COURT OF APPEALS
DECISION
DATED AND FILED

July 27, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2164 **Cir. Ct. No. 2008CV682**

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

COIN APPLIANCES, INC.,

PLAINTIFF-RESPONDENT,

V.

WILLIAM J. WARNER, MARY J. WARNER, MARC W. WHITE AND DONNASUE WHITE,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Fine, Kessler and Brennan, JJ.

¶1 BRENNAN, J. William J. Warner, Mary K. Warner, Marc W. White, and Donnasue White (collectively "the Warners and Whites" unless otherwise noted) appeal a judgment and an order entered following a bench trial.

The trial court ruled that two lease agreements held by Coin Appliances, Inc. were enforceable against the Warners and Whites, and that the Warners and Whites breached the lease agreements. But rather than order specific performance, as requested by Coin, the trial court ordered payment of damages pursuant to a stipulated damages clause in the lease agreements. The Warners and Whites appeal, arguing that: (1) the trial court erred in holding that the lease agreements were enforceable against them when they had not been recorded; and (2) the trial court erroneously exercised its discretion in imposing money damages when Coin only requested specific performance and waived its right to money damages. We agree with the trial court that the lease agreements were enforceable. But we conclude that the trial court erroneously exercised its discretion when it awarded Coin stipulated damages, and therefore, remand the case to the trial court for a hearing pursuant to WIS. STAT. § 802.09(2) (2007-08).[1]

BACKGROUND

¶2 On February 12, 1999, Coin entered into a lease agreement with Woodlake East Apartments for "the exclusive use and control of the laundry areas" at 1055 Market Street in Nekoosa, Wisconsin, for the purpose of "installing, servicing, and maintaining coin operated washing and drying laundry equipment" at that property. The lease provided that Coin would pay the owner of Woodlake East Apartments or its successors and assigns, monthly, eighty percent of the gross income received from the use of the laundry equipment, less eighty cents a day per washer and dryer. In other words, Coin received eighty cents per

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

day, per washer and dryer, and twenty percent of the monthly gross income generated from the tenants' use of the laundry equipment.

¶3 The term of the lease was seven years, and stated that it:

> shall automatically be extended for successive terms of the same duration unless [Coin] or [the current owner of the apartment building] shall notify each other in writing, certified mail, return receipt requested, of their intention to terminate this lease at least one hundred eighty (180) days before the expiration of this lease or any extension.

The lease further stated that "[t]his lease agreement shall constitute a covenant running with the land and shall not be construed as a license, and shall be binding on the owner[,] its/their heirs, personal representatives, successors and assigns, including any future owners, beneficiaries or lessees of the property."

¶4 In the event of a breach of the lease agreement by the owner of the apartment, the lease

> recognize[d that] the damages to [Coin] would be difficult to compute, and therefore, [the parties] agree[d] that, at the option of [Coin], either (a) [the owner of the apartment] shall pay to [Coin] at the expiration of such ten-day notice, as liquidated damages and not a penalty[,] an aggregate sum equal to thirty cents per day for each apartment in the building multiplied by the number of days remaining for the balance of the unexpired lease term (such number of days determined from the date on which the breach occurred) plus actual attorneys fees incurred by [Coin] …; and (b) such other legal remedy [Coin] may choose.

¶5 Also on February 12, 1999, Coin entered into a second lease agreement with Covey Apartments, almost identical to the one above, for "the exclusive use and control of the laundry areas" at 145 North Section Street in Nekoosa, Wisconsin. The only difference between the two lease agreements lay in the division of income, in that the owner of Covey Apartments did not have to pay

Coin a per diem on each washer and dryer and only received fifty percent of the gross income generated from the laundry equipment each month.

¶6 In November 2001, Coin recorded with the Wood County Register of Deeds a Notice of Laundry Room Lease Agreement for each property. The Notices stated that a valid laundry room lease agreement was in existence at each property between Coin and "the owner or agent of the owner, and their/its heirs, personal representatives, successors and assigns." It further stated that the "lease agreement shall constitute a covenant running with the land and shall not be construed as a license, and shall be binding upon the Owner, its/their heirs, personal representatives, successors and assigns." The Notices also stated that any questions regarding the lease agreements should be directed to Coin and provided Coin's contact information. The Notices did not set forth the terms of the lease agreements, and the actual lease agreements were not recorded.

