

FILED

AUG 30 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

NO. 284352

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

JAMES R. SWEETSER and DELORES G. SWEETSER,
husband and wife,
Respondents/Cross-Appellants,

vs.

BLACK COMMERCIAL, INC. d/b/a NAI Black, f/k/a TOMLINSON
BLACK COMMERCIAL, INC., a Washington Corporation;
DAVID R. BLACK, its designated broker and chief executive officer, an
unmarried person; JEFF K. JOHNSON, its managing associate broker,
JANE DOE JOHNSON, and their marital community;
EARL ENGLE, its agent, JANE DOE ENGLE, and their marital
community; ANNE BETOW, its agent, JOHN DOE BETOW, and their
marital community; MARK McLEES, its agent, JANE DOE McLEES,
and their marital community; JEFF McGOUGAN, its agent, JANE DOE
McGOUGAN, and their marital community,
Respondents/Cross-Appellants,

BRIEF OF RESPONDENTS/CROSS-APPELLANTS

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I. INTRODUCTION

This case involves disputes between a real estate buyer (Sweetser) and his real estate brokers and agents at Tomlinson Black Commercial, Inc. (TBC) concerning Sweetser's purchase of the commercial real estate located at 1020 N. Washington, Spokane, Washington (the Property). The Property was owned by Sebco Inc. (Sebco) and leased to First American Title Co. (First American) who held a first right of refusal under the lease. Sweetser was the most eager to buy the Property, was willing to pay the most for it, and eventually bought the Property. However, he had to pay \$240,000 more than Sebco was willing to sell it for because TBC breached their duties to Sweetser and thereby caused Sebco's quick sale to Copeland Architecture and Construction, Inc. (Copeland) first, which closed the transaction using the name of Day Three, LLC, (Day Three) and then sold it to Sweetser shortly thereafter and without occupying the Property.

II. ASSIGNMENTS OF ERROR ON CROSS-APPEAL

Assignment of Error No. 1: The jury verdict was a compromise verdict, and therefore in error and invalid.

Issue Pertaining to Assignment of Error No. 1:

Must the jury verdict be reversed and vacated where it was not the result of jury deliberation, but a compromise at the end of a Friday

because the jurors ran out of time for deliberating damages?

Assignment of Error No. 2: Sweetser did not receive a fair trial due to juror bias and juror nullification.

Issue Pertaining to Assignment of Error No. 2:

If the judgment is not reversed on other grounds, should the Court remand the case to ascertain (a) whether some jurors were biased against Sweetser and failed to make material disclosures during voir dire, and (b) whether there was jury nullification, where jurors' declarations under penalty of perjury indicate that some jurors were extremely biased against Sweetser from the outset and refused to deliberate based on the evidence and the law?

Assignment of Error No. 3: The trial court erred in giving Jury Instruction No. 11 (CP 664).

Issues Pertaining to Assignment of Error No. 3:

1. Did the trial court erroneously conclude as a matter of law that the purchase and sale agreement between Sebco and Copeland was mutually accepted on October 20, 2006, where (a) this defective agreement was not fully signed with signatures and dates, (b) was not made subject to the release of First American's first right of refusal which was never properly released, and (c) there was clearly conflicting evidence on when it was actually signed or accepted?

2. More importantly, was the instruction entirely inappropriate for this case, where (a) the agreement was strictly between third parties not parties to this lawsuit, (b) the instruction amounted to judicial comment on the evidence in violation of the Wash. State Constitution, and (c) it was misleading to the jury by legitimizing the result of TBC's breach of duties and turning this result of wrongdoing into a seemingly intervening outside cause that minimized TBC's wrongdoing and undermined the finding of proximate cause?

Assignment of Error No. 4: The trial court erred in giving Jury Instruction No. 12 (CP 665).

Issues Pertaining to Assignment of Error No. 4:

1. Did the trial court erroneously conclude as a matter of law that the first right of refusal in the lease between Sebco and First American can be waived orally, where (a) the viability of the principle the trial court relied on is doubtful, (b) the language of the lease controls how the first right of refusal must be accepted or released, and (c) the lease requires any notice, acceptance and release of the first right of refusal to be in writing?

2. Did the trial court erroneously conclude as a matter of law that the first right of refusal in the lease between Sebco and First American was not assignable, where (a) the lease generally allows

assignment of First American's interest with Sebco's approval, (b) the lease is an integrated contract, and (c) the instruction was misleading to the jury on what could be done with the first right of refusal since assignment was not the only way Sweetser could have acquired the property?

3. More importantly, was it reversible error to give such an instruction at all, where (a) the instruction uses legal terms of art such as statute of frauds, waiver and assignment without defining them, (b) the relevant issue was whether the first right of refusal was a material fact requiring disclosure by TBC to Sweetser, not whether it was waived or assignable by non-parties, (c) the instruction was judicial comment on evidence in violation of Wash. State Constitution, and (d) the instruction legitimized TBC's speculation that the knowledge of the first right of refusal would have been useless to Sweetser?

Assignment of Error No. 5: The trial court erred in imposing arbitrary time limits without any flexibility and refusing to allow Sweetser more time to present relevant evidence affecting the CPA claim.

Issue Pertaining to Assignment of Error No. 5:

Did the trial court prejudice Sweetser's case and reduce the quality of Sweetser's presentation and proof by unilaterally imposing as a matter of course arbitrary time limits without flexibility (would shut down

presentation mid-course), forcing Sweetser to repeatedly change his plans for trial, cut the number of and time for witnesses, and rely unsuccessfully on TBC's part of the case to present evidence, and then refusing to allow Sweetser more time to present relevant evidence of TBC's duty-breaching misconduct affecting public interest, when Sweetser was unable to fit all his witnesses and evidence within the rigid time limits?

Assignment of Error No. 6: The trial court erred in excluding Exhibits 129, 130, 133 and 149.

Issue Pertaining to Assignment of Error No. 6:

Are Exhibits 129, 130, 133 and 149 relevant evidence of TBC's duty-breaching misconduct permeating the firm's practice and affecting the public interest that should have been admitted for Sweetser to prove his CPA claim, where they show (a) TBC's agent first tied up (had under contract) property they were supposed to be marketing and then tried to find buyers (Ex 129), (b) TBC agent requested "flip" of property for \$1.4+ million (Ex 130), (c) TBC agent planned to tie up property and then assign the contract for profit rather than providing brokerage service (Ex 133), (d) TBC designated broker Mr. Black proposed tying up property first if an agent thought a client had interest (Ex 149)?

Assignment of Error No. 7: The judgment (CP 409-16) entered in favor of TBC against Sweetser was in error.

Issues Pertaining to Assignment of Error No. 7:

Same as all the issues above for the other assignments of error.

