COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP844 **Cir. Ct. No. 2012CV4665**

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

LISA C. GOLDMAN,

PLAINTIFF-APPELLANT,

V.

LAWTON & CATES, S.C.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County: WILLIAM D. JOHNSTON, Judge. *Reversed and cause remanded with directions.*

Before Lundsten, Higginbotham and Kloppenburg, JJ.

¶1 KLOPPENBURG, J. Attorney Lisa Goldman claimed that Lawton & Cates, S.C., breached its employment contract with her and violated the wage claim statute when it failed to pay her year-end bonuses equivalent to the bonuses

paid to its directors in 2010 and 2011, and violated its implied duty of good faith when it took actions that impeded the development of her law practice during her employment at the firm. The circuit court dismissed Goldman's claims on summary judgment and imposed sanctions against Goldman and her attorneys. Goldman appeals.

¶2 Consistent with our de novo review of summary judgment, we summarize the arguments from the perspective of Lawton & Cates, the party that sought and received summary judgment in its favor. Lawton & Cates argues that it is entitled to summary judgment: (1) dismissing Goldman's breach of contract claim because Lawton & Cates did not agree to employ or treat Goldman as a director; (2) dismissing Goldman's breach of contract claim because the claim is barred by the applicable statute of limitations; (3) dismissing Goldman's wage claim because the disputed year-end bonuses do not fall under the wage claim statute; and (4) dismissing Goldman's breach of good faith claim because it did not breach any contractual obligation and because it presented undisputed material facts that negate Goldman's claim. For the reasons below, we conclude that Lawton & Cates has failed to demonstrate that it is entitled to summary judgment on any of these claims. We also address Goldman's contention that the circuit court erred in imposing sanctions against her and her attorneys for continuing meritless claims. In light of our discussion of Lawton & Cates' failure to demonstrate that it is entitled to summary judgment dismissing Goldman's claims, we reverse the order awarding sanctions.

BACKGROUND

¶3 Goldman began practicing law in 1997. In October 2006, Goldman accepted employment at Lawton & Cates in an "Attorney" position. Goldman

alleged in her complaint that Lawton & Cates represented to her that "a bonus pool at the end of each year is divided equally between shareholders … with Directors receiving their corresponding percentage if they have contributed significantly to the productivity requirements of the firm and that [Goldman] was in the Directors category." Goldman left the firm in February 2012.

¶4 In November 2012, Goldman filed a complaint against Lawton & Cates alleging three separate claims. First, Goldman claimed that Lawton & Cates breached its employment contract with Goldman when Lawton & Cates "fail[ed] to pay [Goldman] her corresponding percentage of a shareholder's equal share of the bonus pool at the end of 2010 and 2011" at the directors level.

¶5 Second, Goldman claimed that Lawton and Cates' failure to pay her the year-end bonuses in 2010 and 2011 violated various sections of the wage claim statute, WIS. STAT. §§ 109.03, 109.09, and 109.11 (2013-14).[1]

¶6 Third, Goldman claimed that Lawton & Cates breached its implied duty of good faith "by refusing to permit [Goldman] to develop her criminal practice" and by "refusing to permit [Goldman] a reasonable opportunity to work on civil cases that came to the firm."

¶7 After discovery was completed, Lawton & Cates moved for, and the circuit court granted, summary judgment in Lawton & Cates' favor. At the summary judgment motion hearing, the circuit court held that there was no "real dispute" as to the alleged breach of "payment of a director's salary," because "[i]f

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

you are not a director, you are not entitled to a director's salary, and in this case [Goldman] was not [a director]."

¶8 The circuit court further held that Goldman's breach of contract claim was barred by the six-year statute of limitations.

¶9 The circuit court dismissed Goldman's wage claim based on its conclusion that the year-end bonuses did not fall under the purview of WIS. STAT. ch. 109.

¶10 The circuit court also dismissed Goldman's breach of implied duty of good faith claim because Goldman "couldn't point to any damages," and therefore did not have any basis for the claim.

¶11 After the summary judgment motion hearing, Lawton & Cates filed a motion for sanctions, pursuant to WIS. STAT. § 802.05(3), against Goldman for pursuing meritless claims after discovery. The circuit court granted the motion and awarded Lawton & Cates costs in the amount of $5,877.20 and sanctions in the amount of $14,564.56.

