

**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.

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2015 JUL -1 PM 4: 27

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**APPELLANT'S REPLY BRIEF**

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## I. INTRODUCTION

The Court should reverse the Superior Court's grant of summary judgment to Defendant/Appellee Sitrion Systems Americas, Inc. ("SSA") and remand this case to the Superior Court for trial. SSA complains that Plaintiff/Appellant Niels Hvidtfeldt's opening brief was "nearly identical to the briefing he submitted to the trial court." This should come as no surprise to SSA. Mr. Hvidtfeldt's arguments were correct in the trial court and they are correct today. Had the trial court properly applied the law of contract interpretation and the summary judgment standard when it decided SSA's motion, Mr. Hvidtfeldt would have prevailed. The language of the Employment Agreement, standing alone, is unambiguous: nowhere does it condition Mr. Hvidtfeldt's entitlement to his full Success Bonus on his continued employment at SSA through the end of 2012. Furthermore, the extrinsic evidence, viewed in the light most favorable to Mr. Hvidtfeldt, supports his position. A court deciding a motion for summary judgment must view all facts and draw all reasonable inferences therefrom in the light most favorable to the nonmoving party. SSA continues to argue, as it did below, that the Court should, instead, draw all inferences in its own favor. This Court should reject SSA's renewed efforts to subvert CR 56 and reverse the Superior Court's order granting summary judgment to SSA.

## II. ARGUMENT

### A. The Employment Agreement Unambiguously Establishes Mr. Hvidtfeldt's Entitlement to his Full Success Bonus.

The plain terms of the Employment Agreement make clear SSA's obligation to pay Mr. Hvidtfeldt his full Success Bonus at the end of 2012.

Paragraph 2 of the Employment Agreement provides:

Success Bonus: In addition to the base salary, the Employee *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. See Appendix 1 for the 2012 Bonus agreement. The Success Bonus increases to US \$230,000 (at 100% target achievement) in fiscal year 2013.

CP 30 (emphasis added). The language providing that he “will be receiving” the variable compensation requires SSA to pay the Success Bonus in accordance with the 2012 Bonus Agreement in Appendix 1. *See Durand v. HIMC Corp.*, 151 Wn. App. 818, 831, 214 P.3d 189 (2009) (contract provision stating that plaintiff “*will receive* \$20,000 as relocation expenses” was properly interpreted as an unconditional bonus). The 2012 Bonus Agreement, sets forth six terms and conditions governing Mr. Hvidtfeldt entitlement to his variable compensation. All of the performance-based terms refer to targets that the *Employer*—that is, SSA—must achieve. CP 34-35. Eighty percent of the variable compensation “is based on *the Employer* achieving quarterly revenues

goals.” CP 34 (emphasis added). The remaining 20% “is based on *the Employer* achieving annual Margin achievements.” *Id.* (emphasis added). Nowhere does the Bonus Agreement set individual performance targets for Mr. Hvidtfeldt. Furthermore, nowhere does it condition Mr. Hvidtfeldt’s receipt of the Success Bonus on his continued employment at SSA through the end of 2012. *See id.* The actual written terms of the Employment Agreement and its Appendix thus unambiguously provide that Mr. Hvidtfeldt was entitled to his full 2012 Success Bonus as long as SSA met its performance targets. The Court should interpret the Employment Agreement to mean what it says. *See Hearst Commc’ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503-04, 115 P.3d 262 (2005).

Contrary to SSA’s assertions in its Response Brief, Paragraph 14, governing Mr. Hvidtfeldt’s “Continuing Obligations,” in no way conflicts with SSA’s obligation to pay the Success Bonus. Paragraph 14 lists only those obligations *of Mr. Hvidtfeldt* that continue after the termination of his employment. CP 32 ¶ 14. Specifically, Paragraph 14 provides that Mr. Hvidtfeldt remained bound by the Employment Agreement’s confidentiality, non-compete, non-solicitation, inventions, and non-disparagement provisions even after SSA terminated him. *Id.* Paragraph 14 does not contradict the language of Paragraph 2 and Appendix 1 that

obligates SSA to pay Mr. Hvidtfeldt a Success Bonus provided the company met the performance goals set forth in the Bonus Agreement.

