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STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF THE DISCIPLINARY PROCEEDINGS AGAINST	:	
	:	FINAL DECISION AND ORDER
JAMES F. TAFF,	:	
TAFF AND TAFF BUILDERS, INC.,	:	(93 REB 069)
RESPONDENTS.	:	LS 9307161 REB

The parties to this action for the purposes of Wis. Stats. sec. 227.53 are:

James F. Taff
601 North Sherman Street
Madison, WI 53704

Taff and Taff Builders, Inc.
601 North Sherman Avenue
Madison, WI 53704

Wisconsin Department of Regulation and Licensing
Division of Enforcement
P.O. Box 8935
Madison, WI 53708-8935

The parties in this matter agree to the terms and conditions of the attached Stipulation as the final disposition of this matter, subject to the approval of the Real Estate Board ("Board"). The Board has reviewed the Stipulation and considers it acceptable.

Accordingly, the Board adopts the attached Stipulation and makes the following:

FINDINGS OF FACT

1. James F. Taff ("Taff"), 601 North Sherman Avenue, Madison, Wisconsin 53704, is and was at all times relevant to the facts set forth herein a real estate broker licensed to practice in the State of Wisconsin pursuant to license #11297, originally granted on August 17, 1960.

2. Taff and Taff Builders, Inc., ("T & T"), 601 North Sherman Avenue, Madison, Wisconsin 53704, is and was at all times relevant to the facts set forth herein a real estate corporation licensed to practice in the State of Wisconsin pursuant to license #12008, originally granted on December 27, 1974.

3. At all times relevant to the facts set forth herein Taff was an officer and employee of T & T and is currently the president of that corporation.

4. On or about June 21, 1990, in the Circuit Court for Dane County, Wisconsin in case number 88CV690, after a trial by jury, judgment was entered against Taff and T & T in favor of the plaintiff Fred R. Nelson ("Nelson").

5. The Judgment in case number 88CV690 found that Nelson was entitled to judgment against Taff and T & T due to fraudulent misrepresentation and violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. Section 1962, and the Wisconsin Organized Crime Control Act, Section 946.86, of the Wisconsin Statutes. The Judgment awarded Nelson the sum of 1,514,326.20 in damages. A copy of the Order for Judgment and Judgment in case 88CV690 is attached as Exhibit A and incorporated in this document as if set forth at length.

6. On or about March 4, 1993 the Court of Appeals, District 4 for the State of Wisconsin, affirmed the Judgment of the Dane County Circuit Court in case 88CV690. A copy of the decision in the Court of Appeals is attached hereto as Exhibit B and incorporated herein as if set forth at length.

7. The circumstances of the conduct which constituted the grounds for judgment against Respondents substantially relate to the practice of a real estate broker.

8. The conduct of Respondents which constituted the grounds for judgment against Respondents constitutes improper, fraudulent or dishonest dealing by Respondents.

CONCLUSIONS OF LAW

9. The Wisconsin Real Estate Board has jurisdiction to act in this matter pursuant to sec. 452.14, Wis. Stats.

10. The Wisconsin Real Estate Board is authorized to enter into the attached Stipulation pursuant to sec. 227.44(5), Wis. Stats.

11. Respondent James F. Taff has violated:

a. Section RL 24.17(1) and sec. 452.14(3)(i), Wis. Stats., by violating a law, as set forth above, the circumstances of which substantially relate to the practice of a real estate broker or salesperson.

b. Section 452.14(k) by having been found guilty of conduct which constitutes improper, fraudulent or dishonest dealing in a manner which substantially relates to the practice of a real estate broker.

12. Respondent Taff and Taff Builders, Inc., has violated:

a. Section RL 24.17(1) and sec. 452.14(3)(i), Wis. Stats., by violating a law, as set forth above, the circumstances of which substantially relate to the practice of a real estate broker or salesperson.

b. Section 452.14(k) by having been found guilty of conduct which constitutes improper, fraudulent or dishonest dealing in a manner which substantially relates to the practice of a real estate broker.

13. Taff and Taff Builders, Inc., is subject to discipline, in addition to the above, as a consequence of section 452.14(4) of the Wisconsin Statutes.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, that the attached Stipulation is accepted.

IT IS FURTHER ORDERED, that the VOLUNTARY SURRENDER of the real estate broker license of James F. Taff, license #11297, is accepted and, effective on the date of this Order, all rights and privileges held by James F. Taff pursuant to that license are terminated.