¶12 Goldman now appeals the circuit court's orders and amended judgment dismissing Goldman's claims on summary judgment and awarding sanctions against Goldman. Goldman's arguments are fact-intensive, and, therefore, we set forth additional facts as relevant to each claim in our discussion below.

DISCUSSION

¶13 As summarized in our introductory paragraph, Lawton & Cates argues that it is entitled to summary judgment: (1) dismissing Goldman's breach

of contract claim because Lawton & Cates did not agree to employ or treat Goldman as a director; (2) dismissing Goldman's breach of contract claim because the claim is barred by the applicable statute of limitations; (3) dismissing Goldman's wage claim because the disputed year-end bonuses do not fall under the wage claim statute; and (4) dismissing Goldman's breach of good faith claim because it did not breach any contractual obligation and because it presented undisputed material facts that negate Goldman's claim. In addition, Goldman contends that the circuit court erred in imposing sanctions against her and her attorneys for continuing meritless claims.

¶14 We first set forth the standard of review of the circuit court's grant of summary judgment. Consistent with that standard of review, we then address each of Goldman's arguments numbered above, in terms of whether Lawton & Cates is entitled to summary judgment.

¶15 Our review of a circuit court's grant of summary judgment is de novo. ***Post v. Schwall***, 157 Wis. 2d 652, 656, 460 N.W.2d 794 (Ct. App. 1990). "When reviewing a grant … of summary judgment, we apply the same methodology as the [circuit] court." ***Universal Die & Stampings, Inc. v. Justus***, 174 Wis. 2d 556, 560, 497 N.W.2d 797 (Ct. App. 1993). "Summary judgment is granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." ***Kruschke v. City of New Richmond***, 157 Wis. 2d 167, 169, 458 N.W.2d 832 (Ct. App. 1990). "Summary judgment should not be granted unless the moving party demonstrates a right to judgment with such clarity as to leave no room for controversy." ***Waters v. United States Fidelity & Guar. Co.***, 124 Wis. 2d 275, 279, 369 N.W.2d 755 (Ct. App. 1985).

¶16 "Summary judgment methodology prohibits the [circuit] court from deciding an issue of fact. The court determines only whether a factual issue exists, resolving doubts in that regard against the party moving for summary judgment." ***Preloznik v. City of Madison***, 113 Wis. 2d 112, 116, 334 N.W.2d 580 (Ct. App. 1983). "Credibility of witnesses is not a determination to be made at the summary judgment stage." ***Pum v. Wisconsin Physicians Serv. Ins. Corp.***, 2007 WI App 10, ¶16, 298 Wis. 2d 497, 727 N.W.2d 346 (WI App 2006). "In deciding whether there are factual disputes, the circuit court and the reviewing court consider whether more than one reasonable inference may be drawn from undisputed facts; if so, the competing reasonable inferences may constitute genuine issues of material fact. We draw all reasonable inferences from the evidence in favor of the nonmoving party. Whether an inference is reasonable and whether more than one reasonable inference may be drawn are questions of law." ***H & R Block Eastern Enterprises, Inc. v. Swenson***, 2008 WI App 3, ¶11, 307 Wis. 2d 390, 745 N.W.2d 421 (WI App 2007) (citations omitted).

¶17 Consistent with these well-established principles, we review Lawton & Cates' motion for summary judgment as the circuit court would. Therefore, we structure our discussion not around Goldman's arguments as to why the circuit court erred, but around Lawton & Cates' arguments as to why it is entitled to summary judgment. We review the arguments, pleadings, and summary judgment materials submitted by the parties, drawing all reasonable inferences from the evidence in favor of Goldman.

1. Breach of Contract Claim: Summary Judgment[2]

¶18 Lawton & Cates argues that it is entitled to summary judgment dismissing Goldman's breach of contract claim. As explained below, a genuine issue of material fact remains as to whether Lawton & Cates agreed to compensate Goldman at the directors level for the purpose of year-end bonuses, and, therefore, we conclude that Lawton & Cates is not entitled to summary judgment dismissing Goldman's breach of contract claim.

¶19 Goldman alleged in her complaint that Lawton & Cates agreed to compensate Goldman at the directors level for the purpose of year-end bonuses. She further alleged that Lawton & Cates breached that agreement by failing to provide the promised bonuses for the years 2010 and 2011.

