

NO. 43405-9-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

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DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

KRISTINE FAILLA,

Respondent,

v.

**FIXTUREONE CORPORATION;
and KENNETH A. SCHUTZ,**

Appellant.

APPELLANT KENNETH A. SCHUTZ'
OPENING BRIEF

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ASSIGNMENTS OF ERROR

1. The trial court erred in entering its orders
 - a. of April 13, 2012 entitled Order Granting Plaintiff's Motion For Summary Judgment;
 - b. of April 27, 2012 entitled Order Denying Defendant Schutz' Motion For to Dismiss; and
 - c. of April 27, 2012 entitled Amended Order Granting Plaintiff's Motion For Summary Judgment.

ISSUES

1. Do the Washington courts have personal jurisdiction over defendant Kenneth Schutz?
2. Do RCW 49.52.050 and RCW 49.52.070 give the Washington courts personal jurisdiction over a nonresident individual defendant whose only contact with the state of Washington is as an officer/employee of a foreign corporation that has never done business in the state of Washington but that employed an individual who happened to reside in the state of Washington, in the absence of a showing of a purposeful direction of that employee's sales activities to *any* account in Washington?

3. Even if the Washington courts have personal jurisdiction over defendant Schutz, is the evidence sufficient to prove that he violated RCW 49.52.050 and 49.52.070?

STATEMENT OF THE CASE

Mr. Schutz is a resident of Philadelphia, Pennsylvania. A copy of the summons and complaint in this action was served on his wife at their residence in Philadelphia, Pennsylvania (CP 62).

Mr. Schutz is the President and CEO of defendant FixtureOne Corporation ("FixtureOne"). FixtureOne is a Pennsylvania corporation headquartered in Philadelphia specializing in the design and production of custom store fixtures and furnishings for the retail industry. Mr. Schutz has been an officer and director of FixtureOne since 2004 (CP 62).

FixtureOne has never transacted any business in the State of Washington. FixtureOne is not registered to do business in the State of Washington and has no operations or offices in the State of Washington. Mr. Schutz has never been to the State of Washington, nor has he personally ever transacted any business in the State of Washington (CP 62).

In October or November 2009, Kristine Failla contacted FixtureOne by a "cold call" email to Mr. Schutz inquiring whether there were any sales/account executive position openings with FixtureOne. In

her email, Ms. Failla indicated she had a background in sales and marketing but had been out of the industry for an extended period of time. Mr. Schutz, as President of FixtureOne, replied to Ms. Failla and made arrangements to interview her at the corporate office in Pennsylvania (CP 63).

Following the interview, FixtureOne offered Ms. Failla a position as Account Executive, which she accepted (CP 62). The terms of Ms. Failla's employment with FixtureOne were detailed in an email to Ms. Failla dated November 9, 2009. One of the instructions in that e-mail was for Ms. Failla to work with the Controller of the company regarding payroll. (CP 30-31) FixtureOne paid Ms. Failla her Wages by checks issued and mailed in Pennsylvania and by direct deposit initiated in Pennsylvania. (CP 64)

The duties of an Account Executive can be performed remotely wherever internet and telephone access is available. It is beneficial, but not required, for the person to be reasonably close to a relatively large airport for ease of travel. FixtureOne does not require or expect Account Executives to relocate to Pennsylvania or any other specific physical location, because the nature of the sales work is such that accounts can be managed by telephone and email, with occasional travel. Therefore, FixtureOne was willing to hire Ms. Failla even though FixtureOne has

never had any operations, offices, or customers in the State of Washington (CP 63).

A little over a year after her hire date, Ms. Failla sent Mr. Schutz an email on December 16, 2010 requesting a raise. On December 31, 2010, Mr. Schutz, as CEO, replied to Ms. Failla's email and confirmed that FixtureOne would increase the salary portion of her compensation, adjust her commission with regard to one customer, and promote her to Vice President -- Sales (CP 64).

As a condition of Ms. Failla's promotion, Mr. Schutz advised Ms. Failla that FixtureOne would require her to sign an employment agreement, the form of which was attached to Mr. Schutz' email (the "Employment Agreement"). The Employment Agreement expressly provides that it shall be interpreted in accordance with the laws of the Commonwealth of Pennsylvania (CP 64).