III. STATEMENT OF THE CASE

TBC, currently known as Black Commercial, Inc., is a commercial real estate brokerage firm. David Black has been the designated broker and the CEO of TBC. RP 173:2-5.¹ Mr. Black has been an active investor and has very substantial real estate holdings. RP 184:19-185:19, Ex 8. He owns TBC with Jeff Johnson who has been the president and managing broker. RP 138:1-11, 257:23-24. Mark McLees, a TBC agent, was the president of the Spokane Traders Club in 2007. RP 257:13-15. Mr. McLees represents Mr. Black in real estate transactions (RP 258:6-18) and they were discussing a game plan for the north periphery of Spokane where the Property is located (Ex 15, RP 259:23-25). He also shares the same secretary with Jeff Johnson and co-lists property with him. RP 257:18-258:5. Jeff McGougan, another TBC agent, also represents Mr. Black on leasing real property Mr. Black owns. RP 185:9-187:11.

Mr. Sweetser has lived in Spokane for 25 years. He worked as a deputy prosecuting attorney in Spokane and was elected as the Spokane County Prosecutor 1995 to 1999. RP 447:3-17. Since leaving office, he

has been in private practice. RP 447:24-448:5.

It is not disputed that Sweetser engaged TBC to help him buy a commercial building for his law office and attorney colleagues, but there has never been any buyer-broker agreement between TBC and Sweetser akin to a listing agreement between a broker/agent and a seller.

For about three years prior to 2006, Sweetser had been looking for but was unable to find a suitable building. RP 451:8-13, 452:21-453:2. No building he had seen even compared to the subject Property, which met all his criteria, including large offices, parking and closeness to the courthouse. RP 454:15-18, 456:20-23.

By contrast, Copeland had been in the market to lease office space for its offices. On October 17, 2006, just two days before the critical day of October 19, 2006, Jeff Fountain on behalf of Copeland was working with both Mr. McLees and Mr. McGougan on a lease arrangement for Copeland to occupy another building. RP 263:14-264:22, Ex 27, RP 266:4-14. Before October 19, 2006, Mr. Fountain and Mr. Britton, in their own names or through Day Three or Copeland, had not made any offer to buy any commercial property, but only offers to lease. RP 266:15-19.

Also on October 17, 2006, Sebco entered into a listing agreement

¹ References to RP are made by page number(s) followed by line number(s) after a colon.

with TBC to sell or lease the Property based on the information and recommendations provided by TBC. Ex 23, RP 368:23-369:15. Mr. Engle was the person at TBC who primarily did the work as the listing agent for Sebco, including recommending the \$475,000 price. RP 371:16-374:25, Ex 85, 86. There was apparently no urgency to sell the Property, as Sebco did not have to sell it. RP 371:13-15.

On October 19, 2006, TBC circulated a flyer for the Property “inner office only.” RP 369:16-370:23, Ex 10. Anne Betow, a TBC agent who was working with Sweetser at the time, forwarded the flyer to him at 2:06 p.m. Ex 29. Sweetser replied within minutes and wanted to see the Property at once. Ex 29. He saw the Property and made an immediate full price offer to buy the Property before 4:00 p.m. RP 456:2-457:16, Ex 33.

The next day, Friday, October 20, 2006, Sweetser was informed in the morning that he was not the only one and might get ready for a bidding process. Ex 43. Surprised, disappointed and temporarily unsure of what to do, Sweetser sought advice from Ms. Betow of TBC and was told to do nothing. RP 461:21:465:9, Ex 42-45. In the afternoon, Sweetser was informed the seller decided to deal with another buyer, not him. RP 466:1-8. Sweetser made it clear he wanted to compete for the Property, but Ms.

Unless indicated otherwise, RP refers to the report of proceedings prepared by Mark

Betow attempted to discourage it. RP 466:9-20, Ex 50. That same afternoon and thereafter, Sweetser made multiple better offers to compete, including a \$505,000 offer (Ex 46), an offer of \$505,000 to be increased to match all terms plus \$1,000 (Ex 47), an offer of \$505,000 to be increased to match all terms plus \$1,000 plus express language indicating his willingness to engage in a bidding process to maximize profit to the seller (Ex 48), as well as a \$600,000 offer with no financing contingency (Ex 53, 54). All of these offers fell on deaf ears because the seller refused to accept any of Sweetser's offers, not even as a backup. RP 395:19-21, Ex 54, 732:12-18. Sweetser was told that the other offer had already been signed around. RP 527:7-20.

Sweetser's attempt to find answers from TBC's management was met with Jeff Johnson's rather flippant response. RP 470:3-471:13. The Property was sold to Day Three, not Copeland, in December 2006 (Ex 58, 59) and was put on the market through McLees for lease. RP 539:21-540:8, Ex 64. Mr. Sweetser made an immediate offer to lease it at the full advertised lease price so that he could use the Property for his law office. RP 540:9-12, Ex 67. However, the Property was promptly taken off the market. Ex 66, 114, RP 616:6-617:11. The only way for Sweetser to use

Sanchez, who was the court reporter for most of the proceedings in this case.

the Property was to attempt to buy it from Day Three. Unwilling to give up his dream office, Sweetser bought the Property for \$750,000, the minimum Day Three would sell it for, and satisfied all the harsh terms including \$50,000 nonrefundable deposit, no financial contingency and a quick 30-day close. RP 542:1-17, Ex 68, 69.

Through extremely arduous and expensive litigation, Sweetser was able to uncover previously unknown facts about the Sebco-Copeland transaction and TBC's regular duty-breaching practices, which in this case deprived him (the end-user) of any chance to buy the Property from the original seller, Sebco, for less than \$750,000. Sweetser's findings are summarized below:

1. TBC agents were allowed to use insider information to unfairly compete, steer, tie up or flip properties.² RP310:8-20, Ex. 73.

2. In the forensically recovered email, Mr. McLees admitted he was flipping the Property with Copeland and talked about future flips

² For example, after examining the timeline and contents of the various offers on the Property, Richard Hagar, Sweetser's expert witness, found Sweetser's initial offer was quickly matched or bested by Mr. McGougan for himself or Mr. McLees for Copeland. RP637:6-639:14. On October 25, 2006, only a few days after the Sebco-Copeland deal was allegedly signed around, Mr. McLees already drew up a listing agreement to sell the Property for \$600,000 (RP 305:5-16, Ex. 22), the exact amount of Sweetser's backup offer to Sebco (Ex 55). Mr. McGougan's offer included a contingency stating "[s]eller shall have the right to market subject property during due diligence period." Ex 41.

and profit. Ex 73.³

3. TBC and Mr. McLees received a \$22,500 “consulting fee” for the sale from Day Three to Sweetser for providing information to make the case to sell it to Sweetser for \$750,000. Ex 72, 73. RP 324:4-18.⁴

4. Mr. Engle, admittedly the gatekeeper of all the information received by Sebco about prospective buyers, wrote on Sweetser’s \$600k offer, “he cannot possibly do this if he has to obtain the funds through a loan.” RP 388:7-13, Ex 55.⁵ Mr. Engle admitted that he had no knowledge of Sweetser’s financial ability at the time he wrote that. RP 391:5-392:5.⁶

5. TBC’s managing broker Jeff Johnson told Mr. McLees to make his best offer, but did not tell Ms. Betow to do so for Sweetser. RP

³ In this email, Mr. McLees asks Jeff Fountain, “if I bring you another property that you can either use or flip, how would you handle it?” He also explains, “[o]ne of the reason’s I had us go in so strong on the Washington building was because I’d said we could turn around and resell it for at least \$600K anyway.” His testimony confirms he is referring to Mr. Sweetser as the buyer. RP 310:8-20.

