

**Court of Appeals No. 72846-6  
King County Superior Court No. 13-2-42119-4**

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**IN THE COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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NIELS HVIDTFELDT,

Appellant,

v.

SITRION SYSTEMS AMERICAS, INC.,

Respondent.

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APPELLANT'S OPENING BRIEF

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Michael C. Subit, WSBA No. 29189  
Christie J. Fix, WSBA No. 40801  
Frank Freed Subit & Thomas LLP  
705 Second Avenue, Suite 1200  
Seattle, WA 98104-1798  
Telephone: (206) 682-6711  
Facsimile: (206) 682-0401

2015 APR - 1 PM 4:04

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COURT OF APPEALS  
STATE OF WASHINGTON  
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## I. INTRODUCTION

Plaintiff/Appellant Niels Hvidtfeldt is the former General Manager of Defendant/Respondent Sitrion Systems Americas, Inc. (“SSA”). Mr. Hvidtfeldt’s executive Employment Agreement specifically provides that he “will be receiving” a “Success Bonus” for 2012. The Employment Agreement explicitly sets forth six “terms and conditions” for the payment of Mr. Hvidtfeldt’s 2012 Success Bonus, but his employment by SSA for the entire 2012 calendar year is not among them. Had the parties intended to condition the payment of Mr. Hvidtfeldt’s 2012 Success Bonus on his continued employment for all of 2012, they would have included that term in Mr. Hvidtfeldt’s Employment Agreement. Notably, the employment agreements of other, lower-level SSA employees expressly provide that their bonus had to be earned in full prior to termination, but Mr. Hvidtfeldt’s does not. Because a jury viewing the evidence in the light most favorable to Mr. Hvidtfeldt could reasonably find not only that SSA owes Mr. Hvidtfeldt his entire Success Bonus for 2012 but also that SSA has willfully withheld that bonus in violation of RCW 49.52.050 and RCW 49.52.070, the Superior Court erred when it granted SSA’s motion for summary judgment and dismissed Mr. Hvidtfeldt’s claims for breach of contract and willful withholding of wages. The Court of Appeals should reverse the Superior Court’s order and remand this case for trial.

## **II. ASSIGNMENTS OF ERROR**

The Superior Court erred when it granted SSA's motion for summary judgment on Mr. Hvidtfeldt's claim for breach of his employment contract where there is no express term conditioning payment of his Success Bonus on his continued employment through the end of 2012 and where the only relevant extrinsic evidence, viewed in the light most favorable to Mr. Hvidtfeldt, supports Mr. Hvidtfeldt's right to receive the bonus payment.

The Superior Court erred when it granted SSA's motion for summary judgment on Mr. Hvidtfeldt's RCW 49.52 claim where the evidence viewed in the light most favorable to Mr. Hvidtfeldt does not establish as a matter of law that there is a bona fide dispute regarding Mr. Hvidtfeldt's right to his full 2012 Success Bonus.

## **III. STATEMENT OF THE CASE**

### **A. The eRhapsody-Sitrion GMBH Cooperation Agreement.**

Mr. Hvidtfeldt is the owner of a Washington software business called eRhapsody. CP 80 at ¶ 2. On March 22, 2011, eRhapsody and SSA's German parent company, Sitrion Systems GMBH ("Sitrion"), entered into a Cooperation Agreement. CP 80 at ¶ 3, CP 85-93. The term of the Cooperation Agreement was for one year beginning January 1,

2011, subject to termination during that period upon 60 days' written notice by either party. CP 90 at ¶ 2. Among its other terms, the Cooperation Agreement provided that eRhapsody—which was effectively Mr. Hvidtfeldt—would receive commissions based on sales of specified Sitrion software products. CP 88 at ¶¶ 1.a & 1.b; CP 80 at ¶ 2.

The Cooperation Agreement contained a “tail provision” that governed eRhapsody's entitlement to commissions following the expiration or termination of the Cooperation Agreement. CP 81 at ¶ 4 & CP 88-89 at ¶ 1.c. The Cooperation Agreement provided that if Sitrion terminated the Cooperation Agreement without cause, eRhapsody would continue to receive certain commissions for 12 months after the termination of the agreement. On the other hand, if (1) eRhapsody terminated the Cooperation Agreement or (2) Sitrion terminated the Cooperation Agreement for cause, eRhapsody would receive no commissions after the termination of the agreement. CP 89 at ¶ 1.c.

On October 31, 2011, Sitrion informed Mr. Hvidtfeldt that it was terminating the Cooperation Agreement effective December 31, 2011. CP 95. Sitrion terminated the Cooperation Agreement without cause. CP 81 at ¶ 6. Therefore, eRhapsody and Mr. Hvidtfeldt were entitled to continue receiving substantial commissions for 12 months post-termination

pursuant to the terms of the Cooperation Agreement's "tail provision." *Id.*;  
CP 89 at ¶ 1.c.i.

