**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

November 12, 1997

**NOTICE**

**A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.**

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**No. 96-1961**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT II**

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**JOSEPH C. MRAZEK, SR.,**

**PLAINTIFF-RESPONDENT,**

**v.**

**FIRST BANK SOUTHEAST, N.A.,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Racine County: DENNIS J. FLYNN, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

SNYDER, P.J. First Bank Southeast, N.A.[1] appeals from a judgment in which the Bank was found to have breached a lease agreement to occupy space in the Corporate Centre, a development by Joseph C. Mrazek, Sr. The final judgment was the result of two separate trials. In the first trial, the jury found that the Bank did not breach the lease, and therefore did not answer the verdict questions on damages. After hearing postverdict motions, the trial court changed the jury's answer to the breach question and scheduled a second trial on the issue of damages. The second trial resulted in a jury award of damages totaling $2.5 million.

The Bank raises a total of twelve claims of error, some of which occurred during the first trial, and some relating to the second trial. The Bank claims that the trial court erred and appeals the following issues: (1) the rescission of a settlement agreement on grounds of duress; (2) four separate claims pertaining to the finding of breach in the first trial; (3) six issues relating to the award of damages at the second trial; and (4) a final issue requesting a new trial. We affirm that portion of the verdict in which the jury found that the settlement agreement was the result of duress. However, because we conclude that reversible error occurred in the first trial we reverse and remand for a new trial on the breach issue in the interests of justice. We affirm the award of damages, with the exception of the denial of the Bank's motion to recoup its payments to Mrazek made pursuant to the rescinded settlement agreement. We begin by addressing those facets of the case that underpin our reversal of the outcome of the first trial.

[1] During the pendency of this action, First Bank Southeast, N.A. was acquired by Firstar Corporation.

## STATEMENT OF FACTS

### *Initial Lease Agreement*

Mrazek is a real estate developer who built a commercial office building, the Corporate Centre. In January 1991, the Bank and Mrazek signed a lease in which the Bank agreed to rent space in the Corporate Centre development for five years at a rate of $1700 per month. While most of the lease was "boilerplate" commercial lease language, it did contain a clause which stated, "This Lease shall be null and void unless approval is received by the Lessee from the OCC[2] on or before May 1, 1991 to operate a branch bank in subject premises."

Shortly after signing the lease with Mrazek, the Bank applied to the OCC for branch bank approval. The Bank received a letter dated April 22, 1991, which provided in relevant part:

> This is to inform you that the Office of the Comptroller of the Currency (OCC) has granted conditional approval to your proposal to establish a branch at [proposed branch office address]. This approval is conditioned upon the bank's being in substantial compliance with the following Articles of the Formal Agreement which was entered into on March 20, 1991 ….[3]
>
> The branch must not be opened until the bank's supervisory office has determined that the bank is in full compliance with the above mentioned Articles.… In addition, the district office must be advised … in advance

[2] The "OCC" refers to the Office of the Comptroller of the Currency, a federal regulatory agency that oversees banking practices in national banks. Approval from the OCC is required before a bank can open a new branch office.

[3] In September 1990, the Bank underwent an examination by the OCC. As a result of the examination, the OCC prepared a "Formal Agreement" in which it outlined changes the Bank would be required to make in order to be in compliance with OCC requirements. The Formal Agreement was presented to Bank officials in Chicago on March 20, 1991.

> of the effective date desired for the branch opening so that the OCC may issue the necessary approval letter authorizing the branch.… The OCC's letter of authorization to operate the branch will be issued when this information has been received.

Shortly thereafter, the Bank notified Mrazek that it would not be able to open the branch office in the leased space. At that time the Bank did not mention the OCC letter to Mrazek. Mrazek became aware of the OCC's investigation of the Bank and the resulting Formal Agreement a few weeks later. He initially believed that the OCC issue was causing a timing problem for the Bank, but that it still intended to open a branch; within a month, however, he learned that the Bank would not be moving into the space.[4]

Mrazek claimed that under the lease the Bank was still required to pay the $1700 monthly rent. He withheld several monthly mortgage payments owed to the Bank and threatened litigation. During October and November 1991, through counsel, a settlement agreement was reached. It provided, inter alia, that: (1) the Bank would pay rent for the complete five-year term of the lease at a rate of $2665 per month; (2) the Bank would not consider the withheld payments when it evaluated Mrazek's upcoming loan renewal requests; (3) it would resubmit an application for OCC approval for a Corporate Centre branch; and (4) Mrazek would allow the Bank to terminate the lease it held for the Taylor Crossings branch office with six months notice. *See supra* note 4.

The Bank paid rent for each subsequent month of the five-year lease term, it renewed Mrazek's loans, and it reapplied for OCC approval for a branch

[4] At that time, Mrazek owed the Bank more than $3,000,000 in loans. He also had a lease agreement with the Bank for a branch it operated at another of his commercial developments, Taylor Crossings.

bank at the Corporate Centre.[5] Mrazek, however, brought this action, claiming that he had been coerced into executing the settlement agreement and that it should be rescinded. After the Bank's summary judgment motion was denied, the matter was tried to a jury.

At trial, both sides presented extensive testimony regarding the settlement negotiations which had preceded the signing of the settlement agreement. Mrazek testified, as did his attorney, Michael Krill. Mrazek also utilized as an adverse witness John Kis, a bank official who participated in the negotiation process. Mrazek testified that during the negotiations he was threatened with foreclosure, "drastic consequences," and with the Bank's ability to "make things very uncomfortable." He also testified that during this same period his cash flow was tenuous. Krill corroborated this testimony and stated that the attorney for the Bank made it clear that Mrazek had to sign or the Bank would begin foreclosure proceedings.

When Kis testified, he admitted that at the time the agreement was negotiated, Mrazek was not a candidate for foreclosure proceedings. He further claimed that no improper threats were made. He also stated that at the time the settlement was being negotiated, Mrazek seemed "eager to get it done" and opined that this was because Mrazek was concerned about his loan renewals. It was undisputed that at the time the settlement agreement was negotiated, Mrazek had more than $3,000,000 in outstanding loans. The first loan renewal was coming up in late December 1991, the same month the agreement to settle was reached.

[5] That approval was denied by the OCC on March 20, 1992, because the OCC concluded that the Bank had not yet satisfied the various articles of the Formal Agreement.

*OCC Contingency Language*

In addition to extensive testimony from both sides regarding the validity of the settlement agreement, the jury also heard testimony from both parties which pertained to the OCC contingency language in the lease and what was meant by the term "conditional approval." The April 22, 1991 letter from the OCC was put into evidence, and Mrazek also offered another letter that Krill had solicited from the OCC. Krill had written to the OCC several months after the Bank had told Mrazek that it would not be occupying the Corporate Centre space in order to try to ascertain the status of the Bank's application for the branch office. The letter Krill received stated that approval had been granted. The validity of this statement later became the subject of a postverdict motion. *See infra* note 8.

