IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JAMES R. SWEETSER and DELORES G. SWEETSER, husband and wife, Respondents and Cross-Appellants, v. TOMLINSON BLACK COMMERCIAL, INC. d/b/a NAI Black, f/k/a TOMLINSON BLACK COMMERCIAL, INC., a Washington Corporation; DAVID R. BLACK, broker and Chief Executive Officer; DAVID R. BLACK and JANE DOE BLACK, individually and as a marital community; JEFF K. JOHNSON, broker; JEFF K. JOHNSON and JANE DOE JOHNSON, individually and as a marital community; EARLE ENGLE, the listing agent; EARLE ENGLE and JANE DOE ENGLE, individually and as a marital community; ANNE BETOW, a commercial realtor; ANNE BETOW and JOHN DOE BETOW, individually and as a marital community; MARK McLEES,	)	No. 28435-2-III Division Three UNPUBLISHED OPINION

commercial realtor; MARK McLEES and JANE DOE McLEES, individually and as a marital community; JEFF McGOUGAN, commercial realtor; JEFF McGOUGAN and JANE DOE McGOUGAN, individually and as a marital community,

Appellants,

CARLO JENSEN, a commercial realtor; CARLO JENSEN and JANE DOE JENSEN, individually and as a marital community; MARK DAVIS, a commercial realtor; MARK DAVIS and JANE DOE DAVIS, individually and as a marital community; SPOKANE TRADERS CLUB, a Washington Corporation; and JOHN DOE and JANE DOE, with knowledge and responsibility,

Defendants.

Sweeney, J. — The trial of this case, over eight days, ended with a jury verdict substantially in favor of the defendant real estate company. The plaintiffs claimed that they sustained substantial damages on a real estate transaction because of the negligent, unethical, unfair, and duplicitous conduct of the defendant real estate company, and they presented evidence to that effect. The jury disagreed. We affirm the judgment entered on the jury verdict because we conclude that

the court properly instructed the jury, appropriately exercised discretion in limiting the length of the trial, and properly concluded that juror comments "inhered" in the verdict and were not then subject to judicial review and criticism. We also conclude that no contract supports the defendant real estate company's claim for reasonable attorney fees. We, therefore, affirm the trial court's denial of the company's request for fees and also deny fees on appeal.

FACTS

SEBCO, Inc., through Black Commercial, Inc., d/b/a NAI Black, listed its commercial building at 1020 North Washington in Spokane for sale for $475,000 on October 19, 2006. James Sweetser, through Black Commercial real estate agent Anne Betow, prepared and presented several offers to buy the property between October 19 and 31, 2006. Each offer was printed on a form entitled "Real Estate Purchase & Sale Agreement (With Earnest Money Provision)" and signed by Mr. Sweetser. Clerk's Papers (CP) at 55-56, 63-64, 69-70, 87-88, 288-89. And each form included a provision for attorney fees:

> If Purchaser, Seller, or any Agent or Broker involved in this transaction is involved in any dispute relating to any aspect of this transaction or this Agreement, any prevailing party shall recover their reasonable attorneys' fees and costs.

CP at 56, 64, 70, 88, 289. SEBCO rejected the Sweetsers' offers and sold the property to Day Three, LLC (aka Copeland

Architecture & Consultants, Inc.) for $510,000. It appears the sale was mutually accepted on October 20, although that is contested. Day Three then sold the property to the Sweetsers a few months later for $750,000.

Mr. Sweetser and his wife sued Ms. Betow, Black Commercial, Inc., commercial brokers David R. Black and Jeff K. Johnson, and commercial agents Earl Engle, Mark McLees, and Jeff McGougan (collectively, Black Commercial). They alleged common law negligence and violations of the Washington Consumer Protection Act (chapter 19.86 RCW) and the Washington Criminal Profiteering Act (chapter 9A.82 RCW). The Sweetsers claimed that Black Commercial denied them the opportunity to purchase the Washington property from SEBCO, Inc. They also asserted that Black Commercial engaged in unethical and illegal conduct, including "flipping" properties for personal profit. "Flipping" is a slang term for buying real estate at a lower price and then quickly reselling it at a higher price to turn a profit. Black's Law Dictionary 715 (9th ed. 2009). "Flipping" is fraudulent when resale is based on a false appraisal or other documentation that the property has a greater value. *Id.* The trial court granted the Sweetsers' motion to voluntarily dismiss the criminal profiteering claim and several defendants before the trial of the case started.

