NO. 896712

IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

KRISTINE FAILLA,

Failla,

v.

FIXTUREONE CORPORATION;
and KENNETH A. SCHUTZ,

Appellant.

APPELLANT KENNETH A. SCHUTZ'

ANSWER ~~REPLY~~ TO PETITION FOR REVIEW

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I. SUMMARY OF ARGUMENT

The standard for acceptance of review by the Supreme Court is stated in RAP 13.4.

> **(b) Considerations Governing Acceptance of Review.** A petition for review will be accepted by the Supreme Court only:
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.
> RAP 13.4

The Petition for Review filed by petitioner Failla falls short of that standard. There is no conflict between the decision of the Court of Appeals and other decisions of the Court of Appeals or the Supreme Court. The decision is consistent with applicable constitutional law. The decision is based upon well-established concepts for jurisdiction under state and federal law and under the Washington long arm statute and general tort law, and does not involve a novel issue of substantial public interest.

Kenneth Schutz ("Mr. Schutz") is a resident of Pennsylvania. Mr. Schutz has never been to the state of Washington. Mr. Schutz is an officer and shareholder of FixtureOne Corporation ("Corporation"). Mr. Schutz never employed Kristine Failla ("Failla"). Failla was an employee of

Corporation. All of the contacts and communications by Mr. Schutz with Failla were made in his capacity as an officer of Corporation. Failla was paid (or not paid) by Corporation. Compensation payments were made by check drawn on bank accounts of Corporation in Pennsylvania, and were mailed from Pennsylvania.

Failla was a resident of Washington. She traveled to Pennsylvania for an interview with Corporation. Following the interview, Corporation employed Failla as an account executive. The position required Failla to conduct her work by telephone, e-mail, and occasional airplane travel. There is no evidence that Failla pursued Starbucks or any other Washington company or person as a customer, or that Corporation entered into any contracts with a Washington company or person while she was employed by Corporation.

Failla has the burden of showing that the exercise of personal jurisdiction over appellant Mr. Schutz complies with both the long-arm statute and the constitutional due process considerations delineated in *International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945)*, and *Tyee v. Dulien Steel*. Ms. Failla has not met her burden. She has failed to demonstrate that Mr. Schutz transacted business here or committed a tort here. She has not shown that the assumption of jurisdiction comports with due process.

Ms. Failla also contends that Mr. Schutz is subject to jurisdiction because he committed a tort in Washington. Ms. Failla asserts a statutory claim for damages arising from her employment relationship with Corporation. She does not state any cognizable tort claim Mr. Schutz committed in Washington. Mr. Schutz has never been to the State of Washington. He could not have committed a tortious act in Washington.

Nevertheless, Ms. Failla contends that Mr. Schutz committed a tort in Washington because she suffered a nonphysical injury here when Corporation allegedly failed to pay her the wages she claims were owing. Ms. Failla claims that Mr. Schutz violated RCW 49.52.050, a penal statute that imposes criminal misdemeanor liability. She does not explain how a violation of a penal statute creates tort liability. Nor does she explain how fundamental concepts of jurisdiction and due process make this statute applicable to an action by a person taken, if at all, outside the state of Washington. Ms. Failla also alleges that Mr. Schutz is liable for exemplary damages under RCW 49.52.070. However, she does not explain how Mr. Schutz is liable for those damages if there is no evidence that he personally violated RCW 49.52.050. Imposition of liability of under RCW 49.52.070 is subject to the constitutional due process considerations set forth in *International Shoe*, and *Tyee*. Due process does not allow the imposition of liability on an out-of-state individual simply because of his

status as an officer of a corporation. Minimal direct contacts between the forum state and that individual are required.

Ms. Failla admits that Mr. Schutz was "physically present in Pennsylvania when he decided not to pay Failla's wages." *Failla's Brief on Appeal,* at 15. Thus, even if one were to assume that Mr. Schutz is a tortfeasor, which he is not, the last event necessary for purposes of imposing liability (i.e. the decision not to pay Failla wages) occurred in Pennsylvania – not Washington. Further, the Washington courts have held that a tort resulting in a nonphysical injury suffered in Washington is not sufficient in itself for the exercise of jurisdiction under the long-arm statute. *Hogan v. Johnson*, 39 Wash. App. 96, 100, 692 P.2d 198, 201 (1984) (A nonphysical loss suffered in Washington is not sufficient in itself to confer jurisdiction.); See, *DiBernardo-Wallace v. Gullo,* 34 Wash.App. 362, 661 P.2d 991 (1983); and *Oertel*, 33 Wash.App. 331, 655 P.2d 1165 (1982).