⁴ Although Mr. McLees acted puzzled on the witness stand regarding the term “flipping,” emails gathered in this litigation prove otherwise. RP 313:4-9, RP 183:8-184:13, RP 327:8-328:25, Ex 74.

⁵ This shows the kind of prejudicial and unfounded information Sebco was receiving about Sweetser, as contrasted to the favorable and unfounded information about Copeland received by Sebco (Copeland was able to fund the transaction independently without financing).

⁶ Yet he admittedly discussed it with Mr. Ayers, who thereafter decided not to accept Sweetser’s offer as a backup even though the offer was \$90,000 above the Copeland offer, and even though Sweetser’s offer contained no financing contingency. RP 395:8-21, Ex 55. Mr. Engle represented to Sebco that Copeland’s offer had no financing contingency, but Mr. Fountain admitted he was never asked to show that Copeland could

278:19-25.

6. TBC allowed Ms. Betow to use an outdated PSA form of only two pages to make offers for Sweetser (Ex. 47), whereas Mr. McLees used the more substantial form consisting of more than 12 or 13 pages (Ex. 37). Sebco was influenced by the difference. RP 646:9-647:14.

7. After Sweetser's full-price offer came in, Mr. McLees increased Copeland's draft full-price offer to the higher \$485,000 offer plus an escalation clause. RP 275:18-276:6, RP 280:8-285:9, Ex. 37.

8. After Sweetser's full-price offer came in, Mr. McGougan modified a competing offer to match the major terms of Sweetser's offer with a shorter closing date (desired by Sebco). RP 539:4-7, Ex 40, 41, 46.

9. TBC failed to disclose material facts (own agent competing and the first right of refusal) and made misrepresentations to Sweetser (claiming the Sebco-Copeland PSA was signed around 10/20/2006, when the PSA was not fully signed and dated, and not made subject to the release of the first right of refusal. RP177:6-11, RP 387:2-25, Ex 25, 1019.

10. The first right of refusal was never properly released because the letter to First American dated 10/30/2009 offering the sale falsely stated \$540,000 as the purchase price rather than the true \$510,000

close without financing and in fact, intended to obtain financing from a bank to fund the

price sold to Day Three. Ex 56

The bottom line is TBC brokers/agents steered the sale to Mr. McLees' property-flipping clients, Mr. Fountain and Mr. Britton, before the Property could be sold to Sweetser for \$750,000.

IV. SUMMARY OF THE PROCEEDINGS BELOW

From the outset of this litigation, Sweetser only made statutory and common law claims. CP 1-33, 94-155. No one made any contract claim or sought to enforce any contract between the parties. No counterclaim was ever made. CP 156-171. Due to lack of necessary discovery allowed by the trial court, Sweetser voluntarily dismissed the criminal profiteering claim and certain defendants without prejudice. CP 779-82, 783-84. The case proceeded to trial with the remaining common law and statutory claims including the Consumer Protection Act (CPA) claims. CP 478.

The trial was scheduled to begin on Tuesday, May 26, 2009, as Monday, May 25, 2009 was Memorial Day. In a pretrial conference shortly before trial, the trial court imposed rigid time limits to complete the trial by June 4, 2009. The trial judge would apparently travel out of town on June 5, 2009. It was made very clear that presentation would be shut down when the time was up. The rigid time limits were imposed,

purchase. RP 495:7-21.

This case is inherently difficult by its nature as Sweetser must rely on TBC's witnesses and documents to establish his claims. Sweetser and his counsel struggled with the time limits at trial and were forced to make further cuts on evidence presentation, as the trial court reminded them repeatedly that the clock will stop at noon on Monday. RP 362:9-364:11, 569:3-570:3. Sweetser ran out of time at noon on Monday 6/1/09 and was forced to rest without presenting all his planned witnesses and evidence. RP 691:22-692:3. Even the trial court was surprised Jeff Johnson was not called by anyone. RP Corbey⁸ 253:16-17. Exacerbating the time limit problem was also the trial court's own rule that exhibits must be talked about before they would be allowed into the jury room. RP 936:17-20. After TBC took advantage of Sweetser's time limit problem and rested without calling all the witnesses Sweetser expected them to call (in fact relied on them to call due to the time limits) (RP 937:14-19), Sweetser requested more time to reopen the case to present more evidence (RP 937:9-14), particularly evidence related to the public interest prong of the CPA claim (e.g. Ex 129, 130, 133, 149), or in the alternative to present such evidence as part of his rebuttal case the next morning. RP 935:7-940:8. The trial court refused. RP 938:18-940:8.

⁸ Ronelle Corbey was the court reporter who reported part of the proceedings. RP is

Adding insult to injury, the trial court decided, over Sweetser's objections, to give erroneous Jury Instructions No. 11 and No. 12, which played right into TBC's affirmative defense theory that none of TBC's misconduct mattered to Sweetser or caused Sweetser any damage. CP 664-65, RP 1000:15-1001:14, 1004:4-1017:8, 1050:17-1052:1.⁹

Despite the substantial prejudice to Sweetser's case, the jury found TBC liable under the statute and common law. CP 412, 414. However, the jury found no proximate cause and no CPA violation. CP 413-16.

It turned out that the verdict was not the result of jury deliberation, but a compromise by the jurors at the end of a Friday because they wanted to go home. CP 707, 709, 711. At the end of that day, the jurors had just completed deliberation on liability against TBC, but ran out of time for deliberation on damages. CP 709. In addition, four of the jurors refused to deliberate based on the evidence and the law. CP 709, 711, 707. The four jurors, including Mr. Tomlinson's neighbor, Ms. Helen Burley, were extremely biased against Sweetser from the outset (CP 707), made up their minds from the beginning and refused to budge no matter what the law said (CP 709).

followed by Corbey for distinction from those prepared by Mr. Sanchez.

⁹ Much like the rest of the trial, discussions on jury instructions were also rushed.

Apparently, not all discussions on jury instructions were on the record, but these are the references to the relevant record that can be found on these instructions.

After trial, TBC moved for attorney fee award based on “contract” arguing that the never accepted offers Sweetser made on TBC’s purchase and sale agreement (PSA) forms were “contracts” entitling them to fees. CP 273-80. Sweetser opposed the rather frivolous motion. CP 333-43, 366-91, 403-08. The trial court properly denied TBC’s fee motion. CP 417-18. TBC appealed the denial of fee award. CP 421-432. Sweetser timely cross-appealed the verdict and the judgment. CP 713-22.