IT IS FURTHER ORDERED, that the VOLUNTARY SURRENDER of the real estate broker license of Taff and Taff builders, Inc., is accepted and, effective on the date of this Order, all rights and privileges held by Taff and Taff Builders, Inc., pursuant to that license are terminated.

IT IS FURTHER ORDERED, that neither James F. Taff or Taff and Taff Builders, Inc., shall be issued a credential under Chapter 452 of the Wisconsin Statutes for a period of two years from the date of this Order

IT IS FURTHER ORDERED, that Division of Enforcement file 93 REB 069 be, and hereby is closed.

Dated this 23RD day of September, 1993.

WISCONSIN REAL ESTATE BOARD

BY: _____

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STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

FRED R. NELSON

Plaintiff,

vs.

JAMES M. TAFF,
TAFF & TAFF BUILDERS, INC.

Defendants.

MJ 49-34

Case No. 88-CV-0690

ORDER FOR JUDGMENT AND JUDGMENT
Chapter 806, Wis. Stats.

This matter came before the Court on plaintiff's motion for judgment on the verdict and on defendant's post-verdict motions, including a motion to dismiss the action, to change answers in the verdict, to grant a new trial, to grant a judgment notwithstanding the verdict, and to grant a directed verdict. Having considered the record in this case, including the parties' pleadings and briefs, the evidence presented during the five-day jury trial commencing on April 16, 1990, and the verdict returned by the jury on April 20, 1990, the Court rendered its Decision on post-verdict motions June 21, 1990, denying the defendants' motions and ruling that the plaintiff is entitled for defendants' fraudulent misrepresentation and violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962, and the Wisconsin Organized Crime Control Act, § 946.86, Wis. Stats., to recover One Million Five Hundred Fourteen Thousand Three Hundred Twenty-six and 20/100 Dollars ($1,514,326.20) in treble damages.

60-1

Exhibit "A"

Plaintiff is further entitled to judgment for his attorneys' fees. This judgment is entered pursuant thereto.

PARTIES

The plaintiff, Fred R. Nelson, is an adult residing at 2618 North Nine Mound Road, Verona, Dane County, Wisconsin, 53593, and is an employee of Nelson Mink Farm, Inc., engaged in the business of breading and raising mink livestock.

The defendant, James F. Taff, is an adult whose address is Genrich Road, Route 2, Rio, Lowville Township, Columbia County, Wisconsin, 53560; he is the President of Taff & Taff Builders, Inc., and is, upon information and belief, a real estate broker licensed by the State of Wisconsin and is engaged in the real estate development and sales business and the construction industry.

The defendant, Taff & Taff Builders, Inc., is, upon information and belief, a Wisconsin corporation with offices located at 6 Maplewood Lane in the City of Madison, Dane County, Wisconsin, 53704, and is engaged in the real estate development and sales business and the construction industry.

NOW, THEREFORE, upon the jury verdict returned on April 20, 1990, and the Court's June 21, 1990 Decision,

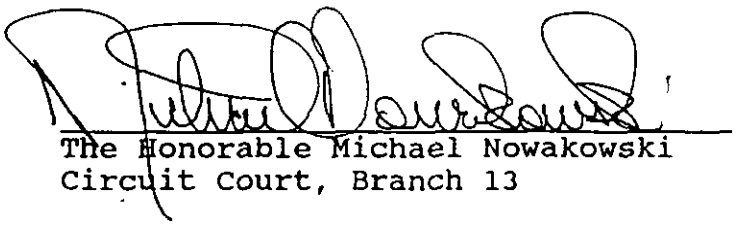
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

The plaintiff, Fred R. Nelson, shall have and recover from the defendants, James F. Taff and Taff & Taff Builders, Inc., jointly and severally, the sum of One Million Five Hundred Fourteen Thousand Three Hundred Twenty-six and 20/100 Dollars

after June 21, 1990, under Wis. Stats. §§ 814.04(4) and 815.05(8), together with actual attorneys' fees and costs taxed by the Clerk of Courts under Chapter 814, Stats.

Dated this 21 day of June, 1990.

BY THE COURT:



The Honorable Michael Nowakowski
Circuit Court, Branch 13

COURT OF APPEALS
DECISION
DATED AND RELEASED

March 4, 1993

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant to s. 808.10 within 30 days hereof, pursuant to Rule 809.62(1)

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 91-2451

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

FRED NELSON,

Plaintiff-Respondent,

v.