On December 31, 2010, Ms. Failla sent Mr. Schutz a reply email indicating that she would sign and email the Employment Agreement that day. For unknown reasons, Ms. Failla never sent FixtureOne a copy of the Employment Agreement with her signature (CP 64).

After receiving her raise and promotion, Ms. Failla continued with her employment with FixtureOne. In May 2011, FixtureOne terminated Ms. Failla's employment (CP 64).

FixtureOne is not registered to do business in the State of Washington. FixtureOne does not transact business in the State of Washington and has no customers in the State of Washington. FixtureOne does not maintain any offices or operations in the State of Washington. All of the sales Ms. Failla obtained and accounts managed by her for FixtureOne were for customers outside of the State of Washington (CP 65).

FixtureOne has never conducted a hiring campaign in the State of Washington or initiated contact with Ms. Failla. Ms. Failla unilaterally solicited employment with FixtureOne in October, 2009, (CP 93) and traveled to Pennsylvania to interview with the company. Respondent was offered a position as Account Executive with the corporation on Nov. 9, 2009 (CP 68). In the initial offer, she was directed to contact the corporate Controller to get setup for payroll (CP 69). Respondent was promoted to VP-Sales at the end of December, 2010 (CP 33). On December 31, 2010, Mr. Schutz instructed the Controller to develop a report regarding the respondent's sales commissions and to issue a check to her in January, 2011 for those commissions (CP 36). Subsequent e-mails indicate that Mr. Schutz continued during April, 2011 to get commissions calculated and paid (CP 38-40). On May 8, 2011, Mr. Schutz again notified the respondent that he had instructed the controller to send her payroll, and

that he would follow up regarding commissions (CP 42). On May 26, 2011, Mr. Schutz notified respondent that FixtureOne 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 (CP 44). On June 6, 2011, Mr. Schutz indicated that he had signed respondent's payroll check, and assumed that it had been sent overnight. Mr. Schutz also indicated that he would check the status of the respondent's expenses and calculate the 2011 commissions (CP 46). In a final e-mail on July 26, 2011, Mr. Schutz advised the respondent that "legally we [FixtureOne] do not owe you and he commissions . . .", and expressed that he would like to have FixtureOne "pay you a severance in an amount equal to what the commission would have been assuming [FixtureOne is] in a financial position to do so, however right now [FixtureOne is] not in a financial position to do so." (CP 50). Other than Ms. Failla, FixtureOne has never employed anyone who was or is a resident of the State of Washington.

After her termination, Ms. Failla brought this action against FixtureOne Corporation and Mr. Schutz. However, respondent has never served the corporation or pursued her claim against the corporation.

ARGUMENT

I. Standard of Review.

Washington appellate courts review orders of summary judgment de novo, engaging in the same inquiry as the trial court.

This court reviews an Order of summary judgment de novo, engaging in the same inquiry as the trial court. *Harberd v. City of Kettle Falls*, 120 Wash.App. 498, 507, 84 P.3d 1241 (2004). Summary judgment is appropriate when there is “no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law ...” CR 56(c). The court must construe facts and all reasonable inferences from those facts in the light most favorable to the nonmoving party. *7 *Lipscomb v. Farmers Ins. Co. of Wash.*, 142 Wash.App. 20, 27, 174 P.3d 1182 (2007). However, mere allegations and argumentative assertions will not defeat summary judgment. *Vacova Co. v. Farrell*, 62 Wash.App. 386, 395, 814 P.2d 255 (1991). Summary judgment is appropriate if reasonable persons could reach but one conclusion. *Venwest Yachts, Inc. v. Schweickert*, 142 Wash.App. 886, 893, 176 P.3d 577 (2008). *Moore v. Blue Frog Mobile, Inc.*, 153 Wash. App. 1, 6-7, 221 P.3d 913, 915-16 (2009)

2. Do the Washington courts have personal jurisdiction over defendant Kenneth Schutz?

Kenneth Schutz is a resident of the State of Pennsylvania. Mr. Schutz has never been to the state of Washington. Mr. Schutz has never personally transacted business in the State of Washington. Mr. Schutz has never had an employee in the State of Washington.

Kenneth Schutz is the CEO of FixtureOne Corporation, a corporation that is incorporated under the laws of the State of Pennsylvania, with its main office in Philadelphia, Pennsylvania. FixtureOne has never transacted any business in the State of Washington. FixtureOne is not registered to do

business in the State of Washington and has no operations or offices or customers in the State of Washington.

