No.: 13-2050

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CYRIAC ABRAHAM,

Plaintiff-Appellant,

v.

WASHINGTON GROUP INTERNATIONAL, INCORPORATED and URS CORPORATION,

Defendants-Appellees.

APPEAL OF A CIVIL CASE FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN
THE HONORABLE JUDGE BARBARA B. CRABB

CORRECTED BRIEF AND REQUIRED SHORT APPENDIX OF PLAINTIFF-APPELLANT CYRIAC ABRAHAM

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 26.1 of the Federal Rules Appellate Procedure and Rule 26.1(c) of the Seventh Circuit Rules, the undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case.

1) Cyriac Abraham (Plaintiff-Appellant)
2) Andrew B. Greenlee (Attorney for Plaintiff-Appellant);
3) Brownstone, P.A. (Law Firm representing Plaintiff-Appellant);
4) Mark Allen Seidl (Attorney for Plaintiff-Appellant in district court);
5) Seidl & Stingl (Law Firm representing Plaintiff-Appellant in district court);
6) URS Corporation (Defendant-Appellee);
7) Washington Group International, Inc. (Defendant-Appellee);
8) URS Holdings, Inc. (subsidiary of Defendant-Appellant URS Holdings, Inc.);
9) URS Energy & Construction Holdings, Inc. (subsidiary of URS Holdings, Inc.);
10) URS Energy & Construction, Inc. (subsidiary of URS Energy & Construction Holdings, Inc. and successor to Washington Group International, Inc., which no longer exists as a corporate entity);

11) Nicholas O. Anderson (Attorney for Defendants-Appellees);

12) Robert Hugh Duffy (Attorney for Defendants-Appellees);

13) Quarles & Brady LLP (Law Firm representing Defendants-Appellees)

14) The Honorable Barbara B. Crabb (United States District Court Judge for the Western District of Wisconsin).

/s/ Andrew B. Greenlee
Andrew B. Greenlee, Esquire
Attorney of Record for Plaintiff-Appellant

STATEMENT REGARDING ORAL ARGUMENT

The Plaintiff-Appellant, Cyriac Abraham ("Mr. Abraham"), believes the issues on appeal are adequately addressed in the Initial Brief and, therefore, does not request oral argument in this case.

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STATEMENT OF JURISDICTION

Mr. Abraham submits this Jurisdictional Statement pursuant to Federal Rule of Appellate Procedure 28(a)(4)(A) and Seventh Circuit Rule 28(a).

1. District Court Jurisdiction: Defendants-Appellees (collectively, "WGI") removed this matter from Wisconsin state court, invoking the district court's diversity jurisdiction as conferred under 28 U.S.C. § 1332(a). The citizenship of the parties is follows:

   a. Plaintiff-Appellant Cyriac Abraham is a citizen of the State of Texas;

   b. Defendant-Appellee URS Corporation is a Delaware corporation with a principal place of business in San Francisco, California;

   c. Defendant-Appellee Washington Group International, Inc., no longer exists as a corporate entity. Its successor, URS Energy & Construction, Inc., is an Ohio corporation with its principal place of business in Denver, Colorado.

As the parties are completely diverse, and Mr. Abraham seeks damages in excess of $75,000, exclusive of interest and costs, the district court properly exercised diversity jurisdiction under 28 U.S.C. § 1332(a).

2. Appellate Jurisdiction: The district court issued its Final Judgment on March 27, 2013. On April 24, 2013, the district court denied Mr. Abraham's Motion for Relief from Judgment filed under Federal Rule of Civil Procedure 60(b). Mr. Abraham timely filed his Notice of Appeal on May 14, 2013. FED. R. APP. P.

4(a)(4)(A)(vi). Jurisdiction lies in this Honorable Court pursuant to 28 U.S.C. § 1291.

PRELIMINARY STATEMENT

Cyriac Abraham, an engineer, received an offer of employment from WGI for the position of "Lead Project Scheduler." He declined the offer because a different employer offered him work as a "Project Control Manager," a management position. After learning of this offer, WGI wrote Abraham a letter extending him an offer to work as a Project Control Manager. Abraham signed the letter and accepted the offer.