JAMES TAFF, AND
TAFF & TAFF BUILDERS, INC.,

Defendants-Appellants.

APPEAL from a judgment and an order of the circuit court for Dane county: MICHAEL N. NOWAKOWSKI, Judge. *Affirmed.*

Before Gartzke, P.J., Dykman and Sundby, JJ.

DYKMAN, J. James Taff and Taff & Taff Builders, Inc. appeal from a judgment for $1,514,326 plus costs and attorneys' fees of approximately $22,000, and from an order denying relief under sec. 806.07, Stats., from that judgment. Taff

Exhibit "B"

asserts that the trial court erred by refusing to direct a verdict, by refusing to give a requested instruction and by denying relief from the judgment. We affirm.

In 1978, Peter Dwyer, Tilman Christianson and Donald Raffel formed the PDT Partnership to develop land at the corner of North Sherman and Aberg Avenues in Madison. James Taff became involved with the partnership, and Taff & Taff became the general contractor for the project known as "Maple Wood Condominium Homes." Various witnesses testified that James Taff was a partner in the project, that the entity formed was a general partnership and that James Taff was well aware that the partnership was not a limited partnership.

Between June 1978 and April 1979, PDT brought in ten "investors" who each contributed $10,000 to the project. There was conflicting testimony, but the jury believed Fred Nelson, who testified that in February 1979, he and his wife had a meeting with James Taff, at Poole's supper club, just across the street from the project. Nelson and his wife were interested in the project but they quizzed Taff on the nature of the interest they could buy. Taff told them that they would be purchasing a limited partnership interest. Nelson pressed Taff on the subject, inquiring as to what would happen if the project failed. Taff explained that the project would not fail because of his experience and reputation, but that if it did, the Nelsons' exposure would be limited to their $10,000 investment.

Maple Wood failed. The partnership filed a petition in bankruptcy. The partnership's bankruptcy trustee sued Nelson, alleging that Nelson was a partner in Maple Wood and liable for its debts. Ultimately, the trustee obtained a judgment against Nelson for nearly $400,000. Unable to pay the judgment, Nelson began this action against James Taff and Taff & Taff, alleging fraud, violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968, and the Wisconsin Organized Crime Control Act, secs. 946.80 - 946.88, Stats.

The jury found that James Taff either knowingly made a false representation to Nelson, or he did so recklessly, without caring whether it was untrue. It found that Taff intended to deceive Nelson, and that Taff made the statement to induce Nelson to act on it. The jury decided that Nelson believed Taff's false representation and relied on it to his damage. Taff had stipulated that Nelson was damaged in the amount of the $400,000 judgment, and the jury found additional damages of $105,000. As required by RICO, the trial court trebled the jury's verdict and entered judgment against James Taff and Taff & Taff for $1,514,326 plus costs and Nelson's actual attorneys' fees. *See* 18 U.S.C. § 1964(c).

After judgment was entered, Nelson negotiated a settlement of the trustee's judgment against him. In exchange for paying $16,000 and relinquishing a $700 claim against PDT, Nelson received a satisfaction of the $400,000 judgment.

James Taff and Taff & Taff moved for relief under sec. 806.07(1)(f)-(h), Stats. The trial court denied the motion, and this appeal resulted.

DIRECTED VERDICT

James Taff asserts that any statements he made concerning the nature of the partnership were representations of law, and therefore not actionable. He concludes that the trial court erred by not granting him a directed verdict at the end of the plaintiff's case.

Misrepresentations of law are generally not actionable as fraud. ***Bentley v. Fayas***, 260 Wis. 177, 184, 50 N.W.2d 404, 408 (1951). But there are exceptions to this rule. ***Ritchie v. Clappier***, 109 Wis.2d 399, 402, 326 N.W.2d 131, 133 (Ct. App. 1982).

> "It is not ... universally true that a misrepresentation of the law is not binding upon the party who made it.... Where one who has had superior means of information professes a knowledge of the law, and thereby obtains an unconscionable advantage of another who is ignorant and has not been in a situation to become informed, the injured party is entitled to relief as well as if the misrepresentation had been concerning matter of fact."

Id. (quoting ***Rusch v. Wald***, 202 Wis. 462, 464, 232 N.W. 875, 876 (1930)).

Other authority also holds that the general rule is not as rigid as Taff suggests. In *Sawyer v. Pierce*, 580 S.W.2d 117, 125 (Tex. Civ. App. 1979), the court said:

> One notable exception to the general rule is that where one party who possesses superior knowledge as to the law takes advantage of the other party's ignorance in that respect, and intentionally makes a misrepresentation concerning the law for the purpose of deceiving the other party and actually succeeds in that respect, [the person making the fraudulent misrepresentation] may be held responsible for his conduct.