In countering this evidence, Kis testified at length with regard to the OCC. His testimony included: (1) that the Bank did not learn that the September 1990 examination by the OCC would require it to enter a Formal Agreement until early March 1991, and that the terms of that agreement were not disclosed to the Bank until it met with the OCC in Chicago on March 20, 1991;[6] (2) that the law does not permit a Bank to divulge the results of an OCC examination; and (3) that the Bank immediately undertook efforts to resolve the issues contained in the Formal Agreement after the meeting in Chicago with OCC officials. Kis also testified at length about what the terms of the Formal Agreement actually required the Bank to do, and that the Bank could not have begun to resolve the issues until

[6] This refuted testimony by Mrazek's expert, who opined that Bank officials should have been given an oral report when the OCC examiners completed their on-site investigation and that therefore they should have been apprised of the issues that later became the terms of the Formal Agreement.

March 1991, when the Formal Agreement was presented to it. Kis testified that once the Bank had signed the Formal Agreement, he devoted half of his time to these issues and that other Bank officers also devoted an equivalent amount of time; furthermore, as a result of the OCC investigation, four loan officers were terminated for not adhering to proper practices. Kis further denominated the Bank's efforts to resolve the OCC situation as "aggressive" and stated that the Bank resolved the issues in the Formal Agreement to the satisfaction of the OCC approximately a year and a half later. Kis also testified that the "conditional approval" granted by the OCC would not permit the Bank to legally open or operate a branch office at the Corporate Centre site.

The jury also heard extensive testimony regarding Mrazek's alleged damages. Because the first jury did not reach those issues, the evidence on damages presented at the first trial is not pertinent.

*The Verdict*

In closing arguments, counsel for Mrazek characterized the Bank's OCC defense as a "cover-up, the shifting sands, the shilly-shallying of the bank regarding the OCC." Counsel also argued that "[t]he evidence showed the entire OCC matter ... was a pretext for not occupying the Corporate Centre."

The defense countered at closing with its position that there was no duress in the signing of the original settlement agreement. The contested issue according to the defense was whether Mrazek or Kis was more credible. After arguing that only the first question on the verdict need be answered by the jury, the defense then stated:

> I'm going to briefly touch on [verdict questions] 2 and 3 together. Those are the questions pertaining to whether the bank actually breached the lease. Two reasons why you

> should answer those questions no. First, again the OCC contingency. OCC contingency said if no approval by May 1st, no lease. And in fact it's undisputed there was no approval by May 1st.
>
> ….
>
> The other reasons you should answer no to questions 2 and 3 is simply this, because of the settlement agreement the bank has essentially paid Mr. Mrazek everything it would have been required to pay under the lease anyway, even if it did occupy or didn't occupy.… Well, they have paid rent, over $120,000 for it.[7] Now just short of four years worth on a five-year term. Where's the breach of agreement there? The very thing the bank agreed to do, it has done.

At the end of the closing arguments, the jury was presented with the following questions on the verdict:

> **AS TO THE SETTLEMENT AGREEMENT:**
>
> QUESTION NO. 1: Was the consent of Plaintiff, Joseph C. Mrazek, Sr., to the 6 December 1991 Settlement Agreement gained through duress by Defendant Bank?
>
> **AS TO THE BREACH OF CONTRACT CLAIM**
>
> QUESTION NO. 2: If you answered Question No. 1 "Yes", then answer this question: Did Defendant Bank agree in the lease of 18 January 1991, to occupy those premises known as Corporate Centre?
>
> QUESTION NO. 3: If you answered Question [No.] 2 "Yes", then answer this question: Did the Defendant Bank breach the Corporate Centre lease of 18 January 1991, it had with Plaintiff, Joseph C. Mrazek, Sr.?

The jury came back with affirmative answers to the first two questions, but answered "no" to Question No. 3. The final two questions of the verdict, not

[7] This statement refers to the Settlement Agreement, wherein the Bank agreed to pay $2665 per month for the five-year term of the lease. Under the original lease, the Bank was obligated to pay rental payments of $1700 per month. This equates to $102,000 for the five-year lease term.

included here, pertained to damages and were not answered by the jury because of the "no" answer to Question No. 3.

*Postverdict Motions*

In motions after verdict, the trial court changed the jury's answer to Question No. 3. The court reasoned that the Bank had argued at trial that there were three reasons for lawfully not occupying the Corporate Centre space:

> 1. The Settlement Agreement specifically allowed Defendant to terminate the lease.
>
> 2. The words of the lease do not require the Bank to occupy the premises. (This was claimed in motions before trial.)
>
> 3. The actions of OCC in their letter of 22 April 1991 (Exh. 38) did not constitute approval to open a branch at Corporate Centre and, therefore, the Corporate Centre lease contract was void under the provisions of paragraph 1.45 [the OCC contingency provision].

The trial court dismissed the first possibility because the jury's answer to Question No. 1 on the verdict rendered the Settlement Agreement a nullity. The second reason was dismissed because the court concluded that the lease language regarding "occupancy" was clear and unambiguous. In addition, the trial court noted that the Bank had not seriously argued that it had no duty to occupy the premises due to the language of the lease. Therefore, according to the trial court, the second reason does not "as a matter of fact or law" provide a basis for nonoccupancy or voiding of the lease.

The court then addressed the third reason. The trial court noted that it agreed with Mrazek that "the determination of whether the lease was breached or rendered void due to noncompliance with all of OCC's conditions is a question of law to be resolved by the court." The court then reasoned that the language

used by the parties allowed for only two options—approval or denial of the application; "[n]o agreement was made to nullify the lease if conditional approval was provided." The court then concluded that the August 1991 letter from the OCC to Krill unambiguously stated that "[t]he application in question was approved by us."[8] The trial court then found that there was no basis in the record for any conclusion other than that the OCC had approved the Bank's application and therefore the contingency requirements were not met as a matter of law. The trial court reasoned:

> Also, since the vast majority of the OCC record is beyond the knowledge of the Jury and the court and Plaintiff, but within the knowledge of Defendant, it realistically would not be possible to prove anything more as to OCC's actions except by speculation. Said another way -- Defendant Bank claims a status (it made a reasonable and good faith effort to comply with OCC directives before 1 May 1991, but couldn't) and yet evidence that would corroborate or rebut that claim is not available due to federal law which makes OCC audit information confidential. The Bank also claims an interpretation of OCC action which would result in nonapproval even though the OCC audit record is unavailable and the clear language of the letters of 22 April 1991 and 5 August 1991, do not support that interpretation in any way.
>
> As a matter of law, the OCC letters of 22 April 1991, and 5 August 1991, establish that approval, as contemplated by the parties in paragraph 1.45 of the Corporate Centre lease of 18 January 1991, was in fact given to Defendant by OCC before 1 May 1991.