When Mr. Abraham commenced his employment, WGI immediately relegated him to performing the duties of a Lead Project Scheduler, the inferior position that he rejected during the parties' negotiations. Although he retained the title and compensation of a Project Control Manager, Mr. Abraham grew dissatisfied with the lack of managerial responsibilities and left the company. Mr. Abraham subsequently brought suit against WGI under Wisconsin law, claiming WGI breached the employment contract and tortiously misrepresented the terms of his employment to induce him to take the position.

The district court granted summary judgment in favor of WGI on the tort and breach of contract claims. With respect to the breach of contract claim, the district court found that Mr. Abraham identified no contract in which WGI

promised to give him specific job duties that were different from the duties of the scheduling job to which he was ultimately assigned. In support of its decision, the district court relied on extrinsic evidence – deposition testimony and post-contract email communications – offered by WGI to show that Abraham was hired to perform the tasks of a lead scheduler from the outset, notwithstanding the contract provision stating he was hired as a Project Control Manager. Mr. Abraham now appeals the entry of summary judgment on the breach of contract claim.

STATEMENT OF THE ISSUES

ISSUE I: Did the district court err in considering parol evidence offered by WGI to show that the parties to the contract intended for Mr. Abraham to assume the tasks of a Lead Project Scheduler, even though the parol evidence conflicts with a negotiated term of the contract stating Abraham was hired as a Project Control Manager?

ISSUE II: Did the district court err in resolving a dispute regarding the parties' intent in forming the contract via summary judgment where Abraham claimed the parties intended to hire him to perform the functions of a Project Control Manager, while WGI claimed that the parties intended that he perform the functions of Lead Project Scheduler?

STATEMENT OF THE CASE AND FACTS

1. The Courtship

In 2004, Cyriac Abraham, who was living in California, began looking for employment because his work on a short-term construction project had nearly concluded. (Doc. 26 at 4). Mark Maier, a recruiter employed by ENC Services, contacted Mr. Abraham to inform him that WGI, a company that provides engineering, construction and management services, had a job opening for a lead scheduler on a project in Wisconsin (the "Weston 4 Project"). *Id*.

Abraham applied for the position in late April or early May 2004. *Id*. Shortly after submitting his application, Bob Villa, a Project Control Manager with WGI, interviewed Mr. Abraham over the telephone. *Id*. The two discussed the scheduler position, and Mr. Villa told Abraham that the compensation would be in the $90,000 range. *Id*. After the interview, Mr. Abraham traveled to Green Bay to meet with two WGI employees, Chuck Meyer and Lynn Rohrbaugh. *Id*. at 4-5. They discussed the Weston 4 Project with Abraham, but never spoke about Abraham's prospective duties if he were hired as a lead scheduler. *Id*. at 5. After returning from Wisconsin, Mr. Abraham spoke with Mr. Villa again by telephone. *Id*.

Around the same time, Mr. Abraham applied for a job as a Project Control Manager on a power plant construction project in Sacramento with the Fru-Con

Corporation. *Id*. Fru-Con offered him a job as a Project Control Manager. *Id*. Abraham told Maier and Villa that he intended to accept Fru-Con's offer because Project Control Manager was a management position, and the location would allow Abraham to remain closer to his family's residence in California. *Id*.

WGI then raised its offer to Abraham. *Id*. In a letter sent by Inez Davis, the Human Resources Director of WGI, the corporation extended Abraham the following offer:

> We are pleased to confirm our offer of employment to you with the Washington Group International, Inc. Your title will be Project Control Manager with a monthly salary of $8,750 and your assignment will be on our Weston Project in Green Bay, Wisconsin. Your start date is scheduled for June 1, 2004. You will be eligible to a sign on bonus of $5,000 payable 30 days after your start date. You will also be entitled to participate in our Project Incentive Program at the rate of 10-15% of base salary, once it is submitted and approved.

(Doc. 16-2). Abraham signed the offer letter, sent it back to WGI and commenced his employment on June 1, 2004. *Id*.