There is no evidence in the record that Mr. Schutz acted with willful intent to deprive Ms. Failla of the wages she claims are owed to her by Corporation. In fact, the email communications exchanged between Mr. Schutz and Ms. Failla indicate that he was attempting to assist her in resolving the payment issue, and that there was a bona fide dispute concerning whether Corporation was obligated to pay those wages.

II. RESPONSE TO STATEMENT OF CASE

Mr. Schutz is the only defendant in this case. There is no proof that plaintiff made any effort to serve corporation. Failla repeatedly misstates or overstates the evidence. For example, she states that Mr. Schutz "was excited about the possibility of hiring a sales representative in Washington" when the document to which she is referring does not use the word "excited", or any form of it, and does not refer to the state of Washington. The document identified by Failla as showing that Corporation was trying to do business with Starbucks says absolutely nothing about that subject. Failla repeatedly refers to having been hired by Mr. Schutz when in fact she was hired by Corporation.

Mr. Schutz did not dispute that he was the founder and CEO of Corporation. The evidence showed, however, that Mr. Schutz acted to promote the payment of wages to Failla, not to hinder them.

III. ARGUMENT

A. *Review of jurisdictional analysis.*

Analysis of jurisdiction under a long-arm statute involves a two-step approach: (1) does the statutory language purport to extend jurisdiction, and (2) would imposing jurisdiction violate constitutional principles. *Grange Ins. Ass'n v. State*, 110 Wash. 2d 752, 756, 757 P.2d 933, 935-36 (1988). Courts should address the statutory issue before

reaching the constitutional issue. *Id.*; see also, *Lake v. Lake,* 817 F.2d 1416, 1420 (9th Cir.1987); *Wolf v. Richmond Cy. Hosp. Auth.,* 745 F.2d 904, 909 (4th Cir.1984), *cert. denied,* 474 U.S. 826, 106 S.Ct. 83, 88 L.Ed.2d 68 (1985). The burden of proof rests with the party asserting jurisdiction. *Grange Ins. Ass'n,* 110 Wash.2d at 752; *MBM Fisheries, Inc. v. Bollinger Mach. Shop and Shipyard, Inc.*, 60 Wash.App. 414, 418, 804 P.2d 627 (1991); *In re Marriage of Hall,* 25 Wash.App. 530, 536, 607 P.2d 898 (1980); *Access Rd. Builders v. Christenson Elec. Contracting Eng'g Co.,* 19 Wash.App. 477, 576 P.2d 71 (1978).

B. *Long-Arm Statute Analysis.*

Washington's long-arm statute provides, in relevant part:

> (1) Any person, whether or not a citizen or resident of this state, who .... does any of the acts in this section enumerated, thereby submits said person .... to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:
>
> (a) The transaction of any business within this state;
>
> (b) The commission of a tortious act within this state;
>
> . . .
>
> (3) Only causes of action *arising from acts enumerated herein* may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

Wash. Rev. Code § 4.28.185 [emphasis added].

Failla relies specifically on sections 1(a) and (b) of the long-arm statute. Under the statute, a Washington court may assert jurisdiction over a nonresident defendant *only* if the cause of action arises from the defendant's activities in Washington, and the activities within the state are to such an extent that under the "minimum contacts" analysis as expressed in *International Shoe,* 326 U.S. 310, 316, (1945), and *Tyee v. Dulien Steel,* 62 Wash.2d 106, 381 P.2d 245 (1963), due process is not offended.