The parties agreed they would need 11 days for a jury trial on the Sweetsers'

remaining claims. The court allotted 8 days for the trial. And the judge later denied the Sweetsers' motion to reopen their case in chief after Black Commercial rested. The Sweetsers wanted to bolster their consumer protection claim by introducing e-mails between Black Commercial's brokers and agents that purportedly showed a pattern of assigning and flipping properties. The trial court concluded that the evidence could have been introduced during the Sweetsers' case in chief and denied the Sweetsers' motion on the ground that the exhibits could mislead the jury.

The court gave two jury instructions at the behest of Black Commercial and over the Sweetsers' objection. It instructed that SEBCO and Copeland Architecture mutually accepted the contract for the purchase and sale of the Washington property on October 20, 2006:

> The purchase and sale agreement between Sebco Inc., as seller, and Copeland Architecture & Consultants, Inc. or assigns, as buyer, was mutually accepted when it was delivered on October 20, 2006.

CP at 664 (Instruction 11). It also instructed the jury that a right of first refusal can be waived orally:

> The real estate statute of frauds does not apply to first rights of refusal. Therefore, a first right of refusal can be waived orally.
>
> The first right of refusal in the lease between Sebco, Inc. and First American Title was not assignable.

CP at 665 (Instruction 12). A jury ultimately found that Mr. Black, Mr. Johnson, and Mr. Engle violated statutory duties and

professional standards of care but that these violations did not proximately cause damage to the Sweetsers.

Two months after the verdict, the Sweetsers filed declarations from three jurors that said the jury's verdict was reached by compromise. The court struck the declarations as untimely and inappropriate:

> I also received these affidavits and declarations from jurors. Those I will strike. Neither are they timely nor are they appropriate. What happens in the jury room [in]heres in the verdict. Soliciting of individual jurors to complete affidavits and declarations other than on – it is not relevant for what I have to do in terms of what is before the Court. I am not going to consider them.

Report of Proceedings (RP) at 1254-55. And the court then entered judgment for Black Commercial, but awarded only statutory attorney fees and costs, despite Black Commercial's request for reasonable fees and costs based on the purchase and sale agreements.

Black Commercial appealed the denial of its motion for contractual attorney fees and costs. The Sweetsers cross-appealed the judgment.

DISCUSSION

I. BLACK COMMERCIAL'S APPEAL

Attorney Fees Based on Contract

Black Commercial contends the court erred by refusing to award its reasonable attorney fees and costs based on the various

purchase and sale agreements it prepared and Mr. Sweetser signed. The Sweetsers respond that none of the purchase and sale agreements were ever accepted, so the only agreement of any legal significance here was the oral agreement that Black Commercial would try to secure the building for the Sweetsers, and, of course, that agreement had no provision for attorney fees and costs.

Whether a contract exists and whether a party is entitled to an award of attorney fees under a contract are questions of law that we will review de novo. *Taufen v. Estate of Kirpes*, 155 Wn. App. 598, 603, 230 P.3d 199, *review denied*, 169 Wn.2d 1019 (2010); *Boguch v. Landover Corp.*, 153 Wn. App. 595, 615, 224 P.3d 795 (2009). An award of attorney fees must be based on contract, statute, or a recognized ground in equity. *Kaintz v. PLG, Inc.*, 147 Wn. App. 782, 785-86, 197 P.3d 710 (2008).