In *Miller v. Osterlund*, 191 N.W. 919, 919 (Minn. 1923), the court said:

> But it is not always easy to classify representations as of law or fact, often they are of mixed law and fact, and courts should not be too indulgent of defendants who have made misrepresentations as to matters of which they should be expected to have knowledge, and of which the other party ordinarily would not have knowledge. A misrepresentation though involving [a] matter of law will be held actionable if it amounts to an implied assertion that facts exist that justify the conclusion of law which is expressed.

In *National Conversion Corp. v. Cedar Bldg. Corp.*, 246 N.E.2d 351 (N.Y. 1969), the court commented on the modern trend that requires frauds to suffer the consequences of their acts:

> Most important it is that the law has outgrown the over-simple dichotomy between law and fact in the resolution of issues in deceit. It has been said that "a statement as to the law, like a statement as to anything else, may be intended and understood either as one of fact or one of opinion only, according to the circumstances of the case."
>
> ....
>
> Moreover, the modern rule extends even further to cover a false opinion of law if misrepresented as a sincere opinion, as in the case of any other opinion, where there is reasonable reliance.

Id. at 355 (citations omitted).

RESTATEMENT (SECOND) OF TORTS § 545 (1977) also recognizes that misrepresentations of law are actionable:

> (1) If a misrepresentation as to a matter of law includes, expressly or by implication, a misrepresentation of fact, the recipient is justified in relying upon the misrepresentation of fact to the same extent as though it were any other misrepresentation of fact.
>
> (2) If a misrepresentation as to a matter of law is only one of opinion as to the legal consequences of facts, the recipient is justified in relying upon it to the same extent as though it were a representation of any other opinion.

Professor Prosser notes:

> The present tendency is strongly in favor of eliminating the distinction between law and fact as

> "useless duffle of an older and more arbitrary day," and recognizing that a statement as to the law, like a statement as to anything else, may be intended and understood either as one of fact or one of opinion only, according to the circumstances of the case. Most courts still render lip service to the older rule, but they have been inclined whenever possible to find statements of fact "implied" in representations as to the law.

W. PROSSER, LAW OF TORTS § 109, at 725 (4th ed. 1971) (footnotes omitted).

We conclude that whether the changing view as to the remedy for fraudulent misrepresentation of law is viewed as exceptions to the general rule, as we noted in ***Ritchie,*** or an elimination of the law-fact difference as noted by Prosser and the RESTATEMENT, the result is the same. One who misrepresents the law after professing a knowledge of the law will not be able to escape the consequences of his or her misrepresentation by asserting that that misrepresentation was one of law only.

A case should be taken from the jury and a verdict directed only if the evidence gives rise to no dispute as to material issues, or when the evidence is so clear and convincing that unbiased and impartial minds could reasonably come to but one conclusion. ***D'Huyvetter v. A.O. Smith Harvestore Products***, 164 Wis.2d 306, 331, 475 N.W.2d 587, 596 (Ct. App. 1991). We therefore examine the evidence that Nelson produced to determine whether, under the standard we have just discussed, there was a complete lack of evidence that James Taff misrepresented to the Nelsons the nature of the partnership developing Maple Wood.

James Taff admitted that on June 8, 1978, Taff & Taff builders signed a contract with PDT for the construction of Maple Wood. He signed the contract. PDT's partnership agreement, dated June 5, 1978, was signed in Taff's office. Taff read the partnership agreement and asked whether it was a limited or a general partnership. He was told that the partnership was a general partnership, and he believed that it was a general partnership. We have already discussed Nelson's testimony as to James Taff's statements to him and his wife in February 1979. We conclude that the trial court did not err when it denied James Taff's motion for a directed verdict at the end of Nelson's case.

JURY INSTRUCTION

James Taff's assertion that the trial court erred by submitting an erroneous jury instruction on misrepresentation is closely tied to his previous assertion that misrepresentations of law are not actionable. The trial court has wide discretion in instructing a jury, and if its instructions adequately cover the law, there is no erroneous exercise of discretion when the court refuses to give a requested instruction, even if the proposed instruction is correct. ***In Interest of D.P.***, 170 Wis.2d 313, 331, 488 N.W.2d 133, 140 (Ct. App. 1992). The four factors James Taff included in his requested jury instruction are contained in the instruction given, Wis J I--Civil 2401, albeit in a different order and worded somewhat differently.[1]

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[1] James Taff's requested instruction reads:

(continued...)