1. *Failla's cause of action does not arise from any business transacted in the State of Washington by Mr. Schutz.*

The cases Failla cites in suggesting that Mr. Schutz transacted business here, *Thornton v. Interstate Securities Co.*, 35 Wn.App. 19, 25, 666 P.2d 370 (1983), *Toulouse v. Swanson*, 73 Wn.2d 331, 438 P.2d 578 (1968), and *Cofinco of Seattle, Ltd. v. Weiss*, 25 Wn.App. 195, 605 P.2d 794 (1980), are distinguishable. In *Thornton*, the defendant foreign corporation was found to have minimum contacts with this state because it "actively wooed" and then contracted with the plaintiff employee, a Washington resident, for purposes of servicing and collecting accounts receivable owed by debtors domiciled in this state. *Thornton*, 35 Wn.App. at 25. In *Toulouse*, a case involving an attorney fee dispute, the non-resident defendant was subject to personal jurisdiction because he had hired an attorney (who was licensed to practice law in Washington and

who officed in Washington) to represent his interest in an estate that was being probated in Washington and "it [was] undisputed that defendant was in the state of Washington on many occasions from 1956 to 1959, and was a frequent visitor, as a client, to plaintiff's law office." *Toulouse*, 73 Wash.2d at 331 [emphasis added]. In *Cofinco*, a non-resident employee was deemed to be subject to personal jurisdiction in this state as a result of an oral employment contract entered into during a telephone call at a time when the president of the employer was in Seattle and the employee was in New York. *Cofinco*, 25 Wn.App. 196-197. Pursuant to the contract, the non-resident employee "requested and received sample goods, funds and advancements" from the Washington corporation in furtherance of the non-resident employee's sales efforts. *Id.* In each of these cases, the plaintiffs' cause of action *arose* from a direct relationship between the non-resident defendants' resulting in the non-resident defendant being deemed to have transacted business within this state. *Thornton*, 35 Wash. App. at 25 (The cause of action arose from the non-resident defendant's breach of its employment contract with the Washington resident that it actively wooed for employment.); *Toulouse*, 73 Wash.2d at 334 ("It is beyond dispute that defendant consummated a [business] transaction in this state when he employed plaintiff as his lawyer; *and that the present action arises from that transaction.*" [emphasis added]); and *Cofinco*, 25

Wash. App. at 196-197 (The cause of action arose from an employment contract under which the non-resident defendant "requested and received sample goods, funds and advancements" from his Washington employer in furtherance of the business relationship.)

The instant case is distinguishable because Failla's cause of action is not linked to Mr. Schutz having transacted business in Washington. The cause of action arises from Failla's employment relationship with Corporation. Failla pursued employment with Corporation. Failla solicited Corporation about open sales positions with the company by contacting the corporate headquarters in Pennsylvania. Failla traveled to Corporation's headquarters in Pennsylvania for an interview. Corporation hired Failla. There is no employment relationship or contract between Mr. Schutz and Failla, and Failla does not claim otherwise. Mr. Schutz was not Failla's employer. The assumption of jurisdiction under RCW 4.28.185(1)(a) is improper here because Failla's cause of action does not arise from Mr. Schutz having personally transacted business in this state.

> 2. *Failla's cause of action does not arise from any tort committed in the State of Washington by Mr. Schutz, and even assuming a tort was committed, an injury caused outside the state resulting in a nonphysical loss in the state is insufficient to give rise to personal jurisdiction.*

Failla contends that "[r]egardless of whether Schutz is subject to the jurisdiction of Washington courts because he engaged in business in

Washington, Schutz is subject to such jurisdiction because he committed a tort in Washington." *Failla's Brief* at 14. Failla concludes that Mr. Schutz must have committed a tort based on the Black's Law Dictionary definition of "tort" i.e. a breach of duty in a particular relation to one another. *Id.* at 15. Failla does not identify the tort claim upon which she is relying to assert liability against Mr. Schutz. She does not state what duty Mr. Schutz owed to her that he breached. She does not claim that Corporation's alleged non-payment of wages caused her physical harm.

In support of her argument that Mr. Schutz is subject to personal jurisdiction under RCW 4.28.185(1)(b), Failla relies on one case, *Lewis By & Through Lewis v. Bours*, 119 Wash. 2d 667, 835 P.2d 221, 222 (1992), which involved a *physical* loss arising as a result of medical malpractice. In *Lewis*, The Washington Supreme Court held that in the case of professional malpractice, a tort is not committed in Washington if the alleged act of malpractice was committed out-of-state even though the injuries may manifest themselves in Washington. *Id.* at 674.