Black Commercial's request for fees is based on a contract, specifically, various purchase and sale agreement forms. Mr. Sweetser directed Ms. Betow to prepare several offers to buy the Washington property. Ms. Betow complied. She wrote each offer on a purchase and sale agreement form that included an attorney fees provision, which we quoted earlier. Significantly, none of those forms reference the oral agreement between Black Commercial and the Sweetsers. Instead, each form is entitled "REAL ESTATE PURCHASE & SALE AGREEMENT (With EARNEST MONEY PROVISION)." CP at

55, 63, 69, 87, 288. And each says, "THIS CONTRACT CONTROLS THE TERMS OF SALE OF REAL PROPERTY," and "This Agreement . . . covers the following described real estate . . . 1020 N. Washington." CP at 55, 63, 69, 87, 288. The Sweetsers used these forms for the sole purpose of offering to buy the building on Washington from SEBCO. RP at 457, 466-67, 525-27; RP (June 2, 2009 afternoon) at 138-39, 152-53, 155-56, 159-61. But SEBCO did not sign or otherwise accept any of the Sweetsers' offers. And there can be no agreement without acceptance. *Christiano v. Spokane County Health Dist.*, 93 Wn. App. 90, 95, 969 P.2d 1078 (1998). None of the purchase and sale agreements, then, ever culminated in a completed contract. And, accordingly, there was no agreement to pay attorney fees.

All that is left, then, is the oral agreement between Black Commercial and the Sweetsers for brokerage services, by which the real estate agents promised to try to tie up this property for the Sweetsers. There is no evidence that an agreement for attorney fees was part of this brokerage services agreement. The absence of an attorney fees agreement is what distinguishes this case from *Boguch* and *Deep Water Brewing LLC v. Fairway Resources Ltd.*, 152 Wn. App. 229, 215 P.3d 990 (2009), *review denied*, 168 Wn.2d 1024 (2010). In *Boguch*, the parties' listing agreement expressly "provided for an award of fees in any action brought to enforce the terms of the agreement." 153 Wn. App. at 615.

And, in *Deep Water Brewing* the easement and right-of-way agreements explicitly included attorney fees and costs provisions. 152 Wn. App. at 245, 277. The relevant issue in those cases, then, was not whether a contractual attorney fees provision existed but whether the asserted causes of action arose from the contracts that contained the attorney fees provisions. *Boguch*, 153 Wn. App. at 615; *Deep Water Brewing*, 152 Wn. App. at 279.

Even if the parties here agreed that their oral agreement included an attorney fees provision, Black Commercial would not be entitled to attorney fees under the purchase and sale agreements. We recognized in *Deep Water Brewing* that "[t]he court may award attorney fees for claims other than breach of contract when the contract is central to the existence of the claims, i.e., when the dispute actually arose from the agreements." 152 Wn. App. at 278. And, in *Boguch*, Division One of this court specifically held that a claim of breach of professional duties is not an action on a contract, unless the plaintiff claims breach of a specific contractual duty (which the Sweetsers do not):

> A claim that a Realtor breached his or her professional duties . . . is not an action on a contract unless the seller claims that the Realtor's omission "violated a specific contractual undertaking." A Realtor has a common law and statutory duty to exercise reasonable care in representing a seller's interests. RCW 18.86.030(1), .040(1), .110. This duty exists regardless of any contractual provision.

153 Wn. App. at 618-19 (citation omitted). The respondents in *Deep Water Brewing* were entitled to fees under the agreements

there because the "enforcement of the agreements [was] the essence of the . . . tortious interference with contract claim." 152 Wn. App. at 279. But the respondents in *Boguch* were not entitled to fees under the parties' listing agreement because the appellant had claimed violations of duties under chapter 18.86 RCW not the contract. 153 Wn. App. at 618-19.

Similarly, the Sweetsers do not seek to enforce any of the purchase and sale agreements signed by Mr. Sweetser. They instead assert common law and statutory causes of action based on claims that the realtors were negligent and unethical. The complaint alleges that Black Commercial violated statutory duties imposed as a result of its broker-client relationship with the Sweetsers and that those violations prevented them from having even an opportunity to buy the Washington property from SEBCO. The contract for brokerage services, then, did not support Black Commercial's claim for attorney fees and costs. The underlying action was not based on the purchase and sale agreements. The trial court did not err by concluding that Black Commercial is not entitled to attorney fees.