¶20 In its brief supporting its motion for summary judgment, Lawton & Cates denied that it agreed to pay Goldman year-end bonuses at the directors level. However, Lawton & Cates focused its arguments, and presented evidence, almost entirely on a separate claim raised by Goldman: whether Goldman was hired as a director. This issue was beside the point, because as noted above, Goldman's breach of contract claim arose from her much more limited allegation that Lawton

[2] We address the dismissal of Goldman's breach of contract claim on its merits before the dismissal of that claim on statute of limitations grounds, because the application of the statute of limitations depends on the identification of the basis for the breach of contract claim and the dates relevant to that basis. The identification of the basis of the breach of contract claim and the relevant dates depends, in turn, on an examination of the pleadings and summary judgment materials. Therefore, we first engage in that examination and determine whether summary judgment was correctly granted on the merits in light of the properly identified basis for the breach of contract claim. Because we conclude that it was not, and that disputes of material fact remain for trial, we then address whether the statute of limitations bars the claim.

& Cates agreed to compensate her at the directors level in one respect—for the purpose of year-end bonuses.

¶21 Accordingly, we focus our attention on the evidence presented by the parties that relates to Goldman's claim—that Lawton & Cates breached its agreement to compensate her at the directors level for the purpose of year-end bonuses. Reviewing that evidence de novo, we conclude that whether Lawton & Cates agreed to compensate Goldman at the directors level for the purpose of year-end bonuses remains a disputed issue of material fact to be decided at trial.

¶22 In support of its motion for summary judgment, Lawton & Cates presented two letters that were sent to Goldman from the firm's administrator dated October 11, 2006 and October 16, 2006. The October 11 letter referred to the position offered to Goldman as "Attorney" and indicated that Goldman would receive "a bonus based on the firm's profitability." Lawton & Cates argues that because the October 11 letter stated that Goldman was being offered an "Attorney" position, rather than a "director" position, it follows that Lawton & Cates did not agree to compensate Goldman at the directors level for the purpose of year-end bonuses. We disagree. There is nothing inherently inconsistent between hiring a person as an attorney, but agreeing to sweeten the deal by agreeing to enhance compensation in a particular respect. Thus, while the letter might be considered evidence favorable to Lawton & Cates, it does not supply undisputed evidence as to whether Goldman would be compensated at the directors level for the purpose of year-end bonuses.

¶23 Moreover, Goldman points out that the follow-up October 16 letter suggests otherwise. That letter described the bonus determination process for

shareholders and directors followed by a statement that Goldman's salary was in the "Directors" category:

> You requested clarification on the firm's policy regarding allocating fees to attorneys who work together on cases. Currently, the firm pays a 15% premium bonus to attorneys who generate in excess of $200,000 in fee income. The remainder of the bonus pool at the end of each year is divided equally between the Shareholders who have contributed significantly to the productivity requirements of the firm with Directors receiving their corresponding percentage if they have contributed significantly to the productivity requirements of the firm. *As mentioned during our conversations, your salary is in the "Directors" category and fee income allocations would be attributed to you as a Director ….*

(Emphasis added.) Thus, we conclude that the October 11, 2006 letter does not constitute undisputed evidence that Lawton & Cates did not agree to compensate Goldman at the directors level for the purpose of the year-end bonuses.

¶24 Lawton & Cates also submitted a document titled "2007 Bonuses," which showed Goldman's name under a heading that read "Associates." Lawton & Cates argued that this document showed that it paid Goldman the 2007 bonus as an associate, rather than as a director, in a year when no bonuses were paid to directors. However, this evidence lacks probative value without additional evidence, such as evidence showing that Goldman knew that the 2007 bonus was at the associates level, that Goldman knew that no directors received bonuses that year, or that Goldman failed to act on such knowledge. Lawton & Cates fails to point to any such evidence.

¶25 Moreover, Goldman presented evidence refuting the above factual contentions, specifically the depositions of Douglas Phebus and Victor Arellano,

both of whom were shareholders at Lawton & Cates at the time of Goldman's hiring.[3]

¶26 Phebus testified at his deposition about the bonus that Goldman received in a different year, 2006, the year that Goldman started and worked a partial year. He testified that Goldman was paid a bonus of $500 that year, when directors were receiving $5,000 bonuses, because the firm was "sort of prorating and giving her … something that would give her a little something" since she "had just got[ten] there." Phebus testified that although the firm did not "talk[] about it as prorating the director [bonus], … [the firm] looked at what the directors made" when deciding.