V. ARGUMENT ON TBC’S APPEAL

A. The Standard of Review

Contrary to TBC’s assertion, TBC’s appeal of the trial court’s denial of their motion for fees is not about “interpretation of contract provisions,” which presupposes the existence of a contract to begin with. TBC assigned error to the trial court’s determination that there was no contract between TBC and Sweetser. App. Br. at 3. This determination involves both questions of fact and law. Appellate courts give deference to the trial court’s factual findings but review its legal conclusions de novo. In re Pennington, 142 Wn.2d 592, 602-03, 14 P.3d 764 (2000).

A trial court’s denial of a motion for attorney fees is reviewed for abuse of discretion. Nakata v. Blue Bird, Inc., 146 Wn. App. 267, 276, 191 P.3d 900 (2008).

B. The Trial Court Correctly Determined There was No Contract

Between Sweetser and TBC for Fee-Shifting, and TBC was Not Entitled to Fees.

The trial court was familiar with the facts of this case through its long involvement in pretrial and trial proceedings and knew that it was a hard fought and difficult case. RP 1288:11-13. In making its decision, the trial court made a number of factual findings or observations, including (a) Sweetser's relationship with TBC was one of securing services akin to hiring a plumber or electrician (RP 1279:14-1280:2); (b) calling it an oral contract is using that term loosely (RP 1279:14-1280:2); (c) this case is factually different from the authorities cited by TBC, all of which involve an agreement we don't have here, albeit sometimes the agreement in some cases might be invalid or fraudulently procured (RP 1280:10-18); (d) there was no agreement between Sweetser and TBC, as none of the multiple offers from Sweetser was accepted, which was TBC's own position (RP 1281:2-14); (e) TBC's position in this case was that there never was a contract (RP 1282:8-9); (f) Sweetser made only statutory, tort and common law claims, and there was no contract claim and no attempt to enforce any contract provision (RP 1281:20-25). These factual findings are not disputed or challenged. Given the facts of this case and public policy implications of TBC's logic unsupported by law, the trial court properly concluded there was no contract for fee-shifting between

Sweetser and TBC. RP 1284:2-9.

C. The Recent Binding Authority, Boguch v. Landover Corp., Has Left Absolutely No Doubt that TBC is Not Entitled to Any Fees in This Case of Only Statutory and Commons Law Claims.

Not only is TBC not entitled to fees because there has never been any fee-shifting contract between the parties, TBC would not have been entitled to any fees in this case, even had there been a fully executed fee-shifting contract directly between the parties. The recent case of Boguch v. Landover Corp., 153 Wn. App. 595, 224 P.3d 795 (2009), explains in detail the status of the law on fee recovery by a realtor from a customer and leaves absolutely no doubt that a realtor cannot recover attorney fees from the customer who unsuccessfully brought statutory and common law (tort) claims against him/her, even if there was a fee-shifting contract.

A prevailing party may recover attorney fees under a contractual fee-shifting provision such as the one at issue herein only if a party brings a "claim on the contract," that is, only if a party seeks to recover under a specific contractual provision. If a party alleges breach of a duty imposed by *an external source*, such as *a statute or the common law*, the party does not bring an action on the contract, *even if the duty would not exist in the absence of a contractual relationship*.

Id. at 615 (emphasis added).

An action is on a contract for purposes of a contractual attorney fees provision if the action arose out of the contract and if the contract is central to the dispute. Stated differently, an action sounds in contract when the act complained of is a *breach of a specific term of the*

contract, without reference to the legal duties imposed by law on that relationship. If the **tortious breach of a duty**, rather than a breach of a contract, gives rise to the cause of action, the claim is **not properly characterized as breach of contract**.

Id. at 615-16 (emphasis added) (citations omitted).

When an act complained of is a breach of specific terms of the contract, without any reference to the legal duties imposed by law upon the relationship created thereby, the action is in contract, but where there is a contract for services which places the parties in such a relation to each other that, in attempting to perform the promised service, **a duty imposed by law as a result of the contractual relationship** between the parties is violated through an act which incidentally prevents the performance of the contract, then the gravamen of the action is **a breach of the legal duty, and not of the contract itself**, and in such case allegations of the latter are considered mere inducement, showing the relationship which furnishes the right of action for the tort, but **not the basis of recovery** for it.

Id. at 617-18 (emphasis added) (citing Yeager v. Dunnavan, 26 Wash.2d 559, 562, 174 P.2d 755 (1946)). In Boguch, the plaintiff pursued common law and statutory claims, just like Sweetser. Id. at 618. These claims involve duties that “exist regardless of any contractual provision” and are “defined by the common law and by statute, not by the contract.” Id. at 619. It is reversible error to award fees to the prevailing realtors on these claims, even though Boguch also made breach of contract claims based on his listing agreement, which provides for fee shifting. Id.

In the case at bar, Sweetser only made common law and statutory

claims, and made absolutely no contract claims of any kind, nor sought to enforce any contractual right throughout this litigation. Under Boguch, TBC would not have been entitled to fees, even had there been a buyer-broker contract between Sweetser and TBC expressly providing for fees. See id. 615-19.

D. Statutory Fee-Shifting Schemes Cannot be Altered.

Courts also do not allow statutory fee-shifting schemes to be altered by conflicting provisions, if any, in private contracts. In Walters v. AAA Waterproofing, Inc., 151 Wn. App. 316, 211 P.3d 454 (2009), there is a mandatory “loser pays all” provision in a fully executed employment agreement, but the contractual fee-shifting provision is ruled as a matter of law to be unconscionable and unenforceable because it conflicts with the prevailing-employee-only fee-shifting statutes designed to protect the right of employees to wages. See id. at 321-22, 329. For claims made under the CPA, see Sato v. Century 21 Ocean Shores Real Estate, 101 Wn.2d 599, 681 P.2d 242 (1984) (signed purchase and sale agreement, but only CPA claim was made with no breach of contract claim; no fee recovery by successful defendants); Vogt v. Seattle-First Nat'l Bank, 117 Wn.2d 541, 557, 817 P.2d 1364 (1991) (reversing trial court’s award of fees to CPA defendants as it was contrary to the statutory scheme).

In the case sub judice, Sweetser only sued and made claims under

the statutes (including the CPA with prevailing-claimant-only fee-shifting provision) and common law. Even assuming hypothetically that Sweetser had entered into a mutually agreed and fully executed Buyer/Broker contract with TBC with a fee-shifting provision (Sweetser did not), the provision would have been unconscionable and unenforceable because it would have conflicted with the claimant-only statutory fee-shifting and would have operated as a deterrent to consumers trying to enforce their statutory rights and to hold their real estate brokers and agents accountable under the statutes. When TBC attempted to alter the statutory fee-shifting by arguing the “never-accepted PSA offers” as “contracts” despite that their position had been “no contract” through the end of trial, TBC moved into the realm of the frivolous.

