COURT OF APPEALS
DECISION
DATED AND FILED

July 22, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-3100 **Cir. Ct. No. 99SC008224**

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

BUSINESS PARK DEVELOPMENT CO., LLC,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

MOLECULAR BIOLOGY RESOURCES, INC.,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Dane County: STUART A. SCHWARTZ, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] Business Park Development Co., LLC, appeals an order of the circuit court. Business Park contends that the circuit court erred when it: (1) held that Molecular Biology Resources, Inc., was not obligated to compensate Business Park for its attorneys' fees; (2) failed to award actual holdover damages to Business Park; and (3) awarded an offset to Molecular for unreimbursed tenant improvements. We disagree with Business Park's arguments and affirm.

¶2 Molecular cross-appeals the same order of the circuit court. Molecular contends that: (1) if the circuit court awards statutory double-rent damages, it may not also award actual damages; (2) the circuit court's award of pre-judgment interest is not supported by the evidence or applicable law and, if it is, it should not be awarded in addition to double-rent damages; and (3) the trial court incorrectly used an artificially low value to calculate Molecular's offset for unreimbursed improvements. We disagree with Molecular's cross-appeal arguments and affirm.

Background

¶3 Business Park is a limited liability company engaged in the business of leasing warehouse space to start-up companies. Don Warren is the business manager of Business Park, LLC. Molecular is a corporation that develops and produces chemicals for medical research and diagnostic purposes. Peter Smyczek is Molecular's president and a shareholder of the corporation.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶4 In February 1995, Business Park and Molecular executed a lease relating to warehouse space. The lease commenced September 1, 1995, and was to run for three years. The lease stated that rent would be $4.68 per square foot per year plus utilities. The lease also allowed Molecular to construct facility improvements on the premises. According to the terms of the lease, any improvements made to the premises by Molecular were to be paid for by Business Park in the form of a rent credit to Molecular. Rent credits were to be applied according to a "schedule A," which the contract stated was attached to the lease. However, no "schedule A" was drafted or attached to the lease. The lease further stated that Business Park was to retain all improvements at the expiration of the lease, except for those improvements Business Park instructed Molecular to remove.

¶5 The lease required Molecular to pay for all oil, electric, water, and other utility charges allocated to Molecular for use of the premises, and that any utility use in excess of the ordinary office use base rate would be paid by Molecular on a pro-rata share on a best efforts equalization basis. The lease included an option to extend for an additional three years, but required Molecular to give written notification to Business Park of its election to extend no less than sixty days prior to the expiration of the original term. The lease also stated that if Molecular remained in possession or occupancy of the leased premises after the expiration of the original or extended term of the lease, a month-to-month tenancy would be created.

¶6 On September 30, 1998, the lease terminated and Molecular did not timely exercise its option to extend. In November 1998, Molecular informed Business Park that it wished to exercise its option to extend the lease. Molecular continued to pay monthly rent to Business Park in the same amount it had paid

since the lease began. Business Park and Molecular never entered into a new lease, but Business Park did accept Molecular's post-lease rent payments.

¶7 Between June 1998 and January 1999, Business Park sent occasional invoices to Molecular for real estate taxes and utilities. Molecular paid portions of the utility bills, but did not pay the real estate taxes because, Molecular claimed, Business Park had not provided Molecular with satisfactory underlying documentation supporting the charges.

¶8 On March 23, 1999, Business Park and Fugent Company, LLC, a biotechnology company owned solely by Vladimir Gurevich, signed a Letter of Intent, agreeing that Fugent would lease the space Molecular was occupying once Molecular vacated the premises. On March 25, 1999, Business Park sent Molecular a notice of termination of lease, terminating Molecular's holdover month-to-month tenancy effective April 30, 1999. Molecular, however, did not vacate the premises.

¶9 On August 24, 1999, Business Park initiated an eviction action, and a trial to the court was held. On January 10, 2000, the circuit court issued a judgment of eviction. Among other findings, the court found that Molecular's unlawful holdover of the property ran from May 1, 1999, until August 4, 2000, the date on which Molecular vacated the premises. Molecular appealed the circuit court's decision and, on November 15, 2001, we affirmed the circuit court's judgment of eviction, but reversed the portion of the judgment pertaining to the issue of improvements and alterations and remanded with directions to determine those alterations and improvements.

¶10 In January 2003, a trial was held to determine damages related to the eviction action. On May 6, 2003, the circuit court entered its decision. The court

awarded Business Park a total of $126,327.75 in damages: $10,273.81 for electrical bills; $4,500 for real estate taxes; $3,000 for gas, water, and sewer; $2,546.98 for clean-up and repairs; $165 for autoclave/sterilization; $337.50 for dumpster fees; and $105,504.46 plus interest for holdover damages. The court awarded Business Park holdover damages using the statutory double-rent formula found in WIS. STAT. § 704.27, instead of the actual holdover damages Business Park claimed it suffered. The court also awarded Business Park 5% interest on its damage award, but denied Business Park's request for attorneys' fees. In its decision, the circuit court also awarded a total of $54,206.36 to Molecular: $22,903.21 for payments previously made by Molecular to Business Park, and $31,303.15 for unreimbursed property improvements. Business Park appeals, and Molecular cross-appeals.

Discussion

I. Business Park's Appeal

¶11 Business Park makes three arguments on appeal: (1) that Molecular is contractually obligated to compensate Business Park for its attorneys' fees; (2) that Business Park should be awarded "actual" holdover damages instead of statutory double-rent damages; and (3) that Business Park's damage award should not be offset by unreimbursed property improvements made by Molecular.