**B. Negotiation of Mr. Hvidtfeldt's SSA Employment Agreement.**

Throughout the last months of 2011 and into the beginning of 2012, Mr. Hvidtfeldt and Sitrion negotiated the terms of a series of agreements to bring him on as General Manager of Sitrion's North American subsidiary, SSA. CP 81 at ¶ 7. "General Manager" was functionally a Chief Executive Officer position. *Id.*

In early January 2012, Sitrion's attorney sent Mr. Hvidtfeldt a draft employment agreement, as well as other agreements. CP 81 at ¶ 8. Mr. Hvidtfeldt was directed by then-Chief Executive Officer of Sitrion GmbH, Markus Dopp (who was also President of SSA), to negotiate with a "hired consultant" named Daniel Kraft. CP 81 at ¶ 9. Mr. Kraft owned a company called iFridge. Mr. Kraft eventually acquired Sitrion. *Id.* On the morning of January 10, 2012, Mr. Hvidtfeldt wrote an email to Mr. Kraft expressing Mr. Hvidtfeldt's concerns with the draft employment agreement. CP 81 at ¶ 10, CP 37-39. One of Mr. Hvidtfeldt's concerns was that the proposed employment agreement did not provide a "post agreement tail" for bonus payments following the termination of the agreement in the manner that the 2011 eRhapsody-Sitrion Cooperation Agreement did. CP 81 at ¶ 11, CP 37. Mr. Hvidtfeldt noted that the 2011

Cooperation Agreement provided for 12 months of continued compensation to him following the termination of the agreement, unless eRhapsody terminated the agreement or Sitrion terminated it for cause. CP 82 at ¶ 12, CP 37. Mr. Hvidtfeldt proposed including in the 2012 employment agreement a tail provision that was essentially the same as the tail provision in the Cooperation Agreement. CP 82 at ¶ 13, CP 37.

Mr. Kraft responded to Mr. Hvidtfeldt's email later that afternoon. CP 41-42. He stated Sitrion had included some of Mr. Hvidtfeldt's changes. CP 41. Mr. Kraft rejected Mr. Hvidtfeldt's request to add a "post-agreement tail" to the employment agreement. *Id.* Mr. Kraft also wrote: "As long as you are with the company, you will receive compensation, if you leave this ends." *Id.* (emphasis supplied). Mr. Kraft noted Mr. Hvidtfeldt's new incentive agreement included a 12-month "tail." CP 42. Mr. Hvidtfeldt then requested additional modifications to the *formula* for calculating his 2012 incentive bonus under the Employment Agreement. CP 44, CP 47. Sitrion rejected Mr. Hvidtfeldt's request. *Id.*

The parties ultimately executed an Employment Agreement (CP 30-35); a Transition Agreement (CP 97-98), and an Incentive Agreement (CP 100-01). CP 82 at ¶ 14. The Transition Agreement furnished eRhapsody and Mr. Hvidtfeldt with certain payments in lieu of the commissions guaranteed by the tail provision of the 2011 Cooperation

Agreement. CP 97 at ¶¶ 1-3. The Incentive Agreement provided Mr. Hvidtfeldt with monetary proceeds in case of a sale of more than 80% of Sitrion's shares. CP 100. The term of the Incentive Agreement was coextensive with the term of the Employment Agreement. CP 100 at ¶ 3. If, however, SSA terminated Mr. Hvidtfeldt's Employment Agreement without cause, the Incentive Agreement would then continue for another 12 months after the termination date of the Employment Agreement. *Id.* This was the "Incentive Tail" referenced in Mr. Kraft's email of January 10. CP 82 at ¶ 15.

The Employment Agreement was effective retroactive to January 1, 2012. CP 30. Paragraph 1 stated Mr. Hvidtfeldt's duties as General Manager North America "shall include the operational management of the North American business of the Employer, which includes supervising all sales, field marketing, professional services, support and administrative functions in North America." CP 30 at ¶ 1. Mr. Hvidtfeldt's position was at will and could be terminated by him or SSA at any time. *Id.*; CP 32 at ¶ 11. Paragraph 2 provided SSA would pay Mr. Hvidtfeldt a Base Salary "for services provided." CP 30 at ¶ 2. That paragraph further stated that "[i]n addition to the base salary," Mr. Hvidtfeldt "*will be receiving* an annual variable compensation in the amount of US\$180,000 (at 100% target achievement) per year *to be paid* upon achieving targets defined by

the Board of the Employer.” *Id.* (emphasis supplied). That variable compensation was labeled a “Success Bonus.” *Id.*

The terms of the Success Bonus are set forth in the document “Bonus Agreement General Manager North America fiscal year 2012” attached to the Employment Agreement as Appendix 1. CP 34-35. The Bonus Agreement provides that Mr. Hvidtfeldt’s 2012 variable compensation “as agreed in the employee Agreement is subject to the following terms and conditions:”