Respondent relies on RCW 4.28.185, the long-arm statute, as the basis for this Court having personal jurisdiction over Mr. Schutz.¹ A state court may exercise personal jurisdiction over a nonresident only if there are minimum contacts between the defendant and the forum state of such character that maintenance of the suit does not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). The case of *Tyee Const. Co. v. Dulien Steel Products, Inc.*, 62 Wash.2d 106, 381 P.2d 245 (1963) provides a three part test for subjecting foreign persons to Washington's long-arm jurisdiction. This test states that three basic factors must coincide for jurisdiction to be entertained:

- 1) the non-resident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state;

¹ RCW 4.28.185 provides in relevant part:

(1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his or her personal representative, 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

- 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. *Id.*, pages 115–116, 381 P.2d 245.

To establish personal jurisdiction under Washington's long-arm statute, respondent 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 as follows:

- (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).

Under Washington's long-arm statute, personal jurisdiction may be either general or specific. General jurisdiction flows from a non-resident defendant's continuous, systematic business contacts with Washington. Specific jurisdiction exists, by contrast, when a court agrees to entertain a cause of action which does arise from forum-related activities. However, specific jurisdiction may be asserted only when the non-resident defendant has had "fair warning" that its activities in Washington may subject it to the jurisdiction of courts of this forum. *Van Steenwyk v. Interamerican Management Consulting Corp.*, 834 F. Supp. 336 (U.S. District Court, E.D. Washington 1993). Neither standard is met in this case. Mr. Schutz had no continuous, systematic business contacts with Washington, nor did he have any activities in Washington. Mr. Schutz has had no personal business contacts with Washington. Respondent has presented no evidence that Mr. Schutz was involved in any decision to deprive the respondent of any wages. In fact, the evidence that she has presented is to the contrary.

Mr. Schutz has not done any act or transaction in Washington. He has not employed any Washington resident. He has never been to Washington. This cause of action is not connected to any act or transaction that occurred in Washington. The assertion of jurisdiction by Washington courts over Mr. Schutz offends traditional notions of fair play and substantial justice, consideration being given to the quality, nature and extent of the activity in

this state, the relative convenience of the parties, the benefits and protection of the laws of this state afforded the respective parties, and the basic equities of the situation. Therefore, the assertion of jurisdiction violates the fundamental due process requirements set forth in *Tyee v. Dulien Steel*, supra, and *International Shoe*, supra.

3. Do RCW 49.52.050 and 49.52.070 give the Washington courts personal jurisdiction over a nonresident individual defendant whose only contact with the state of Washington is as an officer/employee of a foreign corporation that has never done business in the state of Washington but that employed an individual who happened to reside in the state of Washington, in the absence of a showing of a purposeful direction of that employee's sales activities to *any* account in Washington?

RCW 49.52.050 provides, in pertinent part:

Any employer or officer, vice principal or agent of any employer, whether said employer be in private business or an elected public official, who

(1) . . .

(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; . . .

(3) . . .

Shall be guilty of a misdemeanor.

Wash. Rev. Code § 49.52.050 [emphasis added]

RCW 49.52.070 provides, in pertinent part:

Any employer and any officer, vice principal or agent 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, together with costs of suit and a reasonable sum for attorney's fees:

Wash. Rev. Code § 49.52.070

a. Basis for jurisdiction required for each defendant.

Respondent has the burden of demonstrating that this Court has personal jurisdiction over Mr. Schutz, a non-resident defendant who has never been to this state. *SeaHAVN, Ltd. v. Glitnir Bank*, 154 Wash. App. 550, 563, 226 P.3d 141, 148 (2010). The basis for that jurisdiction must be established for each defendant, and the court may not aggregate the contacts of multiple defendants.

Due process requires that a defendant be given notice of the suit and be subject to the personal jurisdiction of the court. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1949); *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). A state court may exercise personal jurisdiction over a nonresident only if there are minimum contacts between the defendant and the forum state of such character that maintenance of the suit does not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington, supra*. The forum court may not aggregate the contacts of multiple defendants, *i.e.*, the requirements of *International Shoe* must be met as to each defendant over whom a state court asserts jurisdiction. *Rush v. Savchuk*, 444 U.S. 320, 100 S.Ct. 571, 62 L.Ed.2d 516 (1980). The defendant's conduct and connection with the forum state must be such that he should reasonably foresee being haled into court there. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). *Huebner v. Sales Promotion, Inc.*, 38 Wash. App. 66, 70-71, 684 P.2d 752, 755-56 (1984)

The various ties that an individual has to the forum state, *if any*, must be evaluated to determine whether these ties to the forum are sufficient to comport with traditional notions of fair play and substantial justice. If there are no contacts with the forum, the court may not exercise jurisdiction.