A. Attorneys' Fees

¶12 Business Park contends that, under the language of the lease, it is entitled to recover its attorneys' fees from Molecular. Business Park points to the section of the lease entitled "Indemnification" to support its claim. That section reads:

ARTICLE XX

INDEMNIFICATION

(a) The Lessee shall indemnify the Lessor against all liabilities, damages, and other expenses, including reasonable attorneys' fees, which may be imposed upon, incurred by, or asserted against the Lessor by reason of any of the following occurrences during the term of this Lease:

(1) Any negligence on the part of the Lessee or its employees, agents, contractors, licensees, or invitees.

(2) Any failure on the part of the Lessee to timely perform or comply with any covenant required to be performed or complied with by the Lessee hereunder.

(3) Any and all losses or damage, including reasonable attorneys' fees, from loss or damages related to or arising from (i) pollution, including any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapors, soot, fumes, acids, alkalis, chemicals and waste, which shall include all pollutants which are at any time transported, handled, stored, treated, disposed of, or processed as waste by the Lessee, including its agents and contractors; and (ii) the uses of hazardous properties, including radioactive, toxic or explosive properties.

If any action or proceeding is brought against the Lessor by reason of any such occurrences, the Lessee, upon written notice from the Lessor, will at the Lessee's expense resist or defend such action or proceeding by its present corporate counsel or other counsel, as approved in writing by the Lessor, provided that such approval shall not be withheld unreasonably.

Business Park asserts that under the above lease language Molecular is obligated to indemnify Business Park for reasonable attorneys' fees incurred by Business Park by reason of Molecular's failure to timely perform or comply with covenants

of the lease. Business Park contends that Molecular failed to comply with the lease covenants when Molecular failed to surrender possession of the leased premises at the end of its tenancy, when it failed to pay utility charges, and when it failed to pay real estate taxes.

¶13 Molecular makes several arguments in opposition. Molecular claims that it is not obligated to pay Business Park's attorneys' fees because: (1) the lease must be construed against Business Park, as drafter of the lease, consistent with the "American Rule" that requires fee-shifting clauses to be clear and unambiguous; (2) the lease only shifts attorneys' fees for indemnification, i.e., claims by third parties; and (3) Business Park's claims are not covered by the lease. Since we agree with Molecular's argument that the lease does not clearly and unambiguously shift fees and, under the American Rule, each party is therefore responsible for its own attorneys' fees, we need not address Molecular's other arguments.

¶14 Where the facts are undisputed, the interpretation of a contract presents a question of law, which we review *de novo*. ***Northern States Power Co. v. National Gas Co.***, 2000 WI App 30, ¶7, 232 Wis. 2d 541, 606 N.W.2d 613. "Contractual language is ambiguous only when it is 'reasonably or fairly susceptible of more than one construction.'" ***Town of Neenah Sanitary Dist. No. 2 v. City of Neenah***, 2002 WI App 155, ¶9, 256 Wis. 2d 296, 647 N.W.2d 913 (quoting ***Borchardt v. Wilk***, 156 Wis. 2d 420, 427, 456 N.W.2d 653 (Ct. App. 1990)).

¶15 Wisconsin follows the American Rule, under which "parties to litigation are generally responsible for their own attorney's fees unless recovery is expressly allowed by either contract or statute, or when recovery results from

third-party litigation." ***DeChant v. Monarch Life Ins. Co.***, 200 Wis. 2d 559, 571, 547 N.W.2d 592 (1996). We "will not construe an obligation to pay attorneys' fees contrary to the American Rule unless the contract provision clearly and unambiguously so provides." ***Hunzinger Constr. Co. v. Granite Res. Corp.***, 196 Wis. 2d 327, 340, 538 N.W.2d 804 (Ct. App. 1995). Therefore, we must determine whether the lease clearly and unambiguously requires Molecular to pay Business Park's attorneys' fees in an action brought by Business Park against Molecular.

¶16 In ***Hunzinger***, Hunzinger Construction sought attorneys' fees from Granite Resources. ***Id***. at 337. Hunzinger Construction incurred the attorneys' fees while seeking an order of specific performance on its contract with Granite Resources. ***Id***. Hunzinger Construction asserted that its contract allowed it to recover attorneys' fees because the contract provided: "'[Granite Resources] agrees … to reimburse [Hunzinger Construction] in any event for any loss, cost or expense incurred including special damages as a result of delay in or failure to make delivery ….'" ***Id***. at 337-38. We found that the provision did not allow reimbursement for attorneys' fees because it did not specifically mention attorneys' fees while another part of the contract did specifically mention attorneys' fees. ***Id.*** at 339-40. We reasoned that "'[w]e cannot ignore the draftsman's failure to use an obvious term, especially where it is the draftsman who is urging a tenuous interpretation of a term in order to make it applicable to a situation that would clearly have been covered if the obvious term had been chosen.'" ***Id***. at 340 (quoting ***North Gate Corp. v. National Food Stores, Inc***., 30 Wis. 2d 317, 323, 140 N.W.2d 744 (1966)).

¶17 In this case, the pertinent provision reads: "The Lessee shall indemnify the Lessor against all liabilities, damages, and other expenses, including

reasonable attorneys' fees." "Shall indemnify … against" could be interpreted as "shall reimburse for" or "shall pay." However, as we said in ***Hunzinger***, we will not ignore the fact that the drafter did not choose a phrase that would have patently applied outside of a third-party dispute. Other sections of the lease use the terms "pay" or "reimburse" when referring to issues only involving the parties to the contract, and "indemnify" when referring to issues involving third parties. Additionally, there are specific sections of the lease entitled "Lessor's Remedies" and "Lessee's Remedies." If the parties had intended to shift attorneys' fees in contractual breach or default disputes, the more logical place to do so was in the sections of the contract providing remedies for breach and default.

¶18 Business Park's argument that "indemnify" can and should be broadly defined as "compensate" does not dispel the proposition that the language is ambiguous. It only shows that Business Park's interpretation is one reasonable interpretation. If Business Park wanted the clause to convey "compensate," it should have used that word or its equivalent.