[8] Before the subsequent trial on the issue of damages, this letter became the subject of the Bank's motion for relief from judgment based on the trial court's decision and order which changed the jury's answer to Question No. 3. The Bank stated that it had attempted to get an OCC witness at the first trial, but the OCC denied that request. Subsequent to the court's decision to change the jury's answer, the Bank appealed the decision of the OCC not to provide testimony. The OCC ultimately responded with an affidavit which "basically said that the branch was never approved to operate, and it also said that the August 5 letter [solicited by Krill] on which the Court had relied was in effect in error." After concluding that this was "newly available" evidence and not "newly discovered" evidence, *see* § 806.07(1)(b), STATS., the trial court denied the motion.

> The Court further finds that a reasonable jury, acting reasonably, could not conclude otherwise. There is no credible evidence in the record of this Jury Trial from which a reasonable juror could conclude that paragraph 1.45 of the Corporate Centre lease allowed Defendant to void the said lease. Such an interpretation is not based upon evidence in the record and would produce a miscarriage of justice.… Defendant [Bank] asserts that a Jury could conclude that no breach occurred because the Bank had substantially paid its lease rents as a result of the increased payments made under the Settlement Agreement. A reasonable jury, acting reasonably, could not lawfully consider higher payments made as a result of a "duress" agreement as constituting full consideration, satisfaction or performance under the Corporate Centre lease.

The trial court then changed the jury's answer on Question No. 3 and set a new trial on the issue of damages. We will address the legal issues pertaining to the first trial, and then present additional facts as required by the issues raised that are pertinent to the second trial.

## THE SETTLEMENT AGREEMENT

The first issue we consider on appeal is the jury's determination that the settlement agreement was the product of duress. The Bank claims that the "so-called economic threats were not wrongful or unlawful, and therefore, cannot constitute duress as a matter of law." The standard of review of a jury verdict is that it will be sustained if there is any credible evidence to support the verdict. *See* ***Radford v. J.J.B. Enters., Ltd.,*** 163 Wis.2d 534, 543, 472 N.W.2d 790, 794 (Ct. App. 1991). It is the duty of this court to search for credible evidence to sustain a jury's verdict and not to search the record for evidence to sustain a verdict the jury could have reached, but did not. *See* ***id.*** It is within the jury's province to accept or reject any or all of the evidence presented at trial in determining its verdict. *See* ***Hunzinger Constr. Co. v. Granite Resources Corp.,*** 196 Wis.2d 327, 337, 538 N.W.2d 804, 808 (Ct. App. 1995).

In order to establish a claim of economic duress, Mrazek was required to present evidence of the following: (1) that he had been the victim of a wrongful or unlawful act or threat, (2) the act or threat deprived him of his "'unfettered will,'" and (3) as a result, he was "'compelled to make a disproportionate exchange of values or to give up something for nothing.'" ***Wurtz v. Fleischman,*** 97 Wis.2d 100, 109, 293 N.W.2d 155, 160 (1980) (quoted source omitted). However, a "threat to do what the person making the threat has a legal right to do does not constitute duress; nor does driving a hard bargain or taking advantage of another's financial difficulty." ***Pope v. Ziegler,*** 127 Wis.2d 56, 60, 377 N.W.2d 201, 203 (Ct. App. 1985).

The jury heard the testimony of both Mrazek and Krill that Bank officials told Mrazek that any action on his part to enforce the lease agreement "would not be prudent" and would have a "detrimental effect" on the status of his loans. Mrazek's banking expert, Richard Cramer, testified that "this case was unique in the sense that the bank had become a key tenant in a key risk which Mr. Mrazek was taking; namely, the development of the shopping center, and that Mr. Mrazek was far more dependent on the strength and the power of the bank as it relates to just negotiating a loan." Cramer also testified that because of this, the Bank should be held to a "higher standard of care" as it related to its dealings with Mrazek.

In countering this, Kis' testimony did not dispute Mrazek's recollection of statements made, but, rather, he argued that the statements were not illegal within the context of the negotiations. Kis admitted that Mrazek was not a candidate for foreclosure at the time the settlement was negotiated.

The jury was presented with substantial credible evidence from Mrazek, Krill and Cramer to support Mrazek's claim of duress. As an expert witness, Cramer opined that because of the Bank's knowledge of Mrazek's financial affairs, it should be held to a higher standard. Countervailing testimony was presented by Kis. It was ultimately a question of fact for the jury, and it is within the jury's province to assess the credibility of witnesses and the weight to be given their testimony. *See* ***Radford,*** 163 Wis.2d at 543, 472 N.W.2d at 794. We affirm the jury's finding that the settlement agreement was the result of duress.

THE BREACH OF LEASE QUESTIONS

We next turn to questions two and three on the verdict, both of which related to the issue of whether the Bank breached the lease agreement. The jury answered "yes" when asked whether the Bank had agreed to occupy the premises (Question No. 2) but came back with a "no" response when asked whether the Bank had breached the lease agreement. At a postverdict hearing, the trial court changed the jury's answer to Question No. 3 from "no" to "yes." As will be discussed below, it is this aspect of the trial where we conclude reversible error occurred and upon which basis we remand the case for a new trial in the interests of justice.[9] We begin with the trial court's decision to change the jury's answer to Question No. 3.

[9] It is apparent from both the briefs and oral argument that the parties rely on different verdict answers in supporting their respective positions and in attempting to cast the verdict in a way that is most favorable. Mrazek relies on the jury's answer to Question No. 2, where the jury said the Bank was obligated to occupy the premises, as determinative of the breach issue; the Bank relies on the jury's answer to Question No. 3, in which the jury responded "no" to the question of whether the Bank breached the lease, as indicative of the jury's ultimate determination. However, neither side drew this distinction in closing arguments to the jury.

In considering a motion to change a jury's answers to questions on a verdict, the trial court must view the evidence in the light most favorable to the verdict and affirm the verdict if it is supported by any credible evidence. *See* ***Richards v. Mendivil,*** 200 Wis.2d 665, 671, 548 N.W.2d 85, 88 (Ct. App. 1996). If there is any credible evidence to support the jury's findings, a trial court is not justified in changing the jury's answers. *See* ***id.*** In its review of the evidence, the trial court is guided by the proposition that "'[t]he credibility of witnesses and the weight given to their testimony are matters left to the jury's judgment, and where more than one inference can be drawn from the evidence,' the trial court must accept the inference drawn by the jury." ***Id.*** (quoted source omitted). On appeal, we are guided by these same rules. *See* ***id.***

In reviewing an order changing a jury's answer, we begin with considerable respect for the trial court's better ability to assess the evidence. *See* ***id.*** However, we may overturn a trial court's decision to change one or more answers on a verdict if the record reveals that the trial court was clearly wrong. *See* ***id.*** at 672, 548 N.W.2d at 88. As we quoted with approval in ***Richards***:

> When a circuit court overturns a verdict supported by "any credible evidence," then the circuit court is "clearly wrong" in doing so. When there is *any* credible evidence to support a jury's verdict, "even though it be contradicted and the contradictory evidence be stronger and more convincing, nevertheless the verdict … must stand."