We conclude that Wis J I--Civil 2401 correctly states the law of misrepresentation and intentional deceit. The trial court did not erroneously exercise its discretion by using that instruction rather than the one James Taff submitted.

RELIEF FROM JUDGMENT

Nelson settled the trustee's judgment against him for a fraction of its amount. Defendants moved for relief from the judgment under sec. 806.07(1)(f)-(h), Stats. The trial court denied the motion. On appeal, defendants have abandoned the argument that sec. 806.07(1)(f) is applicable to them.

Section 806.07(1), Stats., reads in relevant part as follows:

> On motion and upon such terms as are just, the court may relieve a party or legal representative from a judgment ... for the following reasons:

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[1](...continued)

> If you find that the defendant Taff misrepresented to plaintiff that if he became a partner in PDT the most he could lose was the amount of his investment, you may find defendant liable to plaintiff only if you find each of the following statements to be true:
>
> (1) Plaintiff acted with prudence and diligence.
>
> (2) The defendant misle[d] or deceived the plaintiff.
>
> (3) There existed a relationship of trust and confidence between the plaintiff and the defendant; and
>
> (4) The defendant possessed superior knowledge and skill as compared to the plaintiff.

....

> (g) It is no longer equitable that the judgment should have prospective application; or
>
> (h) Any other reasons justifying relief from the operation of the judgment.

A circuit court's order denying a motion for relief under sec. 806.07, Stats., will not be reversed on appeal absent an erroneous exercise of discretion. *State ex rel. M.L.B. v. D.G.H.*, 122 Wis.2d 536, 541, 363 N.W.2d 419, 422 (1985). We will not find an erroneous exercise of discretion if the record shows that the trial court exercised its discretion and that there is a reasonable basis for its decision. *Id.* at 542, 363 N.W.2d at 422.

Section 806.07(1)(g), Stats.

For assistance in construction of sec. 806.07, Stats., we may refer to federal cases interpreting Rule 60(b) of the Federal Rules of Civil Procedure, upon which sec. 806.07 is based. *M.L.B.*, 122 Wis.2d at 542, 363 N.W.2d at 422.

In *Kock v. Government of Virgin Islands*, 811 F.2d 240 (3d. Cir. 1987), the court explained that the "no longer equitable" clause of Rule 60(b)(5) refers to the powers of a court of equity:

> The permissible revision of a decree having prospective effect is materially and legally different from the impermissible alteration of a final judgment having conclusive, res judicata effect. In the instant case, the

> judgment initially entered was final at law, and not prospective in equity. Thus, the defendant was not entitled to relief under Rule 60(b)(5).

Id. at 244-45 (citation omitted).

We conclude that sec. 806.07(1)(g), Stats., applies only to equitable actions in which the decree has a prospective effect. Because this is an action at law, relief under sec. 806.07(1)(g) is not available to defendants. The trial court therefore did not erroneously exercise its discretion by refusing to grant relief pursuant to this subsection.

Section 806.07(1)(h), Stats.

We are to be mindful that finality of judgments is important, and that sec. 806.07(1)(h), Stats., should be used "only when the circumstances are such that the sanctity of the final judgment is outweighed by 'the incessant command of the court's conscience that justice be done in light of *all* the facts.'" *M.L.B.*, 122 Wis.2d at 550, 363 N.W.2d at 426 (quoting ***Bankers Mortgage Co. v. United States***, 423 F.2d 73, 77 (5th Cir.), *cert. denied*, 399 U.S. 927 (1970)). The trial court considered this law and applied it to the facts of this case.

The trial court explained, for five pages, the various factors it felt were applicable. It noted that it was undisputed that James Taff had filed a voluntary petition in bankruptcy, lessening the effect on him of a grant of relief. It observed that the settlement was obtained through the work of Nelson and his counsel, not

James Taff. The court felt it would not be fair for the benefits of this negotiation to fall to defendants. The court noted that in punitive damage and collateral source cases, plaintiffs recover more than their damages, so that the result in this case was not unique. The trial court was concerned that if relief were granted when an error was made in predicting future damages, many personal injury cases would have to be reopened under such a rule.