- 80% of the variable compensation is based on the Employer achieving quarterly Revenues targets as highlighted in the Goal Table. Quarterly Revenues goals that did not get achieved in a quarter will lead to no variable compensation in that respective quarter.
- 20% of the variable compensation is based on the Employer achieving annual Margin achievements as highlighted in the Goal Table. Annual Margin goals that did not get achieved lead to no variable compensation.
- Should Employer achieve the annual Revenues goals but not the quarterly Revenues goals, the total variable compensation will be reconciled based on the Payout Table.
- Should Employer achieve the annual Revenue goals and the Margin Goal, the Payout Table is applied [to] 100% of the variable compensation. Should the Employer achieve the annual Revenues goals but not the Margin Goal, the Payout Table is only applied to 80% of the variable compensation.

- Each payment depending on revenue goals is due 45 days after the respective period. Each payment depending on margin goals is due 10 days after the audited annual report is available.
- In the Goal Table “Revenues” are defined as recognized revenues according to US GAAP standards excluding any and all intercompany revenues. “Margin” is defined as operating profit as calculated in the annual business plan.

*Id.* Thus, the terms and conditions of the Bonus Agreement made clear that Mr. Hvidtfeldt’s receipt of his Success Bonus was contingent on the *Employer* achieving certain performance objectives; the Bonus Agreement does not list any conditions based on Mr. Hvidtfeldt’s individual performance. The Bonus Agreement does not list Mr. Hvidtfeldt’s continued employment among the enumerated terms and conditions for payment of the Success Bonus.

**C. SSA Terminates Mr. Hvidtfeldt’s Employment, but Does Not Terminate the 2012 Employment Agreement.**

On September 10, 2012, SSA President Markus Dopp sent Mr. Hvidtfeldt a letter, erroneously dated October 10, 2012, stating that the Board of Directors had “resolved to terminate *your employment* with the Company, effective immediately, without cause pursuant to Section 11 of your employment agreement with the Company (the ‘Agreement’), as will be discussed with you, and hereby gives notice of such termination

pursuant to Section 20 of the Agreement.” CP 82 at ¶ 16, CP 103 (emphasis supplied). The letter also stated: “We remind you of all your continuing obligations of confidentiality, non-solicitation, non-competition and non-disparagement set forth in the Agreement.” CP 103. On September 14, 2012, Mr. Dopp sent the following correction to Mr. Hvidtfeldt: “We note that the letter of termination contained a typo in the date, which should have been September 10<sup>th</sup>, 2012. That is the date we met and on which your employment was terminated.” CP 105.

SSA paid Mr. Hvidtfeldt his Success Bonus for the first quarter of 2012. SSA refused to pay him the remainder of his 2012 Success Bonus. CP 83 at ¶ 18.

#### **D. Procedural Background.**

Mr. Hvidtfeldt filed the instant civil action against SSA on December 19, 2013. CP 1-4. He alleges that SSA’s refusal to pay the remainder of his 2012 Success Bonus was a breach of the Employment Agreement and also constitutes willful withholding of wages in violation of RCW 49.52. CP 3-4.

On November 21, 2014, the Superior Court granted SSA’s motion for summary judgment on Mr. Hvidtfeldt’s claims for breach of contract and willful withholding of wages. CP 113-14. The Superior Court dismissed Mr. Hvidtfeldt’s claims with prejudice and dismissed

Mr. Hvidtfeldt's lawsuit with prejudice. CP 114. On December 17, 2014, Mr. Hvidtfeldt filed a timely notice of appeal. CP 115-16.

#### IV. ARGUMENT

##### A. Summary Judgment Standard.

The Court of Appeals reviews summary judgment decisions *de novo*, engaging in the same inquiry as the trial court. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003). The court must view the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Summary judgment is proper only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Versuslaw, Inc. v. Stoel Rives, LLP*, 127 Wn. App. 309, 319-20, 111 P.3d 866 (2005). A genuine issue of material fact exists where reasonable minds could differ regarding the facts controlling the outcome of the litigation. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Contract interpretation is a question of law only if “(1) the interpretation does not depend on the use of extrinsic evidence, or (2) only one reasonable inference can be drawn from the extrinsic evidence.” *Tanner Elec. Co-op. v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674, 911

P.2d 1301 (1996) (citing *Scott Galvanizing, Inc. v. Nw. EnviroServices, Inc.*, 120 Wn.2d 573, 582, 844 P.2d 428 (1993)).

In this case, the express language of the Employment Agreement does not condition payment of Mr. Hvidtfeldt's 2012 Success Bonus on his remaining employed by SSA through the end of 2012. In addition, the extrinsic evidence and the reasonable inferences therefrom, viewed in the light most favorable to Mr. Hvidtfeldt, further support Mr. Hvidtfeldt's right to payment and do not establish SSA's right to judgment as a matter of law. The Court of Appeals should reverse the Superior Court's order granting summary judgment to SSA and remand this case for trial.