¶7 Each of the washing machines and dryers installed at the properties bore a large sticker, stating in all bold capital letters: "THIS MACHINE IS OWNED BY COIN APPLIANCES, INC. OF MILWAUKEE AND IS OPERATED BY VIRTUE OF A LEASE BETWEEN COIN APPLIANCE[S] AND THE OWNER OR AGENT, OF THIS BUILDING, AND THEIR RESPECTIVE SUCCESSORS." The stickers were conspicuously located on the washing machines and dryers, and each month Coin's collection staff checked to make sure the stickers were in place and re-applied missing stickers.

¶8 On June 29, 2005, the owner of both of the properties subject to the lease agreements sold the properties to the Warners and Whites. An Addendum to the Offer to Purchase, which was signed by the Warners and Whites, shows "laundry income" of $2400 per year and included the following note: "This

income could more than double if you would install your own machines when the current contract expires in October." The Addendum also required the seller to provide the Warners and Whites with a copy of the "laundry contract" within three days of acceptance. (Some capitalization omitted.) Moreover, the Addendum stated that if the seller did not provide the Warners and Whites with a copy of the lease agreements within seven days of acceptance, the Warners and Whites could deliver a written notice to the seller rendering the offer null and void. The seller never provided the Warners and Whites with a copy of the lease agreements, and there is no evidence in the record that the Warners and Whites ever asked the seller for copies of the lease agreements.

¶9 Sometime after closing on the properties, Marc White called Coin to tell it of the change of ownership, causing Coin to mail him a Change of Ownership and/or Management Confirmation Form. Marc White signed the form on July 5, 2005, and returned it to Coin. On it, he wrote: "Please do not enter complex w[ith]out an owner present" and "We will be month to month with a 50/50 commission on gross." (Some capitalization omitted.)

¶10 On July 19, 2005, following a request by Marc White, Coin sent a letter and copies of the lease agreements to the Warners and Whites via certified mail to the Woodlake East Apartments' Market Street address. The letter was returned to Coin unclaimed.

¶11 On August 18, 2005, Coin made another attempt to provide the Warners and Whites with a copy of the lease agreements. Coin again sent the lease agreements to the Market Street address via certified mail and included a letter stating that the July 19, 2005 notice had gone unclaimed. It is unclear from the record, and the parties do not clarify in their briefs, whether Coin's second

attempt to provide the Warners and Whites with copies of the lease agreements was successful.

¶12 On August 29, 2005, Coin sent Marc White a letter stating as follows:

> Pursuant to our conversation, I will change the commission paid for 1055 Market to 50%. The Section St. property is currently at that percentage. Also, our personnel will no longer need to contact you prior to entering the property.
>
> If your intent is to not have our leases renew, it will require the timely receipt of your certified, return receipt cancellation letter at our office.

¶13 The Warners and Whites did not send Coin a certified letter indicating they did not wish to renew the lease agreements. Instead, they continued collecting approximately $200 per month in income from their share of the profits under the lease agreements.

¶14 More than two years later, on September 26, 2007, the Warners and Whites sent a fax to Coin, informing Coin that it had until October 27, 2007, to remove its washers and dryers from the properties, or the Warners and Whites would have them removed. In response to the fax, on October 5, 2007, counsel for Coin wrote to the Warners and Whites informing them that the laundry room lease agreements were in effect until February 11, 2013, and that Coin would seek strict enforcement of the contracts.

¶15 On October 30, 2007, the Warners and Whites refaxed the September 26, 2007 notice to Coin, adding the following handwritten note, signed by William Warner: "As of today, 10/30/07[,] the washers and dryers have not been picked up. If not picked up by 11/2/07 they will be placed outside. We will not be responsible for any damages." On November 19, 2007, the Warners and

Whites sent another fax to Coin, stating that if the washers and dryers at the properties were not removed by November 30, 2007, the Warners and Whites would "either turn them over to the police department as unclaimed property or store them outside." Soon thereafter, counsel for Coin notified the Warners and Whites that Coin would remove the laundry equipment for safekeeping but would be filing a civil suit to enforce the lease agreements.

¶16 On January 14, 2008, Coin filed a declaratory judgment action, requesting that the court find the lease agreements valid and enforceable against the Warners and Whites, and that the court order specific performance and money damages in an unspecified amount. The Warners and Whites answered, and subsequently, the trial court issued its Civil Division Scheduling Order. In relevant part, the order explicitly stated that Coin was to provide to the Warners and Whites, in writing by September 30, 2008, a witness list and "an itemized statement of damages claimed." The Warners and Whites received a witness list, but Coin never provided the Warners and Whites with an itemized statement of damages.