¶27 Arellano testified at his deposition that he participated in the process of hiring Goldman. Arellano testified that the firm "approved the administrator to send [Goldman] a note specifically telling her how [the firm] would be treating her, how she would be paid and the bonuses that she would be entitled to." When asked "what [Goldman] was bonused as," Arellano answered, "[B]ased on the confirmation [letter] that we sent her, she was going to be treated as a director, paid as a director and she was treated like a director."

¶28 Lawton & Cates fails to persuade us that, in light of this deposition testimony and the hiring letters referenced above, the one document listing bonuses for 2007 demonstrates that it is undisputed that Lawton & Cates and Goldman agreed that she would be compensated at the associates level.

[3] Goldman also referred to her own deposition testimony as to her understanding of Lawton & Cates' offer, and her expectation that she would be compensated at the directors level for the purpose of year-end bonuses.

¶29 We emphasize that the role of this court on summary judgment is not to decide the facts, but only to determine whether there are disputes of material facts. Drawing all reasonable inferences in favor of Goldman as the nonmoving party, we conclude that the evidence presented upon summary judgment demonstrates that there are material facts in dispute—specifically, whether Lawton & Cates agreed to compensate Goldman at the directors level for the purpose of the year-end bonuses—that entitle Goldman to a trial.

¶30 Apart from the factual issue whether Lawton & Cates agreed to compensate Goldman at the directors level for the purpose of year-end bonuses, Lawton & Cates makes four other arguments in support of its summary judgment motion. We reject all four.

¶31 First, Lawton & Cates argues that Goldman cannot prove the terms of the employment contract as a matter of law because the alleged agreement is vague and indefinite as to the terms of her compensation. This argument fails because Goldman specifically alleged, and submitted evidence in support of her allegation, that Lawton & Cates agreed to compensate her at the directors level for the purpose of year-end bonuses; the agreement that she alleged is neither vague nor indefinite as to the terms of her compensation. Whether such offer and acceptance with regards to the terms of Goldman's compensation, as alleged by Goldman, occurred is for the jury to decide.

¶32 Second, Lawton & Cates contends that Goldman provided no consideration to establish a contract on the terms she alleged, because she did not perform directorial duties that would entitle her to year-end bonuses at the directors level. However, Lawton & Cates fails to present any evidence that Goldman was required to perform directorial duties as consideration in order to be

paid year-end bonuses at the directors level.[4] Moreover, Lawton & Cates cites no legal authority stating that each promised benefit in a contract requires separate consideration in return. Therefore, we do not consider this argument further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be considered.").

¶33 Third, Lawton & Cates contends that it changed the terms of Goldman's employment as to the year-end bonuses, and that, because of her at-will employment status, she accepted the changed terms by continuing her employment. Specifically, Lawton & Cates contends that by giving Goldman a bonus in 2007 rather than paying her no bonus (because the directors did not receive year-end bonuses that year), Goldman should have known that Lawton & Cates was changing the employment agreement to compensate her at the associates level instead of at the directors level. Lawton & Cates argues further that because Goldman continued her employment thereafter, Goldman accepted that change. But, as explained in ¶24 above, Lawton & Cates fails to provide the evidence necessary to support its argument.

¶34 Finally, in an argument much like the last, Lawton & Cates argues that, had there been an agreement, it rescinded the agreement when it did not treat Goldman as a director and when she did not perform duties of a director. But whether Lawton & Cates *treated* Goldman as a director in other respects and whether Goldman performed directorial duties have no bearing on Lawton &

[4] In fact, Goldman presented evidence of another attorney who had been hired in 2004 and was offered to be compensated at the directors level for the purpose of year-end bonuses without having to perform directorial duties.

Cates' alleged agreement to *compensate* her at the directors level for the purpose of year-end bonuses.

¶35 In sum, because whether Lawton & Cates agreed to compensate Goldman at the directors level for the purpose of year-end bonuses is a disputed issue of material fact, we reverse the circuit court's grant of summary judgment on the breach of contract claim and remand for trial.