**B. Mr. Hvidtfeldt's Employment Agreement Does Not Condition Payment of His Full 2012 Success Bonus Upon His Continued Employment for the Entire 2012 Calendar Year.**

SSA argued below that it is entitled to summary judgment on Mr. Hvidtfeldt's legal claims because the "employment agreement . . . does not provide for post-termination bonus payments." CP 14. To the contrary, the plain language of the Employment Agreement establishes Mr. Hvidtfeldt's right to payment of his Success Bonus.

Washington law governs the Employment Agreement. CP 33 at ¶ 21. Washington follows the objective manifestation approach theory of contracts. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). The court determines the intent of the parties to

a contract by looking at the actual terms of their agreement and giving the words used their ordinary, usual and popular meaning (unless the agreement clearly demonstrates a contrary intent). 154 Wn.2d at 503-04. The court interprets what is actually written, not what was intended to be written. *Id.* at 504. Courts will not add contractual terms to an agreement containing an integration clause, which the Employment Agreement does at Paragraph 19. *Denny's Restaurants, Inc. v. Sec. Union Title Ins. Co.*, 71 Wn. App. 194, 202, 859 P.2d 619 (1993); see CP 32 at ¶ 19.

Surrounding circumstances and other extrinsic evidence can be used to explain the specific words and terms used in the contract. *Hearst Commc'ns, Inc.*, 154 Wn.2d at 503. However, extrinsic evidence cannot be used to show an intention independent of the words used or to vary, modify or contradict the written word. *Id.* A court should not read ambiguities into a contract where none exist. *BP Land & Cattle LLC v. Balcom & Moe, Inc.*, 121 Wn. App. 251, 254, 86 P.3d 788 (2004). If there are ambiguities in a contract, they are construed against the contract drafter. *Lamar Outdoor Adver. v. Harwood*, 162 Wn. App. 385, 395, 254 P.3d 208 (2011). Sitrion was the exclusive drafter of the terms of the Employment Agreement. CP 83 at ¶ 19.

1. *Mr. Hvidtfeldt is Entitled to Payment of His Success Bonus Under the Express Language of the Employment Agreement.*

Paragraph 2 of Mr. Hvidtfeldt's Employment Agreement unambiguously provides that he "will be receiving" for 2012 annual variable compensation in the amount of \$180,000 "to be paid" if SSA met certain defined financial targets. CP 30 at ¶ 2 (emphasis added). Appendix 1 to the Employment Agreement sets forth the terms and conditions for the payment of Mr. Hvidtfeldt's 2012 variable compensation. CP 34. There are six terms and conditions, which are stated verbatim on pages 7-8, *supra*. Mr. Hvidtfeldt's continued employment through December 31, 2012, or any other specific date, is not among those enumerated terms and conditions. If the parties had intended Mr. Hvidtfeldt's continued employment through December 31, 2012, to be a condition for the payment of his entire fiscal 2012 bonus, they would have said so. Nothing in Paragraph 2 of the Employment Agreement or Appendix 1 suggests that Mr. Hvidtfeldt's entitlement to his success bonus for 2012 depended on his continued employment through December 31, 2012.

Whether a contract contains a condition depends on the intent of the parties. *Jones Associates, Inc. v. Eastside Properties, Inc.*, 41 Wn. App. 462, 466-67, 704 P.2d 681 (1985). An intent to create a condition is revealed by words and phrases such as "on condition," "when," or

“while.” *Id.* at 467. Where it is unclear whether the terms of a contract create a promise or a condition, they will be interpreted as creating a promise rather than a condition *Id.* The “Success Bonus” portion of paragraph 2 of the Employment Agreement does not use conditional language. Instead it uses the mandatory language “will be receiving” and “to be paid.” In contrast, the same paragraph of the Employment Agreement states that SSA will pay Mr. Hvidtfeldt a base salary “for services rendered.” The “for services rendered” language conditions SSA’s obligation to pay Mr. Hvidtfeldt’s base salary upon his continued rendering of services to the Employer. When SSA terminated Mr. Hvidtfeldt’s employment in September 2012, its obligation to pay him his base salary ceased under the plain terms of the Employment Agreement. There is, however, no similar language in the Employment Agreement conditioning SSA’s obligation to pay Mr. Hvidtfeldt his variable compensation on his continued performance of services for the company for any period of time. Because the Employment Agreement placed no conditions on Mr. Hvidtfeldt’s Success Bonus other than the Employer’s achievement of certain financial targets, Mr. Hvidtfeldt is entitled to variable compensation set forth in Paragraph 2 and the Bonus Agreement.