Paragraph 3 of the Employment Agreement also supports Mr. Hvidtfeldt's view. Paragraph 3 provides that "the Employer *will* reimburse Employee for reasonable expenses incurred by Employee in the performance of his duties subject to timely submission by Employee of payment or reimbursement requests and appropriate documentation." CP 30 ¶ 3 (emphasis added). The use of the word "will" in Paragraph 3 creates a mandatory duty for SSA to reimburse Mr. Hvidtfeldt's expenses provided he submits the appropriate documents. *See Durand*, 151 Wn. App. at 831. "Will" is used the same way in Paragraph 2 to define SSA's obligation to pay Mr. Hvidtfeldt's Success Bonus. *See* CP 30 ¶ 2. SSA cannot reasonably argue that its obligation under Paragraph 3 to reimburse Mr. Hvidtfeldt for reasonable business expenses that he incurred before September 10, 2012, ceased when it terminated his employment. Nevertheless, Paragraph 3, like Paragraph 2, is not included among the "Continuing Obligations" in Paragraph 14. Thus, the fact that Paragraph 14 does not include Paragraph 2 proves nothing.

SSA contends that Mr. Hvidtfeldt has "cherry picked" words and phrases from the Employment Agreement to support his position. Response Brief at 18. To the contrary, it is SSA that is attempting to avoid

the consequences of the contract that it drafted by asking the Court to read language into the Employment Agreement that simply does not exist. First, SSA argues that the fact that Mr. Hvidtfeldt's position was at will somehow cut off his entitlement to a Success Bonus governed by terms in a Bonus Plan that makes no mention of continued employment as a condition of payment. SSA contends that Paragraph 1 provides "that the relationship could 'be terminated by Employee or Employer at any time.'" Response Brief at 18. Paragraph 1, however provides only that the "*position* [of General Manager North America] is 'at will'". CP 30 ¶ 1 (emphasis added). That SSA could terminate Mr. Hvidtfeldt's position at any time does not sever the Employment Agreement for purposes of payment of the Success Bonus.

Second, SSA makes a somewhat confusing argument that there is no difference between the terms for payment of the Base Salary and the terms for payment of the Success Bonus. Response Brief at 19. This argument ignores the language of the first section of Paragraph 2, which states that Mr. Hvidtfeldt would be paid a Base Salary "[f]or services provided." CP 30 ¶ 2. There is no such condition in the language of the second section of Paragraph 2, which governs the payment of the Success Bonus. *See id.* Thus, although Paragraph 2 conditions Mr. Hvidtfeldt's receipt of his Base Salary on his continued service to the company,

Paragraph 2 places no such condition on his entitlement to his Success Bonus.<sup>1</sup>

Third, SSA revealingly addresses the express terms and conditions enumerated in the Bonus Agreement only in a tortured argument consigned to a footnote. Response Brief at 20 n.2. SSA contends that because an employer can only act through its employees, the terms and conditions of the Bonus Agreement should really be read as individual targets for Mr. Hvidtfeldt. *Id.* With this argument, SSA essentially asks the Court to replace the word “Employer” with “Mr. Hvidtfeldt.” The Court, however, must interpret the language that was actually written in the contract, and not what SSA purportedly intended to write (or wishes it wrote). *See Hearst Commc’ns*, 154 Wn.2d at 504. As discussed above and in Mr. Hvidtfeldt’s opening brief, the Bonus Agreement expressly conditions the payment of variable compensation on six enumerated terms and conditions, none of which require Mr. Hvidtfeldt to remain employed through the end of 2012 to receive a 2012 Success Bonus. And none set forth any conditions on Mr. Hvidtfeldt’s individual performance; rather,