2. The Deterioration of the Relationship

Although Abraham had the title of Project Control Manager, WGI charged him with scheduling on the Weston 4 Project. (Doc. 26 at 6). On May 27, 2005, Abraham sent Villa an email expressing his dissatisfaction with the arrangement. *Id*. Abraham stated that he would not have taken the job with WGI if he had not been offered a managerial position. (Doc. 15-1 at 1). He also expressed his belief that he had progressed beyond the stage of working as a scheduler beneath a

superior. *Id*. Abraham concluded the email by observing that WGI corporate documents state that a Project Control Manager generally works under the direction of a business unit director, operations manager, regional office manager or project manager, and asked why his situation differed from that description. *Id*.

Mr. Villa responded by email, stating,

> There is still a misunderstanding or miscommunication between you and I. Let me try to clarify what my and the project's desires are. In our initial discussions prior to you accepting WGI's offer, the position I described to you was that of the Lead Scheduler on the Weston 4 project. You stated that you currently held a position of Project Controls Manager and from your resume I recognized you appeared to be qualified for that position. When you accepted our offer, my understanding was (and from our conversation this week you confirmed) that you recognized the position you were being hired for was Lead Scheduler and you would report to the [project control manager]. At the time, unknown to you, I was in the process of replacing Lynn Rohrbaugh.
>
> Because of your experience and capabilities, you were offered a salary that was a grade 17 which has a corporate title of Project Controls Manager. You were hired at the corporate title (and salary) of Project Controls Manager to fill the position of Lead Scheduler. We expected the place (sic) a Lead Scheduler on the project at a much lower grade and salary.
>
> We do have an organization on the project as you know. Greg is the [project control manager] with full responsibility for the group. But, Cyriac, you are a very important member of the project controls team. Which has one of, if not the greatest exposure to WGI and WPS of any group on the project. I expect all members of the team to be key participants. You have full responsibility for managing the schedule on the project, in itself a major responsibility and one you should not take lightly. A major success factor on the project will be meeting this schedule.

> A job description would be helpful for you and you should discuss this with Greg.
>
> As for the future, there will be many opportunities for you in a PCM role. Once this project is up and running smoothly, we could then discuss other opportunities. . . .

Id. at 2.

Mr. Abraham then wrote an email in response, stating, "I really appreciate your reply. There is nothing in your reply I could disagree with except for the fact that I am not in the loop on many issues where I need to be on this project. I am upset because various discussions have [taken] place without me where schedule inputs were very important. . . . Let us leave this discussion here. Greg may learn the value of delegation, or some day I may be able to move into another project when a suitable opportunity arises. . . ." *Id*.

In February 2006, Abraham applied for a position with another company, Noble Environmental Power. (Doc. 26 at 8). Mr. Abraham testified at his deposition that he had become unhappy and frustrated with his employment at WGI. (Doc. 17 at 47). Thus, when he received an offer from Noble Environmental Power, Mr. Abraham accepted the position and resigned from WGI on February 17, 2006. (Doc. 26 at 8). Abraham worked his last day with WGI on March 3, 2006. *Id*.

3. <u>The Litigation</u>

Mr. Abraham brought suit in the Circuit Court of Marathon County, Wisconsin on March 1, 2012. (Doc. 1-1). In his state-court complaint, Mr. Abraham alleged that he declined the Fru-Con offer of employment because WGI offered him employment as a Project Control Manager. *Id*. at 2. Mr. Abraham further alleged that WGI's "job classification system," which outlines the duties of a Project Control Manager, states that the position is responsible for "managing activities related to planning and scheduling, cost control, monitoring all project costs, revenue, development and progress, implementing established policy, procedures and systems, and staffing and maintaining technical performance excellence." *Id*.

Abraham claimed the document further stated that a Project Control Manager has additional responsibilities that include "providing functional and administrative management of all project control activities, including: Baseline and control budgets, cash flow forecasts manpower forecasts, progress and performance measurement, productivity, analysis, trending change control process, project and executive reporting and check estimates." *Id*. The project control manager works "under the direction of a business unit director, operations manager, regional office manager or project manager," and ensures "an adequate level of personnel, with appropriate levels of skills to staff projects, and also to provide on-going staff development and training." *Id*. at 3. Thus, according to the

WGI job classification system, the position of Project Control Manager entailed some scheduling duties, but also required many additional managerial responsibilities. *See id*. at 2-3.