E. TBC’s Appeal is Frivolous.

RAP 18.9(a) authorizes this Court to order a party who files a frivolous appeal to pay terms or compensatory damages to any other party who has been harmed. Appropriate sanctions may include an award of attorney fees and costs to the opposing party. Holiday v. City of Moses Lake, 28233-3-III (WACA) (August 5, 2010) (citing Yurtis v. Phipps, 143 Wn. App. 680, 696, 181 P.3d 849 (2008)). An appeal is frivolous if, considering the entire record, the court is convinced 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. Id.

Here, TBC's position is completely devoid of merit factually and legally. Factually, it is a stretch to characterize merely engaging services of a realtor as "an oral contract" when there was no evidence whatsoever of any terms discussed, let alone agreed to, that would constitute this so-called oral contract. Simply calling and using the services of someone (be it plumber, electrician or realtor) does not give rise to an "oral contract" unless some agreement is orally discussed and agreed to. There was no such evidence whatsoever in the entire case. It is a stretch upon a stretch to argue that the "oral contract" somehow became or contained the terms contained in those multiple never-accepted PSA offers simply because the offers were handled during the course of TBC's performance of their duties governed by the various statutes and common law. It is a stretch upon a stretch upon another stretch to further morph the multiple never-accepted PSA offers into the status of a "contract" that TBC argues mandates a fee award. TBC emphasize that all the PSA offers contain the same broad fee-shifting provision. What if the multiple offers contained different or conflicting terms? What if one offer says prevailing party gets fees, one says each party pays his/her own fees, and a third provides a liquidated damage sum for any such fees? Which term would apply if all three PSA offers were presented to various sellers and never accepted?

Does an attorney who provides services to a client without any contract all of a sudden have a “contract” to recover against the client simply because he worked on or handled a settlement agreement for the client containing a provision that benefits the attorney as a third party beneficiary (e.g. giving him 1/3 of the settled amount), even though the settlement was never accepted by the opposing party? What if the attorney worked on multiple such settlement offers with varying terms benefiting the attorney, but none was accepted? Which term would be one the attorney can recover against the client for? In an attempt to conjure up a basis for fees, TBC turned the meaning of “contract” or “agreement” on its head and utterly disregarded facts, logic and common sense.

Legally, TBC beat around the bush rehashing mostly the same inapplicable authorities they cited, and Sweetser thoroughly addressed, in the trial court. Sweetser incorporates herein by reference all the analyses of these cases in the record. CP 334-43, 366-91, 403-08. The newly cited cases in TBC’s appellate brief are equally inapposite.

TBC quoted a partial sentence out of context in Jackowski v. Borchelt, 151 Wn. App. 1, 209 P.3d 514 (2009) to invent a general rule that hiring a realtor forms a contract, which is not in Jackowski at all. The court was discussing the economic interest rule in situations where a customer hires a realtor and forms a contract. See id. at 14. It does not

state or support a hiring-equals-contract rule. In fact, Boguch v. Landover Corp. explained how Jackowski's discussion of the economic interest rule militates against allowing contractual fee shifting for common law and statutory claims. Boguch, 153 Wn. App. at 618.

TBC cited Cultum v. Heritage House Realtors, Inc., 103 Wn.2d 623, 694 P.2d 630 (1985), to support award of fees based on PSA, but the PSA there was executed by the buyer and the seller (id. at 625-26), and the disputes involved enforcing a provision of the PSA, i.e. the inspection contingency clause (id. at 626). It does not support turning unaccepted PSA offers into "contracts."

TBC gave further "examples" supporting their position. One was Brown v. Johnson, 109 Wn. App. 56, 34 P.3d 1233 (2001). However, Brown involved a consummated sale of a home (id. at 58), the fully executed PSA for which certainly contained required disclosure forms. The claims of misrepresentation by the buyer against the seller for non-disclosure of defects were essentially contract claims and arose from the parties' contract. Id. Brown does not support turning unaccepted PSA offers into "contracts" or seeking fees for purely statutory and common law claims based on non-existing contracts, as TBC is attempting to do.

Deep Water Brewing, LLC v. Fairway Res., Ltd., 152 Wn. App. 229, 215 P.3d 990 (2009), cited by TBC, also involved a fully executed

agreement, id. at 240 (all signed), as well as a breach of and tortious interference with the agreement regarding a height restriction covenant, id. at 238. The enforcement of agreements and claims following breach are the essence of the tortious interference claims. Id. at 279. Again, Deep Water does not support turning unaccepted PSAs into contracts, either. In fact, Deep Water supports Sweetser's position and contradicts TBC's, as it affirmed denial of fees sought by the Taylors against the Kenagys because the Kenagys' claims against the Taylors were "not contractual in nature." Id. at 279-280.

Lastly, TBC gave Hudson v. Condon, 101 Wn. App. 866, 6 P.3d 615 (2000) as an "example;" but again, the case involved a fully executed partnership agreement and a fully executed lease, not never accepted PSA offers. Id. at 869. The amended complaint alleged practically all breach of contract claims. Id. at 871. The court observed:

All of the Hudsons' causes of action are related to the partnership agreement and the duties that arise from it. Most claims also involve the lease, which clearly entitles the prevailing party to costs and fees incurred in legal action occasioned by default or breach of the lease. No issues separate from the agreement or the lease were addressed in this lawsuit.

Id. at 877-78. Here, there has not been any allegation, implication or attempted enforcement of any contractual right or duty between Sweetser and TBC throughout the entire litigation. Hudson does not support TBC's

turning never-accepted PSA offers into “contracts” at all.

Sweetser need not address those authorities TBC cited for general principles of contract interpretation, as contract interpretation is at issue in this case. There is simply no contract to interpret.

The conspicuous absence of any authority, not even from any other jurisdiction, for TBC’s position of turning unexecuted PSA offers into “contracts” indicates just how legally baseless TBC’s position is.

Boguch v. Landover Corp. is directly on point on whether a party like Sweetser who made only statutory and tort claims against realtors can be liable for fees. TBC knew about it as the case was mentioned earlier in the year between counsel for the parties. TBC chose intentionally not to address this binding authority in their brief at all, perhaps in order to wait to distinguish it in their reply brief so that Sweetser cannot respond.

Regardless, in light of the complete lack of factual and legal basis for contractual fee shifting in this case, TBC should not have pursued the appeal, which is frivolous, especially after Boguch v. Landover Corp. was decided. Moreover, the policy implications of allowing real estate brokers and agents to use never-accepted PSA offers to form “contracts” they can enforce against their unsuspecting customers (easily not limited to altering statutory fee-shifting scheme) is utterly unacceptable.

VI. ARGUMENT ON CROSS APPEAL

A. The Verdict was Not the Result of Jury Deliberation Based on the Evidence and the Law, but a Compromise to Go Home Due to Lack of Time, and Therefore, Must be Vacated.