II. THE SWEETSERS' CROSS-APPEAL

Compromise Verdict

The Sweetsers contend, based on affidavits from jurors, that the jury's verdict for

Black Commercial was the result of a compromise and that it should therefore be set aside or the case should be, at least, remanded to further consider the jury proceedings.

We review a trial court's refusal to vacate a jury's verdict and grant a new trial for abuse of discretion. *Singleton v. Naegeli Reporting Corp.*, 142 Wn. App. 598, 612, 175 P.3d 594 (2008). We review de novo the legal question of whether or not any of the misconduct claimed here "inheres" in the verdict and is therefore beyond further judicial review. *Turner v. Stime*, 153 Wn. App. 581, 589, 222 P.3d 1243 (2009).

The juror declarations say that four of the jurors believed the Sweetsers eventually got what they wanted (the Washington property) and that the jurors ultimately compromised in favor of Black Commercial so they could go home:

> 2. Mr. James Sweetser did not get a fair trial. A minority of the jurors (four of them) who were for Black did not make any arguments based on evidence or law. They made up their minds from the beginning and were never going to budge, no matter what the law said.
>
> 3. At the end of the day on Friday, we had just got done deliberating and agreeing on liability against Black, and we ran out of time to deliberate about the damages. The verdict was a compromise verdict in favor of Mr. Sweetser.

CP at 709.

> 2. I would say that the jury was hung until some jurors changed positions to vote for the compromise win for Sweetser so that people could get it over with and go home on a Friday. The jurors for the Defendants, only reluctantly changed their minds in favor of a compromised win, as long as no monetary award was given to Sweetser. Their reasoning was, they felt that Sweetser got the property he wanted in the end; maybe not at

> the original bargain price but at market value.
>
> 3. I don't recall [whether] any of the four jurors who were for Defendants argued based on evidence or witnesses. I was very frustrated by these few jurors. I don't think Tomlinson's neighbor should have been allowed on the jury. There should have been substantial damages (maybe 6-figures) awarded to Mr. Sweetser. There was no time to deliberate the damage issue.

CP at 711.

> 2. The verdict returned at trial was a compromise, definitely not a win for Defendants Black. After getting nowhere at the end of the day on Friday, the jury agreed to a compromise finding that Black breached duties to Sweetser so that the jury could give Sweetser the win that he was wronged, but not award any damages. Sweetser is supposed to be the prevailing party. There was no way the jury would have agreed to the verdict if it meant that Mr. Sweetser had to pay Black's attorney's fees and costs. In fact, most of the jurors wanted to award Sweetser money, but people wanted to go home at the end of the day on Friday. Regardless, the verdict was not for Black; it was for Mr. Sweetser.
>
> 3. The four jurors who were for Black and insisted on zero damages did not care about truly deliberating. They had already made up their minds against Mr. Sweetser from the beginning, basing their decisions on prior knowledge, misinterpretations, bias, not fact or law. I do not know why these four jurors, especially two of them (one was Tomlinson's neighbor), were so very biased against Mr. Sweetser from the outset. What I saw happened and was done by the jurors in this case destroys my faith in the jury system.

CP at 707.

The Sweetsers filed these declarations but did not move for a new trial. The vehicle for challenging a verdict based on juror misconduct is a motion for a new trial:

> On the motion of the party aggrieved, a verdict may be vacated . . . for any one of the following causes materially affecting the substantial

> rights of such parties:
>
> . . . .
>
> (2) Misconduct of . . . jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict or to a finding on any question or questions submitted to the jury by the court, other and different from his own conclusions, and arrived at by resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors.