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<sup>1</sup> SSA also asserts that if Mr. Hvidtfeldt “took his own argument seriously” he would seek full base salary and bonus through the present day. Response Brief at 22. This argument is nonsense. Paragraph 2 of the Employment Agreement provides that SSA will pay Mr. Hvidtfeldt a base salary “for services provided.” CP 30 ¶ 2. Mr. Hvidtfeldt ceased providing services when SSA terminated him. With respect to the Success Bonus, Appendix 1 to the Employment Agreement sets forth the terms and conditions to qualify for the **2012** Success Bonus. CP 34. SSA and Mr. Hvidtfeldt never agreed on the terms and conditions for a 2013 Success Bonus. The Court should not penalize Mr. Hvidtfeldt for bringing his strongest legal claim and not asserting a far weaker one.

they only prescribe performance targets for the Employer as a whole. The Court should reject SSA's attempt to rewrite the Bonus Agreement to set individual targets for Mr. Hvidtfeldt.

**B. The Extrinsic Evidence, Viewed in the Light Most Favorable To Mr. Hvidtfeldt, Supports Mr. Hvidtfeldt's Interpretation of the Agreement.**

SSA also asks the Court to resolve in its favor the competing inferences the parties draw from Regional Sales Director Dean K. Read's offer letter. Response Brief at 31-33. In direct contrast to Mr. Hvidtfeldt's Employment Agreement, Mr. Read's offer letter expressly states that his bonus is conditioned on his continued employment. CP 58 ("Bonuses will not be paid pro-rata; they must be earned in full prior to termination."). The most natural inference to be drawn from this evidence is that when SSA intends to condition payment of a bonus on continued employment, it knows how to craft language that makes that intention clear. The Read letter thus helps Mr. Hvidtfeldt, not SSA.

SSA, however, asks the Court to accept, without citation to any fact in the record, that "after hearing continued complaints from Mr. Hvidtfeldt concerning the lack of post-termination bonus payments, SSA later improved its contract language to make its intent more certain." Response Brief at 33. There is no evidence in the record to support SSA's assertion. In any event, SSA's argument that Mr. Read's offer letter was a

“quasi ‘subsequent remedial measure’” that somehow demonstrates its intent to cut off Mr. Hvidtfeldt’s entitlement to his Success Bonus upon his termination misses the mark. If SSA truly sought to clarify the bonus language that applied to Mr. Hvidtfeldt, it should have done so in *Mr. Hvidtfeldt’s Agreement*.

To support its argument, SSA quotes *Smith v. Miller Brewing Co. Health Benefits Program*, 860 F. Supp. 855, 857 n.1 (M.D. Ga. 1994). *Smith*, however, sheds no light on this case. *Smith* involved language in a company’s standard ERISA health-benefits plan. *Id. at 857*. After the plaintiff filed his lawsuit, the company amended the plan at issue to clarify the language that was in dispute. *Id.* This new language applied to and benefited all plan participants. *Id.* Here, by contrast, Mr. Dean and Mr. Hvidtfeldt entered into two different contracts. *Compare CP 57-59 with CP 30-35*. Mr. Read was a lower-level employee than Mr. Hvidtfeldt, and the terms of his employment are set forth in a three-page offer letter, rather than in a lengthy and detailed Employment Agreement. Mr. Dean’s offer letter was in no way an amendment to Mr. Hvidtfeldt’s Employment Agreement. It cannot be analogized to the amended benefits plan at issue in *Smith*.

*Smith*, in fact, supports Mr. Hvidtfeldt’s position. Under *Smith*, an amendment to a contract may provide evidence of the parties’ intent in

drafting the language of the original contract. By the same token, the fact that SSA didn't amend Mr. Hvidtfeldt's agreement is evidence in his favor. If SSA had wanted to clarify the language governing Mr. Hvidtfeldt's Success Bonus, it could have done so in the course of the parties' negotiations. It did not.