It is well established in Washington that compromise verdicts are not allowed and require retrial of all the issues. Myers v. Smith, 51 Wn.2d 700, 705-07, 321 P.2d 551 (1958); see also Cyrus v. Martin, 64 Wn.2d 810, 812, 394 P.2d 369 (1964) (retrial of all issues if the jury's verdict suggests the possibility that it was the result of compromise); Shaw v. Hughes Aircraft Company, 83 Cal. App. 4th 1336, 1346, 100 Cal. Rptr. 2d 446 (2000) (compromise verdict cannot stand); Rose v. Melody Lane of Wilshire, 39 Cal.2d 481, 489-90, 247 P.2d 335 (1952) (circumstances indicating compromise verdict require reversal of judgment).

We learned the verdict was the result of a compromise from the declarations of three jurors. CP 707, 709, 711. Facts regarding jurors' "motive, intent and belief" or "mental processes" during deliberation inhere in the verdict and cannot be considered. Gardner v. Malone, 60 Wn.2d 836, 841, 376 P.2d 651 (1962). This is so even though these intrinsic contents within deliberation contain errors, mistakes and other problems. See id. at 841-42 and fn.5-10.

However, misconduct or irregularities about the deliberation process do not inhere in the verdict and "must be" considered by the court to determine their effects as a matter of law. See id. 841-42. "[W]hen

misconduct is once shown, and there is reasonable doubt as to its effect, that doubt must be resolved against the verdict.” Id. at 846.

In the case at bar, all three jurors testified that the verdict was a result of compromise, and not deliberation on the law and the evidence. Such facts have nothing to do with any intrinsic contents within any deliberation, but are evidence of misconduct or irregularities about the deliberation procedure that must be considered under Gardner. By failing to deliberate on all the issues and by agreeing to a compromise verdict, the jurors abdicated their duties as officers of the court. What they did at the end of that Friday differed little from flipping a coin or using other unauthorized procedures for reaching a verdict. The compromise verdict here must not stand and must be vacated under Myers and Cyrus.

As a separate matter, the extraordinary jury bias and apparent jury nullification by certain jurors, including Tomlinson’s neighbor, are truly disturbing. Sweetser has an inviolable constitutional right to trial by jury, Wash. State Constitution, Article I, §21, which necessarily means trial by a fair and impartial jury. If this Court reverses the judgment based on any of the grounds argued in the cross appeal, this issue will be moot. Otherwise, the case should be remanded to the trial court to ascertain whether some jurors were truly biased and predisposed against Sweetser and either failed to make material disclosures or made misrepresentations

during voir dire, see Kuhn v. Schnall, 155 Wn. App. 560, 573-75, 228 P.3d 828 (2010) (material non-disclosure during voir dire requires a new trial), as well as whether there was indeed jury nullification.

B. The Trial Court Erroneously Concluded As a Matter of Law in Jury Instruction No. 11 that the Purchase and Sale Agreement Between Sebco and Copeland was Mutually Accepted on October 20, 2006.

Jury instructions are reviewed de novo, and an instruction that contains an erroneous statement of the applicable law is reversible error where it prejudices a party. Thompson v. King Feed & Nutrition Serv., Inc., 153 Wn.2d 447, 453, 105 P.3d 378 (2005). Jury instructions are sufficient when they allow counsel to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied. Id. A clear misstatement of the law, however, is presumed to be prejudicial. Id.

TBC wanted Jury Instruction No. 11 to help their theory of the case, i.e., it was a done deal on October 20, 2006, so any alleged wrongdoing would not have mattered. The trial Court gave the instruction over Sweetser's objection. Jury Instruction No. 11 state:

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 664. It was in essence a ruling on contract formation as a matter of

law between third parties who are not parties to this lawsuit.

An offeror who receives an acceptance which is too late or which is otherwise defective, cannot at his election regard it as valid. The late or defective acceptance is a counter-offer which must in turn be accepted by the original offeror in order to create a contract. It is also a rule that an offer may be withdrawn or modified before an acceptance. . . .

In truth, a defective acceptance can only amount to a counter-offer, and the only way a contract can be formed is by acceptance of the counter-offer in the same way as if it were an original offer.

Wax v. Northwest Seed Co., 189 Wash. 212, 218, 64 P.2d 513 (1937).

If a ruling on these third parties' contract formation is necessary, one must examine what constitutes acceptance between these parties and whether the acceptance was defective. The Sebco-Copeland PSA provides in ¶23 what constitutes acceptance.

No acceptance, offer or counteroffer from the Buyer is effective until a ***signed copy is received by the Seller***, the Listing Agent or the licensed office of the Listing Agent. No acceptance, offer or counteroffer from the Seller is effective until a ***signed copy is received by the Buyer***, the Selling Licensee or the licensed office of the Selling Licensee. "***Mutual Acceptance***" shall occur when the last counteroffer is signed by the offeree, and the ***fully-signed counteroffer*** has been received by the offeror, his or her licensee, or the licensed office of the licensee. If any party is not represented by a licensee, then notices must be delivered to and shall be effective when received by that party.

Ex 36, 37, 1019. In other words, mutual acceptance required both a fully-signed counteroffer and delivery.

Where the PSA and the addendum by their own terms required signatures to be valid, signature is necessary to evidence assent. Uznay v. Bevis, 139 Wn. App. 359, 368, 161 P.3d 1040 (2007). The Uznay court reverses the trial court's decision enforcing the addendum with missing signature. Id. at 372-73; see also Swanson v. Holmquist, 13 Wn. App. 939, 943, 539 P.2d 104 (1975) (when signatures were missing, there was no mutual assent, and therefore no contract).

In the case at bar, no fully-signed counteroffer with all the necessary signatures and dates had been delivered or received by anyone. Any acceptance was defective at best.

Moreover, although TBC produced emails between Sebco and TBC indicating transmittal of offers and an alleged "signed-around" counteroffer on Friday, October 20, 2006, Mr. Fountain testified that he did not do it for Copeland until the next Monday, October 23, 2006. RP 496:21-497:15. Ms. Betow also testified in deposition that she thought it was Monday or Tuesday. RP Corbey 204:16-205:11. There was clearly contradicting evidence on when the alleged "mutual acceptance" occurred, which required determination by a trier of fact and precluded the trial court's ruling as a matter of law.

Finally, Sebco's right to sell the Property to Copeland was, and the PSA should have been made, subject to First American's first right of

refusal in the lease. It was not done in any offer or counteroffer between Sebco and Copeland. Both Sebco and TBC knew they needed to do that because when TBC sold another of Sebco's real estate with a first right of refusal, they put in the necessary clause in the PSA making the sale subject to the first right of refusal. See Ex 151 (page SEBCO 000958). Moreover Sebco was not free to quote one price to First American and then sell to another at a lesser price than that quoted to First American. See Bennett Veneer Factors, Inc. v. Brewer, 73 Wn.2d 849, 856, 441 P.2d 128 (1968). As stated in the factual section of this brief, First American did not release the first right of refusal until October 31, 2006, and even then the release was based on a false price of \$540,000. See Ex 56. The Sebco-Copeland PSA was defective.