2. Breach of Contract Claim: Statute of Limitations

¶36 Although we conclude above that there are disputed issues of material fact as to Goldman's breach of contract claim, that claim must be dismissed if the applicable statute of limitations has run. *See* ***Shaurette v. Capitol Erecting Co.***, 23 Wis. 2d 538, 546, 128 N.W.2d 34 (1964) ("In Wisconsin the running of the statute of limitations absolutely extinguishes a cause of action."). The circuit court held that Goldman's breach of contract claim was barred by the six-year statute of limitations provided in WIS. STAT. § 893.43. Goldman argues on appeal that the circuit court erred, because the statute of limitations began to run when Lawton & Cates failed to pay her the year-end bonuses at the end of 2010 and 2011, less than six years before she filed her complaint in 2012. We agree.

¶37 "The interpretation and application of a statute is a question of law that we decide without deference to the [circuit] court." ***Kruschke***, 157 Wis. 2d at 169. WISCONSIN STAT. § 893.43 requires that a breach of contract action be commenced within six years of accrual. A contract claim accrues, and the statute of limitations begins to run, from the moment the breach occurs. ***CLL Assocs. Ltd. P'ship v. Arrowhead Pac. Corp.***, 174 Wis. 2d 604, 609, 497 N.W.2d 115 (1993).

¶38 Here, Goldman's complaint alleged that Lawton & Cates breached the contract at the end of 2010 and again at the end of 2011 when, in each of those years, Lawton & Cates failed to pay Goldman the promised year-end bonus. Lawton & Cates argues that if a breach of contract occurred, then it occurred when the firm "fail[ed] to treat [Goldman] as a director" beginning on November 27, 2006, when Lawton & Cates did not invite Goldman to the first Board of Directors meeting following her start date. Lawton & Cates' responsive argument once again relies on mischaracterizing Goldman's claim. As indicated, Goldman did not claim that Lawton & Cates breached the contract to make her a director or generally treat her as a director; she claimed that Lawton & Cates breached its contractual promise to pay her year-end bonuses at the directors level. Thus, Lawton & Cates fails to respond to Goldman's argument that a new breach occurred each year when the firm failed to pay Goldman the year-end bonuses at the directors level. Thus, based on our reading of Goldman's complaint, we conclude that her complaint was timely filed as to the claimed 2010 and 2011 breaches.

3. Wage Claim Pursuant to WIS. STAT. ch. 109

¶39 Goldman claimed in the circuit court that Lawton & Cates' failure to pay her the year-end bonuses in 2010 and 2011, in addition to breaching her employment contract, violated the Wisconsin wage claim statute.[5] The wage claim statute creates a private right of action for employees to recover unpaid

[5] Goldman alleged violations of WIS. STAT. §§ 109.03, 109.09, and 109.11.

wages. *See* WIS. STAT. § 109.03(5).[6] Lawton & Cates argues Goldman's wage claim should be dismissed for three reasons: (1) Goldman did not serve as a director and therefore did not provide any "personal services" so as to entitle her to year-end bonuses at the directors level; (2) the year-end bonuses are discretionary; and (3) Goldman's claim of entitlement to the year-end bonuses is not "clear and already determined." For the reasons set forth below, we reject Lawton & Cates' arguments and conclude that whether the year-end bonuses at issue here are wages within the meaning of the statute depends on the resolution of a disputed fact, and, therefore, we reverse the circuit court's dismissal of Goldman's wage claim.

A. Standard of Review

¶40 As noted above, our review of the circuit court's grant of summary judgment in favor of Lawton & Cates on Goldman's wage claim is de novo. *See* ***Post***, 157 Wis. 2d at 656. Furthermore, whether the wage claim statute's definition of "wages" covers the year-end bonuses at issue is a question of statutory construction which we review de novo. *See* ***Sliwinski v. City of Milwaukee***, 2009 WI App 162, ¶13, 321 Wis. 2d 774, 777 N.W.2d 88 (applying de novo review to determine whether WIS. STAT. ch. 109's definition of "wages" includes pay and benefits under another statute).

[6] WISCONSIN STAT. § 109.03(5) states in pertinent part:

> Each employee shall have a right of action against any employer for the full amount of the employee's wages due on each regular pay day as provided in this section … in any court of competent jurisdiction.

¶41 The term "wages," as used in the wage claim statute, is defined in WIS. STAT. § 109.01(3) as:

> *remuneration payable to an employee for* ***personal services****, including* salaries, commissions, holiday and vacation pay, overtime pay, severance pay or dismissal pay, supplemental unemployment benefit plan payments when required under a binding collective bargaining agreement, ***bonuses*** *and any other similar advantages agreed upon between the employer and the employee or provided by the employer to the employees as an established policy*.