CR 59(a)(2); *see State v. Davis*, 41 Wn.2d 535, 537, 250 P.2d 548 (1952) (stating that "[t]he office of the motion for a new trial is to give the trial court an opportunity to pass upon questions not before submitted for its ruling" and that errors which could only have been but were not raised by a motion for new trial will not be considered on appeal). A motion for a new trial must be filed within 10 days of the entry of the judgment. CR 59(b). However, any party has one year to move to set aside a judgment based on jury misconduct but only if the evidence of misconduct could not have been discovered in time to move for a new trial under CR 59(a). CR 60(b)(3); *State v. Owen*, 24 Wn. App. 130, 135, 600 P.2d 625 (1979).

The trial court apparently assumed that the Sweetsers filed the declarations in support of a CR 59 motion to vacate the verdict for jury misconduct. RP at 1254-55. So it struck the declarations as untimely and because they raised matters that inhere in the verdict. It is not clear why the trial court assumed the declarations were untimely. It is possible that the court believed the time for the motion began to run when the court read the jury's verdict on June 5, 2009. But a

motion for new trial must be filed "not later than 10 days after the entry of the judgment, order or other decision." CR 59(b). And the trial court struck the juror declarations the same day that it entered judgment—August 14, 2009. The record, then, does not support the conclusion that the declarations were untimely. Ultimately, however, that does not make a difference because we conclude that the declarations address matters that "inhere" in the jury's verdict.

The judge's decision on the motion to vacate the jury verdict required a two-step analysis. *Gardner v. Malone*, 60 Wn.2d 836, 841, 376 P.2d 651, 379 P.2d 918 (1962). She first had to decide whether the alleged misconduct inhered in the verdict. *Id.* If so, the judge was not privileged to intervene. *Id.* Misconduct inheres in the verdict if it relates to a juror's motives, intent, or belief, or describes their effect on him, for example, when a juror assents to a verdict because of weariness, when the jury fails to consider an issue or reaches its verdict by some other motive or belief, or when a verdict is forced by jurors holding out for the defendants. *Id.* at 841-42; *Wagoner v. Warn*, 88 Wash. 688, 691, 153 P. 1072 (1915).

The declarations here claimed that four jurors held out for Black Commercial because they believed the Sweetsers eventually got what they wanted (the Washington property). They allege that the jurors finally agreed to find Black Commercial liable so

they could all go home on a Friday and that they did not deliberate on damages because of this agreement. These allegations relate to the jurors' motives and beliefs and described their effect on the jury. They, therefore, inhere in the verdict. *Gardner*, 60 Wn.2d at 841-42; *Wagoner*, 88 Wash. at 691. Neither we nor the trial court, then, was privileged to set aside the jury's verdict, even if the allegations set out in the declarations were accepted as true.

Instruction 11—SEBCO/Copeland Sale Final on October 20

The court instructed the jury, at Black Commercial's request, that SEBCO and Copeland mutually assented to the purchase and sale of the Washington property on October 20, 2006. The Sweetsers contend this instruction was erroneous for a number of reasons. First, they say that the date the SEBCO-Copeland sale was completed was a disputed question of fact that the court should not have instructed on as a matter of law. Second, they note that neither SEBCO nor Copeland was a party to this suit and therefore whether and when their deal closed was not the proper subject of a jury instruction in this case. Third, they argue that the instruction was wrong because it ignored the right of first refusal owned by the then-current tenant, First American Title. And, finally, the Sweetsers urge that they were prejudiced by this instruction because some of their offers followed October 20 and the instruction impressed upon the jury that, after that date,

nothing Black Commercial did could have damaged the Sweetsers. That is, the instruction touched on the Sweetsers' claim of a causal connection between Black Commercial's misconduct and the Sweetsers' damages.

Whether or not the instruction is a correct statement of the law and whether or not the court should have been instructing on this topic in the first place are questions of law that we review de novo. *Burchfiel v. Boeing Corp.*, 149 Wn. App. 468, 491, 205 P.3d 145, *review denied*, 166 Wn.2d 1038 (2009).