¶17 The parties filed cross-motions for summary judgment, and a hearing on the motions was held before the trial court on February 23, 2009. The court denied both motions, finding a number of factual issues to be in dispute.[2] However, at the conclusion of the hearing, counsel for the Warners and Whites raised the following concern:

[2] The trial court granted summary judgment for W Squared Apartments, LLC, dismissing it from the case. W Squared Apartments, LLC, was the name under which the Warners and Whites apparently owned and managed the apartment buildings.

> And as of yet here we are at summary judgment, I don't even know what my client's potential exposure is because not withstanding my repeated request[s] and the court's order that a witness list and an itemized list of damages be submitted, I still don't know.
>
> I get circular letters from counsel [for Coin] saying [it's] seeking specific performance, and we'll have a trial on damages later.
>
> As I put in my various briefs, I think at some point [Coin] needs to elect a remedy; and if we're going to move on, I'd like to know where we are. If they're going to -- if the damages are ascertainable, it should have been disclosed in the witness list. If they're not, we need expert witness testimony to determine how they're going to do it or some mechanism.

In response, the trial court ordered Coin to include in its pretrial report "what damages it seeks and how it intends to prove them up."

¶18 Following its February 23, 2009 order, the trial court expressed surprise that Coin had not complied with the scheduling order, and again repeated Coin's obligation to comply with the statement of damages. The following exchange took place:

> THE COURT: What did [Coin] not comply with?
>
> [WARNERS AND WHITES' COUNSEL]: There's no itemized list of damages or any way that I can determine how --
>
> THE COURT: An itemized statement of damages claimed.
>
> She asked for specific performance?
>
> You're not looking for any dollars?
>
> [COIN'S COUNSEL]: I have to find what I filed, Your Honor.
>
> It's my understanding I asked for specific performance of the underlying lease.

> Once we're back in the apartment, then we can determine, okay, we got kicked out at this point, we're reinstalled now, that's the period of time in which we can ask for damages.
>
> Damages --
>
> THE COURT: Well, that should not have precluded you from submitting a statement of damages since when you get back in, it's just an issue of computation based upon the date.
>
> The analysis for the damages you can certainly produce and should have produced. I don't know what to tell you now; but if you don't follow the scheduling order, this is what happens. I'm not putting this case back where it was in July.

The trial court then proceeded to schedule the pretrial conference.

¶19 On May 19, 2009, Coin filed its pretrial report without the statement of damages or any mention of the lease agreements' stipulated damages clause, saying that it was seeking specific performance only. The pretrial report contained the following statement regarding damages: "Pursuant to relevant case law, [Coin] is entitled to Specific Performance of the Laundry Room Lease Agreements as money damages will not adequately compensate [Coin] for its continual business loss."

¶20 On May 27, 2009, the trial court held a pretrial hearing during which it addressed a motion in limine filed by the Warners and Whites asking the court to issue an order precluding testimony regarding damages, based upon Coin's failure to abide by the scheduling order. With respect to the motion, the trial court stated as follows:

> The other issue that we took up in pretrial, during the pretrial in chambers[,] had to do with the motion in limine that [the Warners and Whites' counsel] has filed. [The Warners and Whites' counsel] is concerned because [Coin] has never produced a report on damages, and so [the

> Warners and Whites' counsel] is uncertain as to how to defend on the issue of damages.
>
> [Coin] is committed to the notion of specific performance being the remedy that [Coin] seek[s] in this case. I did look briefly at the cases that had been cited by [Coin] on this issue in a November[] 2008 submission; and it appeared to me as if specific performance is by no means a given in this case. I was prepared to give [Coin] time to secure an opinion with respect to damages. However, [Coin's counsel] expressed to me that what she really, truly is looking for here is specific performance.
>
> She wishes to call [a witness] to explain during the course of a court trial that there is no other true measure of damages that is available here. That is the way that she wishes to present the case, and that is the way that the case will proceed with [Coin] seeking specific performance and not seeking money damages; but rather, as I understand it, what [Coin is] going to seek is an order that [Coin] be returned to the premises. And I believe that [Coin] is also going to ask for the terms of the lease to be extended by a length of time equivalent to whatever period of time [Coin has] been excluded from the property. That is the posture of the case that [Coin] wishes to pursue.
>
> That should alleviate [the Warners and Whites'] concern with respect to the issue of damages.

¶21 Following a July 17, 2009 bench trial, the trial court found that the Warners and Whites had constructive notice of the lease agreements and breached them. The trial court then turned to potential remedies and rejected specific performance, stating as follows:

> [I]t seems to me that what [Coin] seeks in this case is the enforcement of the contract[] itself. And I do believe that there is good reason to believe that there was a breach on the part of the [Warners and Whites].
>
> I realize that what [Coin] seeks is for me to order that the washing machines be returned, that Coin … be allowed to place its washing machines and its dryers on the premises, and then to enlarge the term of the contract for the period of time that Coin … was excluded from the premises.