¶19 Business Park also argues that if we read "indemnification" to apply only to third parties, then we render the phrase "all liabilities" meaningless. However, we agree with Molecular that the phrase "all liabilities" is modified by "indemnify" and, therefore, "all liabilities" derives its meaning and scope from "indemnify."

¶20 Further support for our interpretation of "indemnify" in this context is provided by Black's Law Dictionary. It defines "indemnify" as: "1. To reimburse (another) for a loss suffered because of a third party's act or default. 2. To promise to reimburse (another) for such a loss. 3. To give (another) security against such a loss." BLACK'S LAW DICTIONARY 772 (7th ed. 1999). The first

definition describes the underlying loss as one necessarily tied to a third party, and the second and third definitions incorporate the first by reference. All three definitions comport entirely with Molecular's assertion that the term "indemnify" contemplates damages incurred in connection with a third-party action.

B. Damages

¶21 Business Park contends that the circuit court erred in awarding Business Park statutory holdover damages rather than actual holdover damages. WISCONSIN STAT. § 704.27 contains a damages clause for unlawful holdover and provides, in part: "In absence of proof of greater damages, the landlord may recover as minimum damages twice the rental value apportioned on a daily basis for the time the tenant remains in possession." Business Park maintains that it proved "greater damages" when it provided uncontroverted evidence that, but for Molecular's failure to vacate, Business Park would have entered into a three-year lease on the property with Fugent for $11 per square foot. The primary evidence presented in support of this assertion was a Letter of Intent detailing an agreement between Business Park and Fugent. Business Park argues that the circuit court incorrectly concluded that the letter was unenforceable and that the damages asserted by Business Park were speculative.

¶22 Molecular's response is that Business Park failed to provide sufficient evidence of its actual damages because the Letter of Intent was not self-executing or immediately enforceable. Molecular also contends that the damages asserted by Business Park are speculative. We agree with Molecular that Business Park has failed to prove actual damages. Business Park is, therefore, only able to recover damages under the double-rent formula provided in WIS. STAT. § 704.27.

¶23 The parties argue about exactly what challenges Business Park is making on appeal and the applicable standard of review. Business Park contends that it is challenging the circuit court's application of law to established facts, while Molecular asserts that Business Park is challenging the circuit court's findings of fact. We surmise that Business Park is challenging the circuit court's conclusion that Business Park failed to prove actual damages. In doing so, Business Park challenges the circuit court's legal conclusion with regard to the Letter of Intent and the court's finding of fact that the damages asserted by Business Park were speculative. Assuming, without deciding, that the Letter of Intent was enforceable, we conclude that the damages asserted by Business Park are nonetheless speculative. Therefore, we need not address the enforceability of the Letter of Intent.

¶24 Business Park has the burden to prove its damages by credible evidence to a reasonable certainty. *See* ***Plywood Oshkosh, Inc. v. Van's Realty & Constr.***, 80 Wis. 2d 26, 31, 257 N.W.2d 847 (1977). The evidence is viewed in the light most favorable to the circuit court's determination. *See* ***Grassl v. Nelson***, 75 Wis. 2d 107, 114, 248 N.W.2d 403 (1977). When reviewing a damage award, we "do[] not substitute [our] judgment for that of the fact finder." ***Cords v. Anderson***, 80 Wis. 2d 525, 552-53, 259 N.W.2d 672 (1977).

¶25 The circuit court concluded that the damages claimed by Business Park were simply too speculative. On this, it said:

> There is no assurance that even if a three year lease had been signed that Fugent would have remained in the BP space for the duration of the contract term. Fugent could default on its rent payments and face an eviction process, it could file bankruptcy thereby negating its rental obligation, it could have renegotiated new lease terms with BP during the lease period, or it might have concluded that BP's business practices were so vague as to constitute a

> breach of the contract. All of these speculations might never occur, but the uncertainties associated with a long lease cause this court to have concerns when attempting to calculate actual damages under BP's first theory.

¶26 Business Park argues that an award for actual damages based on a three-year lease with Fugent is not speculative because, by the time the trial on damages was held, more than three years had elapsed since Molecular failed to vacate the premises. In other words, Business Park claims that the damages cannot be speculative because they were not based on a future event but, rather, on an event that, had it come to fruition, would have already occurred. This argument is unpersuasive.

¶27 Speculation as to whether Fugent might actually lease the space in the future is little different from speculation about what Fugent might have done in the past under different circumstances. Business Park itself points out that there is "[e]very *indication*" that Fugent would have fully discharged its duties had it entered into a lease (emphasis added). That there is "every indication" that a certain event *would* have occurred still calls for one to engage in speculation as to whether that event would have *actually* occurred. Business Park essentially argues that basing an award for actual damages on lost rent pursuant to a lease that never existed is not speculative because, if the lease had been signed, it would have run its full term without incident.

¶28 Business Park asserts that the undisputed evidence shows it would have entered into a lease with Fugent and that there was no evidence to the contrary. In addition to the Letter of Intent, Business Park presented the affidavit and deposition of Vladimir Gurevich, the principal of Fugent, to show that Fugent would have leased the property. However, the evidence that Fugent would have

signed a three-year lease is not the same as evidence that Fugent would have remained on the premises for the entire contract period.

¶29 Business Park contends that the evidence also shows that Fugent would have fulfilled the terms of a three-year lease. Business Park asserts that "[t]he only evidence in the record is that Fugent would have entered into the 3-year Lease contemplated by the Letter of Intent, and there is no evidence to suggest that Fugent would not have fully performed on that Lease. Every indication is that he would have performed." Business Park points out that Fugent did not file for bankruptcy and remained a month-to-month tenant of Business Park, in a different location, during the entire three-year period. Business Park insists that Molecular's argument that Fugent "ultimately rented larger, better space" and "outgrew that space within about a year" is without merit, but Business Park does not explain the problem with Molecular's argument. If it matters that Fugent did not file for bankruptcy and remained a month-to-month tenant of Business Park, then why doesn't it matter that Fugent rented a larger space and outgrew that space within a year? We agree with the circuit court that any number of events could have occurred during a three-year lease and that there are too many uncertainties in this case to support a claim for actual damages.