2. *SSA's March 1, 2012 Agreement with Dean K. Read Demonstrates that When SSA Conditions a Bonus on Continued Employment, It Does So Explicitly.*

The language of Mr. Hvidtfeldt's Employment Agreement sharply contrasts with the employment agreement between SSA and Dean K. Read, executed on March 1, 2012. CP 57-59. Paragraph 5 of Mr. Read's agreement expressly states: "Bonuses will not be paid pro-rata; they must be earned in full prior to termination." CP 58. Mr. Read's employment agreement shows that when SSA wants to condition payment of an employee bonus upon his continued employment for the entire bonus period, it does so explicitly. It is hardly surprising that Mr. Hvidtfeldt's Employment Agreement has more generous terms than Mr. Read's does. Mr. Read was an SSA regional sales director. Mr. Hvidtfeldt held one of the two highest positions in the Company. The contrasting language of Mr. Read's employment agreement provides powerful support to Mr. Hvidtfeldt's contention that his Employment Agreement does not condition payment of his full 2012 Success Bonus on his continued employment for the entire 2012 calendar year.

SSA's arguments to the contrary are not convincing. First, SSA argued below that the court should interpret the language in Mr. Read's contract as SSA's attempt to clarify or enhance its bonus language following its negotiations with Mr. Hvidtfeldt. SSA provided no factual

support for this assertion; rather, it asked the Superior Court to draw this inference, favorable to SSA, from Mr. Read's contract. At summary judgment, however, the court must view the facts and the reasonable inferences therefrom in the light most favorable to the non-moving party. *Young*, 112 Wn.2d at 225. Consistent with this fundamental principle, this Court should reject SSA's attempt to explain away the difference in language between its agreements with Mr. Hvidtfeldt and Mr. Read.

Second, SSA contended for the first time at oral argument on its motion for summary judgment that Mr. Read's employment contract was a "subsequent remedial measure" inadmissible under ER 407. SSA's reliance on ER 407 is misplaced. ER 407 provides,

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove *negligence or culpable conduct* in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

ER 407 (emphasis supplied). Not surprisingly, no reported Washington case has applied ER 407 to exclude evidence in a breach of contract case such as this. Because the purpose of excluding evidence of subsequent remedial measures is the "social policy rationale of encouraging safety precautions," *Hyjek v. Anthony Indus.*, 133 Wn.2d 414, 417-18, 944 P.2d

1036, 1037 (1997), the policy considerations which underlie ER 407 are simply not at issue in a breach of contract case such as this. Furthermore, Mr. Read's contract is not being introduced for the impermissible purposes of proving negligence or culpable conduct on the part of SSA. Rather, it is relevant and is properly admitted for purposes of contract interpretation.<sup>1</sup> SSA's argument that ER 407 renders Mr. Read's contract inadmissible should be rejected.

3. *Paragraph 14, Governing "Continuing Obligations," is Consistent With SSA's Continued Obligation to Pay Mr. Hvidtfeldt's Variable Compensation.*

SSA erroneously argued below that because paragraph 14, entitled "Continuing Obligations," states that "[n]otwithstanding the termination of Employee for any reason, the provisions of paragraph 5, 6, 7, 9 and 13 will continue in full force and effect following such termination," and does not mention paragraph 2, the parties did not intend that SSA would have an obligation to pay Mr. Hvidtfeldt's variable compensation following his termination. See CP 32 at ¶ 14. As Mr. Dopp recognized in his September 10, 2012, letter terminating Mr. Hvidtfeldt's employment, however, the purpose of paragraph 14 was to set forth *Mr. Hvidtfeldt's* continuing

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<sup>1</sup> Indeed, SSA argued in its Motion for Summary Judgment in the trial court that Mr. Read's employment agreement supported its own interpretation of Mr. Hvidtfeldt's contract. See CP 18 n.1.

obligations *to SSA* following the termination of his employment. Mr. Dopp wrote to Mr. Hvidtfeldt: “We remind you of all *your* continuing obligations of confidentiality, non-solicitation, non-competition and non-disparagement set forth in the Agreement.” CP 103 (emphasis supplied). Those are the Employee obligations set forth in paragraphs 5, 6, 7, and 13 of the Employment Agreement. See CP 30-32 at ¶¶ 5, 6, 7, & 13. SSA has no post-termination obligations under those paragraphs or under paragraph 9 of the Employment Agreement (regarding inventions), which also continues in full force and effect after the Employee’s termination pursuant to paragraph 14.

SSA also argued below that the purpose of paragraph 14 was to make clear that SSA has no continuing obligations under the Employment Agreement except with respect to the five enumerated paragraphs mentioned therein. One flaw in this argument is that SSA has no obligations whatsoever under those enumerated paragraphs per the express terms of the contract. Rather, the listed paragraphs describe only the obligations that the employee owes to SSA. SSA’s reading of paragraph 14 is nonsensical and it violates the principle that a court should read a contract as a whole, giving effect to all of its provisions. *BP Land & Cattle LLC*, 121 Wn. App. at 254. The second flaw with SSA’s argument is that it proves too much. Paragraphs 15, 16, 17, 18, 19, and 20 are not

mentioned in paragraph 14 as provisions that “will continue in full force and effect” following Mr. Hvidtfeldt’s termination. But those contractual obligations by their terms continued in full force and effect following SSA’s termination of Mr. Hvidtfeldt’s employment. The same is true of SSA’s obligations to pay Mr. Hvidtfeldt’s full variable compensation for 2012 under paragraph 2 of the Employment Agreement, as long as the terms and conditions set forth in the Employment Agreement were satisfied. Those terms and conditions did not include Mr. Hvidtfeldt’s continued employment for all of 2012.