***Id.*** (quoted source omitted).

The trial court changed the jury's answer to the third question on the verdict, "Did the Defendant Bank breach the Corporate Centre lease of 18 January 1991, it had with Plaintiff, Joseph C. Mrazek, Sr.?" The jury had answered that question "No." In changing the answer, the trial court reasoned that based upon the jury's response to verdict questions one and two in which the jury voided the

settlement agreement and found that the Bank had agreed to occupy the Corporate Centre space, the determination of the breach question was now a question of law. The trial court opined that there were three reasons that had been argued at trial as lawfully excusing the Bank's failure to occupy the Corporate Centre space. These were: (1) the settlement agreement allowed the Bank to terminate the lease; (2) the language of the lease did not require occupancy of the premises; and (3) the actions of the OCC did not constitute approval to open a branch at the Corporate Centre location, and consequently, the lease was void under the provisions of paragraph 1.45, which contained the OCC contingency provision.

The trial court then proceeded to dismiss the settlement agreement as a factor because according to the jury's answer to Question No. 1, the agreement was a nullity. The possibility that the lease language did not require occupancy was also dismissed, with the trial court concluding that the lease language regarding "occupancy" was clear and unambiguous. The court then turned to the third possibility: that the jury concluded that the OCC "conditional approval" was not, in fact, approval to open the branch, but rather failed to satisfy the lease contingency.[10]

Based on its reasoning that "the vast majority of the OCC record is beyond the knowledge of the Jury and the court and Plaintiff" and that the

[10] We also note that at the verdict conference the Bank had requested a question regarding whether "the [B]ank's ability to occupy the premises [was] made impossible by the April 22, 1991, determination of the Office of the Comptroller of the Currency…." Counsel for Mrazek argued that this question was unnecessary because the issue was subsumed in verdict Question No. 2, and because of the inclusion of the word "impossible," it went beyond the "fact-finding responsibility of the jury." The trial court did not agree that the issue was subsumed in the other question, but did find as a matter of law "that there would be inadequate information before this jury for the jury to make that as a finding of fact." This was based on the trial court's reasoning that only a "de minimis" portion of the OCC record was made available.

language of the lease allowed for only two options, "approval" or "denial" of the application, the trial court concluded that "[n]o agreement was made to nullify the lease if conditional approval was provided." Looking to the August 1991 letter from the OCC to Krill as further evidence that the OCC had granted approval, the trial court found, as a matter of law, that "approval, as contemplated by the parties in paragraph 1.45 of the Corporate Centre lease … was in fact given to Defendant by OCC before 1 May 1991."

Our independent review of a voluminous record convinces us that the trial court's decision ignored significant credible evidence that would support a jury's finding that no breach of the lease agreement occurred. As outlined in the statement of facts, bank officer Kis testified at length about the ramifications of the OCC's conditional approval, what was required of the Bank in order to open the new branch office, and the steps that the Bank took in seeking to address the requirements of the Formal Agreement. Furthermore, the trial court's determination that approval was granted focused on the term "conditional approval" contained in the April letter from the OCC to the Bank and ignored the following portions of that letter, which were also placed into evidence before the jury:

> *This approval is conditioned upon the bank's being in substantial compliance with the following Articles of the Formal Agreement* which was entered into on March 20, 1991 ….
>
> *The branch must not be opened until the bank's supervisory office has determined that the bank is in full compliance with the above mentioned Articles*. If the branch is not opened within 18 months from this date, this approval shall automatically terminate unless the OCC has granted an extension of the time period. In addition, the district office must be advised in writing at least 10 days in advance of the effective date desired for the branch opening so that the OCC may issue the necessary approval letter

> authorizing the branch.… *The OCC's letter of authorization to operate the branch will be issued when this information has been received.* [Emphasis added.]

In addition, the trial court placed significant reliance on a letter solicited from the OCC by Krill, which stated that OCC approval had been granted. The letter was sent directly to him. At the time it was written, the contents of this letter were never conveyed to or shared with the Bank. The OCC ultimately provided the Bank with a sworn statement that this letter was in error. *See supra* note 8. The trial court's reliance on this letter was misplaced; a letter from the OCC to a third party cannot be said to "trump" correspondence sent directly to one of the parties in an action.

We conclude that the trial court's determination that the issue of the OCC's "conditional approval" was a question of law, as well as its determination that "[t]here is no credible evidence in the record … from which a reasonable juror could conclude that [the OCC contingency] allowed Defendant to void the said lease," are clearly wrong. Kis testified at great length regarding the Bank's activities during all time periods relevant to the case and focused with particularity on the issue of the OCC. Kis explained to the jury that direct testimony from the OCC was prohibited by law. The only witness who directly disputed Kis' testimony regarding the impact of the Formal Agreement and what it required of the Bank was Cramer, a banking expert offered by Mrazek. Even Cramer, however, agreed with Kis that conditional approval was not approval to open a branch office and admitted that he had no direct knowledge of when the Bank learned what conditions it would have imposed upon it or what steps were taken by the Bank to address the specific requirements of the Formal Agreement. Cramer stated, "I have no direct knowledge of what the examiners told the officers after the exam."

The lease agreement was undeniably contingent upon the Bank receiving approval to operate the branch. Looking no further than the testimony of Kis and Cramer and the submission of the entire text of the April letter from the OCC to the Bank, the issue of the meaning of "conditional approval" under the terms of the lease was a question of fact for the jury. There was credible evidence to support a jury answer of "no" to the question of whether the Bank had breached the lease agreement. The trial court's determination that there was no credible evidence, as well as its conclusion that "as a matter of law" the Bank could not rely on the term "conditional approval" as excusing its performance under the lease, are "clearly wrong."[11] *See* ***Richards,*** 200 Wis.2d at 672, 548 N.W.2d at 88.