The trial court was impressed with the fact that defendants stipulated to the nearly $400,000 judgment as being a measure of Nelson's damages. We, too, are impressed with that fact. Had defendants desired, they could have taken the position at trial that they do in their sec. 806.07(1)(h), Stats., motion. True, defendants had no way to know that a settlement in the amount of $16,700 would occur. But they could have considered the likelihood that the trustee would settle her case against Nelson for a reduced amount. Discovery would have enabled defendants to ascertain that Nelson would obtain a substantial discount, and that likelihood could have been shown to the jury and argued as a means to reduce the verdict.

The trial court's opinion reasons from the facts of record and uses the proper legal standards to reach a conclusion based on logic. It is a textbook example of the proper exercise of judicial discretion. We affirm.

By the Court.--Judgment and order affirmed.

Recommended for publication in the official reports.

No. 91-2451(C)

GARTZKE, P.J. (*concurring*). According to the dissenting opinion, Nelson's damages should be recomputed. I disagree.

The parties stipulated that the judgment against Nelson for $399,775 was part of his damages in his action against Taff. It is irrelevant that Nelson was able later to settle that judgment after winning his suit against Taff. Judgment debtors and creditors frequently settle judgments for various reasons, sometimes for less and sometimes for more. How the market operates in that regard is not for our review. When Nelson successfully bought off the judgment for $16,000, he was entitled to act for his own benefit and not Taff's. It is of no more concern to us that Nelson settled the judgment for $16,000 than would be the fact that he could not settle for less than $399,775.

No matter what we do, a windfall will result to Nelson or to Taff. If we affirm the trial court's ruling, then Nelson has an enforceable judgment against Taff for $1,199,326 and he need not pay the trustee in bankruptcy the $399,775 judgment against him, all at a cost of $16,000. If the trial court recomputes Nelson's damages with an eye to excusing Taff from paying more than $16,000 or so, then Taff enjoys a windfall equal to the reduction.

Since a windfall will result no matter what we do, we should look to Taff's conduct and the law which gave rise to the $1,199,326 judgment against him.

The jury found that Taff intentionally made a false representation to Nelson, and that Nelson believed the misrepresentation and he relied on it. The jury found that a conspiracy existed to induce individuals to invest in the PDT Partnership under the false pretense that their total liability was limited to the loss of their investment, Taff was a member of that conspiracy, and Nelson was induced to invest in the partnership by the false pretense that his liability was limited to the loss of his investment. The jury found that Taff engaged in a pattern of racketeering activity and Nelson was damaged as a result. The law trebled the damages. Given the nature of Taff's conduct, and the law, I see no reason to give him a windfall on grounds that Nelson will otherwise enjoy a windfall.

SUNDBY, J. (*dissenting*). Nelson's damages included, by stipulation, a judgment against him by the federal bankruptcy court in the amount of $399,775.43. That amount was trebled under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962, and Wisconsin's counterpart, the Wisconsin Organized Crime Control Act (WOCCA), sec. 946.86, Stats., resulting in a judgment against the defendants (hereafter "Taff") which included the amount of $1,199,326.29. After judgment was entered herein, Nelson settled the bankruptcy court's judgment against him by paying the trustee $16,000 and giving up a claim valued at approximately $700. I conclude that the disparity between Nelson's stipulated damages, especially as trebled, and Nelson's actual damages presents an "extraordinary circumstance" entitling Taff to relief from the judgment under sec. 806.07(1)(h), Stats.[1]

Section 806.07, Stats., attempts to achieve a balance between the competing values of finality and fairness in the resolution of a dispute. ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis.2d 536, 542, 363 N.W.2d 419, 422 (1985). For

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[1] Section 806.07 provides:

> (1) On motion and upon such terms as are just, the court may relieve a party ... from a judgment, order or stipulation for the following reasons:
>
> ....
>
> (h) Any other reasons justifying relief from the operation of the judgment.

assistance in interpreting sec. 806.07(1)(h), Stats., and the analogous Federal Rule of Civil Procedure, Rule 60(b)(6), we may refer to Wisconsin cases interpreting the Wisconsin rule and federal cases interpreting the federal rule.

The United States Supreme Court has construed Rule 60(b)(6) [sec. 806.07(1)(h), Stats.] as requiring a showing of "extraordinary circumstances" before relief may be granted. *Klapprott v. United States*, 335 U.S. 601, *modified*, 336 U.S. 942 (1949), and *Ackermann v. United States*, 340 U.S. 193 (1950). The Wisconsin Supreme Court has adopted that test. *M.L.B.*, 122 Wis.2d at 549, 363 N.W.2d at 425.