> I do not believe that [Coin] is entitled to that remedy.

After concluding that Coin was not entitled to specific performance, the trial court turned to the lease agreements' stipulated damages clause:

> In this case [Coin] opted for an equitable remedy which I declined to grant. Therefore, the damages in this action will be those provided for by (a) [of the stipulated damages clause].
>
> I note that the contract provides for notice by [Coin] of the breach; and we do have the October 5, 2007 letter from [Coin's counsel] directed to Ms. Warner. That date, the date of this letter … is October 5th of 2007.
>
> Therefore, under the contract I am deeming the breach to begin 10 days after October 5th of 2007 and to continue through February 11th of 2013, that's the date in your letter, and I am assuming -- I think that's consistent with [the] testimony -- and I am assuming that that is the day of the expiration of the current lease. So the damages will be those that are provided here.
>
> [Coin,] consistent with the requirements of the contract[,] is also entitled to actual attorney fees for its efforts to recover on the breach.

¶22 The court calculated damages and attorney fees, pursuant to the terms of the stipulated damages clause in the lease agreements, in the amount of $39,497.20 and entered judgment against the Warners and Whites in that amount. Coin did not appeal the trial court's decision to reject its request for specific performance. The Warners and Whites, however, do appeal.

DISCUSSION

¶23 The Warners and Whites argue that the trial court erred when it: (1) found that the lease agreements were enforceable; and (2) awarded Coin

money damages pursuant to the lease agreements' stipulated damages clause after Coin had waived its right to that remedy.[3] Coin counters that the trial court correctly decided that the lease agreements were enforceable and acted within its discretion when it amended the pleadings, pursuant to WIS. STAT. § 802.09(2), to include a request for stipulated damages. We agree with the trial court that the lease agreements are enforceable. But because we conclude that the trial court erroneously exercised its discretion in amending the pleadings after the close of all evidence to allow an award of unpled stipulated damages, and, in the process, denied the Warners and Whites the opportunity to object to the amendment and demonstrate prejudice, we reverse and remand for a hearing on that issue.

A. The lease agreements were enforceable.

¶24 The Warners and Whites first contend that the trial court erred in concluding that the lease agreements were valid and enforceable against them. The crux of their argument is that the lease agreements were not properly recorded, pursuant to WIS. STAT. ch. 706, and, therefore, are not enforceable against them as successors in interest. We review the trial court's application of

[3] Contract language setting forth the amount recoverable in the event of a breach is referred to as a stipulated damages clause. ***Rainbow Country Rentals and Retail, Inc. v. Ameritech Publ'g, Inc.***, 2005 WI 153, ¶25 n.2, 286 Wis. 2d 170, 706 N.W.2d 95. Liquidated damages are those stipulated damages found to be reasonable and enforceable. ***Id.*** Stipulated damages provisions that are not reasonable and enforceable are referred to as penalties. *See* ***Wassenaar v. Panos***, 111 Wis. 2d 518, 521, 331 N.W.2d 357 (1983). Throughout the briefs, the parties refer to the language in the lease agreements setting forth the amount recoverable in the event of a breach as the liquidated damages clause. However, because we do not rule on the reasonableness or enforceability of the clause, we refer to it as the stipulated damages clause for clarity.

the applicable statutes *de novo*. ***Christensen v. Sullivan***, 2009 WI 87, ¶42, 320 Wis. 2d 76, 768 N.W.2d 798.

¶25 The Warners and Whites argue that all conveyances[4]—the parties agree that the lease agreements are conveyances—must be recorded to be valid, and indeed, WIS. STAT. § 706.08(1)(a) states, in relevant part, that "every conveyance that is not recorded as provided by law shall be void as against any subsequent purchaser." And WIS. STAT. § 706.09(1) provides that "[a] purchaser for a valuable consideration, *without notice*" of a prior outstanding interest or claim against the property "shall take and hold the estate or interest … free of any claim adverse to or inconsistent with such estate or interest, if such adverse claim is dependent for its validity or priority upon: … (b) … [a]ny conveyance … not appearing of record in the chain of title." (Emphasis added.) However, § 706.09(2) sets forth when "[a] purchaser has notice of a prior outstanding claim or interest":

> (a) *Affirmative notice.* Such purchaser has affirmative notice apart from the record of the existence of such prior outstanding claim, including notice, actual or constructive, arising from use or occupancy of the real estate by any person at the time such purchaser's interest therein arises, whether or not such use or occupancy is exclusive; but no constructive notice shall be deemed to arise from use or occupancy unless due and diligent inquiry of persons using or occupying such real estate would, under the circumstances, reasonably have disclosed such prior outstanding interest; nor unless such use or occupancy is actual, visible, open and notorious.

