

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 25, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2012AP2714

Cir. Ct. No. 2011CV429

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

THOMAS C. NOLASCO AND KRISHNAN UNNI,

PLAINTIFFS-RESPONDENTS,

V.

AMERIPATH MILWAUKEE, S.C. D/B/A AMERIPATH ELMBROOK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
LEE S. DREYFUS, JR., Judge. *Affirmed and cause remanded with directions.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. In this employment contract dispute, AmeriPath Milwaukee, S.C. d/b/a AmeriPath Elmbrook appeals a judgment entered in favor of pathologists Thomas Nolasco and Krishnan Unni (the Doctors). We conclude

that the employment agreements are unambiguous and that the awards for damages, attorneys' fees and prejudgment interest were proper. We affirm. We also remand for a determination and award of the attorneys' fees and costs the Doctors incurred in defending this appeal.

¶2 Nolasco had an employment agreement with AmeriPath since 1999. In 2006, Nolasco and AmeriPath entered into a new agreement and then negotiated an amendment to it effective January 1, 2007. Soon after, Nolasco recruited Unni to work with him.

¶3 Unni's and Nolasco's employment agreements were substantially similar. Essentially, the agreements called for net revenue to be totaled, after which expenses, which include physician compensation, are subtracted, leaving "Pre-Physician Operating Income." Twenty-five percent of that sum automatically goes to AmeriPath. The remaining seventy-five percent forms the "physician compensation pool" (the Pool). Nolasco's agreement provides that his portion of the Pool "shall be determined in the discretion of the pathologists employed by [AmeriPath], with the approval of the Regional President, based upon [Nolasco's] performance to [AmeriPath] during such quarter." Unni's provides that his portion "shall be determined in the discretion of the Managing Director, with the approval of the Regional President, based upon [Unni's] annual performance to [AmeriPath]." The "pathologists" were Nolasco and Unni; the "Managing Director" was Nolasco.

¶4 Sometime in 2008, Nolasco grew concerned that expenses not enumerated in the agreements were being deducted from the Pool. When alerted, AmeriPath reversed those deductions. Soon after, the Doctors ceased being

provided AmeriPath's financial information updates from which they could estimate the Pool balance.

¶5 The Doctors did not receive Pool distributions for several years. AmeriPath acknowledged that from 2007 through 2011 it had not calculated the Pool according to the contract formula because that formula "did not include a number of critical and expensive elements that ordinarily are subtracted from revenue to determine a pool." The Doctors filed suit alleging that AmeriPath's failure to give them the portion of the Pool for which they were eligible breached their employment contracts and Wisconsin's wage claim statute, WIS. STAT. ch. 109 (2011-12).¹

¶6 Both parties moved for summary judgment. The trial court ruled in favor of the Doctors, concluding that, when Pool funds existed, they constituted a portion of the Doctors' salaries, and AmeriPath had no discretion in whether to distribute the funds. The court adopted AmeriPath's expert's damages figure and awarded Nolasco \$765,396.18 and Unni \$631,593.83 in compensatory damages, attorneys' fees, costs, and expenses. It also awarded Nolasco \$105,423.54 in prejudgment interest. AmeriPath appeals.

¶7 In reviewing the grant or denial of a summary judgment, we apply the same methodology as the trial court and review the grant or denial de novo. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). Because contract interpretation is a question of law, we also review it de

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

novo. *Ford Motor Co. v. Lyons*, 137 Wis. 2d 397, 460, 405 N.W.2d 354 (Ct. App. 1987).

¶8 AmeriPath contends that summary judgment was wrongly granted to the Doctors because it did not breach “the clear and unambiguous language of the employment agreements.” We agree that the language is clear and unambiguous. We disagree, however, with AmeriPath’s reading of it. Specifically, we disagree that it gives AmeriPath the discretion whether to allocate the Pool amounts. Rather, in an arrangement akin to a partnership, Nolasco’s agreement gives “the pathologists” the discretion to determine Nolasco’s portion of the pool and Unni’s gives “the Managing Director”—Nolasco—the discretion to determine Unni’s. The agreements give the Regional President the power only to approve the allocation based on the individual doctor’s performance, but not to disallow a distribution altogether. We therefore reject AmeriPath’s persistent description of the Pool allocations as “bonuses,” and agree with the trial court that the amounts are additional salary.