Failla cites *Lewis* for the proposition that generally "when injury occurs in Washington, it is an inseparable part of the tortious act and that act is deemed to have occurred in this state for purposes of the long-arm statute" as first established in *Nixon v. Cohn,* 62 Wash.2d 987, 995, 385 P.2d 305 (1963). *Id.* at 671. However, Failla ignores the portion of the

Lewis opinion noting that the Court in *Nixon* accepted the reasoning of the Restatement of Conflict of Laws § 377 (1934) that "[t]he place of the wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place." *Id.*; see also *Grange Ins. Ass'n*, supra, at 757 ("The only question is if Idaho committed a "tortious act" within Washington, when all of its actions occurred outside this state."). Thus, *Lewis* is not helpful to Failla's contention that Mr. Schutz committed a tort here because the last event necessary for liability, the mental process of the decision not to pay the wages that are claimed to be due, occurred in Pennsylvania, not Washington.

Failla also fails to recognize that in Washington a nonphysical loss is not sufficient to confer jurisdiction under the long-arm statute. *Hogan v. Johnson,* 39 Wash. App. 96, 100, 692 P.2d 198, 201 (1984), citing *DiBernardo-Wallace v. Gullo,* 34 Wash.App. 362, 661 P.2d 991 (1983) (no jurisdiction when alleged fraud had an effect in Washington only because plaintiff had chosen to reside there); *Oertel v. Bradford Trust Co.,* 33 Wash.App. 331, 655 P.2d 1165 (1982) (no jurisdiction where defendant issued certificate in New York to Washington resident who suffered loss while in Washington); see also, *In re Marriage of Yocum*, 73 Wash. App. 699, 703, 870 P.2d 1033, 1035 (1994). In *Gullo*, the plaintiff brought an action against non-resident defendants for intentional infliction of

emotional distress and fraud arising from the defendants' participation in the transfer of certain real property at issue in the plaintiff's divorce. The plaintiff claimed that jurisdiction was appropriate under RCW 4.28.185(1)(b) because the nonphysical injury from the alleged torts was suffered by her in Washington. *Gullo*, 34 Wash.App. at 365. The court looked to the factors set forth in *International Shoe* and *Tyee* for guidance. The Court determined that it did not need to analyze the first two *Tyee* factors because the third factor was absent, i.e. the three *Tyee* factors *must coincide* in order for jurisdiction to be entertained. *Id.* at 365-366. The court concluded that the "quality, nature and extent" of the defendants' activities in Washington were not adequate to justify the assumption of jurisdiction over them. In reaching this conclusion, the court said the following:

> The allegedly fraudulent transaction was a single, isolated incident with an effect in Washington only because Mrs. DiBernardo-Wallace had chosen to reside in this state. By itself, "'foreseeability" [of an effect in the forum state] has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295, 100 S.Ct. 559, 566, 62 L.Ed.2d 490, 500 (1980). Nor can the unilateral activity of the plaintiff who claims some relationship with the nonresident defendants satisfy the requirement of contact with the forum state. *Kulko v. Superior Court*, 436 U.S. 84, 90, 98 S.Ct. 1690, 1695, 56 L.Ed.2d 132, *reh'g denied*, 436 U.S. 908, 98 S.Ct. 3127, 57 L.Ed.2d 1150 (1978), quoting from *Hanson v. Denckla*,

357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958).

Id. at 366.

Failla, a Washington resident, unilaterally contacted Corporation, a Pennsylvania corporation, in search of employment. Corporation hired Failla without any expectation that she would reside in any particular state because the nature of the sales work is such that accounts could be managed by telephone and email, with occasional travel. This is why Corporation was willing to hire Failla even though Corporation has no operations, offices, or customers in the State of Washington. Failla unilaterally chose to reside in Washington. She unilaterally chose to seek employment with, and agreed to be employed by, a foreign Pennsylvania corporation.