In *Ennis v. Ennis*, 88 Wis.2d 82, 91, 276 N.W.2d 341, 344 (Ct. App. 1979) (citing *Klapprott*, 335 U.S. at 615), we concurred with the federal interpretation that sec. 806.07(1)(h), Stats., "must be liberally construed to allow relief from judgments 'whenever such action is appropriate to accomplish justice.'" *Ennis* is supported by *In re Smith*, 82 Wis.2d 667, 264 N.W.2d 239 (1978), and followed in *Conrad v. Conrad*, 92 Wis.2d 407, 284 N.W.2d 674 (1979). In *Smith*, the court sustained the exercise of the trial court's discretion under sec. 806.07(1)(h) to reopen a judgment entered in the course of a probate proceeding to correct what the trial court considered to have been an erroneous disposition of property. In *Conrad*, the court sustained the use of sec. 806.07(1)(h), Stats., to reopen a divorce judgment to reconsider the property division where the wife did not specifically agree

to an oral division of the property and immediately objected to a written order allegedly based on an oral agreement. Thus, the Wisconsin Supreme Court has approved the use of sec. 806.07(1)(h), Stats., to grant relief from a judgment where, because of changed circumstances, the interests of justice so require.

This is consistent with the federal courts' interpretation of Rule 60(b)(6). In *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 17-19 (1984), the Court held that the rule could be used to correct the value of condemned land because of a change in value between the determination of the condemnation commission in 1979, and the date of the taking in 1982.

In this case, it cannot be denied that there was an extraordinary change in Nelson's circumstances. At the time of trial, judgment had been entered against him by the federal bankruptcy court in the amount of almost $400,000. The trial court correctly ruled that damages are to be determined at the time of entry of judgment. But, as we have seen, where extraordinary circumstances intervene, the trial court may reopen a judgment to reflect the changed circumstances. In this case, I conclude that the disparity between the damages awarded Nelson because of his assumed liability on the bankruptcy court's judgment, especially as trebled, and his actual damages is so great that the trial court erroneously exercised its discretion when it denied Taff's motion to reopen the judgment to redetermine Nelson's

damages. Because of the trebling of Nelson's damages, he has received a windfall almost beyond belief.[2]

The jury found that Nelson's "other damages" were $105,000. This amount was also trebled. In addition, Nelson received an award for his attorney fees and expenses of litigation, in the amount of approximately $22,000. Further, I consider it significant that the jury did not find that Nelson was entitled to punitive damages. If there ever was a case in which the sanctity of the final judgment is outweighed by "the incessant command of the court's conscience that justice be done in light of *all* the facts," ***M.L.B.***, 122 Wis.2d at 550, 363 N.W.2d at 426, (quoting ***Bankers Mortgage Co. v. United States***, 423 F.2d 73, 77 (5th Cir.), *cert. denied*, 399 U.S. 927 (1970) (emphasis in original)), this is that case.

[2] The concurrence asserts that if Taff obtains relief from the judgment, he will get a "windfall." This assertion begs the question. In this sense, any defendant who obtains relief from a judgment gets a "windfall." But that is exactly the purpose of sec. 806.07, Stats. -- to grant relief (read "windfall") whenever equitable considerations so dictate. However, it is not the purpose of RICO or WOCCA to allow the trebling of non-existent damages. Nelson was never damaged in the amount of $399,775.43 as adjudged by the bankruptcy court; he was damaged in the amount of $16,700. Let the trial court exercise its discretion to treble that figure and the "other damages" of $105,000 found by the jury; Nelson ends up with $365,100 which is surely enough to satisfy the purposes of RICO and WOCCA, and, perhaps, to bankrupt Taff.

STATE OF WISCONSIN
BEFORE THE REAL ESTATE BOARD

IN THE MATTER OF THE DISCIPLINARY PROCEEDINGS AGAINST	:	
	:	STIPULATION
JAMES F. TAFF,	:	
TAFF AND TAFF BUILDERS, INC.,	:	(93 REB 069)
RESPONDENTS.	:	LS 9307161 REB

The undersigned parties in this matter agree and stipulate as follows:

1. This Stipulation is entered into for the purpose of resolving investigative case file 93 REB 069. This case is currently scheduled for a formal administrative disciplinary hearing before Administrative Law Judge John Schweitzer on September 28, 1993 as Disciplinary Action LS9307161REB. Upon the approval of this stipulation and issuance of the stipulated Order of the Wisconsin Real Estate Board ("Board"), this case will be closed and the attached Final Decision and Order will be issued.