C. Offset

¶30 Business Park argues that the circuit court erred by allowing Molecular to offset Business Park's damages by the amount that Business Park failed to reimburse Molecular for tenant improvements. Business Park asserts that this is error for four reasons: (1) Molecular never pled nor sought to amend its pleadings to assert a claim for an offset for tenant improvements; (2) the lease did not provide for reimbursement of tenant improvements; (3) an award to Molecular

for unreimbursed tenant improvements is contrary to the law of the case as established by this court; and (4) the circuit court's offset award of $31,303.15 is not supported by sufficient evidence.

1. The Pleadings

¶31 Business Park argues that the circuit court erred in awarding an offset to Molecular because offset is an "avoidance or affirmative defense" that is waived if not pled. Further, absent pleading offset in the first place, Molecular was required, but failed, to request permission to amend its pleadings to include offset. Finally, Business Park points out that it did not consent to offset being tried. We are not convinced.

¶32 There was neither a formal attempt to amend the pleadings nor any written indication that the pleadings had been amended. However, as explained below, offset was properly litigated because the circuit court implicitly amended the pleadings to include a counterclaim of offset.

¶33 Business Park first insists that offset constitutes an "avoidance or affirmative defense" because, by raising it, Molecular was trying to avoid some of its liability to Business Park. We disagree. A counterclaim for offset has no impact on *liability* in the underlying action. It is merely an additional action which, if successful, reduces the damages owed *to* the other party on one claim by the damages owed *by* the other party on a separate claim. *Cf.* ***State v. Watkins***, 2002 WI 101, ¶39, 255 Wis. 2d 265, 647 N.W.2d 244 ("An 'affirmative defense' is defined in Black's Law Dictionary as 'a defendant's assertion raising new facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim *even if all allegations in the complaint are true*.'" (quoting BLACK'S LAW DICTIONARY 430 (7th ed.1999))).

¶34 Business Park also contends that Molecular did not attempt to amend its pleadings to include a counterclaim for offset. We agree that Molecular did not at any point explicitly move to amend its pleadings to include a claim for offset. However, the circuit court may amend the pleadings on its own motion. ***State v. Peterson***, 104 Wis. 2d 616, 627-28, 312 N.W.2d 784 (1981). WISCONSIN STAT. § 802.09(2) allows the court to amend the pleadings to conform to the evidence:

> AMENDMENTS TO CONFORM TO THE EVIDENCE. If issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice such party in maintaining the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

A decision to amend the pleadings is reviewed under the erroneous exercise of discretion standard. ***John v. John***, 153 Wis. 2d 343, 365, 450 N.W.2d 795 (Ct. App. 1989).

¶35 Business Park insists that an amendment under WIS. STAT. § 802.09(2) is inappropriate here because Business Park did not consent, either explicitly or implicitly, to offset being tried. While it is true that Business Park did not give its express consent, we are convinced that Business Park gave its implied consent.

¶36 We have previously addressed the issue of implied consent to an amendment of the pleadings. On this, we said:

> In general, implied consent to amend pleadings is inferred when the party fails to object to the introduction of evidence on the unpleaded issue, and when the party who has not objected knows that the evidence relates to the unpleaded issue. Actual notice to the parties is the key factor in determining whether there is implied consent.

Schultz v. Trascher, 2002 WI App 4, ¶15, 249 Wis. 2d 722, 640 N.W.2d 130.

¶37 Here, we agree with Molecular that Business Park had actual notice that Molecular could and would introduce evidence of offset. In its memorandum decision denying summary judgment to Business Park, the circuit court stated:

> Furthermore, Molecular Biology contends that it never received the full value of the rent credit it is entitled to for leasehold improvements made and that it is also entitled to an offset for the remaining rent credit amount…. The summary judgment record reflects that the parties agree that they dispute the cost of the build-out improvements, whether they agreed to an amortization period, and the resultant rent credit amount.

Moreover, Molecular made it clear that it was seeking an award for offset. In its trial brief, Molecular stated:

> This trial will focus on the categories and amount of damages for which Business Park can meet its burden of proof. That amount is also subject to offsets for both the amount of rent and expenses that [Molecular] paid during its occupancy and the amount of reimbursable improvements that it did not recoup through a rent credit.

¶38 Indeed, Business Park actively litigated the issue both before and during the trial. After the circuit court issued its summary judgment decision, Business Park filed a motion in limine asking the court to preclude Molecular "from introducing evidence or arguing that it is entitled to an offset for any

amounts it paid for tenant improvements." In that motion, Business Park acknowledged that "[i]n denying Business Park's motion for summary judgment, the Court seems to have ruled that [Molecular] may pursue a claim for an offset to recover the cost of improvements made by [Molecular]." Business Park's argument in support of this motion was that the lease did not support Molecular's assertion that Molecular was entitled to reimbursement for improvements. Nowhere in this motion does Business Park argue that Molecular may not pursue this claim because it had not been pled. The circuit court ultimately denied Business Park's motion.

¶39 During trial, it was also apparent that the parties were litigating offset. At one point during Business Park's direct examination of Warren, the court interrupted to ask counsel for Business Park why he was eliciting testimony on Warren's intent with regard to the nonexistent Schedule A. Counsel replied: "Well, Your Honor, the defendant has argued that they are entitled to some offset based on some equitable result." During both its examination of Warren and its cross-examination of Smyzcek, Business Park attempted to introduce evidence to support a claim that Business Park was entitled to an offset against any offset that Molecular might obtain. Business Park told the court that it was doing so "in anticipation of [Molecular's] claim for offset."