In short, even assuming it was necessary to make a ruling on the Sebco-Copeland PSA, the ruling in Instruction No. 11 was legally in error, given all the above defects and contradicting evidence.

C. Instruction No. 11 was Entirely Inappropriate for this Case and Misleading to the Jury.

Besides its legal deficiency, Instruction No.11 was a ruling on an agreement strictly between third parties (i.e. Sebco and Copeland) who are not parties to this lawsuit. It may be necessary in a different dispute between Sebco and Copeland, but certainly not in this case. When the

Sebco-Copeland PSA was mutually accepted was not an element in any of Sweetser's claims. It appeared to be part of TBC's affirmative defense theory that none of the wrongdoing alleged by Sweetser would not have mattered or caused any harm. If so, TBC had the burden to prove it.

Regardless, this Sebco-Copeland PSA was the direct product of TBC's duty-breaching practices shown by convincing evidence in this case such as the forensically recovered smoking gun email. Ex 73, RP 611:10-13, 612:1-2. It was the direct result of TBC's influence over Sebco, as it was undisputed Sebco did not know Sweetser or Copeland and obtained all the information about them only through TBC who played both sides.

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law. Wash. State Constitution, Article IV, §16.

It is not the quantum of any particular comment, but all comment whatever, that is inhibited by the constitution; and therefore courts should be extremely careful to confine their instructions solely to declaring the law. All remarks and observations as to the facts before the jury are positively prohibited, and if any such are made the judgment will be reversed, unless the appellate court can see that the accused was in no wise prejudiced thereby.

State v. Walters, 7 Wash. 246, 250, 34 P. 938 (1893). The trial court cannot make assumptions of fact. See City of Spokane v. Dale, 112

Wash. 533, 535-36, 192 P. 921 (1920).

Instruction No.11 did not recognize the Sebco-Copeland PSA for what it was, i.e., an effect of TBC's breach of duties to Sweetser. Instead, the instruction gave the jurors the erroneous impression that a valid and legally binding contract was formed between Sebco and Copeland on October 20, 2006, and that both of them presumably must comply with it. Hence, per TBC's theory, there was not much TBC or Sweetser could do after Oct. 20, and most if not all of Sweetser's offers and allegations, or what TBC allegedly did or did not do, would not have mattered. That is simply not true, but the jury "could not well have understood it differently than that." See State v. Wheeler, 93 Wash. 538, 542-43, 161 P. 373 (1916). In other words, the trial court was commenting on the evidence or making factual assumptions in favor of TBC's theory and to the prejudice of Sweetser. It is reversible error.

Moreover, it is reversible error to give misleading jury instructions. See Falk v. Keene Corp., 113 Wn.2d 645, 656, 782 P.2d 974 (1989); see also City of Seattle v. Gellein, 112 Wn.2d 58, 63, 768 P.2d 470 (1989) (an instruction which could have been interpreted by a reasonable juror as a mandatory presumption violated fundamental due process requirements). Here, a reasonable juror could have easily understood and presumed from Instruction No.11 that a valid contract of

third parties prevented Sweetser from acquiring the Property from October 20, 2006, on.

In short, Instruction No.11 was misleading to the jurors by lending legitimacy to TBC's breach of duties to Sweetser and turning the defective Sebco-Copeland PSA, a direct result of TBC's wrongdoing, into a seemingly intervening outside cause that minimized TBC's wrongdoing and undermined the finding of proximate cause. The instruction likely affected the jury's findings regarding the unfair and deceptive act and public interest elements under the CPA because it legitimized the product of the unfair and deceptive acts of TBC. It also likely affected the proximate cause finding for all Sweetser's claims.

D. The Trial Court Erroneously Concluded as a Matter of Law that the First Right of Refusal in the Lease Between Sebco and First American can be Waived Orally.

TBC also wanted, and the trial court gave, Jury Instruction No.12:

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 665. The trial court relied on the rule "no interest in land is created by a right of first refusal; only personal rights are affected" in Robroy Land Co. v. Prather, 95 Wn.2d 66, 70-71, 622 P.2d 367 (1980) and repeated in Old Nat. Bank of Washington v. Arneson, 54 Wn. App. 717, 721-22, 776

P.2d 145 (1989) to support the statement that the statute of frauds does not apply to first rights of refusals. However, the “continuing viability of the court’s holding in Robroy is questionable after our Supreme Court’s decision in Manufactured Housing Communities v. State, 142 Wn.2d 347, 13 P.3d 183 (2000).” South Kitsap Family Worship Center v. Weir, 135 Wn. App. 900, 909, 146 P.3d 935 (2006). This more recent authority held the freedom to grant a right of first refusal was an interest in land. Id. at 910. Being an interest in land, the statute of frauds applies.

Regardless of whether the statute of frauds applies to first rights of refusal as a general proposition, it is not the only or controlling authority requiring things to be done in writing here. The express language of the right of first refusal controls how the right must be exercised or released. The Sebco-First American lease states in Paragraph 16.23 that “any notice, demand or declaration of any kind” must be in writing and served personally or by mail. Ex 25. Paragraph 16.14 says each provision is deemed a “covenant,” a term “currently used primarily with respect to promises in conveyances or other instruments relating to real estate.” See Black’s Law Dictionary, Abr. 6th Ed., p.251. Most importantly, the first right of refusal provision (Schedule 7.4 in the lease) specifically requires any notice, acceptance and release of the first right of refusal to be in writing. Ex 25. The lease is an integrated contract, which cannot be

modified orally. Ex 25, ¶16.9.

Therefore, the trial court erred as a matter of law to the prejudice of Sweetser by giving Instruction No.12 that contradicted the express lease terms governing the acceptance or rejection of the first right of refusal.

E. Instruction No. 12 was Defective, Irrelevant and Misleading to the Jury.

Jury Instruction No.12 was a hastily put together instruction TBC wanted the Court to give to undermine Sweetser's case. "Jury instructions must more than adequately convey the law." State v. Berg, 147 Wn. App. 923, 931, 198 P.3d 529 (2008). "They must make the relevant legal standards manifestly apparent to the average juror." Id. When the jurors "were not instructed as to the full extent of the applicable law," the judgment was reversed. Brashear v. Puget Sound Power and Light Co., 33 Wn. App. 63, 70-71, 651 P.2d 770 (1982). Here, Instruction No.12 uses legal terms of art such as "statute of frauds," "waived" and "assignable" without defining them for the jury. An average juror will not know the legal definition or elements of these terms or concepts.

Contrary to the trial court's statement, the first right of refusal may well be assignable, given that the lease generally allows assignment of First American's interest with Sebco's approval with no exception for the

first right of refusal. See Ex 25, ¶14. More importantly, the instruction was misleading to the jury on what could be done with the first right of refusal since assignment was not the only way Sweetser could have acquired the property. For instance, First American could have exercised the right of first refusal and sold the Property to Sweetser in simultaneous closings without involving any assignment.