Mr. Abraham alleged that the position of Lead Project Scheduler is an inferior position that has none of the managerial responsibilities of a Project Control Manager. *Id*. at 3. Abraham alleged that WGI required him to work in the capacity of a Lead Project Scheduler instead of a Project Control Manager, and thereby breached the terms of their contract and tortiously misrepresented the terms of his employment to induce him to accept the offer of employment. (Doc. 1-1 at 3-5).

WGI removed the matter to the United States District Court for the Western District of Wisconsin, Madison Division, invoking the court's diversity jurisdiction. (Doc. 1). After removal, Mr. Abraham filed an amended complaint with similar factual allegations, including the same reference to the job description contained in the WGI "job classification system." (*See* Doc. 7).

In December of 2012, WGI moved the district court for summary judgment on all claims. (Doc. 12). In its summary of the facts, WGI did not dispute that the offer letter purported to hire Mr. Abraham as a Project Control Manager or that it assigned him the tasks of a Lead Project Scheduler. *Id*. at 4. Instead, WGI maintained that Villa explained to Abraham during their negotiations that WGI

would provide him with the corporate title of Project Control Manager in order to compensate him at a higher pay grade, but that he would be performing scheduling duties and working under the supervision of another Project Control manager. *Id*.

WGI argued that Mr. Abraham's breach of contract claim failed because he served as an at-will employee and "can point to no contract between himself and Washington Group, let alone one under which performance is due." *Id*. at 2. WGI alternatively argued that it could not have breached any contract between the parties because the offer letter only stated that Abraham's title would be Project Control Manager, and that WGI gave him that title and the salary it promised. *Id*. at 26.

WGI maintained that the court should disregard any reference to the WGI job classification system referenced in both complaints because Mr. Abraham stated in his deposition that he never received any job descriptions prior to joining WGI. *Id*. at 16. However, WGI did not dispute the authenticity of the document or the accuracy of the job description it contained. *Id*. at 16-19.

Abraham submitted a brief in response with a section entitled "Summary of the Facts" that set forth his version of the events with citations to record evidence. (Doc. 20 at 2). In his recitation of the facts, Mr. Abraham noted that the conversation in which Villa told him he would serve as a lead scheduler occurred during his initial interview, prior to his rejection of the Lead Project Scheduler

position. *Id*. at 6. According to Abraham, Villa never clarified what his duties would be during the renewed negotiations or offered any information to dispel the notion that, pursuant to the contract, Abraham would serve as a Project Control Manager. *Id*. at 9.

In conjunction with his response, Mr. Abraham submitted a document entitled "Washington Group Classification System, Job Family No. 13020, Project Control Managers," which tracks the language of the job classification system document that he cited in his complaints. (Doc. 19-3). Abraham noted that this document is the same document that WGI produced during the course of discovery and served as Exhibit "4" in Villa's deposition. (Doc. 20 at 6). He explained in an affidavit that he failed to mention the document in his deposition because he had forgotten that he had received it prior to being hired, and had filed a correction to his deposition testimony to that effect in November of 2012. *Id*. Mr. Abraham also filed his job application, which reflects that he applied for the position of Project Control Manager, and not Lead Project Scheduler. *Id*. at 20; (Doc. 19-5).

The district court granted summary judgment in March of 2013. (Doc. 26). The court first found that Mr. Abraham failed to file a separate document with proposed findings of fact as suggested in the district court's "Procedures to be Followed on Motions for Summary Judgment" and "Helpful Tips for Filing a Summary Judgment Motion in Cases Assigned to Judge Barbara B. Crabb." (Doc.

26 at 2). As a consequence, the district court adopted all of the proposed findings of fact submitted by WGI as undisputed for purposes of adjudicating the motion for summary judgment. *Id*.