(Emphasis added.)

¶42 "A WIS. STAT. ch. 109 wage claim is meant to be a procedure for employees to get prompt payment of monies clearly owed to them by their employers.... [T]here are two facets to the WIS. STAT. § 109.01(3) wage claim: (1) the employee must have at some time performed personal services that entitle him or her to the wages; and (2) the employee's entitlement to the wages must be clear and already determined by either an agreement or employer's policy." ***Sliwinski***, 321 Wis. 2d 774, ¶17.

B. Personal Services

¶43 Lawton & Cates first argues that Goldman did not provide "personal services" so as to entitle her to year-end bonuses at the directors level, because she did not perform the duties of a director. However, Lawton & Cates fails to demonstrate as undisputed its factual assertion that Goldman was required to perform duties of a director in order to receive year-end bonuses at the directors

level.[7] Moreover, it appears that Goldman performed personal services during 2010 and 2011 for Lawton & Cates, because Goldman was allocated legal service fees at the directors level of at least $122,000 and $153,000 in 2010 and 2011 respectively. Lawton & Cates fails to point to any evidence suggesting that Goldman's performance of legal services for Lawton & Cates in 2010 and 2011 was not the provision of personal services entitling her to year-end bonuses at the directors level for those years. Thus, we reject this argument by Lawton & Cates.

C. Year-End Bonuses Were "Discretionary"

¶44 Second, Lawton & Cates argues that the year-end bonuses are not wages within the meaning of WIS. STAT. § 109.01(3) because the bonuses are discretionary. Lawton & Cates contends that the year-end bonuses are discretionary because "shareholders use their discretion to decide whether to give bonuses from the profits and if so how much," and "shareholders also apply discretion to decide whether a director should get less than their pro rata share because of lack of productivity." In other words, Lawton & Cates argues that the year-end bonuses here are not wages under the wage claim statute, because the year-end bonuses are contingent on certain facts having occurred: that year-end bonuses are paid from profits, and that the individual "contributed significantly to the productivity requirements of Lawton & Cates."

[7] Also, as noted above, Goldman presented as evidence to the contrary, an offer letter directed at another attorney two years before Goldman was hired, which stated that that attorney was offered an "Attorney" position and would be treated as a "Director for compensation purposes" and eligible for year-end bonuses even though that attorney would not be acting as a director.

¶45 However, Lawton & Cates fails to point to any language in the Wisconsin wage claim statute that distinguishes between types of bonuses, such that bonuses that are contingent on certain facts having occurred are not wages. *See* ***Sliwinski***, 321 Wis. 2d 774, ¶16 ("To determine the meaning of WIS. STAT. § 109.01(3), we first look to its plain language."). Nor does the term "discretionary" appear in the statute. Rather, the wage claim statute plainly states that the term "wages" includes "bonuses." *See* WIS. STAT. § 109.01(3).

¶46 Moreover, the wage claim statute contains many examples of contingent compensation that are considered wages under the statute. For example, severance pay and dismissal pay are contingent on the employee being dismissed, but become required once the contingency is satisfied. Commissions are contingent upon the employee making sales. Goldman's alleged entitlement to the year-end bonus was similarly contingent upon the shareholders being paid a year-end bonus and Goldman having contributed significantly to the productivity requirements of the firm.

¶47 If there is a valid argument as to why discretionary year-end bonuses are not covered by the wage claim statute, Lawton & Cates has failed to bring it to our attention.

D. Entitlement That is "Clear and Already Determined"

¶48 Finally, Lawton & Cates argues that it is entitled to summary judgment because Goldman fails to show that her entitlement to the year-end bonuses is "clear and already determined" as that phrase is used in ***Sliwinski***. *See* 321 Wis. 2d 774, ¶17. Lawton & Cates does not provide a discussion of the meaning of "clear and already determined" or apply that meaning to undisputed facts. Rather, it follows up with this brief statement: "[Lawton & Cates] disputes

that Goldman was a director or was otherwise eligible to be considered for directors' profit-sharing bonuses." The argument is a non-starter. Pointing out that Lawton & Cates disputes whether Goldman was in fact entitled to bonuses as if she were a director plainly falls short of pointing to undisputed evidence that would, as a matter of law, warrant the conclusion that the bonuses at issue here are not wages under the wage claim statute.