¶9 AmeriPath next contends that the trial court initially ruled that the Doctors’ compensation was equal to the total Pool when “‘trued-up’ to take into account the ‘draws’” paid to them. AmeriPath mistakes what transpired. To the contrary, the court concluded that the Doctors’ salary structure began with the base salary stated in the agreements—\$320,000 for Nolasco, \$330,000 for Unni. Those “draws” on their compensation already were subtracted from the Pool as part of the expenses. Net revenues in the Pool, less AmeriPath’s twenty-five percent, then would be allocated to the Doctors to complete their salary. To again subtract the draws in an end-of-year “truing-up,” to use AmeriPath’s term, would result in impermissible double-counting.

¶10 The trial court awarded the Doctors damages based on its conclusion that the agreements were clear and unambiguous, on AmeriPath's concessions that it had used the wrong formulation to calculate the Pool, and on AmeriPath's own experts' calculations that AmeriPath understated the Pool by more than \$900,000. AmeriPath inexplicably argues that the court's damages award represents a "puzzling about-face" from its initial "draws trued-up against total [Pool]" and is based on parol evidence. To the contrary, it dovetails perfectly with the court's liability determinations and flows naturally from, as we have stated, the unambiguous language of the agreements. It does not depend on parol evidence.

¶11 AmeriPath next complains that the trial court erred in awarding Nolasco "all" of his attorneys' fees and costs and in awarding any attorney fees at all to Unni who, it asserts, was not the prevailing party. We reject these baseless contentions.

¶12 Nolasco brought his claims under WIS. STAT. ch. 109. The court may allow the prevailing party, in addition to all other costs, a reasonable sum for expenses. WIS. STAT. § 109.03(6). "Expenses" include attorneys' fees. *Jacobson v. American Tool Cos., Inc.*, 222 Wis. 2d 384, 401, 588 N.W.2d 67 (Ct. App. 1998). Nolasco neither requested nor received all of his attorneys' fees. Rather, he sought and was awarded three-fifths of them for the three of the five years that were the subject of his breach-of-contract and ch. 109 claims.

¶13 Unni was awarded attorneys' fees pursuant to the fee-shifting provision in his employment agreement. AmeriPath asserts that it owes him no further compensation because it already paid him over \$1 million more than the total Pool and because he was not the prevailing party. The fee-shifting provision

has no “cap” on compensation and Unni prevailed on liability and damages. This argument fails.

¶14 AmeriPath also contends the award of prejudgment interest to Nolasco was improper because there was a genuine dispute as to what, if anything, was owed. Preverdict interest is available when damages are fixed and determinable or measurable according to a reasonably certain standard. *Loehrke v. Wanta Builders, Inc.*, 151 Wis. 2d 695, 706, 445 N.W.2d 717 (Ct. App. 1989). It should not be required if there is a genuine dispute as to the amount due. *Dahl v. Housing Auth. of the City of Madison*, 54 Wis. 2d 22, 31, 194 N.W.2d 618 (1972). Whether to award prejudgment interest is a question of law that we review independently. *Loehrke*, 151 Wis. 2d at 706.

¶15 We conclude that the prejudgment damage award was proper. While the parties disagreed about the damages owed, it was not a “genuine dispute”: it was less about determining the amount due than about whether AmeriPath was liable for it. “Mere difference of opinion as to amount is ... no more a reason to excuse [one] from interest than difference of opinion whether [the party] legally ought to pay at all, which has never been held an excuse.” *Dahl*, 54 Wis. 2d at 30-31 (citation omitted). Also, the damages were readily ascertainable. AmeriPath’s expert determined them simply by applying the contractual formula that should have been used in the first place.

¶16 Finally, the Doctors ask that we remand the case to the circuit court and direct the court to determine and award the attorneys’ fees and costs incurred in successfully defending this appeal. The parties’ agreement contemplated an award of appellate attorney fees. The “Attorneys’ Fees and Costs” paragraph provides:

In any action, suit or proceeding to enforce the terms and conditions of this Agreement, the prevailing party shall receive and the unsuccessful party shall pay all costs, fees and expenses, including attorney's costs, fees and expenses, incurred in enforcing its rights under this Agreement including costs, expenses and fees with respect to trials, appeals and collection.

Accordingly, we grant the Doctors' request and remand the matter for a determination and award of appellate attorneys' fees and costs.

By the Court.—Judgment affirmed and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