The district court also refused to consider the duties set forth in the WGI job classification system, which Abraham referenced in both complaints. (Doc. 26 at 11). Even though Villa admitted at deposition that the document is the "corporate standard" and did not dispute the accuracy of the Project Control Manager job description, (Doc. 18 at 15), the district court found it inappropriate to consider the job description because Abraham stated in deposition testimony that he had not received a job description prior to his employment. (Doc. 26 at 11).

With respect to the misrepresentation claims, the district court found that, under the "undisputed facts as proposed by defendants, the only possible inference I can draw is that [Abraham] was offered a scheduling position for which he would be classified as a project control manager in order to pay him a higher salary." *Id*. at 9. In support, the district court cited to the deposition testimony of Mr. Villa, who claimed that he told Mr. Abraham that he would perform scheduling duties. *Id*. at 9-10. The district court also noted that Mr. Abraham testified that Villa told him that he would perform scheduling duties, though the court does not mention that Mr. Abraham also testified that he was never told he would exclusively perform scheduling duties. *Id*. at 10. In addition, the district court cited the post-

contract email exchange between Mr. Abraham and Villa as evidence of the parties' intent in forming the contract. *Id*. Concluding that WGI made no misrepresentation, the district court found no basis for liability in tort. *Id*. at 12.

The district court also found that WGI did not breach its employment contract. *Id*. According to the district court, the breach of contract claim "claim fails for the same reasons" as his misrepresentation claims: Abraham "has identified no contract, oral or written, in which [WGI] promised to give [Abraham] specific job duties that were different from those to which [Abraham] was assigned." *Id*. Without any further analysis or citation to authority, the district court granted summary judgment on Mr. Abraham's breach of contract claim stemming from his employment contract. *Id*.

Mr. Abraham moved for relief from judgment under Rule 60 of the Federal Rules of Civil Procedure. (Doc. 28). The district court denied the motion on April 24, 2013. (Doc. 32). Mr. Abraham timely appealed the Judgment on May 14, 2013. (Doc. 33). This appeal follows.

SUMMARY OF ARGUMENT

The district court erred in two respects. First, in granting summary judgment on the breach of contract claim, the district court relied on extrinsic evidence that was barred by the parol evidence rule. Mr. Abraham rejected a position of Lead Project Scheduler and, after negotiations with WGI, applied for

the position of Project Control Manager. The language of the offer is clear: WGI hired Mr. Abraham as a Project Control Manager. Mr. Abraham accepted this offer.

Instead of examining the clear language of the contract, the district court looked to self-serving deposition testimony and email communications and concluded that the "only possible inference" to be drawn is that WGI offered Abraham "a scheduling position for which he would be classified as a project control manager in order to pay him a higher salary." This conclusion conflicts with the clear language of the contract, which contains no reference to a scheduling position, but instead states that Mr. Abraham was hired as a Project Control Manager. Because the district court relied on extrinsic evidence to contradict an unambiguous, controlling contractual provision, the district court erred in granting summary judgment.

Second, even if the district court properly considered the extrinsic evidence, the parties' intent in forming the contract presents a material dispute of fact that precludes summary judgment. When a contract provision is ambiguous, and therefore must be construed by the use of extrinsic evidence, the question is one of contract interpretation for the jury. Here, Mr. Abraham relied on the language of the contract to argue he was hired him as a Project Control Manager, a management position. Though the district court never found any term ambiguous,

WGI used extrinsic evidence to argue that the parties agreed that that Abraham would serve as a Lead Project Scheduler, an inferior position that he rejected in previous negotiations. Since both parties marshaled evidence in support of their respective interpretation of the contract, the district court erred in resolving this material dispute of fact on summary judgment, rather than permitting Abraham to present this claim to a jury.

This Court should reverse.

ARGUMENT

I. THE DISTRICT COURT ERRED IN CONSIDERING PAROL EVIDENCE OFFERED TO CONTRADICT AN UNAMBIGUOUS WRITTEN CONTRACTUAL PROVISION REGARDING THE POSITION MR. ABRAHAM WOULD ASSUME.