Notwithstanding the above, we now turn to the jury's answer to the breach question. While a jury's answer to a verdict question is to be upheld if it is supported by "any credible evidence," *see* ***id.*** at 671, 548 N.W.2d at 88, we are concerned that a separate evidentiary issue makes the original jury verdict unreliable as well and leads us to conclude that it is impossible to tell whether the real controversy was fully tried. *See* § 752.35, STATS. As the trial court correctly found, the settlement agreement and money paid to Mrazek by the Bank pursuant to that agreement could not legally substantiate the jury's answer of "no breach" to Question No. 3. Our concern is grounded in the fact that in addition to the credible evidence relating to the meaning of the OCC's conditional approval, outlined above, which would support the jury's answer of no breach, this jury was

[11] The trial court had reasoned that the language used by the parties in the lease itself allowed for only two options, approval or denial of the application, and concluded that "[n]o agreement was made to nullify the lease if conditional approval was provided." The trial court's finding that "conditional approval" was *approval* as contemplated by the parties in essence rewrites the parties' agreement.

steeped in evidence concerning the settlement negotiations that had occurred prior to this action, as well as the terms of the settlement itself.

The law concerning the admissibility of evidence of settlement negotiations is grounded in § 904.08, STATS., which provides:

> Evidence of furnishing or offering or promising to furnish, or accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This section does not require exclusion when the evidence is offered for another purpose ....

In ***Connor v. Michigan Wisconsin Pipe Line Co.,*** 15 Wis.2d 624-25, 113 N.W.2d 121, 126 (1962), the supreme court concluded that the trial court's grant of a new trial was proper after a jury heard evidence of a conversation between an agent of the pipeline company and the plaintiff in which the agent calculated, in the plaintiff's presence, the worth of the plaintiff's claim to be $10,000, but then dropped a zero and offered the plaintiff $1000. Although in that case the trial court offered a curative instruction, the supreme court concluded that even that was not enough to prevent the "devastating" effect of this information upon the jury. *See* ***id.*** at 624, 113 N.W.2d at 126. After affirming the trial court's finding that this was prejudicial error, *see* ***id.***, the supreme court concurred with the trial court's analysis that:

> [Any] attempt by the trial court to cause the jury to disregard such testimony is the best that can sometimes be done under the circumstances, but in some cases, the best is still not good or effective. When the matter is heard by the jury, no one can generally hope that they can successfully erase it from their minds even though they have been instructed so to do and even though they might honestly attempt so to do. The human mind is not so constituted....

***Id.*** at 625, 113 N.W.2d at 126.

In the instant case, the initial issue before the jury was whether the settlement agreement should be set aside on grounds of duress. We recognize that in order to allow the jury to weigh that issue, all of the evidence pertaining to the negotiations between the parties was relevant and admissible. *See* § 904.08, STATS. The jury heard a "blow by blow" account of how the negotiations proceeded, as well as the terms of the settlement as it was signed. However, along with the evidence about the settlement negotiations was intertwined testimony from many of the same witnesses as to issues surrounding the impact of the OCC's "conditional approval." No limiting instruction was given that the information the jury had before it regarding the settlement negotiations was not to be considered if it were to reach Question Nos. 2 and 3 pertaining to the breach. The jury went into its deliberations with the full knowledge of the negotiations that had taken place, what the Bank had already paid, and that the Bank had continued to pay Mrazek during the pendency of the proceedings—over $120,000. In closing arguments this was highlighted when counsel for the Bank stated that even if the terms of the settlement agreement were set aside due to duress, *the Bank was not liable for breach because it had paid Mrazek everything it had agreed to under the original lease.*

In sum, while we earlier concluded that there was credible evidence which the trial court ignored in changing the jury's answer on Question No. 3 of the verdict, we now conclude that the combination of the extensive evidence concerning the settlement agreement, coupled with the absence of any instruction to the jury to disregard this evidence when considering the issue of breach, has resulted in reversible error. It is impossible for us to determine whether the jury based its answer of no breach on a finding that the OCC contingency excused the

Bank from performance or whether the jury's answer was unfairly based on the information it had concerning the settlement agreement that it had already set aside as being the product of duress. If the jury did base its finding of no breach on the invalid settlement agreement, then the trial court correctly reasoned that the jury's answer should be changed. As a matter of law, a nullified settlement agreement cannot be the basis of a finding of no breach. Conversely, if the jury concluded that the OCC's conditional approval did not satisfy the approval requirement included in the lease, and on that basis determined that there was no breach, then the original verdict should be reinstated.

Because we have no means of reconciling the seemingly conflicting answers to Question Nos. 2 and 3 on the verdict, we conclude that a new trial must be granted in the interests of justice. "A new trial may be granted in the interest of justice … even though the findings are supported by credible evidence." ***Sievert v. American Family Mut. Ins. Co.,*** 180 Wis.2d 426, 431, 509 N.W.2d 75, 78 (Ct. App. 1993); *see also* § 805.15(5), STATS. ("If the appellate court reverses the judgment, nothing in this section precludes it from determining that the appellee is entitled to a new trial."). We therefore remand for a new trial on the issue of the breach.[12]

[12] It is, of course, within the trial court's discretion to prepare the verdicts as it sees fit. We do not want to usurp that power by ordering our own version of how the verdict form in this case should read. But in the interests of judicial administration, we offer two observations. First, we found it impossible to determine on what basis the jury found no breach. The proposed verdict on retrial should strive to make certain that everyone understands the basis upon which the jury arrives at its decision.

Second, the Bank argued in the first trial that the failure to gain approval by the OCC excused it from the contract. Mrazek argued that OCC approval was a pretext. We wonder aloud why a special verdict form cannot be prepared that asks the jury to determine precisely that question: Was the lack of OCC approval the ground upon which the Bank *could not* perform the contract or was it a subterfuge for the real reason why the Bank *would not* perform the contract?

## DAMAGES

The Bank also raises six issues pertaining to the second trial and the jury's imposition of damages.[13] The first jury did not reach the issue of damages because of its finding that there was no breach. After the trial court changed the jury's answer to Question No. 3, a second trial was held on the issue of damages. The second jury, which considered only the issue of damages, determined that a sum of $2.5 million would compensate Mrazek. We will include facts from the second trial as they are necessary to our analysis.

We begin with the issues raised by the Bank which are related to the award of consequential damages. The Bank initially claims that the consequential damages sought by Mrazek "are not recoverable for breach of lease as a matter of law." Then in related claims which underpin the above, the Bank also argues that the testimony of Mrazek's expert as to the damages was inadmissible, there was no evidence presented that the claimed damages were caused by its nonoccupancy, and that these claimed damages are actually "lost profits" and as such were not proved with the requisite certainty. Because the jury's consideration of the testimony of Mrazek's expert underpins its award of consequential damages, we will begin with an analysis of the admissibility of that expert's testimony.