[4] WISCONSIN STAT. § 706.01(4) defines a conveyance as "a written instrument, evidencing a transaction governed by this chapter, that satisfies the requirements of s. 706.02, subject to s. 706.25." The parties agree that the lease agreements are conveyances but that the Notices of Laundry Room Lease Agreement, filed with the register of deeds, are not.

It is with the concept of "affirmative notice" that the Warners and Whites' argument begins to unravel.

¶26 In ***Hoey Outdoor Advertising, Inc. v. Ricci***, 2002 WI App 231, 256 Wis. 2d 347, 653 N.W.2d 763, applying WIS. STAT. § 706.09(2), we held that a subsequent owner has affirmative notice of a prior outstanding claim if: (1) a prior outstanding claim or interest is "actual, visible, open and notorious; and (2) due and diligent inquiry, under the circumstances, reasonably would have disclosed [the] prior outstanding interest." ***Id.***, ¶15. Applying that standard, we concluded that a ten-year, renewable lease, permitting Hoey Outdoor Advertising, Inc. to erect a billboard on real property, was enforceable against the subsequent owner of the property, even though the lease was unrecorded and the subsequent owner had no knowledge of the lease prior to closing on the property. ***Id.***, ¶¶3, 14, 20. Because the billboard and its location were open and obvious and because a survey of the property would have disclosed that the billboard was on the property being purchased, we held that the subsequent owner had affirmative notice of the lease and was therefore bound by its terms. ***Id.***, ¶¶17-20.

¶27 Here, relying on ***Hoey***,[5] the trial court concluded that the Warners and Whites had affirmative notice of the lease agreements with Coin because: (1) the Notices of Laundry Room Lease Agreement were recorded with the register of deeds; (2) the Addendum to the Offer to Purchase, signed by the

[5] While the trial court relied heavily on ***Hoey Outdoor Advertising, Inc. v. Ricci***, 2002 WI App 231, 256 Wis. 2d 347, 653 N.W.2d 763, when rendering its decision, the Warners and Whites failed to mention the case in their brief to this court, except to mention it in passing when discussing the procedural history of the case. In their reply brief, they state only that ***Hoey*** is "factually distinct" but fail to elaborate upon that assertion. Because the Warners and Whites have failed to adequately develop this argument, we do not address it. *See* ***Kristi L.M. v. Dennis E.M.***, 2007 WI 85, ¶20 n.7, 302 Wis. 2d 185, 734 N.W.2d 375 (stating that the appellate court is not required to address undeveloped arguments).

Warners and Whites, noted the existence of a laundry lease at each property; (3) Marc White testified that he knew there was a lease agreement in place; (4) Marc White testified that he was familiar with the laundry business at the time of closing and understood how such businesses operate; and (5) the laundry machines were conspicuously placed in each building and had an easily visible sticker, which stated that the machines were leased and which provided Coin's contact information.

¶28 We conclude that the facts set forth by the trial court demonstrate that the laundry machines and the stickers setting forth the existence of a lease agreement were "actual, visible, open and notorious" and should have notified the Warners and Whites of the existence of the lease agreements. Further, the Addendum to the Offer to Purchase, which was signed by the Warners and Whites, and the Notices of Laundry Room Lease Agreement, of which the Warners and Whites concede they were aware, both affirmatively notified the Warners and Whites that the lease agreements existed.

¶29 Moreover, we conclude that the Warners and Whites did not exercise due diligence in attempting to uncover the terms of the lease agreements. The Addendum to the Offer to Purchase permitted the Warners and Whites to nullify the transaction if they did not receive copies of the lease agreements from the seller. While the record indicates that the seller did not follow through with that promise, due diligence requires the Warners and Whites to follow-up with the seller and request copies of the lease agreements. There is no evidence that such a request was made. Further, after Coin's final attempt to provide the Warners and Whites with copies of the lease agreements on August 18, 2005, the Warners and Whites continued to collect under the lease agreements for two years before insisting that the machines be removed from the property. If the Warners and

Whites did not receive copies of the lease agreements in August 2007, they have presented no evidence that they attempted to uncover the terms of the lease agreements over the next two years.