2. Respondents James F. Taff and Taff and Taff Builders, Inc., ("Respondents"), understand that by the signing of this Stipulation they voluntarily and knowingly waive their rights, including: the right to a hearing on the allegations against them, at which time the State has the burden of proving those allegations; the right to confront and cross-examine the witnesses against them; the right to call witnesses on their behalf and to compel their attendance by subpoena; the right to file objections to any proposed decision and to present briefs or oral arguments to the officials who are to render the final decision; the right to petition for rehearing; and all other applicable rights afforded to them under the United States Constitution, the Wisconsin Constitution, the Wisconsin Statutes, and the Wisconsin Administrative Code.

3. Respondents have had the opportunity to consult with legal counsel regarding this matter and the legal implications of this Stipulation. Respondents are represented in this matter by Attorney Russell J. Mittelstadt, 326 South Hamilton Street, Madison, WI 53703.

4. Respondents voluntarily and knowingly waive the rights set forth in paragraph 2 above, on the condition that all of the provisions of this Stipulation are approved by the Board.

5. Respondents hereby offer to voluntarily surrender their credentials as real estate brokers and consent to the findings, terms and conditions of the attached Final Decision and Order. With respect to the attached Final Decision and Order, Respondents specifically admit the facts as set forth in the Findings of Fact, agree that the Board may make the Findings of Fact and may reach the Conclusions set forth in the Conclusions of Law and that the Board may enter the Order accepting the Voluntary Surrenders. Respondents further agree to the terms of the Order which establishes a two year period of time within which neither Respondent may be granted a credential under Chapter 452 of the Wisconsin Statutes.

6. If the terms of this Stipulation are not acceptable to the Board, the parties shall not be bound by the contents of this Stipulation or the proposed Final Decision and Order. The matter shall then be returned to the Administrative Law Judge for further proceedings. In the event that the Stipulation is not accepted by the Board the parties agree not to contend that the Board or the Administrative Law Judge have been prejudiced or biased in any manner by the consideration of this attempted resolution.

7. If the Board accepts the terms of this Stipulation, the parties to the Stipulation consent to the entry of the attached Final Decision and Order without further notice, pleading, appearance or consent of the parties.

8. Respondent agrees that Complainant's attorney, Charles J. Howden, may appear at any meeting with the Board with respect to the Stipulation but that his appearance is limited to statements in support of the Stipulation and to answer any questions the Board may have regarding the Stipulation. Respondent waives his right to have notice of that hearing and to be present at the meeting with the Board.

9. The Division of Enforcement joins Respondent in recommending that the Board adopt this Stipulation and issue the attached Final Decision and Order.

James F. Taff — Date: September 14, 1993

Taff and Taff Builders, Inc.,
By its President
James F. Taff — Date: September 14, 1993

Russell J. Mittelstadt, Attorney
for the Respondent
326 South Hamilton Street
Madison, WI 53703 — Date: September 14, 1993

Charles J. Howden, Attorney
Division of Enforcement — Date: 9/14/93

ATY2-4802
9/14/93

NOTICE OF APPEAL INFORMATION

(Notice of Rights for Rehearing or Judicial Review, the times allowed for each, and the identification of the party to be named as respondent)

The following notice is served on you as part of the final decision:

1. Rehearing.

Any person aggrieved by this order may petition for a rehearing within 20 days of the service of this decision, as provided in section 227.49 of the Wisconsin Statutes, a copy of which is attached. The 20 day period c mmences the day after personal service or mailing of this decision. (The date of mailing of this decision is shown below.) The petition for rehearing should be filed with the State of Wisconsin Real Estate Board.

A petition for rehearing is not a prerequisite for appeal directly to circuit c urt through a petition for judicial review.

2. Judicial Review.

Any person aggrieved by this decision has a right to petition for judicial review of this decision as provided in section 227.53 of the Wisconsin Statutes, a copy of which is attached. The petition should be filed in circuit court and served upon the State of Wisconsin Real Estate Board.

within 30 days of service of this decision if there has been no petition for rehearing, or within 30 days of service of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing.

The 30 day period commences the day after personal service or mailing of the decision or order, or the day after the final disposition by operation of the law of any petition for rehearing. (The date of mailing of this decision is shown below.) A petition for judicial review should be served upon, and name as the respondent, the following: the State of Wisconsin Real Estate Board.

The date of mailing of this decision is September 27, 1993.