### *Admissibility of Expert Testimony*

The Bank argues that the analysis of Mrazek's expert, Gerald Gray, "ha[d] no relevance to the issue … [of] what damages were caused by the Bank's

[13] On appeal, the Bank claims, inter alia, that: (1) the consequential damages sought by Mrazek are not recoverable for breach of a lease; (2) there is no evidence that the damages were caused by its nonoccupancy; (3) Mrazek failed to make the requisite showing in order to prove lost profits; and (4) the testimony of Mrazek's expert was inadmissible. The Bank also argues that the trial court erred in failing to order Mrazek to repay the monies paid pursuant to the settlement agreement and in failing to give a mitigation of damages instruction.

nonoccupancy[.]" It suggests that the analysis put forth by Gray had "no causal foundation" and argues that he admitted that "he had never used this aggregate net worth analysis before." Therefore, the Bank claims that his testimony should not have been admissible.

A trial court exercises its broad discretion when it determines whether a witness has sufficient knowledge, skill, experience or training to qualify as an expert. *See* ***State v. Jensen,*** 141 Wis.2d 333, 336-37, 415 N.W.2d 519, 521 (Ct. App. 1987), *aff'd,* 147 Wis.2d 240, 432 N.W.2d 913 (1988). "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Section 907.02, STATS. This court will uphold the trial court's determination of a witness' qualifications unless the circumstances demonstrate that it was manifestly wrong. *See* ***Jensen,*** 141 Wis.2d at 337, 415 N.W.2d at 521. If a witness is qualified, "'[a]ny relevant conclusions which are supported by a qualified witness should be received ….'" ***State v. Donner,*** 192 Wis.2d 305, 316, 531 N.W.2d 369, 374 (Ct. App. 1995) (quoted source omitted). Relevancy is satisfied if the evidence assists the trier of fact in understanding the evidence or a fact in issue. *See* ***id.*** at 317, 531 N.W.2d at 374.

Gray offered his credentials as a senior member of the American Society of Appraisers, a Certified Business Appraiser and a financial analyst. He testified that he had more than thirty years of experience, including extensive experience in conducting business appraisals. When the Bank argued that his testimony should not be admissible, the trial court clarified:

> In terms of credentials, yes, both sides acknowledge he's a business appraiser, therefore, the opinions will be in that

> role, not in the role of being a neurosurgeon or epidemiologist or some other area of expertise. His will be in the area of appraising a business, determining the value of a business.

We conclude that Gray's testimony as a business appraiser was properly admissible. The other issues the Bank raises regarding Gray's testimony properly go to its weight and credibility. The weight and credibility given to the opinions of expert witnesses are uniquely within the province of the fact finder. *See* ***Schorer v. Schorer,*** 177 Wis.2d 387, 396, 501 N.W.2d 916, 919 (Ct. App. 1993). Therefore, none of the proffered reasons provide a legal basis to exclude Gray's expert testimony.

*Recovery of Consequential Damages*

We next address the Bank's argument that consequential damages "are not recoverable for breach of lease as a matter of law." It bases this on its contention that Mrazek's losses relating to his other business ventures were not within the contemplation of the parties when the original lease agreement was executed. Mrazek responds that the damages he suffered were a natural and probable consequence of the Bank's actions—including its breach of the lease agreement and failure to occupy the anchor location in the Corporate Centre development.

Wisconsin has long adhered to the doctrine that damages in a breach of contract action "must compensate the wronged party for damages which arise naturally … from the wrong, and must be such as is 'reasonably to be supposed to have been in the contemplation of both parties at the time they made the contract ….'" ***Reiman Assocs., Inc. v. R/A Adver., Inc.,*** 102 Wis.2d 305, 320, 306 N.W.2d 292, 300 (Ct. App. 1981) (quoted source omitted). Furthermore, the question of what constitutes consequential damages is not a discretionary

determination, but is a question of fact. *See* ***Kersten v. H.C. Prange Co.,*** 186 Wis.2d 49, 59, 520 N.W.2d 99, 103 (Ct. App. 1994). This court must sustain a damages award if there is any credible evidence that under any reasonable view supports it and removes the issue from the realm of conjecture. *See* ***id.*** at 59-60, 520 N.W.2d at 103.

There was evidence presented that the Bank had an extensive, intimate and long-standing financial relationship with Mrazek and had loaned him money for several of his ongoing development projects at the time of the alleged breach. Kis, a bank officer, admitted that he had knowledge of Mrazek's business ventures and his relationship with other financial institutions. He also testified that he was familiar with Mrazek's "total loan portfolio."

In addition to the above, Mrazek testified that when Kis came to him on behalf of the Bank to tell him the Bank would not be occupying the Corporate Centre site, Kis told him a statement to the effect that "you know, Joe, you don't want to get cute, because the amount of loans and everything that you have with the bank, basically they could make things rough on me." He also stated that although he asked Kis to keep the news of the Bank's decision not to move into the Corporate Centre location out of the newspaper, shortly thereafter an article appeared in the paper with the title, "First Southeast Nixes Branch," and quoted Kis.

Mrazek also testified that due to the Bank's failure to occupy and pay rent as of May 1991, he experienced "immediate cash flow problems" for which he sought a loan of $250,000. The loan amount was to pay outstanding bills relating to the Corporate Centre project; the Bank denied the loan request. Based on all of the evidence presented—the Bank's intimate knowledge of

Mrazek's financial dealings, Mrazek's extensive testimony about his financial difficulties in the immediate aftermath of the Bank's announcement that it would not anchor the Corporate Centre project, and his testimony that suggested that the Bank utilized its "inside" information in its dealings with him in order to forestall litigation of the breach issue—we conclude that the jury's consideration of the issue of consequential damages was proper.

*Causation*

The Bank's next damages issue concerns causation. The Bank claims that there was no evidence presented that Mrazek's damages were caused by the Bank's failure to occupy the Corporate Centre site.

The question of what constitutes consequential damages is not a discretionary decision, but is a question of fact. *See* ***Kersten,*** 186 Wis.2d at 59, 520 N.W.2d at 103. This court must sustain a damages award if there is any credible evidence that under any reasonable view supports it and removes the issue from the realm of conjecture. *See* ***id.*** at 59-60, 520 N.W.2d at 103. Also, the weight and credibility given to the opinions of expert witnesses are uniquely within the province of the fact finder. *See* ***Schorer,*** 177 Wis.2d at 396, 501 N.W.2d at 919.

The jury heard extensive testimony from Gray who rendered an opinion of the financial damage Mrazek had suffered after the breach of the Corporate Centre lease. A real estate development expert, Barry Peterson, testified about Mrazek's historical ability to withstand difficult financial times and continue new development. He offered his opinion that Mrazek's reputation as a developer was severely damaged because the breach by the Bank made Mrazek look "foolish" in the eyes of the financial community. He explained that "[t]o

develop a special use property for a tenant such as a bank and not to have the deal totally tied down is a sign of inexperience and foolishness in the real estate project."