¶40 Because we conclude that the circuit court had the power to amend the pleadings under WIS. STAT. § 802.09(2), and that the court did not erroneously exercise its discretion in doing so, we need not address Business Park's argument that the portion of § 802.09(2) governing amendment of the pleadings when the

evidence of an unpled claim was objected to at trial does not apply to this situation.[2]

¶41 We conclude that Business Park impliedly consented to an amendment of the pleadings by actually litigating the offset issue. Because we conclude that the circuit court properly permitted the parties to litigate offset and properly ordered an offset amount, we need not address Business Park's argument that it suffered prejudice because the circuit court allowed Molecular to try an unpled issue.

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[2] We note that in making this argument Business Park mischaracterizes the actions of the circuit court. In its reply brief, Business Park states: "[T]he trial court sustained Business Park's objections to evidence that [Molecular] sought to introduce in support of its unpled claim for an offset on the ground that it was barred by the parol evidence rule." This is not accurate. During its direct examination of Smyzcek, counsel for Molecular asked: "What was your understanding of the intention of the lease as it related to the payment for the improvements and ultimate ownership?" Counsel for Business Park immediately objected, stating: "Objection, one, parol evidence rule. Lease is ambiguous on that. And second, his understanding isn't relevant." The circuit court ruled:

> To the extent that the parol evidence rule would bar any modification of the contract, I think Mr. Shumaker is correct. To the extent that the question of improvements and how they fit into the contract impacts on damages is slightly different.
>
> In the latter scenario, the understanding of the parties doesn't go to necessarily the terms of the contract but goes to the credibility of the various parties and their claims for damages. So with that narrow understanding, I'm going to let him answer that question…. So I'm not looking at his testimony in the sense of modifying the contract. You can answer the question.

Thus, the court did not sustain the objection; it merely noted that the parol evidence rule would have likely barred the evidence if the testimony had been offered to modify the contract. The court implicitly overruled the objection and allowed the witness to continue testifying on the "narrow understanding" that the evidence was being offered in support of Molecular's claim for offset. Business Park's statement in its brief implies that the objection was wholly sustained and the evidence was not allowed in because it violated the parol evidence rule.

2. Unreimbursed Tenant Improvements

¶42 Business Park contends that there is no provision in the lease that requires it to pay for tenant improvements upon termination of the lease and, therefore, the circuit court erred when it ordered an offset amount for unreimbursed improvements made by Molecular. As best we can determine, Business Park's underlying argument here is that the circuit court erred as a matter of law in concluding that the lease is ambiguous on this issue. However, rather than develop its legal challenge to the circuit court's conclusion that the rent-credit provision was ambiguous, Business Park instead focuses on the circuit court's factual findings pertaining to the intent of the parties. Business Park's implicit argument is that if the lease is ambiguous, then the evidence of the parties' intent supports Business Park's interpretation of the rent-credit provision.

¶43 Molecular's response is that the circuit court correctly concluded that the rent-credit provision of the lease is ambiguous and that the evidence produced at trial showed that the parties' intent was to reimburse Molecular for improvement costs. We agree with Molecular that the rent-credit provision is ambiguous, and that the trial evidence supports the circuit court's finding that the parties intended there be an offset for improvements made by Molecular.

¶44 Because we resolve this issue through our standard method of contract interpretation, we will address both the legal and factual questions presented. We must first decide whether the lease unambiguously expresses the parties' intent. "The interpretation of a written contract, including the determination of whether its terms are ambiguous, is a legal matter that we decide independently." ***Neenah Sanitary Dist.***, 256 Wis. 2d 296, ¶9. "Contractual

language is ambiguous only when it is 'reasonably or fairly susceptible of more than one construction.'" ***Id.*** (quoting ***Borchardt***, 156 Wis. 2d at 427).

¶45 The relevant portion of the lease reads:

> ARTICLE III
>
> RENTAL
>
> (a) The Lessee shall pay to the Lessor, BUSINESS PARK DEVELOPMENT CO., c/o Don Warren, 3802 Packers Avenue, Madison, Wisconsin, 53704, or at such other place as the Lessor shall from time to time designate in writing, the following monthly rental amounts:
>
> (1) During the first twelve months of this Lease, the Lessee shall pay base rent in the amount of $.39 per gross square foot, plus utilities, per month. ($4.68 per square foot per year plus utilities) *Rent credit resulting from leasehold improvements completed by the Lessee shall be applied according to schedule A attached hereto and incorporated herein.*

(Emphasis added.)

¶46 Here, the lease explicitly provides for a rent credit to Molecular for improvements. The lease does not say, however, anything about the method, terms, amount, or survivability of the rent credit; that information was to be provided by a Schedule A. While there is no Schedule A attached to the final lease, it is plain that the lease contemplated that it would be attached and incorporated by reference. Without a Schedule A, we can only conclude that the rent-credit provision of the lease is ambiguous.

¶47 Because we have concluded that the rent-credit provision is ambiguous, we must look outside the lease to determine the parties' intent. *See*

Farm Credit Servs. v. Wysocki, 2001 WI 51, ¶12, 243 Wis. 2d 305, 627 N.W.2d 444 ("If … we determine that a contract provision is ambiguous, we then look to extrinsic evidence to discern its meaning."). "If ambiguity exists, then the intent of the parties is a question of fact." ***Insurance Co. of North America v. DEC Int'l, Inc***., 220 Wis. 2d 840, 845, 586 N.W.2d 691 (Ct. App. 1998). Since the circuit court also concluded that the lease was ambiguous, we will uphold its factual findings as to the intent of the parties so long as its findings are supported by any credible evidence or reasonable inferences. *See* ***id***.

¶48 At trial, Warren provided the following testimony:

> [Warren]: Schedule A would provide an additional credit for residual value of improvements that [Molecular] was making to the facility.
>
> Q. What did you mean an additional credit for the residual value?
>
> [Warren]: Well, additional credit over and above the credit I indicated earlier for the—the one that was determined to decide the base rent.