A. Standard of Review

This Court reviews *de novo* a district court's grant of summary judgment. *Kidwell v. Eisenhauer*, 679 F.3d 957, 964 (7th Cir. 2012). In so doing, all facts are viewed in the light most favorable to the nonmoving party. *Spiegla v. Hull*, 371 F.3d 928, 935 (7th Cir. 2004). The Court must also draw all reasonable inferences in favor of the party against whom summary judgment is sought. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). Material facts which would preclude entry of

summary judgment are those which, under applicable substantive law, may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Thus, this Court will affirm the grant of summary judgment if the nonmoving party is unable to "establish the existence of an essential element to [that party's] case, and on which [that party] will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

B. Argument on the Merits

The district court erred when it considered inadmissible parol evidence in granting summary judgment in favor of WGI on the breach of contract claim. The parol evidence rule, as interpreted by the Wisconsin Supreme Court, provides as follows: "When the parties to a contract embody their agreement in writing and intend the writing to be the final expression of their agreement, the terms of the writing may not be varied or contradicted by evidence of any prior written or oral agreement in the absence of fraud, duress, or mutual mistake." *Fed. Deposit Ins. Corp. v. First Mortg. Investors*, 250 N.W. 2d 362 (Wis. 1977). The parol evidence rule is a rule of substantive law and not a rule of evidence. *In re Spring Valley Meats, Inc.*, 288 N.W. 2d 852, 855 (Wis. 1980).

The rationale for the rule is that, since the "final agreement of the parties supersedes earlier negotiations," *First Mortgage Investors*, 250 N.W. 2d at 365, consideration of extrinsic evidence of past agreements or terms deprives "parties of

the protection of a written contract." *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 608 (7th Cir. 1993) (*en banc*). For this reason, the parol evidence rule "prohibits a . . . court from inquiring into the intent of parties to an unambiguous written agreement." *Mitchell Bank v. Schanke*, 676 N.W.2d 849, 862 (Wis. 2004). (citation omitted).

On the issue of ambiguity, this Court explained in *Wheelabrator* that "extrinsic evidence is admissible to show that a written contract which looks clear is actually ambiguous." *Wheelabrator*, 993 F.2d at 608. Yet, in such a case, "there must be either contractual language on which to hang the label of ambiguous or some yawning void . . . that cries out for an implied term." *Id*. In the absence of an ambiguous term or a structural justification for an implied term, extrinsic evidence "should not be used to add terms to a contract that is plausibly complete without them." *Id*. "Even if, without objection, parol evidence of the intention of the parties to a written contract, which conflicts with the express provisions of such contract, gets into the record, the court must disregard it." *Spring Valley*, 288 N.W. 2d 852 (Wis. 1980).

Spring Valley illustrates the operation of the parol evidence rule under Wisconsin law. In *Spring Valley*, the parties executed two written agreements for the lease of equipment by Spring Valley for use in its meat processing operations. *Spring Valley*, 288 N.W. at 602-03. After Spring Valley went into receivership,

the lessor, Dairyland, filed a motion in the county court requesting the return of its equipment. *Id*. at 603.

Counsel for the receiver opposed the motion and adduced testimony to show that (1) the written agreements were intended only as a partial integration; and (2) the agreements were not actually leases, but lease-purchase agreements under which Spring Valley would own the equipment upon completion of the payment schedule contained in the agreements. *Id*. Although counsel for Dairyland raised a parol evidence objection, the objection was immediately withdrawn. *Id*. The trial court thereafter held that the written agreements were not leases but instead were security agreements, and, as a consequence, Dairyland was not entitled to take possession of the equipment. *Id*. at 603-04.

On appeal, the Wisconsin Supreme Court reversed. *Id*. at 604. The court noted that, even though the objection had been withdrawn, it still had to decide the admissibility of the parol evidence because courts "must disregard" such evidence if it conflicts with an express provision of a contract. *Id*. The court further held that the court should not have considered the evidence, which violated the parol evidence rule, because the offered testimony stood "in conflict with that part of the parties' agreement which had been integrated in writing." *Id*. at 610.