¶30 In short, our review of ***Hoey*** and the relevant statutes leads us to conclude that the Warners and Whites were affirmatively notified of the lease agreements, and therefore, the lease agreements were enforceable against them, pursuant to WIS. STAT. § 706.09(2).

B. Coin waived all remedies other than specific performance.

¶31 On the record at trial, Coin waived its opportunity to seek any money damages, and, on appeal, Coin does not argue to the contrary. Coin, in its appellate brief, fails to refute the Warners and Whites' assertion that Coin waived its right to money damages before the trial court. *See* ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612 ("[W]aiver is the intentional relinquishment or abandonment of a known right.") (internal quotation marks and citation omitted). By failing to refute the assertion, Coin has conceded that it waived its right to money damages. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (arguments not refuted are deemed admitted). Indeed, it would be difficult for Coin to argue otherwise.

¶32 The record demonstrates that Coin waived its right at trial to seek money damages in four ways: (1) although it pled a claim for money damages in its declaratory judgment complaint, Coin failed to plead any request for stipulated damages and later withdrew its request for money damages; (2) Coin failed to provide an itemized list of damages as required by the trial court's scheduling order, despite several warnings and extensions; (3) Coin explicitly told the court

and the Warners and Whites at the conclusion of the summary judgment hearing that it was seeking specific performance only; and (4) Coin filed a pretrial report seeking specific performance only and with no mention of stipulated damages.

¶33 The trial court gave Coin many opportunities to seek money damages but ultimately concluded that Coin waived any remedy other than specific performance. The trial court: (1) ordered Coin to itemize damages in the July 24, 2008 scheduling order; (2) reminded Coin, in response to the Warners and Whites' expressed concern at the summary judgment hearing on February 23, 2009, that it must comply with the scheduling order's itemization of damages requirement if it sought such damages; (3) made a careful record at the May 27, 2009 pretrial hearing of Coin's counsel's decision *not* to seek any damages other than specific performance, after explicitly stating that it would have given counsel more time to pursue money damages; and (4) confirmed that specific performance would be the only remedy Coin pursued at trial.

¶34 The trial court's cautious words at pretrial and Coin's lack of objection to them demonstrate Coin's waiver. The trial court observed that Coin "is committed to the notion of specific performance being the remedy that [Coin] seek[s] in this case." The trial court repeated that Coin's counsel stated that:

> [s]he wishes to call [a witness] to explain during the course of a court trial that there is no other true measure of damages that is available here. That is the way that she wishes to present the case, and *that is the way that the case will proceed with [Coin] seeking specific performance and not seeking money damages.*

(Emphasis added.) Coin did not object to the trial court's recitation of its position. The court then concluded: "That should alleviate [the Warners and Whites'] concern with respect to the issue of damages." Coin's failure to take advantage of

the multiple opportunities the trial court provided to it to plead and prove that it was entitled to money damages pursuant to the stipulated damages clause, and its steadfast insistence that it only wished to pursue specific performance, amounted to a waiver of damages pursuant to the stipulated damages clause. *See* ***Ndina***, 315 Wis. 2d 653, ¶29.

C. The trial court erroneously amended the pleadings under WIS. STAT. § 802.09(2).

¶35 At the conclusion of the trial, after the close of evidence, the trial court rendered its decision. After finding that the Warners and Whites had breached the lease agreements, the court found that Coin was not entitled to specific performance but then awarded Coin stipulated damages pursuant to the clause for the same in the lease agreements. As previously established, Coin had waived its right to stipulated damages, and the Warners and Whites were not provided with an opportunity to argue against stipulated damages. When awarding stipulated damages, the trial court did not characterize its ruling as one amending the pleadings pursuant to WIS. STAT. § 802.09(2)—that characterization came from Coin in its appellate brief. Accordingly, the trial court did not make any findings regarding whether the parties expressly or implicitly consented to the amendment of pleadings, nor did it provide the parties an opportunity to object to an amendment of the pleadings or offer evidence of prejudice.

¶36 The Warners and Whites argue that the trial court could not award stipulated damages because: (1) Coin had waived all remedies other than specific performance; and (2) stipulated damages had not been pled. Coin did not respond to the Warners and Whites' argument that it had waived stipulated damages, but instead countered the Warners and Whites' second argument by saying that the trial court's award of stipulated damages was, in effect, an amendment of the

pleadings under WIS. STAT. § 802.09(2), in which the court added a request for stipulated damages.