**C. Sitrion’s Refusal to Accept Mr. Hvidtfeldt’s January 10, 2012, Proposal to Include a “Tail Provision” in the Employment Agreement That Would Take Effect Upon the Termination of the Employment Agreement Has No Relevance Here Because Sitrion Never Terminated the Employment Agreement.**

SSA argued below that the parties’ negotiations in January 2012 show that they never intended to provide Mr. Hvidtfeldt with compensation following the termination of his employment with the Company and that Mr. Hvidtfeldt “knew this to be true when he signed the agreement.” CP 14, 22-23. SSA, however, misrepresented the parties’ negotiations. When viewed in the light most favorable to Mr. Hvidtfeldt, nothing about the parties’ negotiations obviates SSA’s obligation to pay Mr. Hvidtfeldt his full Success Bonus.

The documents that SSA submitted show the parties never discussed whether Mr. Hvidtfeldt would receive compensation under his Employment Agreement after the termination of his *employment* by the Company. See CP 83 at ¶ 20. SSA and Mr. Hvidtfeldt did, however, discuss whether Mr. Hvidtfeldt would receive tail compensation *following termination of the Employment Agreement*. *Id.* On January 10, 2012, Mr. Hvidtfeldt sent Mr. Kraft an email proposing the parties address the topic of “post-agreement tail compensation.” CP 37. Under the “topic” of “post-agreement tail compensation,” Mr. Hvidtfeldt wrote “Draft employment agreement does not address tail payments for bonus amounts.” *Id.* Mr. Hvidtfeldt proposed adding to the Employment Agreement a tail provision essentially the same as the one that existed under the parties’ 2011 Cooperation Agreement. *Id.* That tail provision addressed commission payments to Mr. Hvidtfeldt following the termination of the Cooperation Agreement. See CP 88. SSA rejected Mr. Hvidtfeldt’s proposal to add a “post-agreement tail” to the Employment Agreement that would take effect only upon termination of the Employment Agreement—not upon termination of Mr. Hvidtfeldt’s employment. SSA’s rejection of the “post-agreement tail compensation” proposal is irrelevant to the present dispute between the parties because SSA has never terminated the Employment Agreement. CP 83 at ¶ 21.

The parties clearly distinguished between the termination of Mr. Hvidtfeldt's employment with SSA, on the one hand, and the termination of Mr. Hvidtfeldt's SSA Employment Agreement, on the other, in both their final signed agreements and the negotiations leading up to them. Paragraph 1 of the Employment Agreement stated that Mr. Hvidtfeldt's "position" was "at will" and "can be terminated by Employee or Employer at any time." CP 30 at ¶ 1. Paragraph 4 provided Mr. Hvidtfeldt would not accept any other employment "during the time of his employment with Employer." CP 30 at ¶ 4. In paragraph 5 Mr. Hvidtfeldt agreed to not disclose any SSA Confidential Information "at any time during or after the termination of employment." CP 30-31 at ¶ 5. Paragraphs 6 and 7 tie Mr. Hvidtfeldt's non-competition and non-solicitation agreements to the termination of his employment. CP 31 at ¶¶ 6-7. Paragraphs 8 and 9 set forth certain obligations on Mr. Hvidtfeldt's part that existed only "during the course of his employment." CP 31 at ¶¶ 8-9. Paragraph 12 of the Employment Agreement tied Mr. Hvidtfeldt's obligation to return SSA property to the "termination of his employment." CP 32 at ¶ 12. None of these obligations were tied to the term of the Employment Agreement.

By contrast, the contemporaneously executed Incentive Agreement explicitly tied the parties' obligations under it to "the term of this

agreement.” CP 100. Moreover, the Incentive Agreement provides that its terms will expire “on the day *the employment agreement* between Employee and Sitrion Systems, Inc. is terminated. If *the employment agreement* between Employee and Sitrion Systems, Inc. is terminated by Sitrion Systems, Inc. without cause, the term of this Agreement shall expire 12 months after *the employment agreement* between Employee and Sitrion Systems, Inc. is terminated.” CP 100 at ¶ 3 (emphasis supplied). This language shows that the parties understood in January 2012, when they signed the Employment Agreement and Incentive Agreements, that there was a big difference between the termination of Mr. Hvidtfeldt’s employment and the termination of his Employment Agreement.