Similar to the plaintiff in *Gullo,* Failla contends that an injury from a tort that allegedly caused a non-physical loss in Washington is sufficient to subject Mr. Schutz to personal jurisdiction here. This argument should be rejected on the same grounds as in *Gullo*; that is, that the alleged tort (if it is a tort at all) was a single, isolated incident with an effect in Washington only because Failla chose to reside in this state. Assuming *arguendo*, that Mr. Schutz committed a tort for purposes of RCW 4.28.185(1)(b) which is tenuous at best, the quality, nature and extent of

Mr. Schutz' activities with this state are zero. Thus, the assumption of personal jurisdiction over him violates the fundamental due process principles set forth in *Tyee v. Dulien Steel* and *International Shoe*.

C. *The assumption of jurisdiction over Mr. Schutz violates due process.*

To establish personal jurisdiction under Washington's long-arm statute, Failla must demonstrate the existence of *all three* factors of the due process test established by the United States Supreme Court and adopted in Washington case law. Long-arm jurisdiction is intended to operate "to the full extent allowed by due process except where limited by the terms of the statute, RCW 4.28.185." *Werner v. Werner*, 84 Wash. 2d 360, 364, 526 P.2d 370, 374 (1974). Other than reciting the due process test at page 9 of her brief, Failla does not devote any portion of her brief to explaining or applying the due process principles to the facts of this case.

In order to demonstrate that the assumption of jurisdiction is proper, Failla must satisfy the three-pronged due process test:

> (1) The nonresident defendant . . . . must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of

> the laws of the forum state afforded the respective parties, and the basic equities of the situation.

Lewis v. Curry College, 89 Wash. 2d 565, 568-69, 573 P.2d 1312 (1978); citing, *Deutsch v. West Coast Machinery Co.*, 80 Wash.2d 707, 497 P.2d 1311 (1972); *Bowen v. Bateman*, 76 Wash.2d 567, 458 P.2d 269 (1969); and *Tyee Constr. Co. v. Dulien Steel Products, Inc.*, 62 Wash.2d 106, 381 P.2d 245 (1963).

A nonresident defendant must purposefully avail itself of the privilege of conducting activities within the forum state, thereby invoking the benefits and protections of its laws. *Hanson v. Denckla,* 357 U.S. 235, 253, 78 S.Ct. 1228, 1239, 2 L.Ed.2d 1283 (1958). Stated another way, there must exist a substantial connection between the defendant and the forum state which comes about by an action of the defendant purposefully directed toward the forum state. *Asahi Metal Indus. Co. v. Superior Court,* 480 U.S. 102, 107 S.Ct. 1026, 1033, 94 L.Ed.2d 92 (1987). The quality and nature of the defendant's activities determine whether the contacts are sufficient, not the number of acts or mechanical standards. *Nixon v. Cohn,* 62 Wash.2d 987, 994, 385 P.2d 305 (1963). In judging minimum contacts, the focus should be on the relationship between the defendant, the forum and the litigation. *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 775, 104 S.Ct. 1473, 1478, 79 L.Ed.2d 790 (1984) (quoting *Shaffer v. Heitner,* 433 U.S. 186, 204, 97 S.Ct. 2569, 2579, 53 L.Ed.2d 683 (1977)); *Hogan v. Johnson,* 39 Wash.App. 96, 102, 692 P.2d 198 (1984).

Mr. Schutz has not purposefully availed himself of the privilege of conducting activities within this state. See, *Grange Ins. Ass'n*, supra, at 758-760. ("[A] party asserting long-arm jurisdiction must show 'purposefulness' as part of the first due process element. Absent this showing, jurisdiction cannot be imposed.") Mr. Schutz has never been to the State of Washington. He has not transacted business in the State of Washington, nor has he committed a tortious act here. He was not Failla's employer. Mr. Schutz was not personally obligated to pay Failla's wages that she claims are owed by Corporation. Failla reached out to Corporation soliciting it for employment. Failla interviewed for a position at Corporation's offices in Pennsylvania. Failla attempts to create a basis for imposing jurisdiction upon Mr. Schutz solely from her unilateral choice to live here and her decision to seek employment with Corporation, a Pennsylvania corporation.

Failla has not shown that her cause of action arises from Mr. Schutz having purposefully availed himself of the privilege of engaging in activities in this state. Washington is not the proper forum litigation of this dispute because the exercise of jurisdiction over Mr. Schutz is inconsistent with traditional notions of fair play and substantial justice.