Finally, the fact that Mr. Hvidtfeldt signed both agreements is additional powerful evidence that he understood that his Employment Agreement did not condition his receipt of the Success Bonus on his continued employment. Mr. Hvidtfeldt knew that Paragraph 2 of his Employment Agreement did not condition his Success Bonus on his continuing to provide services to the company. Therefore, it was necessary to include different language in Mr. Read's offer letter to make clear that Mr. Read's bonus, unlike Mr. Hvidtfeldt's, depended on his continued employment. Simply put, the language of Mr. Read's offer letter makes clear that SSA conditioned Mr. Read's bonus on his continued employment. The absence of similar language in Mr. Hvidtfeldt's Employment Agreement provides strong evidence that Mr. Hvidtfeldt remained entitled to his full Success Bonus even if SSA terminated his employment before the end of the fiscal year.

**C. A Jury Could Reasonably Find That SSA Willfully Withheld Payment of Mr. Hvidtfeldt's 2012 Success Bonus.**

The question of willfulness is ordinarily a question of fact. A court may, however, grant summary judgment to an employer on a willful withholding claim where there is no dispute as to the material facts and reasonable minds could reach but one conclusion from those facts. *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 160, 961 P.2d 371 (1998). Here, again, SSA's characterization of the material facts in this case as undisputed is disingenuous. Response Brief at 35. As discussed above, although there is little dispute about the evidentiary facts, the reasonable inferences to be drawn from the facts are hotly in dispute, and the Court is bound to draw those inferences in Mr. Hvidtfeldt's favor. *Coffel*, 58 Wn. App. at 520. This dispute precludes a grant of summary judgment on the question of willfulness. *Schilling*, 136 Wn.2d at 160.

SSA contends that it is entitled to summary judgment because it had a "genuine belief" that it did not owe any additional wages to Mr. Hvidtfeldt. For its "genuine belief" rule, SSA cites an unpublished federal court case, *Garrison v. Merchant & Gould, P.C.*, 2011 WL 887749, at \*10 (W.D. Wash. 2011). The case on which the *Garrison* court relied, however, reaches a conclusion opposite from the one SSA seeks here. In *Duncan v. Alaska USA Federal Credit Union, Inc.*, 148 Wn. App. 52, 79,

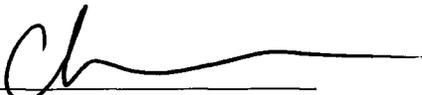
199 P.3d 991 (2008), this Court *reversed* the trial court's grant of summary judgment to the employer on the plaintiff's willful withholding claim where it found that genuine issues of material fact precluded summary judgment on the underlying wage claim. The Court should do the same here. In light of the plain language of the Agreement, and taking all reasonable inferences from the extrinsic evidence in the light most favorable to Mr. Hvidtfeldt, it is clear that a jury could reasonably find that SSA's refusal to pay Mr. Hvidtfeldt his Success Bonus was willful. This Court should reverse the Superior Court's order granting summary judgment to SSA on Mr. Hvidtfeldt's claim for willful withholding of wages under RCW 49.52.050 and RCW 49.52.070.

### III. CONCLUSION

This Court should reverse the Superior Court's grant of summary judgment to Defendant/Appellee Sitrion Systems Americas, Inc., and remand this case to the Superior Court for trial.

RESPECTFULLY SUBMITTED this 1st day of July, 2015.

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**CERTIFICATE OF SERVICE**

I, Cheryl Yeverino, 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.

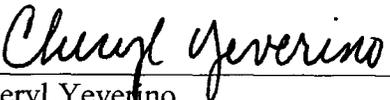
2. I caused to be served the foregoing document upon counsel of record at the address and in the manner described below, on July 1st, 2015: **APPELLANT'S REPLY BRIEF.**

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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 this 1st day of July, 2015.

  
\_\_\_\_\_  
Cheryl Yeverino