 108, 11 N.W.2d 442, 445, 446; unlawful violation of a right, Keith v. Texas & P. R. Co., 14 La.App. 290, 129 So. 190, 194; violation or invasion of right, East Side Lumber & Coal Co. v. Barfield, 193 Ga. 273, 18 S.E.2d 492, 496; wrong committed or threatened, Criswell v. Criswell, 101 Neb. 349, 165 N.W. 362.

It may sometimes mean a person having a right of action. Thus, where a legacy is left to a married woman, and she and her husband bring an action to recover it, she is called in the old books the "meritorious cause of action." 1 H.Bl. 108.

A distinction may be taken between "cause of action" and "right of action." Elliott v. Chicago, M. & St. P. Ry. Co., 35 S.D. 57, 150 N.W. 777, 779. The cause of action is distinct from the "remedy." Tonn v. Inner Shoe Tire Co., Tex.Civ.App., 260 S.W. 1078, 1080. And the cause of action may exist, though the remedy does not. Chandler v. Horne, 23 Ohio App. 1, 154 N.E. 748, 750.

Cause of action is not synonymous with chose in action. Bank of Commerce v. Rutland & W. R. Co., 10 How.Prac.,

N.Y., 1. But under a Montana statute, if the relief sought is the recovery of money or other personal property, the cause of action is designated a "thing in action." State v. District Court of Tenth Judicial Dist. in and for Fergus County, 74 Mont. 355, 240 P. 667, 669.

CAUSE OF INJURY. That which actually produces it, Anderson v. Byrd, 133 Neb. 483, 275 N.W. 825, 826.

CAUSE SUIT TO BE BROUGHT. Commence or begin, State v. Osen, 67 N.D. 436, 272 N.W. 783, 784.

CAUSES CÉLÈBRES. Celebrated cases. A work containing reports of the decisions of interest and importance in French courts in the seventeenth and eighteenth centuries.

Secondarily a single trial or decision is often called a "cause célèbre," when it is remarkable on account of the parties involved or the unusual, interesting, or sensational character of the facts.

CAUSEWAY. A raised roadbed through low lands; it differs from a levee. Board of Sup'rs of Quitman County v. Carrier Lumber & Mfg. Co., 103 Miss. 324, 60 So. 326, 327. See, also, Coleman-Fulton Pasture Co. v. Aransas County, Tex.Civ. App., 180 S.W. 312, 313.

CAUSIDICUS. In the civil law. A speaker or pleader; one who argued a cause *ore tenus*. See "Advocate."

CAUTELA. Lat. Care; caution; vigilance; provision.

CAUTI JURATORIA. See "Caution Juratory."

CAUTIO. In the Civil and French law. Security given for the performance of any thing; bail; a bond or undertaking by way of surety. Also the person who becomes a surety.

In Scotch law. A pledge, bond, or other security for the performance of an obligation, or completion of the satisfaction to be obtained by a judicial process. Bell, Dict.; 6 Mod. 162.

CAUTIO FIDEJUSSORIA. Security by means of bonds or pledges entered into by third parties. Du Cange.

CAUTIO MUCIANA. Security given by an heir or legatee, to obtain immediate possession of inheritance or legacy, for observance of a condition annexed to the bequest, where the act which is the object of the condition is one which he must avoid committing during his whole life, *e. g.*, that he will never marry, never leave the country, never engage in a particular trade, etc. See Mackeld. Rom.Law, § 705.

CAUTIO PIGNORATITIA. Security given by pledge, or deposit, as plate, money, or other goods.

CAUTIO PRO EXPENSIS. Security for costs, charges, or expenses.

CAUTIO USUFRUCTUARIA. Security, which tenants for life give, to preserve the property rented free from waste and injury. Ersk.Inst. 2, 9, 59.

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APPENDIX 2

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cause of action. 1. A group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person; CLAIM(4) <after the crash, Aronson had a cause of action>. [Cases: Action ¶1, 2. C.J.S. *Actions* §§ 2–9, 11, 17, 21, 26, 31–33, 36.]

“What is a cause of action? Jurists have found it difficult to give a proper definition. It may be defined generally to be a situation or state of facts that entitles a party to maintain an action in a judicial tribunal. This state of facts may be — (a) a primary right of the plaintiff actually violated by the defendant; or (b) the threatened violation of such right, which violation the plaintiff is entitled to restrain or prevent, as in case of actions or suits for injunction; or (c) it may be that there are doubts as to some duty or right, or the right beclouded by some apparent adverse right or claim, which the plaintiff is entitled to have cleared up, that he may safely perform his duty, or enjoy his property.” Edwin E. Bryant, *The Law of Pleading Under the Codes of Civil Procedure* 170 (2d ed. 1899).

2. A legal theory of a lawsuit <a malpractice cause of action>. Cf. RIGHT OF ACTION. — Also termed (in senses 1 & 2) *ground of action*.

new cause of action. A claim not arising out of or relating to the conduct, occurrence, or transaction contained in the original pleading. • An amended pleading often relates back to the date when the original pleading was filed. Thus, a plaintiff may add claims to a suit without facing a statute-of-limitations bar, as long as the original pleading was filed in time to satisfy the statute. But if the amended pleading adds a claim that arises out of a different transaction or occurrence, or out of different alleged conduct, the amendment does not relate back to the date when the original pleading was filed. Fed. R. Civ. P. 15(c).

3. Loosely, a lawsuit <there are four defendants in the pending cause of action>.

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