D. *RCW 49.52.050 may not bypass due process to impose jurisdiction over an officer of the employer who has no contacts with this state.*

Failla argues that an employer's willful nonpayment of a Washington resident employee creates personal jurisdiction over every officer of the employer for exemplary damages under RCW 49.52.070. *Failla's Brief on Appeal* at 13. Failla contends that an employer's violation of RCW 49.52.050 somehow creates an exception to due process requirements and establishes jurisdiction to sue every officer in Washington personally for exemplary damages under RCW 49.52.070, regardless of whether the officer has sufficient minimum contacts with this state. Failla states that a violation of RCW 49.52.050 creates that jurisdiction without providing any support for this proposition.

This argument runs counter to the due process principles set forth in *International Shoe* and *Tyee v. Dulien Steel* requiring that the nonresident have sufficient minimum contacts with the forum state in order to establish jurisdiction under the long-arm statute. RCW 52.49.070 creates civil liability for exemplary damages simply because of a person's status as an officer of the employer. As such, it is even more important that the "minimum contacts between the defendant and the forum state are of such character that maintenance of the suit does not offend traditional notions of fair play and substantial justice". Mr. Schutz' status as an officer of Corporation, standing alone, does not constitute sufficient

minimum contacts with the State of Washington to satisfy due process. If the Court were to rule otherwise, it would be setting a dangerous precedent which would have broad, far reaching implications with respect to non-resident employers' willingness to employ residents of this state.

E. *Failla has failed to meet her burden that Mr. Schutz willfully withheld the payment of her wages.*

RCW 49.52.050 provides in relevant part:

> Any employer *or* officer .... of any employer .... who
> ....
> (2) Wilfully and with intent to deprive the employee of any part of his or her wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract; ....
>
> Shall be guilty of a misdemeanor.

Wash. Rev. Code Ann. § 49.52.050 [emphasis added].

RCW 49.52.070 provides:

> Any employer *and* any officer . . . . of any employer who shall violate any of the provisions of RCW 49.52.050 (1) and (2) shall be liable in a civil action by the aggrieved employee or his or her assignee to judgment for twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages....

Wash. Rev. Code Ann. § 49.52.070 [emphasis added].

Under RCW 49.52.050, the burden of proof falls upon Failla to establish the requisite element of willful action on the part of Mr. Schutz. See, *Putnam v. Oregon Dep't of Justice,* 58 Or. App. 111, 647 P.2d 949

(construing ORS 652.150, which provides for liability where an employer "willfully fails to pay any wages or compensation of an employee," and that the plaintiff has the burden of proving the failure to pay was willful). The nonpayment of wages is willful "when it is the result of a knowing and intentional action[.]" *Schilling v. Radio Holdings, Inc.*, 136 Wash. 2d 152, 160, 961 P.2d 371, 375 (1998). Failla has not shown any evidence that Mr. Schutz willfully caused Corporation to withhold her wages. In fact, she contends that the burden is upon Mr. Schutz to prove "that *his* failure to pay Failla was not willful." *Failla's Brief on Appeal* at 17 [emphasis added]. Failla offers no authority for attempting to shift her burden of proof to Mr. Schutz.

Failla solicited employment with Corporation. She traveled to Pennsylvania to interview with the company. Failla was offered a position as Account Executive on Nov. 9, 2009. In the initial offer, she was directed to contact the corporate Controller to get set up for payroll. Failla was promoted to VP-Sales at the end of December, 2010. On December 31, 2010, Mr. Schutz instructed the Controller to develop a report regarding Failla's sales commissions and to issue a check to her in January, 2011 for those commissions. Subsequent e-mails indicate that Mr. Schutz continued his efforts during April, 2011 to get commissions calculated and paid. On May 8, 2011, Mr. Schutz again notified Failla that

he had instructed the controller to send her payroll, and that he would follow up regarding commissions. On May 26, 2011, Mr. Schutz notified Failla that Corporation would be closing, that she was terminated as of May 27, and that her commissions and expenses would be paid ASAP as the company completed operations. On June 6, 2011, Mr. Schutz indicated that he had signed Failla's payroll check, and assumed that it had been sent overnight. Mr. Schutz also indicated that he would check the status of Failla's expenses and calculate the 2011 commissions. In a final e-mail on July 26, 2011, Mr. Schutz advised Failla that "legally we [Corporation] do not owe you any commissions . . .", and expressed that he would like to have Corporation "pay you a severance in an amount equal to what the commission would have been assuming [Corporation is] in a financial position to do so, however right now [Corporation is] not in a financial position to do so.".