Black Commercial's request for the instruction, and the court's instruction, were prompted by argument and testimony that more had to be done for the SEBCO-Copeland transaction to be binding on October 20, 2006. In his opening statement, the Sweetsers' attorney asserted that the SEBCO-Copeland agreement was not valid on October 20 because, among other things, the parties failed to properly execute the agreement and SEBCO's tenant had yet to waive its right of first refusal:

> There's claim by the defendants that the contract, there's a signed around binding contract between SEBCO and Copeland on October 20th, 2006. . . . However, if you look at the signed around contract, it didn't contain the acceptance date, even though there's initials of the changes. Also the signed around contract couldn't have been valid because the First American Title, at that time, hadn't even waived the first right of refusal yet. We're still talking about October 20th now. The First American Title didn't waive that first right of refusal in writing until October 30th, a full ten days later. And that contract didn't even mention that there's this first right of refusal contingency or problem that will prevent SEBCO from selling the property. And the selling price that was countered and was signed around and

> initialed, according to defendants, was $510,000. However, on the 30th of October, I mentioned that, you know, First American waived the first right of refusal. In that letter, notes to them it wasn't $510,000 that was listed, it was listed at $540,000 to First American Title when they signed off on their waiver. And the truth is that when Tomlinson Black told Mr. Sweetser the property had been sold on the 20th of October 2006, . . . in fact, the seller, SEBCO, didn't have the right to sell. Because if First American Title held the first right of refusal and exercised the right, then SEBCO couldn't have sold it to anybody else. Tomlinson Black didn't disclose that very important fact to Mr. Sweetser, and, in fact, represented the opposite.

RP at 125-27. The Sweetsers produced a document showing that First American Title was not informed of the correct sale price and did not waive its right of first refusal in writing until October 31. RP at 303. The Sweetsers also elicited testimony from Mr. McLees that the SEBCO-Copeland agreement did not include a right of first refusal contingency or note the date SEBCO accepted Copeland's counteroffer. RP at 294-96, 298 (Mark McLees). And they attempted to elicit testimony from Mr. Engle and Ms. Betow that First American Title could have rendered the SEBCO-Copeland agreement null and void by enforcing its right of first refusal and that counteroffers must be signed and dated to be enforceable. RP (June 2, 009) at 223, 226 (Ms. Betow); RP at 387 (Mr. Engle).

Certainly, a court may not instruct as a matter of law on questions that are the subject of a factual dispute. Const. art. 4, § 16 ("Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."); *Martin v. Kidwiler*, 71 Wn.2d 47, 426 P.2d 489

(1967); *Gobel v. Finkelberg*, 118 Wash. 301, 303, 203 P. 65 (1922). But the issue here (whether the SEBCO-Copeland agreement was an enforceable contract) is a question of law. *Maryatt v. Hubbard*, 33 Wn.2d 325, 327, 205 P.2d 623 (1949); *Taufen*, 155 Wn. App. at 603. So it was properly the subject of jury instructions by the court rather than testimony by witnesses on the Sweetsers' behalf.

We further reject this assignment of error for a number of reasons. First, there is a compelling factual basis for the court's conclusion that the transaction between SEBCO and Copeland was completed as of October 20, 2006. The Sweetsers' argument that then-current tenant First American Title's right of first refusal remained unresolved is not correct legally for reasons we will take up under our discussion of the propriety of Instruction 12. Likewise, the Sweetsers' argument that more had to be done for that sale to amount to a completed transaction is neither supported by the record nor is there any claim by the parties to the transaction (SEBCO and Copeland) that the sale was anything other than complete. RP at 296. Mr. McLees, who represented Copeland, said Copeland presented SEBCO with an offer and then received and accepted a counteroffer from SEBCO on October 20, 2006. RP at 292-96. Mr. Engle, who represented SEBCO, testified likewise. RP at 406-07. Finally, it is difficult to see the prejudice that would have followed this instruction in any event.