¶49 The circuit court found: "[Business Park] admits that it planned to grant a rent credit to [Molecular] and that any residual value remaining at the end of the lease that had not been amortized over the term of the occupancy would result in additional credit to [Molecular]." The circuit court concluded that "[Molecular] was to receive rent credit and be reimbursed for any residual build-out costs (improvements) not yet compensated for through rent credit deductions when their lease time expired." Based on our reading of Warren's testimony, we cannot say that the circuit court erred.

3. The Law of the Case

¶50 Business Park contends that an award to Molecular for unreimbursed tenant improvements is contrary to the law of the case. Business Park concedes in its reply brief that we did not, in our November 15, 2001, decision, address the offset issue, but contends that an offset award is contrary to that decision. Business Park maintains that "[t]he terms of the Lease and the Court of Appeals' decision establish that [Molecular] was obligated to pay for the improvements and alterations and that upon termination of [Molecular's] tenancy they belonged to Business Park." Moreover, Business Park claims that "[i]mplicit in [the eviction] decision was the recognition that by the clear and unambiguous terms of the Lease Business Park was not required to make any payment at any time to [Molecular] for the tenant improvements." Business Park asserts that a conclusion that the tenant improvements "belong to Business Park—but that Business Park must pay for them—flies in the face of the plain meaning of the Lease and the Court of Appeals' decision."

¶51 Business Park provides no further explanation. It provides no record cites, no quotes from our prior decision, no relevant legal authority, and no explanation why an award of physical possession of the improvements implicitly prohibits an offset award. Thus, Business Park's argument is undeveloped. Since we see nothing in the circuit court's offset award that inherently runs afoul of our prior eviction decision, and Business Park has not adequately developed its argument, we address the issue no further. *See* ***Truttschel v. Martin***, 208 Wis. 2d 361, 369, 560 N.W.2d 315 (Ct. App. 1997) ("[W]e do not decide issues that are not adequately developed by the parties in their briefs.").

4. Sufficiency of the Evidence

¶52 Business Park argues that the circuit court's determination that Molecular was entitled to an offset for unreimbursed improvements was not supported by sufficient evidence. While there is no dispute that Business Park was to provide Molecular with rent credits to reimburse Molecular for the costs of improvements, the parties disagree over Molecular's entitlement to reimbursement after termination of the lease. Specifically, Business Park disputes the circuit court's interpretation of "residual value," and its determination that Molecular was entitled to reimbursement after the expiration of the lease. Molecular does not respond to Business Park's specific evidentiary disputes, but instead argues that "the overwhelming evidence supports an even larger offset."

¶53 We have explained in the prior section of this decision why the rent-credit provision is ambiguous. We have also already concluded that the evidence supports the circuit court's finding that the parties intended there be an offset for improvements made by Molecular. The only new question this argument raises is whether "residual value" means the residual value of the credit remaining at the end of the lease, or the residual value of the physical improvements at the end of the lease. We conclude that the circuit court's finding as to the intended meaning of "residual value" was based on credible evidence. *See* ***Allied Processors, Inc. v. Western Nat'l Mut. Ins. Co.***, 2001 WI App 129, ¶12, 246 Wis. 2d 579, 629 N.W.2d 329 (we will not set aside a circuit court's findings of fact unless they are clearly erroneous); *see also* WIS. STAT. § 805.17(2).

¶54 At trial, Warren testified:

> Given that, we would then give a credit for that improvement against that fair market value and take as payment the difference between the fair market value and

> that credit. In other words, that simplistically says that we had a space that was going to rent for $10 a square foot when they were done. If they put in $5 worth of improvements for it, they would only be paying $5 a month for, per square foot per year.
>
> Simplistically in addition to that, if there was going to be residual values left that had not been amortized over the term of their occupancy, they would have an additional credit coming back for that which would be added to the—to their side of the books so that they—it would reduce their payment by that.

The circuit court found: "[Business Park] admits that it planned to grant a rent credit to [Molecular] and that any residual value remaining at the end of the lease that had not been amortized over the term of the occupancy would result in additional credit to [Molecular]."

¶55 Business Park insists that the circuit court misunderstood the above-quoted testimony. Business Park contends that the testimony shows the parties intended that the total amount of reimbursement for improvement costs be reduced to reflect the residual value of the physical improvements, or the actual value of what Business Park would possess at the termination of the lease due to depreciation.[3] Business Park directs our attention to three other portions of Warren's testimony. We are not persuaded.

¶56 One can read much of Warren's testimony to support the circuit court's finding. On the other hand, it is possible that the circuit court disregarded Warren's testimony on this issue. In its decision, the court wrote that Warren's testimony was "[f]requently lacking in specificity and often inconsistent." We

[3] Specifically, Business Park insists that the $52,525.55 figure should have been reduced by 60%.

agree that Warren's testimony is often vague and contradictory. *See* ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 644, 340 N.W.2d 575 (Ct. App. 1983) ("'[W]hen the trial judge acts as the finder of fact, and where there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility of the witnesses." (quoting ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979))). Business Park has not shown that the circuit court's interpretation is erroneous, but has merely explained how Warren's testimony could be read to support Business Park's interpretation.

II. Molecular's Cross-Appeal

¶57 Molecular makes several arguments on its cross-appeal: (1) that Business Park may not be awarded both statutory double-rent damages and actual damages; (2) that Business Park is not entitled to pre-judgment interest and, if Business Park is, it should not be awarded in addition to double-rent damages; and (3) that Molecular is entitled to a higher offset than that awarded by the circuit court. We address and reject each of these arguments in the three subsections below.