This Court should reach the same conclusion. As an initial matter, the trial court never found any ambiguity in the contract that would allow for consideration

of parol evidence on the parties' intent. In addition, the parties entered into negotiation regarding this contractual term: Mr. Abraham rejected WGI's offer of employment as a Lead Project Scheduler because he had received an offer of employment as a Project Controls Manager from another employer. When WGI learned of that offer, it sweetened the deal, and sent Abraham a letter offering him the position of Project Control Manager. The offer letter, which was drafted by the Director of Human Resources for WGI, should be deemed a final agreement on the position Mr. Abraham was hired to assume. Mr. Abraham signed the offer letter, thereby accepting the offer for employment as a Project Control Manager. The offer makes no mention of the Lead Project Scheduler position or scheduling duties. Thus, the district court should not have considered extrinsic evidence regarding the parties' alleged intent to employ Mr. Abraham in the inferior role that he had rejected during their negotiation.

As in *Spring Valley*, WGI relied on extrinsic evidence in an attempt to establish the existence of a prior oral agreement that conflicts with a contractual term. WGI first cites the deposition testimony of Mr. Villa, who testified that he told Mr. Abraham he would be assigned as a Lead Project Scheduler, while retaining the pay and title of Project Control Manager. This self-serving testimony directly conflicts with a negotiated term of the contract, which states that Abraham would take the title of a Project Control Manager and makes no mention of

employing Abraham in an inferior position that he previously declined to fill. Therefore, under *Spring Valley*, the district court should not have considered this evidence in connection with the breach of contract claim.

WGI also relied upon the email exchange between Villa and Abraham. According to WGI, Abraham's assent to Villa's version of the events "confirms that he knew when he joined Washington Group that he was going to be assigned the title of Project Control Manager so he could be compensated at a higher rate but that he would still be assigned lead scheduling duties." (Doc. 21 at 14). This is not the case.

Mr. Abraham, likely hoping not to aggravate his superior, does state in his reply email that he does not disagree with the contents of Villa's email. However, in Abraham's initial email, he states that he would not have taken the position with WGI if he had not been offered a managerial position and complained that his duties conflict with the job description of a Project Controls Manager in WGI human resources materials. If, as WGI maintained, the parties clearly understood and agreed that Abraham had been hired to perform the tasks of a Lead Project Scheduler, then he would have no reason to write this initial email. Thus, viewing the email communications as a whole and in the light most favorable to Mr. Abraham, the emails do not refute his claim that he took the position under the understanding that he would serve as manager, and not merely as a scheduler.

More importantly, because Villa's assertions contradict the contract, the district court should not have considered this parol evidence in the first place.[1]

The district court offered virtually no analysis of the breach of contract claim, stating that the claim "fails for the same reasons" his "misrepresentation claims fail." That is, Abraham "identified no contract, oral or written, in which [WGI] promised to give [him] specific job duties that were different from those to which [he] was assigned." Mr. Abraham did, of course, identify a contract that states that he was offered the title of Project Control Manager.

Yet, instead of looking to the language of that contract, which is the "best evidence of the parties' intent," *In re Vic Supply Co., Inc.*, 227 F.3d 928, 933 (7th Cir. 2000) (Williams, J., concurring), the district court relied on extrinsic evidence offered by WGI and concluded that the "only possible inference" is that Mr. Abraham "was offered a scheduling position for which he would be classified as a project control manager in order to pay him a higher salary."

[1] The district court suggests that Mr. Abraham, himself, admits in deposition testimony that he believed that he was hired to perform scheduling duties. This is incorrect. In the first portion cited by the district court, Abraham states that he was told he would lead a team of scheduling persons, but this conversation occurred during his first interview, after he applied for the scheduling position that he ultimately rejected. (Doc. 17 at 18). In the second portion of the deposition cited by the district court, Mr. Abraham testifies that, while Villa "said I would be doing scheduling, he did not say that would be the only thing I will do. . . . Because project control is not just scheduling." (Doc. 17 at 62). If anything, this testimony supports Abraham's breach of contract claim because he testifies that he expected to take on more responsibility than just scheduling.