The Sweetsers' theory was that they were damaged by unlawful or, at least, unethical and negligent conduct by Black Commercial. If the jury accepted that theory based on the Sweetsers' showing, then it should not have mattered whether the SEBCO-Copeland sale was completed on October 20 or not. The Sweetsers would have been entitled to a damages award equal to the difference between what they paid for the property and what they should have had to pay regardless of whether or when the SEBCO-Copeland sale was completed. *Martini v. Boeing Co.*, 137 Wn.2d 357, 367, 971 P.2d 45 (1999); *Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 160*, 114 Wn. App. 80, 95, 55 P.3d 1208 (2002), *aff'd in part on other grounds*, 151 Wn.2d 203, 87 P.3d 757 (2004); *Merkley v. MacPherson's, Inc.*, 69 Wn.2d 776, 780, 420 P.2d 205 (1966); *W. Bakeries, Inc. v. John Davis & Co.*, 110 Wash. 463, 188 P. 406 (1920); *Green v. Bouton*, 101 Wash. 454, 172 P. 576 (1918). Indeed, in *Nelson v. Smith*, this court quoted another authority that declares the proper rule of relief that would have applied to this case had the Sweetsers prevailed:

> "It is the first duty of an agent, whose authority is limited, to adhere faithfully to his instructions in all cases to which they can be properly applied. If he exceeds, or violates, or neglects them, he is responsible for all losses which are the natural consequences of his act. . . . The damages which the principal may recover in such cases are the actual damages sustained by reason of the agent's disobedience. The damages recovered are to be compensatory only."

140 Wash. 293, 294-95, 248 P. 798 (1926) (alteration in original) (internal quotation marks omitted) (quoting *Scribner v. Palmer*, 81 Wash. 470, 142 P. 1166 (1914)).

Instruction 12—First American's Right of First Refusal

The Sweetsers next contend that the trial court erred by instructing the jury that First American Title could orally waive its right of first refusal.

Again, the court instructed on this question because of testimony on the question of whether SEBCO's tenant could orally waive its right of first refusal. That, again, is a question of law. The Sweetsers tried unsuccessfully to elicit testimony from expert Richard Hagar that a right of first refusal could be transferred or sold. RP at 685-86. Nevertheless, Mr. Sweetser opined that the statute of frauds applies to a waiver of a right of first refusal and testified that he could have tried to buy First American Title's right of first refusal if he had known about it. RP at 583; RP (June 2, 2009) at 66. This testimony bore upon whether the agreement between SEBCO and Copeland was complete on October 20.

First, the instruction is a correct statement of the law. A right of first refusal creates a personal right, not a property right, in the grantee. *Old Nat'l Bank of Wash. v. Arneson*, 54 Wn. App. 717, 721, 776 P.2d 145 (1989); *Manufactured Hous. Cmtys. of Wash. v. State*, 142 Wn.2d 347, 386, 13 P.3d 183 (2000) ("Our cases have

unquestionably established that not only is a right of first refusal not a fundamental attribute of property ownership, it is not a property right at all."). The statute of frauds then does not apply to the release of such a right of first refusal. *Arneson*, 54 Wn. App. at 722. Second, the instruction was again prompted by testimony that the SEBCO deal was contingent (and therefore not complete) and the suggestion that the Sweetsers could have purchased that right of first refusal to buy the building. RP (June 2, 2009) at 66-67. The court's decision, then, to give the instructions was a proper exercise of discretion given the context generated by the evidence in this case. *Hizey v. Carpenter*, 119 Wn.2d 251, 268, 830 P.2d 646 (1992).

Limitation of Length of the Trial

The Sweetsers next argue that the trial court abused its discretion by arbitrarily limiting the length of this trial to 8 days when the lawyers agreed the case would take 11 days. The Sweetsers also argue that the trial court erred by denying their request to reopen their case in chief. They wanted to reopen their case and admit four e-mails. They contended that the e-mails showed the public impact element of their consumer protection claim. The e-mails were from Black Commercial's agents to other agents or clients, and they suggested plans to enter into contracts to buy unrelated properties and then assign the contracts to other buyers, sometimes for a profit. Exs. 129, 130, 133, 149.