A. Damages

¶58 Molecular asserts that the circuit court erred when it awarded Business Park statutory double-rent damages in addition to actual damages.[4]

[4] Sundry expenses (e.g., electricity fees; real estate taxes; gas, water, and sewer fees; clean-up costs and repair fees; autoclave/sterilizer fees; and dumpster fees) incurred by Molecular during its tenancy of the premises are alternately referred to in the parties' briefs and the circuit court's decision as "damages," "special damages," "other damages," and "actual damages." For clarity, we will refer to these expenses as "non-rent damages" for the rest of this decision, unless a statute or another decision is being quoted.

Molecular first argues that the circuit court erred because, under WIS. STAT. § 704.27, double rent is available only in lieu of non-rent damages. Separately, Molecular argues that the circuit court's rationale for awarding non-rent damages in addition to statutory double-rent damages is flawed in two respects: first, the evidence shows that virtually all non-rent damages post-date lease termination and, second, Business Park did not meet its burden of proof because it failed to prove the dates on which the non-rent damages were incurred. Our resolution of Molecular's first argument renders Molecular's alternative timing arguments of no practical value. As explained below, the circuit court's award is affirmed because it comports with the statute and when the non-rent damages were incurred is irrelevant.

¶59 Molecular asserts that WIS. STAT. § 704.27 allows landlords to collect either non-rent damages or double-rent damages from holdover tenants, but not both. Molecular contends that, under the statute, to calculate the total damages Business Park suffered, the non-rent damages Business Park suffered should be added to the rental damages Business Park suffered due to Molecular's holdover. The total of non-rent damages and rental damages should then be compared to the statutory double-rent damages Business Park would be eligible for under the statute, and Business Park should be awarded the higher of the two.

¶60 Business Park asserts that WIS. STAT. § 704.27 provides for a minimum of double the rental value of the premises. Business Park contends that there is nothing in the statute that precludes a landlord from recovering non-rent damages in addition to double its lost rental income. We agree with Business Park.

¶61 "Construction of a statute, or its application to a particular set of facts, is a question of law, which we review without deference to the trial court decision." ***State v. Isaac J.R.,*** 220 Wis. 2d 251, 255, 582 N.W.2d 476 (Ct. App. 1998). "The aim of statutory construction is to ascertain the intent of the legislature, and our first resort is to the language of the statute itself." ***Id.***

¶62 WISCONSIN STAT. § 704.27 provides, in pertinent part:

> **Damages for failure of tenant to vacate at end of lease or after notice**. If a tenant remains in possession without consent of the tenant's landlord … the landlord may recover from the tenant damages suffered by the landlord because of the failure of the tenant to vacate within the time required. In absence of proof of greater damages, the landlord may recover as minimum damages twice the rental value apportioned on a daily basis for the time the tenant remains in possession. As used in this section, rental value means the amount for which the premises might reasonably have been rented, but not less than the amount actually paid or payable by the tenant for the prior rental period, and includes the money equivalent of any obligations undertaken by the tenant as part of the rental agreement, such as payment of taxes, insurance and repairs.

¶63 In ***Vincenti v. Stewart***, 107 Wis. 2d 651, 321 N.W.2d 340 (Ct. App. 1982), we said that WIS. STAT. § 704.27 requires an award of double rent where greater damages have not been proved. ***Id.*** at 655-56. In its decision, the circuit court here relied on ***Vincenti*** for the proposition that a landlord cannot recover both non-rent damages and double the rental value. The circuit court then distinguished the damages in the present case from those in ***Vincenti***. The circuit court found: "In this case, the special damages, as indicated by the testimony and evidence, were attributable in part to the rental period commencing prior to the hold-over tenancy." For the reasons set forth below, we do not believe it was necessary for the circuit court to differentiate when the non-rent damages were incurred.

¶64 In ***Univest Corp. v. General Split Corp.***, 148 Wis. 2d 29, 435 N.W.2d 234 (1989), the leading case interpreting WIS. STAT. § 704.27, the Wisconsin Supreme Court denied a claim by Univest for double-rent holdover damages that included electricity, water, and sewer services in its calculation of double rent. In its decision, the court discussed the obligations encompassed within the term "rental value" found in § 704.27. It said:

> [T]he term "rental value" found in sec. 704.27, Stats., considered in light of the Committee Comment, indicates an intent to limit "rental value" to those obligations which the tenant would be required to pay in the event of a holdover regardless of whether the tenant uses the premises or not. It is those obligations that naturally and necessarily result in damages as a result of the failure to vacate within the required time. Thus, rental value may include obligations such as real estate taxes, insurance premiums, and certain repairs if those obligations are provided for in the lease separately from the base rent. However, "obligations" which have no direct relationship whatsoever to damages necessarily expected to result from a holdover cannot be considered as rental value.

Univest, 148 Wis. 2d at 42-43. The court found that § 704.27 does not allow non-rent damages (i.e., obligations which have no direct relationship whatsoever to damages necessarily expected to result from a holdover) to be factored in when determining double-rent damages. In reaching this conclusion, the court relied heavily on the committee comment to the statute, particularly the section of the comment that reads: "'The proposed statue limits the double recovery, however, to a daily apportionment of the rent. The landlord cannot under the proposed statute recover both special damages and double the rental value ….'" ***Univest***, 148 Wis. 2d at 41 (emphasis omitted). Regarding the comment, the court wrote: "Thus, the Committee Comment is evidence of a legislative intent to distinguish what was then 'special damages' from that which was subject to doubling, i.e., 'rental value.'" ***Id.*** at 42.

¶65 In ***Univest***, the court did not conclude that WIS. STAT. § 704.27 prohibited non-rent damages in addition to double-rent damages; it only determined that rental damages and non-rent damages could not both be doubled under the statute. Because we find no language in the statute, in ***Univest***, or in our prior decisions that precludes recovery for non-rent damages in addition to double-rent damages, we do not believe it matters when the non-rent damages were incurred in this case.