This is error. All reasonable inferences should be drawn in favor of Mr. Abraham, the nonmovant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. at 587. Not only is it reasonable to infer that the parties intended to employ Mr. Abraham as a Project Control Manager, under *Spring Valley*, this is the *only* permissible inference. The parol evidence rule bars consideration of extrinsic evidence offered for the purpose of establishing that the parties intended to employ him in a different capacity. Accordingly, this Court should reverse the district court and remand this matter for trial on the breach of contract claim.

II. THE PARTIES' INTENT IN FORMING THE CONTRACT PRESENTS A MATERIAL DISPUTE OF FACT THAT PRECLUDES SUMMARY JUDGMENT.

WGI will likely argue that the contract is ambiguous with respect to the responsibilities Mr. Abraham would assume. Even if the district court was permitted to consider parol evidence to resolve any ambiguity regarding the scope of responsibilities, it should not have granted summary judgment because the parties' competing interpretations of the contract presents a material dispute of fact that precludes summary judgment.

Under Wisconsin law, "when parties disagree about their intentions at the time they entered into a contract, the question is one of contract interpretation for the jury." *Mgmt. Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 557

N.W.2d 67, 76 (Wis. 1996). In such cases, summary judgment is inappropriate. *Lemke v. Larsen Co.*, 151 N.W.2d 17 (Wis. 1967).

In *Lemke*, the parties entered an agreement whereby the defendant agreed that it would "endeavor, but does not guarantee to provide the specialized labor and equipment to harvest" the plaintiff's corn. *Id*. at 18. The defendant maintained that it did "endeavor" to harvest the corn, but could not do so because (1) the crop was too immature to harvest when defendant first visited the field; and (2) it did not harvest the corn when it matured because the field was too wet. *Id*. at 19.

The plaintiff disagreed and claimed that the defendant fell short of its obligation because there were several occasions that the defendant could have harvested the corn, but instead allowed its crew to work "short days" by starting late in the morning and quitting early in the afternoon. *Id*. The Wisconsin Supreme Court affirmed the denial of summary judgment and held that parties' intention when they used the word "endeavor" in their agreement presented a question of fact for the jury. *Id*.

Here, WGI will likely argue that the district court did not err in considering parol evidence because the parties' intent regarding the scope of Mr. Abraham's duties was unclear from the language of the contract. As an initial matter, it is

important to note that the district court made no such finding. Moreover, the contract is not ambiguous.

If WGI intended to give Abraham only the title of Project Control Manager, without any of the concomitant responsibilities, it could have (and should have) reduced this condition to writing. This would have allowed Mr. Abraham to choose between the Fru-Con offer, under which Mr. Abraham would have assumed both the title and responsibility of a Project Control Manager, or the comparatively less attractive WGI offer that would only allow him to gain experience as a scheduler.

However, assuming for the sake of argument that the term "title" is sufficiently ambiguous to permit the introduction of parol evidence regarding the parties' intent, their competing interpretations present a question of fact that is inappropriate for resolution on summary judgment. In opposing summary judgment, Mr. Abraham maintained that the contract meant what it says: WGI hired him as a Project Control Manager. Thus, according to Abraham, WGI breached the contract by depriving him of the opportunity to him to fulfill the attendant responsibilities.

WGI, relying on extrinsic evidence, offered a competing interpretation of the parties' intent. According to WGI, it did not breach the agreement because Abraham knew he would serve as a scheduler from the outset. Therefore, WGI

claims it performed under the contract because it gave him the title and pay of a Project Control Manager.

As in *Lemke*, the parties' differing versions of their intent in forming the contract presents a material dispute of fact that should have precluded summary judgment. Therefore, the district court erred in granting summary judgment in favor of WGI on the breach of contract claim.

CONCLUSION

Based upon the foregoing arguments and legal authority, Appellant, CYRIAC ABRAHAM, respectfully requests that this Honorable Court reverse the entry of summary judgment and remand this matter to the district court.

DATED this 8th day of August, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of August, 2013, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a Notice of Electronic Filing to all counsel of record.

/s/ Andrew B. Greenlee
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii). This brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2007 in 14-point Times New Roman Font.

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