SSA’s subsequent conduct reinforces this conclusion. On September 10, 2012, SSA informed Mr. Hvidtfeldt that the SSA board had resolved to terminate his employment. CP 103. Neither the misdated September 10, 2012, letter nor the September 14, 2012, correction mentions anything about terminating Mr. Hvidtfeldt’s Employment Agreement. See *id.* and CP 105. By contrast, SSA’s letter of October 31, 2011, terminating the Cooperation Agreement between Mr. Hvidtfeldt and the Company expressly stated that the Company was terminating the Cooperation Agreement. CP 95. This further demonstrates that both Mr. Hvidtfeldt and SSA knew that a party’s reference to the Employment

Agreement between SSA and Mr. Hvidtfeldt was not the same as a reference to Mr. Hvidtfeldt's employment with SSA as General Manager.

Accordingly, both parties understood that SSA's rejection of Mr. Hvidtfeldt's January 2012 proposal to add "*post agreement* tail compensation" to the Employment Agreement constituted only a refusal to pay compensation to Mr. Hvidtfeldt *following the termination of the Employment Agreement*. SSA's rejection of that proposed modification in no way establishes that the parties understood SSA had no obligation under the terms of the Employment Agreement to pay Mr. Hvidtfeldt's full variable compensation for 2012 regardless of whether SSA terminated his employment prior to the end of that calendar year.

SSA erroneously argues that Mr. Kraft's January 10, 2012, email statement to Mr. Hvidtfeldt that "As long as you are with the company, you will receive compensation, if you leave it ends," disposes of Mr. Hvidtfeldt's claim for payment of his full 2012 success bonus. See CP 41. Where, as here, a contract contains an integration clause, surrounding circumstances cannot be used to "vary, contradict or modify the written word." *Hearst Commc'ns, Inc.*, 154 Wn.2d at 503. Mr. Hvidtfeldt's Employment Agreement explicitly provides that he "will be receiving" his 2012 success bonus "to be paid" provided the terms and conditions for receipt of the bonus set forth in Appendix 1 are satisfied. CP 30 at ¶ 2.

Nowhere does the Employment Agreement or Appendix 1 say that Mr. Hvidtfeldt will receive his variable compensation only “as long as [he is] employed with the company” and that such compensation will end if “[he] leaves.” Mr. Kraft’s January 10, 2012, statement varies, contradicts, and modifies the written terms of Mr. Hvidtfeldt’s Employment Agreement. It is therefore inadmissible as extrinsic evidence.

Mr. Kraft’s statement is also irrelevant to the present dispute between Mr. Hvidtfeldt and SSA even assuming it is not barred entirely. Mr. Kraft told Mr. Hvidtfeldt on January 10, 2012, that Mr. Hvidtfeldt’s rights to compensation from SSA would end if Mr. Hvidtfeldt *left* the company. CP 41. Mr. Hvidtfeldt did not leave SSA. To the contrary, SSA involuntarily terminated his employment without cause in September 2012. Mr. Hvidtfeldt’s understanding that his right to variable compensation would end only if he left the company is consistent with the course of dealings established by the parties’ 2011 Cooperation Agreement, their January 2012 negotiations regarding the Employment Agreement, and the Incentive Agreement executed contemporaneously with the Employment Agreement. *See City of Tacoma v. City of Bonney Lake*, 173 Wn.2d 584, 590, 269 P.3d 1017 (2012) (“Course of dealings is a sequence of previous conduct between the parties to an agreement which establishes a common basis of understanding for interpreting their

agreement.” (internal edits omitted)). All three contemplated different financial consequences to Mr. Hvidtfeldt from a voluntary termination on his part, on the one hand, and an involuntary termination by Sitrion without cause, on the other. The Cooperation Agreement provided continued compensation to Mr. Hvidtfeldt from an involuntary termination of the agreement without cause by Sitrion but no continued compensation if Mr. Hvidtfeldt initiated the termination. CP 88-89 at ¶ 1.c. Similarly, the Incentive Agreement provides continued benefits to Mr. Hvidtfeldt if SSA terminated the Employment Agreement without cause but no continued benefits to Mr. Hvidtfeldt if he voluntarily terminated the Employment Agreement. CP 97. The post-agreement tail compensation provision that Mr. Hvidtfeldt proposed in January 2012 likewise provided for continued compensation to Mr. Hvidtfeldt if SSA terminated the Employment Agreement without cause but no continued compensation to Mr. Hvidtfeldt if he terminated the Employment Agreement. CP 37.

Particularly given this context, Mr. Kraft’s January 10, 2012, email statement to Mr. Hvidtfeldt means exactly what it says: that in Mr. Kraft’s opinion Mr. Hvidtfeldt would cease receiving compensation from SSA *if Mr. Hvidtfeldt left the company*. Mr. Hvidtfeldt did not leave SSA. Instead, SSA involuntarily terminated his employment without cause. A termination without cause entitled Mr. Hvidtfeldt to continued

compensation under both the 2011 Cooperation Agreement and the 2012 Incentive Agreement. The same was true under the 2012 Employment Agreement with respect to Mr. Hvidtfeldt's 2012 variable compensation. Accordingly even if it were not inadmissible extrinsic evidence, Mr. Kraft's January 10, 2012, email statement to Mr. Hvidtfeldt, viewed in the light most favorable to Mr. Hvidtfeldt, does not contradict Mr. Hvidtfeldt's right to payment of his entire 2012 Success Bonus under the Employment Agreement.