¶66 Molecular has not argued that it did not incur the non-rent damages, only that it incurred them at various time periods. The lease in this case clearly assigns to Molecular the obligation of paying "all oil, electric, water, and other utility charges." We see no reason why Molecular should not be responsible for the various expenses it incurred related to using the premises during the holdover period. To hold otherwise would give Molecular a windfall.

B. Pre-judgment Interest

¶67 Molecular next challenges the circuit court's award of pre-judgment interest. Molecular claims that Business Park is not entitled to any pre-judgment interest and, if it is, pre-judgment interest should not be awarded in addition to double-rent damages.[5] Molecular argues that the pre-judgment interest award was based on a finding of fact not supported by the record. Molecular also argues that the pre-judgment interest should not have been awarded because the amount of holdover damages was the "central issue at trial." Business Park's response is that

[5] Molecular implies that it is challenging the interest award as to all damages, yet it only offers argument on the specific issue of the double-rent award. Thus, we will only discuss the award of interest on the double-rent damages.

its damages were readily ascertainable by Molecular at the time that interest would have begun accruing. We agree with Business Park.

¶68 Whether pre-verdict interest may be awarded is a question of law. ***Loehrke v. Wanta Builders, Inc.***, 151 Wis. 2d 695, 706, 445 N.W.2d 717 (Ct. App. 1989). We review questions of law *de novo*. ***First Nat'l Leasing Corp. v. City of Madison***, 81 Wis. 2d 205, 208, 260 N.W.2d 251 (1977). "Preverdict interest is available when damages are fixed and determinable or may be measured according to a reasonably certain standard." ***Loehrke***, 151 Wis. 2d at 706. "However, prejudgment interest will not be granted where the damages are determinable but 'some other factor' prevents the party from determining the amount that should be tendered." ***City of Merrill v. Wenzel Bros., Inc.***, 88 Wis. 2d 676, 697, 277 N.W.2d 799 (1979). "A mere denial of liability is not a sufficient 'other factor.'" ***Id***.

¶69 Molecular argues that "[t]here is literally no evidence in the record that [Molecular] knew of the Fugent letter of intent during its occupancy." Molecular seems to argue that the damages in this case were not capable of determination because Molecular was not aware of the document—containing a specific figure—on which the court would eventually rely to determine rent value. We agree with Business Park that the proper standard is not whether Molecular subjectively knew about the Letter of Intent, but rather whether Molecular could have determined, within a reasonable degree of certainty, what it owed Business Park. *See* ***Loehrke***, 151 Wis. 2d at 706.

¶70 To support its assertion that Molecular could easily have ascertained Business Park's damages, Business Park points to a June 4, 1999, letter it sent to Molecular. The letter reads, in relevant part:

> Finally, this letter will attempt to clarify any misunderstanding that you or the Tenant may have with respect to my client's intentions in this matter. It has been and continues to be my client's position that the tenancy of [Molecular] was terminated effective May 31, 1999, and [Molecular] is occupying the premises as a holdover tenant….
>
> Furthermore, pursuant to Article XXVII of the Lease and Wis. Stat. § 704.27, it is the Landlord's position that it is entitled to hold [Molecular] responsible for minimum damages of twice the rental value of the premises on a daily basis for the time the tenant remains in possession. As you and [Molecular] have previously been advised, Mr. Warren has a tenant that was willing to take over the space on June 1, 1999 at the rate of $12.00 per square foot. Therefore, minimum damages against [Molecular] are accruing at the rate of $24.00 per square foot.

¶71 Molecular maintains that this letter should not be relied on because the circuit court did not rely on it in making its decision and because the letter contains incorrect information. Neither of these arguments has merit. First, because we review this issue *de novo*, we are not bound by the process the circuit court used to arrive at its conclusion. Second, the Letter of Intent shows that the bargained-for rent would have been $12 per square foot per year; the letter also shows that the $11 per square foot per year figure is a result of a $1 per square foot per year credit for electricity.

¶72 Molecular, relying on ***Jones v. Jenkins***, 88 Wis. 2d 712, 726, 277 N.W.2d 815 (1979), contends that it is improper to award interest when the method of calculating the amount owed is in dispute. Molecular insists that "[w]hile the court ultimately based its decision on the Fugent letter of intent, it well could have reasonably adopted another basis for calculating rent." ***Jones***, however, is easily distinguished from this case because in ***Jones*** the amount owed was not due at the time the judgment was rendered. Here, it was clear that Molecular owed Business Park, and that amount was due at the time the judgment

was rendered. Indeed, ***Jones*** acknowledges that "a difference of opinion regarding the amount due would not be an excuse for not making payment." ***Id***. at 726-27 (citing ***Giffen v. Tigerton Lumber Co.***, 26 Wis. 2d 327, 132 N.W.2d 572 (1965)).

¶73 We turn to Molecular's argument that Business Park may not recover pre-judgment interest because it is limited to double-rent damages under WIS. STAT. § 704.27. Stated differently, Molecular argues that pre-judgment interest should be factored into the rent and non-rent damage calculation to determine whether it exceeds double-rent damages. But this argument is not sufficiently developed to warrant our attention. Molecular has not pointed to any legal authority and, rather than provide an analysis, refers us to its prior discussion of the issue in Section I of its brief-in-chief. Turning back to this argument, we see that it too is undeveloped. In sum, we reject Molecular's argument because it is undeveloped and because we find no language in § 704.27 limiting recovery of holdover damages to double rent.

C. Offset

¶74 Molecular last argues that the circuit court used an artificially low value to calculate Molecular's offset award and that the evidence presented supports a higher offset award. Molecular made the same argument in response to Business Park's assertion that the evidence did not support the circuit court's offset award; this new argument adds nothing to Molecular's previous argument. We have already concluded that the circuit court's findings of fact regarding offset were not erroneous and that disrupting the offset award is unwarranted. We need not repeat that discussion here.

By the Court.—Judgment and order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.