The court concluded that the exhibits could have been presented during the Sweetsers' case in chief. That observation is supported by the record. *See, e.g.*, RP at 182-83, 261-62 (testimony of David Black and Mark McLees on "flipping" real estate). The court then denied the Sweetsers' request to reopen and refused to admit the exhibits on the ground that they could mislead the jury:

> THE COURT: I appreciate there [i]s a time constraint in this case. On the other hand, it seems to me, and I agree also with the proposition that you – under the Consumer Protection Act, it is the potential for – it is the potential for deception that is at issue as opposed to actual deception. But I also agree that you just can't kind of cherry pick e-mails and say, "Well this is what we said about this," or "this is what we said about that." Every transaction is different. And so it seems to me when you're arguing a Consumer Protection case in a situation like this, . . . you need to tie it together with something in common. And I looked at those e-mails. Mr. McLees would be allowed to talk about all those e-mails, all the things he did in those particular transactions. Because I give the defense the right to ask him about that, you can't just say, "Did you write this e-mail," yes, and he's off the witness stand.

RP at 938-39.

There are few areas of inquiry in which we are more deferential to trial judges than case or courtroom management. *In re Marriage of Zigler*, 154 Wn. App. 803, 815, 226 P.3d 202, *review denied*, 169 Wn.2d 1015 (2010); *State v. Barnett*, 104 Wn. App. 191, 199, 16 P.3d 74 (2001) (denying request to reopen case to allow defendant to testify), *abrogated on other grounds by State v. Epefanio*, 156 Wn. App. 378, 234 P.3d

253, *review denied*, 170 Wn.2d 1011 (2010). There are multiple factors that shape a judge's decision to set a trial for a given number of days. Certainly, those factors include the needs of the parties and the lawyers. But they also include the trial judge's sense of the case and other docket commitments and, ultimately, the need for the efficient administration of justice. A trial judge, therefore, has broad discretion to manage proceedings in order to achieve the orderly and expeditious disposition of cases. *Zigler*, 154 Wn. App. at 815. Many lawyers and their clients would like to have had more time to present any given case, particularly when they do not prevail.

We have reviewed this record and conclude that the parties here did not have a perfect trial but that they had a fair trial. And a fair trial is what they are entitled to. *Kappelman v. Lutz*, 141 Wn. App. 580, 591, 170 P.3d 1189 (2007), *aff'd*, 167 Wn.2d 1, 217 P.3d 286 (2009). Eight days was ample time for the lawyers, their clients, and their witnesses to lay out the factual and legal theories in this case. We, then, conclude the court did not abuse its discretion by limiting the length of the trial.

We also conclude that the trial court properly exercised its discretion in refusing to reopen the Sweetsers' case to admit exhibits. A court can exclude evidence when its probative value is outweighed by the dangers of confusion of the issues or misleading the jury. ER 403; *Ma'ele v. Arrington*, 111 Wn. App. 557, 565, 45 P.3d 557 (2002). The

proposed e-mail exhibits here did not relate to the Washington property transaction or establish definitively that Black Commercial had plans to fraudulently flip properties for profit. And, even if the trial court abused its discretion, the Sweetsers cannot show that they were prejudiced by the error. Exhibits 129, 130, and 133 were each marked "Admitted." Exhibit 149 was rejected but would have been cumulative evidence in light of the apparent admission of Exhibits 129, 130, and 133 into evidence.

Attorney Fees

Both parties claim the right to fees on appeal. Black Commercial's claim is based on its earlier contract-based arguments, and the Sweetsers' claim is based on the allegedly frivolous nature of Black Commercial's appeal. We reject both claims, Black Commercial's for the reasons stated earlier and the Sweetsers' because the Black Commercial's appeal was not frivolous. *Ramirez v. Dimond*, 70 Wn. App. 729, 734, 855 P.2d 338 (1993) ("An appeal is frivolous if, considering the entire record and resolving all doubts in favor of the appellant, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that it is so devoid of merit that there is no possibility of reversal.").

We affirm the judgment of the trial court entered on the jury's verdict.

A majority of the panel has determined that this opinion will not be printed in the

Washington Appellate Reports but it will be filed for public record pursuant to

RCW 2.06.040.

_____
Sweeney, J.

WE CONCUR:

_____
Kulik, C.J.

_____
Siddoway, J.