The relevant issue regarding the first right of refusal was whether it was a material fact requiring disclosure by TBC to Sweetser, not whether it was waived or assignable by non-parties under a lease between non-parties. In that regard, the definition of “material fact” was already given in Instruction No. 6. CP 657. There was no need for Instruction No.12. As discussed above, judges are constitutionally prohibited from charging juries with respect to matters of fact or commenting thereon. Wash. State Constitution, Article IV, §16. Instruction No.12 essentially made factual findings for the jury by telling them the first right of refusal was released orally, could not be assigned, did not matter to Sweetser. An average juror would not have understood it any differently. See State v. Wheeler, 93 Wash. at 542-43. It assumed nothing could have been done with the first right of refusal and legitimized TBC’s speculation that the knowledge of the first right of refusal would have been useless to Sweetser. See City of Spokane v. Dale, 112 Wash. 533, 535-36, 192 P.

921 (1920) (the trial court cannot make assumptions of fact). The instruction interfered with the jury's determination of the relevant issue, i.e. whether the first right of refusal materially affected Sebco's ability to sell to Copeland, and whether its nondisclosure was part of TBC's breach of duties to Sweetser which doomed Sweetser's every attempt to fairly compete for the Property.

F. The Trial Court Erred by Unilaterally Imposing as a Matter of Course Arbitrary Time Limits Without Flexibility and Refusing to Allow Sweetser More Time to Present Relevant Evidence Affecting the CPA Claim.

Trial judges may maintain firm control of their courtrooms. Egede-Nissen v. Crystal Mountain, Inc., 93 Wn.2d 127, 140, 606 P.2d 1214 (1980). The Code of Judicial Conduct, however, requires that they also "accord to every person who is legally interested in a proceeding, or that person's lawyer, full right to be heard according to law." CJC 3(A)(4). American Bar Association Civil Trial Practice Standards sets forth the standards for judicial control of trial presentations. See ABA Civil Trial Practice Standards (Aug 2007), p.16-19. Courts "should be reluctant to interfere with counsel's control over the presentation of their case and should ensure that each side has the opportunity to present its case fully and fairly, and on the corollary that trial courts therefore should not exercise this discretion as a matter of course." Id. at 18. "In no event

should the court permit any party to be prejudiced because of arbitrary time limits.” Id. at 19. The trial judge here imposed the arbitrary time limits to suit her own travel schedule. No other reason was given. Discretion unexercised is discretion abused. Bowcutt v. Delta N. Star Corp., 95 Wn. App. 311, 976 P.2d 643 (1999). That is the case here.

In the case at bar, the trial court imposed rigid time limits without any flexibility, and the trial was a constant rush during practically all stages. The details of the time limits imposed and how Sweetser and his counsel struggled with them are described in Section IV above. By the nature of this case, Sweetser had to prove his case with TBC’s documents and adverse witnesses, which are inherently hard to control and plan. To comply with the time limits, Sweetser and counsel kept altering their trial plans and shortening evidence presentations so that an understandable case could be presented to the jury. Sweetser often had to sacrifice the quality of presentation just to meet basic requirements of getting evidence into the record. For example, Sweetser’s counsel had to rush through the exhibit numbers only with the computer expert, Mr. Roloff, just to get them into the record without discussing them, before literally running out of time. RP 611:10-612:18, 614:11-12.

The rigid time limits were insidious in sacrificing the quality of presentation and completeness of evidence throughout the trial and forced

unusual plans such as Sweetser's reliance to get needed evidence presented in TBC's part of the case. This allowed procedural advantages to TBC who decided to not call certain witnesses in their part of the case. During trial, Sweetser's counsel explained the unusual predicament Sweetser was in due to the rigid time limits and begged for a little more time to present some evidence of TBC's practices affecting the public interest under the CPA, including Exhibits 129, 130, 133, 149. These emails are clearly relevant documents to show TBC's duty-breaching pattern of behavior or modus operandi affecting public interest: (a) TBC's agent tied up (had under contract) property they were supposed to be marketing and then tried to find buyers (Ex 129), (b) TBC's agent requested "flip" of property for \$1.4+ million (Ex 130), (c) TBC's agent planned to tie up property and then assign the contract for profit rather than providing brokerage service (Ex 133), (d) TBC's designated broker, Mr. Black, proposed tying up property first if an agent thought a client had interest (Ex 149).

The trial court refused, primarily in keeping with her general reluctance during pretrial and at trial to get into transactions other than Sweetser's own. It may be that if Sweetser's counsel had done everything perfectly, he could have fit all the needed evidence into the rigid time limits, but he is far from being anywhere near perfect. He did the best he

could under the very difficult circumstances. Trials should not be contests of who can play the game better, but a fair process to seek the truth and to dispense justice to the parties in dispute.

Sweetser submits that the honorable and learned trial judge should not have imposed such short and rigid time limits as a matter of course, and should not have overemphasized economizing trial at the expense of Sweetser's adequate opportunity to present his case fully and fairly. There was no good reason to deny Sweetser more time to present evidence even though the trial judge needed to leave town. Another judge could have taken over and finished the trial, as was the case with the verdict-taking part of this case, or a short continuance could have been given until the trial judge came back. The trial court's conduct prejudiced Sweetser by imposing the arbitrary rigid time limits, which, according to the ABA guidelines, should "in no event" be permitted.

G. Request for Attorneys' Fees on Appeal.

Pursuant to RAP 18.1, Sweetser hereby requests fees and costs on appeal based on RAP 18.9(a) and incorporates by reference all the arguments and authorities stated in Section V(E) above.

VII. CONCLUSION

TBC brokers/agents regularly breached their statutory and common law duties by engaging in insider practices and unfair

competition and by abusing their position of trust in order to increase present and future profits for themselves and their associates.

In this case, TBC did it at the expense of Sweetser. Sweetser had faith in our court and jury system and endured a great deal financially and emotionally for several years to finally get his day in court last year. He was entitled to a fair trial by an impartial jury, but received neither. Sweetser still has faith in our court and jury system and sincerely hopes that the errors in the trial court will be rectified by this Court, not only for his and his family's sake, but also for the sake of real estate brokerage consumers of Spokane and Eastern Washington.

Sweetser respectfully asks this Court (1) to reverse and vacate the judgment and verdict, and remand this case for a new trial on all issues; or (2) in the alternative, reverse and vacate the judgment and verdict, and remand the case for a new trial on Sweetser's CPA claim as well as on the issues of proximate cause and damages under Sweetser's statutory (RCW 18.86) and common law claims; and (3) award reasonable attorney's fees and costs for responding to TBC's frivolous appeal.

Sweetser took a huge risk and incurred unbelievably large expenses to expose TBC's wrongdoing in court, believing that truth and justice would eventually prevail. Sweetser hopes that they do in this case.

Respectfully submitted this 27th day of August, 2010.

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