There is nothing in the evidence showing any action by Mr. Schutz to cause Corporation not to pay commissions to Failla. The chain of communications from Mr. Schutz to Failla indicates ongoing efforts by Mr. Schutz to get Failla paid until the point in late July, 2011, when someone at Corporation determined that legally the company did not owe Failla any commissions. There is nothing in the record to indicate that Mr. Schutz made that decision or participated in making that decision. Mr.

Schutz ultimately communicated to Failla that the ultimate reason for non-payment of commissions was that the company legally did not owe the commissions, and stated reasons.

A bona fide dispute regarding the payment of wages negates a finding of willfulness. "Lack of intent may be established . . . by the existence of a bona fide dispute." *Schilling,* 136 Wash.2d at 160. A dispute is "bona fide" if the dispute is "fairly debatable" over whether wages are owed. *Id.* at 161. The only evidence in this case regarding the reason for nonpayment of commissions is the statement in Mr. Schutz' e-mail of July 26, 2011 that "Legally [Corporation does] not owe you any commissions as the amount owed was negated when Juicy cancelled $50,000 of JFK . . . ." There is nothing in the record to show that Mr. Schutz' belief regarding that statement was not genuine, or that the statement was false.

F. Attorney Fees Should be Awarded to Mr. Schutz.

RCW 4.23.195 provides, in pertinent part:

> (5) In the event the defendant is personally served outside the state on causes of action enumerated in this section, and prevails in the action, there may be taxed and allowed to the defendant as part of the costs of defending the action a reasonable amount to be fixed by the court as attorneys' fees.
>
> Wash. Rev. Code Ann. § 4.28.185 (West)

Mr. Schutz was personally served outside the state of Washington on a suit alleging the causes of action enumerated in this section. Mr.

Schutz prevailed at the Court of Appeals. The basis for the decision at the Court of Appeals was a lack of jurisdiction over Mr. Schutz. Upon the denial of this Petition for Review, Mr. Schutz should be awarded a reasonable amount to be fixed by the court as attorneys' fees.

IV. CONCLUSION

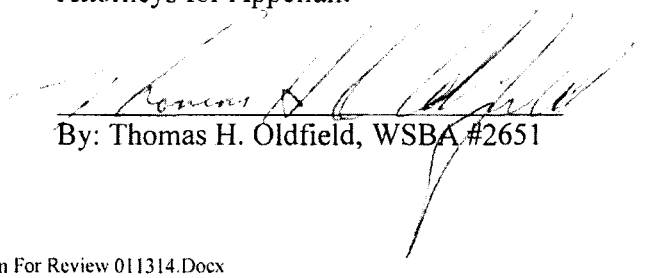
Failla has failed to establish that assertion of jurisdiction by Washington courts over Mr. Schutz complies with both the long-arm statute and due process considerations. It does not comply with either, and the case should be dismissed.

The Court of Appeals did not err when it found that the Washington courts lack jurisdiction over Mr. Schutz because Mr. Schutz did not employ Failla, Mr. Schutz did not conduct any business in the state of Washington, Mr. Schutz did not commit a tort within the state of Washington, Mr. Schutz did not have the necessary minimum contacts with the state of Washington to create jurisdiction, and RCW 49.52.050 may not bypass due process to impose jurisdiction over an officer of an employer who has no contacts with the state of Washington.

In addition, upon denial of the Petition for Review, Mr. Schutz should be awarded a judgment in a reasonable amount to be fixed by the court as attorneys' fees.

The Petition for Review should be denied.

Respectfully submitted,
Oldfield and Helsdon, PLLC
Attorneys for Appellant



By: Thomas H. Oldfield, WSBA #2651

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Subject: Supreme Court No. 89671-2 - Failla v. FixtureOne Corporation, et al.

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Dear Supreme Court Clerk,

Attached please find Appellant Kenneth A. Schutz' Reply to Petition for Review for filing in Supreme Court No. 89671-2.

Thank you.

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