¶49 In sum, we conclude that because it is disputed whether Goldman's entitlement to the year-end bonuses paid at the directors level is clear and already determined by the employment agreement, Lawton & Cates is not entitled to summary judgment dismissing Goldman's wage claim.

4. Breach of Implied Duty of Good Faith

¶50 Goldman alleged that Lawton & Cates breached its implied duty of good faith by "refusing to permit [her] to develop her criminal practice by sending direct mailings between July, 2007 and May 18, 2009," "refusing to permit [her] to send a brochure about representation in civil cases with her direct mailings," and "refusing to permit [her] a reasonable opportunity to work on civil cases that came to the firm." Goldman sought as damages "lost compensation and lost opportunity to participate in the 401-K plan and benefit from additional contributions to the plan."

¶51 Lawton & Cates argues that it is entitled to summary judgment dismissing Goldman's breach of implied duty of good faith claim because it did not have any contractual obligation to Goldman to allow her to send solicitation letters, and even if it had such an obligation, it fulfilled that obligation by allowing Goldman to send solicitation letters at various times during her employment. Lawton & Cates also argues that Goldman "does not dispute material[] facts that

definitively negate her claim." For the reasons stated below, we reject Lawton & Cates' arguments and reverse the circuit court's dismissal of Goldman's breach of implied duty of good faith claim.

¶52 Generally, "the requirement that parties act in 'good faith' inheres in every contract and, therefore, an employer must comply in good faith with its 'contractual obligations.'" ***Phillips v. U.S. Bank, N.A.***, 2010 WI App 35, ¶8, 324 Wis. 2d 151, 781 N.W.2d 540. "'[I]t may be said that contracts impose on the parties thereto a duty to do everything necessary to carry them out…. Moreover, there is an implied undertaking in every contract on the part of each party that he [or she] will not intentionally and purposely do anything to prevent the other party from carrying out his [or her] part of the agreement, or do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. Ordinarily if one exacts a promise from another to perform an act, the law implies a counter-promise against arbitrary or unreasonable conduct on the part of the promisee.'" ***Metropolitan Ventures, LLC v. GEA Assocs.***, 2006 WI 71, ¶35, 291 Wis. 2d 393, 717 N.W.2d 58 (quoted source omitted).

A. No Contractual Obligation

¶53 Lawton & Cates contends that it could not have breached any duty of good faith with respect to the direct mailings because it had no contractual obligation to allow Goldman to send direct mailings. However, Lawton & Cates fails to provide any support for the legal proposition that there has to have been, effectively, a breach of contract, in order for there to be a breach of the implied duty of good faith. To the contrary, this argument contradicts Wisconsin case law, which says that a breach of the implied duty of good faith can occur even when

there is no breach of contract. *See, e.g.*, ***Kreckel v. Walbridge Aldinger Co.***, 2006 WI App 168, ¶20, 295 Wis. 2d 649, 721 N.W.2d 508 ("A party can be liable for breach of the implied covenant of good faith 'even though all the terms of the written agreement may have been fulfilled.'" (quoted source omitted)); ***Foseid v. State Bank of Cross Plains***, 197 Wis. 2d 772, 797, 541 N.W.2d 203 (Ct. App. 1995).

B. Undisputed Material Facts Negate Goldman's Claim

¶54 Lawton & Cates also argues that it is entitled to summary judgment because it presented material facts that "definitively negate [Goldman's] claim" and that Goldman "does not dispute" such facts. As explained below, Lawton & Cates fails to persuade us that it presented undisputed evidence negating Goldman's claim.

¶55 First, Lawton & Cates argues that it could not have breached the implied duty of good faith with respect to the direct mailings because it is undisputed that it allowed Goldman to send direct mailings at certain times during her employment. This argument is flawed, because Goldman alleged a breach of bad faith specifically during the period between July 2007 and May 2009, when Lawton & Cates did not permit her to send direct mailings. The undisputed fact that Lawton & Cates allowed Goldman to send the direct mailings at other times may affect other issues, such as a jury's determination of whether the disallowance between July 2007 and May 2009 was "arbitrary or unreasonable," but such fact does not, as Lawton & Cates argues, "definitely negate [Goldman's] claim" for breach of implied duty of good faith between July 2007 and May 2009.