¶37 Because it is undisputed that Coin did not plead stipulated damages and because we have concluded above that Coin waived all remedies other than specific performance, we accept Coin's characterization of the trial court's ruling as an amendment to the pleadings under WIS. STAT. § 802.09(2) and review that ruling to determine whether it was an erroneous exercise of discretion. *See* ***Hess v. Fernandez***, 2005 WI 19, ¶15, 278 Wis. 2d 283, 692 N.W.2d 655 (stating that amending the pleadings pursuant to § 802.09(2) is within the trial court's discretion).

¶38 WISCONSIN STAT. § 802.09(2) grants the trial court wide discretion to amend the pleadings to comport with the evidence. ***State v. Peterson***, 104 Wis. 2d 616, 634, 312 N.W.2d 784 (1981). However, in exercising that discretion the trial court "must balance the interests of the party benefiting by the amendment and those of the party objecting to the amendment." ***Id.*** We "uphold a discretionary act if the [trial] court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Olson v. Town of Cottage Grove***, 2008 WI 51, ¶35, 309 Wis. 2d 365, 749 N.W.2d 211 (citation and internal quotation marks omitted). We give deference to the trial court's findings of fact and credibility determinations. *See* WIS. STAT. § 805.17(2).

¶39 Here, whether the trial court "applied the proper standard of law" requires our interpretation and application of WIS. STAT. § 802.09(2), which we review independently of the trial court—although, here, the court did not address the statute at all. *See* ***Christensen***, 320 Wis. 2d 76, ¶42 ("The interpretation and

application of statutes are questions of law that we review de novo."). Section 802.09(2) states, in relevant part:

> 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. … 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.

¶40 WISCONSIN STAT. § 802.09(2) was extensively analyzed and discussed by the Wisconsin Supreme Court in ***Peterson***. There, the court, in a case almost identical to this one, reversed and remanded a trial court decision to amend the pleadings because the trial court had not made a finding of express or implied consent to the amended pleadings and had not given the parties a chance to object to the amendment or to offer evidence supporting or rebutting a claim of prejudice from the amendment. *See* ***id.***, 104 Wis. 2d at 631, 640. The court held: "We conclude that while the [trial] court was correct in holding that it had the power to amend the complaint on its own motion after the presentation of the evidence, the [trial] court erred in not granting the parties an opportunity to present additional evidence on the complaint as amended." ***Id.*** at 618.

¶41 The ***Peterson*** court concluded that WIS. STAT. § 802.09(2) essentially bifurcates the statute into two parts. ***Peterson***, 104 Wis. 2d at 634; *see also* ***Zobel v. Fenendael***, 127 Wis. 2d 382, 387, 379 N.W.2d 887 (Ct. App. 1985). First, the statute directs the trial court to determine whether the parties expressly or implicitly consented to the amendment of the pleadings and to a trial of those

issues. ***Peterson***, 104 Wis. 2d at 634. The ***Peterson*** court held that implied consent requires actual notice. ***Id.*** If the court finds that the party implicitly consented, then amendment of the pleadings is mandatory. ***Id.*** at 631. If the trial court fails to make any finding as to express or implied consent, then the reviewing court examines the record for the same. *See* ***id.*** Finding no express or implied consent, the reviewing court goes on to step two. *See* ***id.*** at 634.

¶42 Second, if a party has objected to the amendment, the trial court has discretion to determine whether the objecting party would be prejudiced by the amendment to the pleading. ***Id.*** at 629-30. The ***Peterson*** court held that the parties must be given a meaningful opportunity to object to the amendment and present evidence in support for, or against, claims of prejudice. "The opportunity to submit additional proof must, of course, be a meaningful one." ***Id.*** at 639.

¶43 In ***Peterson***, the defendant was charged with inattentive driving and was facing forfeiture pursuant to WIS. STAT. § 346.89(1) (1977-78).[6] ***Peterson***, 104 Wis. 2d at 618. After the conclusion of the trial, the trial court, *sua sponte*, amended the pleadings to reflect the charge of deviating from a lane of traffic, pursuant to WIS. STAT. § 346.13(1) (1977-78) and then ordered a judgment of conviction on the amended charge. ***Peterson***, 104 Wis. 2d at 619. The trial court did not make any finding of express or implied consent. ***Id.*** at 631. Because it did not, the Wisconsin Supreme Court then examined the record to "determine whether, as a matter of law, the defendant understood, was aware of, or had actual

[6] The court "read the state traffic statutes to provide that the civil rules of procedure apply to amendment of pleadings in trials of forfeiture actions." ***State v. Peterson***, 104 Wis. 2d 616, 622, 312 N.W.2d 784 (1981).