The Minnesota court also attempted to attribute State Farm's contacts to Rush by considering the "defending parties" together and aggregating their forum contacts in determining whether it had jurisdiction. The result was the assertion of jurisdiction over Rush based solely on the activities of State Farm. Such a result is plainly unconstitutional. Naturally, the parties' relationships with each other may be significant in evaluating their ties to the forum. The requirements of *International Shoe*, however, must be met as to each defendant over whom a state court exercises jurisdiction.

....

Such an approach is forbidden by *International Shoe* and its progeny. If a defendant has certain judicially cognizable ties with a State, a variety of factors relating to the particular cause of action may be relevant to the determination whether the exercise of jurisdiction would comport with "traditional notions of fair play and substantial justice." See *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957); cf. *Kulko v. California Superior Court*, 436 U.S., at 98-101, 98 S.Ct., at 1700-1701. Here, however, the defendant has *no* contacts with the forum, and the Due Process Clause "does not contemplate that a state may make binding a judgment . . . against an individual or corporate defendant with which the state has no contacts, ties, or relations." *International Shoe Co. v. Washington*, 326 U.S., at 319, 66 S.Ct., at 160.

Rush v. Savchuk, 444 U.S. 320, 331-33, 100 S. Ct. 571, 579, 62 L. Ed. 2d 516 (1980)

A contract with an out-of-state party does not automatically establish sufficient minimum contact. The important factors are prior

negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing.

If the question is whether an individual's contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot. The Court long ago rejected the notion that personal jurisdiction might turn on "mechanical" tests, *International Shoe Co. v. Washington*, *supra*, 326 U.S., at 319, 66 S.Ct., at 159, or on "conceptualistic ... theories of the place of contracting or of performance," *Hoopston Canning Co. v. Cullen*, 318 U.S., at 316, 63 S.Ct., at 604. Instead, we have emphasized the need for a "highly realistic" approach that recognizes that a "contract" is "ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction." *Id.*, at 316-317, 63 S.Ct., at 604-605. It is these factors—prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing—that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum.

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478-79, 105 S. Ct. 2174, 2185, 85 L. Ed. 2d 528 (1985)

We must first determine, then, whether in dealing with MBM Bollinger engaged in purposeful activity or consummated some transaction in Washington. The mere execution of a contract with a resident of the forum state does not alone automatically fulfill the "purposeful act" requirement. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478-79, 105 S.Ct. 2174, 2185-86, 85 L.Ed.2d 528 (1985). Instead, the entire business transaction, including prior negotiations, contemplated future consequences, the terms of the contract and the parties' actual course of dealing, must be evaluated in determining whether the defendant purposefully established minimum contacts by entering into a contract with a resident of the forum state. *Burger King*, 471 U.S. at 478-79, 105 S.Ct. at 2185-86
MBM Fisheries, Inc. v. Bollinger Mach. Shop & Shipyard, Inc., 60 Wash. App. 414, 423, 804 P.2d 627, 633 (1991)

But, mere execution of a contract with a resident of this jurisdiction alone does not establish the purposeful act requirement. To determine whether the defendant purposefully established minimum contacts by entering into a contract with a resident of the forum state, the court must examine the circumstances of the entire transaction. The court must evaluate prior negotiations, contemplated future consequences, the terms of the contract, and the parties' actual course of dealing.