June Lemke, one of Mrazek's long-time employees, also testified as to the impact of the problems with the Bank on Mrazek's developments. She explained that various concessions were made to attract tenants to the Corporate Centre development after the Bank announced it would not be occupying the anchor position. The testimony of Peterson and Lemke, coupled with Gray's analysis of the timing of the financial impact on Mrazek's business enterprises, leads us to conclude that there was sufficient credible evidence whereby a jury could find that Mrazek's financial reversals were caused by the Bank's breach and subsequent actions.

*Proof of Lost Profits*

The Bank also disputes the award of $2.5 million claiming that "Mrazek has failed to make the showing required in order to prove lost profits, and accordingly, there is no evidence in the record supporting the jury's $2.5 million award." The Bank argues that Mrazek failed to make the requisite showing of "reasonable certainty" in proving his damages to his other business developments.

Gray testified as to the extent of damages to Mrazek's business holdings. Gray described the methodology he used as a "macro appraisal of damages to Mr. Mrazek's overall business" and described this as a "traditional approach" in evaluating money damages. He also stated that he had used this approach in other cases. Gray offered two means of assessing the financial damage Mrazek endured after the Bank's breach. Under one formulation, the "projected net worth" method, Gray calculated the loss based on the past growth

rate of Mrazek's developments over the fourteen years prior to 1991. He then made an assumption that it was reasonably probable that Mrazek would sustain this same rate of growth after 1991 and calculated Mrazek's damages as $6.9 million. This was the difference between the present net worth of Mrazek's holdings and the projected net worth. Gray also proposed a more conservative damages figure of $3.7 million based on an assumption that Mrazek had invested his net worth as of 1991 in United States Treasury Bills. This second analysis was used for illustrative purposes only.

In contrast to the detailed testimony of Gray, the Bank's expert witnesses all admitted on cross-examination that they had not calculated any damages suffered by Mrazek. One expert conceded that he was hired to "poke holes" in Gray's analysis. He provided extensive testimony which questioned the "macro" approach utilized by Gray. Another expert opined that the cause of Mrazek's cash flow problems in the early nineties was the operation of the carpet store and the fact that Mrazek was holding onto a lot of vacant land which he had purchased with borrowed funds, and the vacant land was not producing any revenue.

The issue of lost profits damages must be addressed on a case-by-case basis; if a claimant can present credible evidence of "business history and business experience" that is sufficient to allow a fact finder to ascertain future profitability with reasonable certainty, such damages can be recoverable. *See* ***T & HW Enters. v. Kenosha Assocs.,*** 206 Wis.2d 590, 604 n.6, 557 N.W.2d 480, 485 (Ct. App. 1996). If the finder of fact accepts the testimony of one expert over that of another, and the fact finder's conclusion is sufficiently supported by the one expert's testimony, that finding must be sustained. *See* ***Schorer,*** 177 Wis.2d at 397, 501 N.W.2d at 919.

Our review of the evidence in this case makes it apparent that the jury was presented with conflicting testimony as to the extent of Mrazek's business problems after 1991. Gray stated that according to his calculations, Mrazek's business reversals totaled $6.9 million; other experts suggested that Mrazek had not suffered any damages as a result of the breach. The jury ultimately chose a figure, $2.5 million, which was less than the amount Gray had postulated, but also indicated that the jury agreed with Gray's position that Mrazek had suffered some damages. We conclude that there is sufficient credible evidence to support the award.

Finally, the Bank places before us these remaining claims of error: (1) the failure to give a jury instruction on mitigation of damages, (2) the denial of the Bank's request to set off its payments made under the rescinded settlement agreement against the damages awarded, and (3) the denial of a new trial in the interests of justice. We consider each in turn.

*Jury Instruction on Mitigation of Damages*

The Bank contends that the trial court erred by denying its request to submit a mitigation of damages instruction to the jury. A trial court has broad discretion when instructing the jury. *See* ***Fischer v. Ganju,*** 168 Wis.2d 834, 849, 485 N.W.2d 10, 16 (1992). If the instructions given by a trial court adequately cover the law applicable to a case, this court will not find error in its refusal to give another instruction, even though the sought-after instruction was not erroneous. *See* ***Imark Indus., Inc. v. Arthur Young & Co.,*** 141 Wis.2d 114, 129, 414 N.W.2d 57, 64 (Ct. App. 1987).

The trial court denied the request for the mitigation of damages instruction because it found that "there is no objective evidence that would allow a

reasonable jury acting reasonably to conclude that the steps taken were not reasonable." The court went on:

> I kept waiting for someone from the defense side to say yes, they listened to what was done by the plaintiff but he should have done X, Y or Z and … I don't recall hearing that at all … if the jury were to say no, he should have done something else that would put the jury in the position of speculating and conjecturing and, therefore, that is not a proper position for the jury to be in ….

We conclude that there is no error in the trial court's discretionary decision to forego such an instruction.

*Repayment of Monies Paid Pursuant to Settlement Agreement*

The Bank claims that the trial court erred when it did not order Mrazek to repay the lease payments made by the Bank pursuant to the settlement agreement as a set off to the damages he was awarded.[14] The Bank brought a motion for repayment at the close of the first trial, which was prior to the assessment of any damages. At that time the trial court reasoned that restitution was not appropriate because the Bank "[did] not have clean hands." The Bank claims that because the settlement agreement was rescinded, it should be permitted to set off its payments under the settlement against the damages awarded to Mrazek for its breach. We agree.

In the complaint, Mrazek's first claim was for "CANCELLATION/RECISSION" and he specified, "**WHEREFORE,** plaintiff hereby requests that this Court make a proper judicial declaration that the

[14] Over the five-year term of the original lease agreement, Mrazek had received $143,910 in lease payments.

Agreement in question is null and void and of no force and effect between the parties and cancel the same." The jury instructions in the first trial provided:

> **3068 VOIDABLE CONTRACTS: DURESS**
>
> There must be full and free consent by the parties to the terms of a contract. If consent of a party is gained through duress, that party may either avoid or ratify the contract.

Mrazek's cause of action required, as a first step, that the settlement agreement be rescinded. The legal reason he brought for setting aside that agreement was that it was the result of duress, and that at the time he signed it the Bank had him in a position that left him with no choice. The jury agreed. Had Mrazek's lawsuit stopped at this point, the trial court's analysis that the Bank could not seek the return of the settlement monies paid because it did not have "clean hands" in obtaining the agreement would have been a proper discretionary determination.

Instead, the jury's finding that the settlement agreement should be rescinded was only the first "building block" of Mrazek's cause of action. The next step was to bring a claim of breach of contract which, if proved, opens the door to a claim of damages. Although the issue of the breach will be retried as a result of this decision, the trial court ultimately concluded that the Bank had breached the lease agreement and the case proceeded, giving Mrazek an opportunity to prove his damages. As a result of the second trial, damages of $2.5 million have been awarded and subsequently affirmed by this court.