For all these reasons, the Superior Court erred when it granted SSA's motion for summary judgment on Mr. Hvidtfeldt's breach of contract claim. This Court should reverse the Superior Court's order and remand this case for trial.

**D. A Jury Could Reasonably Find SSA Has Willfully Withheld the Balance of Mr. Hvidtfeldt's 2012 Success Bonus in Violation of RCW 49.52.050 and 49.52.070.**

The Superior Court also erred when it granted SSA's motion for summary judgment on Mr. Hvidtfeldt's claim for willful withholding of wages. RCW 49.52.050 and RCW 49.52.070 together create a cause of action against an employer for the willful withholding of wages. To take advantage of RCW 49.52 the employee must show the defendant (1) willfully withheld (2) wages. *Morgan v. Kingen*, 166 Wn.2d 526, 534, 210 P.3d 995 (2009). Bonuses are wages under RCW 49.52.050. *LaCoursiere*

*v. Camwest Dev., Inc.*, 181 Wn.2d 734, 741, 339 P.3d 963 (2014); *Dice v. City of Montesano*, 131 Wn. App. 675, 689, 128 P.3d 1253 (2006).

“The critical, but not stringent, prerequisite to liability [under RCW 49.52] is that the employer’s (or officer’s) failure to pay wages was ‘willful.’” *Failla v. FixtureOne Corp.*, 181 Wn.2d 642, 655, 336 P.3d 1112 (2014). “Willful means merely that the person knows what he is doing, intends to do what he is doing, and is a free agent.” *Morgan*, 166 Wn.2d at 534(internal quotations omitted). A bona fide dispute can defeat a finding of willfulness with respect to the non-payment of wages under RCW 49.52.050 and 49.52.070. *Washington State Nurses Ass’n v. Sacred Heart Med. Ctr.*, 175 Wn.2d 822, 834, 287 P.3d 516 (2012). A bona fide dispute is a “fairly debatable dispute whether all or a portion of the wages must be paid.” *Id.* (internal quotations omitted).

“Usually willfulness is a question of fact, but as with all fact questions, summary judgment is proper as a matter of law if the evidence supports a single reasonable conclusion.” *Failla*, 181 Wn.2d at 655. The employer has the burden of proving a bona fide dispute exists. *Washington State Nurses Ass’n*, 175 Wn.2d at 834. SSA has fallen far short of establishing as a matter of law that there is a bona fide dispute regarding its obligation to pay Mr. Hvidtfeldt his full 2012 success bonus. Given the plain language of the Employment Agreement and viewing the extrinsic

evidence in the light most favorable to Mr. Hvidtfeldt, there is simply no support for SSA's claim that Mr. Hvidtfeldt's continued employment for all of 2012 was a condition precedent for SSA's payment of his entire variable compensation. Because a jury could reasonably find that SSA has willfully withheld wages from Mr. Hvidtfeldt, the Court of Appeals should reverse the Superior Court's order granting summary judgment to SSA on Mr. Hvidtfeldt's claim under RCW 49.52.050 and RCW 49.52.070.

#### V. CONCLUSION

For the foregoing reasons, the Court of Appeals should reverse the Superior Court's order granting summary judgment to SSA on Mr. Hvidtfeldt's claims for breach of contract and willful withholding of wages, and remand this case for trial.

Respectfully submitted this 1st day of April, 2015

FRANK FREED SUBIT & THOMAS LLP



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Michael C. Subit, WSBA No. 29189  
Christie J. Fix, WSBA No. 40801

**CERTIFICATE OF SERVICE**

I, Janet Francisco, certify and state as follows:

1. I am a citizen of the United States and a resident of the state of Washington; I am over the age of 18 years and not a party of the within entitled cause. I am employed by the law firm of Frank Freed Subit & Thomas LLP, whose address is 705 Second Avenue, Suite 1200, Seattle, Washington 98104.

2. I caused to be served the foregoing Appellant’s Opening Brief upon counsel of record at the address and in the manner described below, on April 1, 2015.

Michael C. Bolasina  
Peter A. Altman  
Summit Law Group PLLC  
315 Fifth Avenue South, Suite 1000  
Seattle, WA 98104-7000  
[mikeb@summitlaw.com](mailto:mikeb@summitlaw.com)  
[petera@summitlaw.com](mailto:petera@summitlaw.com)

- U.S. Mail
- ABC Legal Messenger
- Facsimile
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I hereby declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington on this 1<sup>st</sup> day of April, 2015.

  
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Janet Francisco