CTVC of Hawaii, Co., Ltd. v. Shinawatra, 82 Wash. App. 699, 711, 919 P.2d 1243, 1250 (1996) *modified*, 932 P.2d 664 (Wash. Ct. App. 1997)

- b. *RCW 49.52.050 and 49.52.070 provide for certain liabilities for actions of individuals and corporations, not jurisdiction over those individuals and corporations.*

RCW 49.52.050 purports to create misdemeanor criminal liability upon "any employer *or* officer, vice principal or agent of any employer," who "*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. . . ." RCW 49.52.070 purports to create civil liability for exemplary damages for nonpayment of wages upon "*any* employer and any officer, vice principal or agent of any employer" who violates RCW 49.52.050 (1) or (2) [Emphasis added]. These two statutes differ significantly, in that the former uses the disjunctive term "or", while the latter uses the conjunctive "and". Therefore, an officer, vice principal or agent of an employer must be shown to have acted willfully and intentionally on behalf of the employer to deprive the employee of wages in order to be found guilty of a misdemeanor. On the other hand, if an

employer has willfully and intentionally deprived an employee of wages, RCW 49.52.070 imposes civil liability for exemplary damages upon *any* officer, vice principal or agent of that employer, without any requirement for participation by that individual, simply because that individual is an officer, vice principal or agent of the employer. Where different language is used in the same connection in different parts of a statute, it is presumed that a different meaning was intended. 82 C.J.S. Statutes s 348 (1953). *State v. Roth*, 78 Wash. 2d 711, 715, 479 P.2d 55, 58 (1971).

Because RCW 52.49.070 creates a civil liability for exemplary damages simply because of a person's status with or relationship to an employer, it is even more important that the "minimum contacts between the defendant and the forum state of such character that maintenance of the suit does not offend traditional notions of fair play and substantial justice" required by *International Shoe*, *supra*, are present to enable the Washington courts to exercise jurisdiction over a nonresident.

Jurisdictional analysis is also required by the language of the long arm statute, as quoted in footnote 1, above, which allows long arm jurisdiction only for causes of action arising from, in pertinent part, the transaction of business or the commission of a tortious act *within this state*. The fact that Mr. Schutz is an officer of FixtureOne Corporation in the State of Pennsylvania does not constitute sufficient minimum contacts

with the state of Washington to meet due process requirements. Further, even if there was evidence that Mr. Schutz willfully and intentionally caused FixtureOne Corporation to withhold wages, which there is not, that action by Mr. Schutz would necessarily have to have occurred in Pennsylvania. Mr. Schutz was in Pennsylvania. Any decision he made or action that he took was in Pennsylvania. The respondent was paid in Pennsylvania. FixtureOne Corporation paid the respondent either by check issued and mailed from Pennsylvania or by direct deposit initiated through FixtureOne's bank in Pennsylvania. Even if an act by Mr. Schutz in Pennsylvania had been proven (which it was not), it was a business decision that did not take place in the state of Washington, and in the absence of other significant actions or relationships with the state of Washington, does not constitute sufficient minimum contacts with the state of Washington of such character that maintenance of the suit does not offend traditional notions of fair play and substantial justice meet due process requirements, nor would such actions, in Pennsylvania, constitute sufficient conduct and connection with the state of Washington that Mr. Scultz should reasonably foresee being haled into court in Washington.

The cases of *Cofinco of Seattle, Ltd. V. Weiss*, 25 Wn.App. 195, 605 P.2d 794 (1980) and *Toulouse v. Swanson*, 73 Wn.2d 331, 438 P.2d 578 (1968) are not precedent for this court to find jurisdiction. First, both

of those cases involved actions by or against the employer, not against an individual simply because of his status as an officer of the employer. More importantly, in both of those cases, there were direct and deliberate links and activities related to business in the state of Washington sufficient to establish jurisdiction. In *Cofinco*, the defendant, who was not a resident of Washington, entered into an employment agreement with a Washington corporation. Pursuant to the employment agreement, and in furtherance of the business relationship, the Washington corporation sent product samples to the defendant and made a substantial cash advance to the defendant. When the employment relationship was terminated, the Washington corporation brought suit in this state to recover the cash advance and the product samples. The court found that the employment agreement, combined with the acceptance of the product samples and the cash advance from the Washington company, provided sufficient contacts for the assertion of jurisdiction. In *Toulouse*, an out-of-state individual employed a Washington attorney to perform legal services in the state of Washington with regard to a Washington probate. The court there first stated "Jurisdiction might be sustained upon RCW 4.28.180, supra, alone upon the ground that defendant 'has submitted to the jurisdiction of the courts of this state,' for he certainly availed himself of the benefits of our judicial machinery to protect his interests in his mother's estate. *Toulouse*

v. Swanson, supra. The court then went on to say that “[i]t is beyond dispute that defendant consummated a transaction in this state when he employed plaintiff as his lawyer; and that the present action arises from that transaction”. In the present case, Mr. Schutz did not employ the defendant, and the defendants’ services for FixtureOne Corporation were not related to the state of Washington, and in fact did not result in any business for the company for any customer in the state of Washington.