Mrazek sought in his complaint to rescind the settlement agreement and set it aside. General contract principles permit a party to rescind an agreement if the agreement itself is invalid due to fraud or duress. *See* ***Continental Assurance Co. v. American Bankshares Corp.,*** 540 F. Supp. 54, 59 (E.D. Wis. 1982). If the grounds for avoidance of the contract have been met and the contract

is rescinded, "each party is to return to the other such benefits as have been received from the other." ***First Nat'l Bank & Trust Co. v. Notte,*** 97 Wis.2d 207, 225, 293 N.W.2d 530, 539 (1980). "A party who seeks to rescind an entire contract, because of fraud committed by the other party thereto, must return, or offer to return, whatever he has received under it. 'He cannot hold on to such part of the contract as may be desirable on his part and avoid the residue, but must rescind *in toto* if at all.'" ***Van Trott v. Wiese,*** 36 Wis. 439, 448 (1874) (quoted source omitted).

Although Mrazek points to case law that states that when a party's "culpable negligence in a business transaction results in its own harm, a court of equity may leave the parties as it finds them," ***State Bank of Drummond v. Christophersen,*** 93 Wis.2d 148, 160, 286 N.W.2d 547, 553 (1980), this case is not controlling. Because of the posture of the instant case, Mrazek's action in setting aside the original settlement agreement does not sound in equity. As we explained above, Mrazek's goal was to move beyond the settlement agreement to litigate and prove the breach of contract claim and damages. If he successfully proves the claim of breach on retrial, the final judgment should reflect an accounting of the money he received under the settlement agreement.

*Request for a New Trial*

In its final claim of error, the Bank argues that the trial court erred in denying its request for a new trial. *See* § 805.15(1), STATS. In postverdict motions, the Bank had sought to change the jury award from $2.5 million to $0 and a new trial on the ground that the jury's award was contrary to law and excessive. Because of our analysis of the damages portion of the trial and our conclusion that the jury's award was based on credible evidence, we need not consider this final challenge.

In sum, we affirm the jury's finding that the settlement agreement was the result of duress. We affirm the award of damages, but reverse the trial court's ruling regarding the Bank's request to recoup its payments made under the rescinded settlement agreement. We also reverse the judgment as to the finding of breach in the first trial and remand for a new trial on that issue in the interests of justice.

Costs are denied to both parties.

*By the Court.*—Judgment affirmed in part; reversed in part and cause remanded.

Not recommended for publication in the official reports.

**No. 96-1961(C)**

NETTESHEIM, J. *(concurring).* I agree with the majority's conclusions as to all of the appellate issues. However, I disagree with portions of the majority's discussion regarding the breach of lease.

Although the majority opinion has presented a lengthy and thorough analysis of the facts and law, I contend that the resolution of this issue can be more succinctly stated: the jury's answers to questions two and three are inconsistent as to whether the Bank breached the lease. As a result, we do not know who won or who lost this case. A new trial on this question is necessary.

Mrazek's theory of his case was as follows: (1) the Bank reneged on its obligation to take occupancy under the lease; (2) the Bank's reliance on the OCC's refusal to grant approval of the project was pretexual; and (3) as a result, Mrazek lost the Bank as his anchor tenant, thereby producing substantial financial damage. However, Mrazek faced a threshold obstacle: he and the Bank had previously settled their dispute over the lease by entering into a settlement agreement. Thus, Mrazek had to first convince the jury that the settlement agreement should be rescinded. If he failed on that issue, Mrazek was out of court. However, if he prevailed on that issue, then the lease was back in play and Mrazek then had to convince the jury that the Bank had breached the lease.

The Bank's theory of defense was that the settlement agreement should not be set aside, and, even if it were, the Bank did not breach the lease because it never received the requisite OCC approval to operate a branch bank at

the Corporate Centre. Alternatively, the Bank contended that the payments it had made to Mrazek satisfied its obligations under the lease.

Mrazek prevailed with the jury on the rescission question. Thus, the jury turned to the next question: whether the Bank breached the lease. Unfortunately, questions two and three of the special verdict created the opportunity for the jury to provide inconsistent answers on this critical issue. Question No. 2 asked whether the Bank agreed to occupy the Corporate Centre premises. The jury answered, "Yes." Question No. 3 asked whether the Bank breached the lease. The jury answered, "No." The jury's "Yes" answer to Question No. 2 supports Mrazek's claim that the Bank breached the lease by failing to occupy the Corporate Centre. However, the jury's "No" answer to Question No. 3 supports the Bank's claim that it did not breach the lease because it did not receive the requisite OCC approval.

In the postverdict proceedings and on appeal, each party relies on the particular answer which supported its theory. The Bank reasons that Question No. 2 was essentially a superfluous inquiry because the Bank never disputed that the lease, by its very terms, obligated the Bank to occupy the premises. As such, the Bank contends that Question No. 2 had nothing to do with the critical issue in this case—whether the Bank breached the lease. Instead, the Bank contends that Question No. 3, which inquired whether the Bank breached the lease, was the controlling verdict question. Since the jury answered "No" to that question, the Bank reasons that it should win this case.

But Mrazek says that Question No. 2 embodied a deeper inquiry than simply whether the Bank agreed in the lease to occupy the premises. According to Mrazek, the Bank was not only required to make the lease payments,

*but also to actually occupy the premises as the anchor tenant.* Mrazek contends that Question No. 2 was targeted at the Bank's alternative defense that the payments which the Bank had made to Mrazek satisfied its obligations under the lease and relieved the Bank from its obligation to occupy. As such, Mrazek contends that Question No. 2 governs this case and that Question No. 3 became superfluous. Since the jury answered Question No. 2 "Yes," Mrazek reasons that he should win this case.

The trial court's remedy for this dilemma was to change the jury's answer to Question No. 3. But, as the majority correctly holds, this ruling was error because certain of the evidence shows that the Bank never received the requisite approval from the OCC to open a branch at the Corporate Centre. Since we are compelled to reverse the trial court's change of this answer, we are now faced with the original dilemma created by the jury's inconsistent answers. The remedy for an inconsistent verdict is a new trial. *See* ***Westfall v. Kottke***, 110 Wis.2d 86, 94, 328 N.W.2d 481, 486 (1983).

The majority opinion also surmises that the evidence concerning the parties' settlement agreement affected the jury's assessment of whether the Bank breached the lease. The majority also suggests that the trial court should have delivered a limiting instruction to the jury to avoid this problem. The majority's surmise, however, has nothing to do with the fundamental problem in this case—the structure and wording of the special verdict. Even if the trial court had given the limiting instruction suggested by the majority, the special verdict still invited the hopelessly inconsistent answers with which we are faced.

I respectfully concur.