¶56 Second, Lawton & Cates argues that it did not breach its implied duty of good faith with respect to assisting Goldman with her marketing efforts as

to her civil practice. Rather than presenting evidence to refute Goldman's allegation that Lawton & Cates did not permit her to include a brochure about representation in civil cases with her direct mailings, Lawton & Cates broadly contends that Goldman had opportunities to give the firm's shareholders and directors feedback on marketing issues but did not do so. Lawton & Cates points to two memoranda written in December 2007 and 2008 as evidence that Goldman did not raise any concerns with her marketing efforts during that time. However, this argument is flawed, because it amounts to pointing to contrary evidence, not to undisputed evidence showing that the claim must be dismissed. The fact that Goldman did not complain may affect a jury's determination of whether Lawton & Cates acted unreasonably, but such fact does not "definitively negate [Goldman's] claim."

¶57 Third, Lawton & Cates argues that it did not breach its duty of good faith with respect to permitting Goldman "reasonable opportunity to work on civil cases that came to the firm" because it had, at one point, offered Goldman an opportunity to handle "a potential client about a personal injury concern" and Goldman had declined the opportunity. This argument falls apart, given that Goldman was employed at Lawton & Cates for approximately five-and-one-half years and this incident is the sole example Lawton & Cates provides of an instance when it offered Goldman an opportunity to handle a civil case. Whether Lawton & Cates' failure to provide Goldman with other opportunities during those five-and-one-half years of employment was arbitrary or unreasonable, such that it breached the implied duty of good faith, is a question of fact for a jury to decide.

¶58 We conclude that Lawton & Cates fails to establish that it is entitled to summary judgment as to Goldman's breach of implied duty of good faith claim. Therefore, we reverse the circuit court's dismissal of that claim.

5. Sanctions Against Goldman

¶59 Finally, Goldman argues that the circuit court erred in granting Lawton & Cates' motion for sanctions for pursuing meritless claims after discovery, pursuant to WIS. STAT. § 802.05. WISCONSIN STAT. § 802.05(2) allows courts to impose appropriate sanctions when actions are "continued frivolously." ***Keller v. Patterson***, 2012 WI App 78, ¶22, 343 Wis. 2d 569, 819 N.W.2d 841. We conclude that Goldman's claims were not continued frivolously, and therefore, we reverse the circuit court's award of sanctions against Goldman and her attorneys.

¶60 Our review of a circuit court's decision made pursuant to WIS. STAT. § 802.05 is deferential. *See* ***Storms v. Action Wisconsin, Inc.***, 2008 WI 56, ¶34, 309 Wis. 2d 704, 750 N.W.2d 739. "With regard to whether an action was continued frivolously, what an attorney knew or should have known is a question of fact. Then, whether the facts found by the [circuit] court support a finding of no basis in law or fact is a question of law which we review de novo. All doubts regarding whether a claim is frivolous 'are resolved in favor of the party or attorney' whom it is claimed commenced or continued a frivolous action.'" ***Keller***, 343 Wis. 2d 569, ¶22 (citations omitted).

¶61 The circuit court awarded sanctions based on its conclusion that Goldman frivolously continued her action against Lawton & Cates after discovery and after she was given notice that her complaint was without merit. The court's rationale appears to center around its assumption that Goldman's claim was that she was hired to be a director, and its conclusion that "there is not a dispute of material fact that she was not hired as a director." But, as explained above, Goldman's breach of contract claim and wage claim were premised on a different

proposition—that she was to be compensated at the directors level for the purpose of year-end bonuses. Whether Lawton & Cates in fact agreed to compensate Goldman at the directors level for the purpose of year-end bonuses is disputed. In addition, Goldman's breach of contract claim is not barred by the statute of limitations, and whether Lawton & Cates breached its implied duty of good faith is disputed. Thus, we reverse the order awarding Lawton & Cates sanctions.

CONCLUSION

¶62 Because there were disputed issues of material fact as to Goldman's breach of contract claim, wage claim, and breach of implied duty of good faith claim, and because the statute of limitations does not bar Goldman's breach of contract claim, we reverse the circuit court's decision dismissing those claims on summary judgment and remand for further proceedings consistent with this opinion. For the reasons explained above, we also reverse the order awarding Lawton & Cates sanctions.

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

Not recommended for publication in the official reports.