notice of being tried on the charge of deviating and, by failing to object to the evidence, implicitly consented to trial of this issue."[7] ***Id.***

¶44 In ***Peterson***, the court held that the defendant did not implicitly consent to the amendment to the pleadings by failing to object to evidence, introduced during the trial, that he had deviated from his lane. ***Id.*** at 630. The court reasoned that "[b]ecause the evidence on deviating was relevant to the issue of inattentive driving, an issue already raised in the pleadings in the case, the defendant may not have been aware that the [S]tate was raising a new issue." ***Id.*** "To find implied consent it must appear that parties understood the evidence was aimed at the unpleaded issue." ***Id.***

¶45 Coin's first implied consent argument fails for those reasons stated in ***Peterson***. Coin argues that the record shows that the Warners and Whites implicitly consented to an amended claim for stipulated damages because the Warners and Whites failed to object to the admission of the lease agreements, which contained the stipulated damages clause. However, the lease agreements were relevant to the issue of specific performance, which had been pled. Accordingly, as in ***Peterson***, the Warners and Whites' failure to object to the admission of the lease agreements cannot be said to show their actual notice or implied consent to defending a claim for stipulated damages. *See* ***id.*** at 630. Also, viewed slightly differently, the admission of the lease agreements does not demonstrate that the Warners and Whites had actual notice that Coin was making

[7] The ***Peterson*** court cited the federal commentators to Fed. R. Civ. P. 15(b), noting that actual notice is required for an implied consent finding. ***Peterson***, 104 Wis. 2d at 631.

a claim for stipulated damages; in fact, they could not have had such notice because Coin had repeatedly stated that it was *not* making such a claim.

¶46 The second argument that Coin makes for implied consent is based on the Warners and Whites' counsel's reference to the stipulated damages clause during closing argument. The Warners and Whites' counsel stated the following:

> The other issue when you're asking for injunctive relief is that there's no adequate remedy at law. And [the lease agreements] both have [stipulated] damages provisions that [Coin] could have availed [itself] of.

This reference to the stipulated damages clause, however, was simply a legal argument in rebuttal to the claim for specific performance. Counsel was arguing that Coin had other remedies at law. Viewed in context, counsel's statement was clearly not an acknowledgment that Coin was seeking stipulated damages because Coin was not seeking such damages. It fails to meet the ***Peterson*** test of actual notice that the evidence was aimed at the "unpleaded issue." *See* ***id.*** at 630.

¶47 In ***Peterson***, after the court determined that the record failed to demonstrate implied consent under part one of WIS. STAT. § 802.09(2), the court then concluded that the trial court could still *sua sponte* amend the pleadings, but only after giving both parties a meaningful opportunity to present evidence. ***Peterson***, 104 Wis. 2d at 639-40. The court held that the trial court is required "to ensure that the entire controversy is presented and to ensure that the party opposing the amendment is not unfairly deprived of the opportunity to meet the issue created by the amendment." ***Id.*** at 634. "The issue in the case then becomes whether the defendant … is prejudiced by the amendment." ***Id.*** at 635; *see also* ***American Fed'n of State, Cnty., & Mun. Emps. Local 1901 v. Brown Cnty.***, 146 Wis. 2d 728, 737, 432 N.W.2d 571 (1988) (prohibiting a trial court from amending

the pleadings if doing so "unfairly deprive[s] an adverse party of an opportunity to contest the issues raised by the amendment" or "if the opposing party is … prejudiced by the amendment"). Because the defendant had not had the opportunity to present evidence in opposition to the amendment in ***Peterson***, the court found that "the [trial] court erred when it failed to offer the parties an opportunity to submit additional evidence to ensure that the parties have a full opportunity to be heard on the issues litigated." ***Id.***, 104 Wis. 2d at 640.

¶48 Similarly, the Warners and Whites were not presented an opportunity to submit evidence to challenged the stipulated damages clause. Therefore, we likewise remand for a hearing on the amendment because we conclude that the record fails to show express or implied consent to a trial on stipulated damages pursuant to the lease agreements, and WIS. STAT. § 802.09(2) requires that the parties should have been given a full and meaningful opportunity to be heard. *See* ***Peterson***, 104 Wis. 2d at 640. We conclude that amending the pleadings and awarding Coin money damages pursuant to the stipulated damages clause without providing the Warners and Whites with an opportunity to challenge the clause was an erroneous exercise of the trial court's discretion. *See* ***Olson***, 309 Wis. 2d 365, ¶35.

By the Court.—Judgment and order affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.