Actions brought pursuant to the Washington long arm statute and other specific statutes that purport to create a cause of action must still meet the jurisdictional requirements of sufficient purposeful establishment of minimum contacts and traditional notions of fair play and substantial justice required by *International shoe*, supra, and *Tyee v. Dulien Steel*, supra, and their progeny. This case does not meet those basic requirements.

4. Even if the Washington courts have personal jurisdiction over defendant Schutz, is the evidence sufficient to prove that he is personally liable for exemplary damages in Washington pursuant to RCW 49.52.070?

Respondent was not employed by Mr. Schutz. Respondent was employed by FixtureOne Corporation. Although respondent named FixtureOne Corporation as a defendant, she has not served process on the corporation or pursued that action. Respondent solicited employment with

FixtureOne Corporation in October, 2009, and traveled to Pennsylvania to interview with the company. Respondent was offered a position as Account Executive with the corporation on Nov. 9, 2009. In the initial offer, she was directed to contact the corporate Controller to get setup for payroll. Respondent 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 the respondent's sales commissions and to issue a check to her in January, 2011 for those commissions. Subsequent e-mails indicate that Mr. Schutz continued during April, 2011 to get commissions calculated and paid. On May 8, 2011, Mr. Schutz again notified the respondent 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 respondent that FixtureOne 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 respondent's payroll check, and assumed that it had been sent overnight. Mr. Schutz also indicated that he would check the status of the respondent's expenses and calculate the 2011 commissions. In a final e-mail on July 26, 2011, Mr. Schutz advised the respondent that "legally we [FixtureOne] do not owe you and he commissions . . .", and expressed that he would like to have FixtureOne "pay you a severance in an amount equal to what the commission

would have been assuming [FixtureOne is] in a financial position to do so, however right now [FixtureOne is] not in a financial position to do so.”.

RCW 49.52.050 creates criminal misdemeanor liability for an officer of an employer if that officer willfully and intentionally fails to pay an employee, or willfully and intentionally causes the employer not to pay an employee. FixtureOne, not Mr. Schutz, was the employer. There is nothing in the evidence showing any action by Mr. Schutz to cause FixtureOne not to pay commissions to respondent. In fact, the chain of communications from Mr. Schutz to the respondent indicates ongoing efforts by Mr. Schutz to get the respondent paid up to the point in late July, 2011 when someone at FixtureOne determined that legally the company did not owe the respondent 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 the respondent that the ultimate reason for non-payment of commissions was that the company legally did not owe the commissions, and stated reasons.

Nonpayment of wages is willful when it is the result of a knowing and intentional action and not the result of a bona fide dispute. 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 [FixtureOne 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.

“The critical determination in a case [for exemplary damages] is whether the employer’s failure to pay wages was ‘willful.’”¹⁰³ “The nonpayment of wages is willful when it is the result of a knowing and intentional action and not the result of a bona fide dispute.”¹⁰⁴ A bona fide dispute is one that is “fairly debatable.”¹⁰⁵ “An employer’s genuine belief that he is not obligated to pay certain wages precludes the withholding of wages from falling within the operation of RCW 49.52.050(2) and 49.52.070.”¹⁰⁶ “Ordinarily, the issue of whether an employer acts ‘willfully’ for the purposes of RCW 49.52.070 is a question of fact.”¹⁰⁷ However, where there is no dispute as to material facts, and reasonable minds could reach but one conclusion from those facts, the matter may be decided on summary judgment.¹⁰⁸ *Duncan v. Alaska USA Fed. Credit Union, Inc.*, 148 Wash. App. 52, 78-79, 199 P.3d 991, 1004 (2008)

We will not find willful intent to deprive if the employer has a bona fide dispute as to the obligation to pay. *Pope v. Univ. of Wash.*, 121 Wash.2d 479, 490, 852 P.2d 1055 (1993); 871 P.2d 590. A bona fide dispute is one that is fairly debatable over whether all or a portion of the wages must be paid. *Schilling*, 136 Wash.2d at 161, 961 P.2d 371. For instance, when the employer deducts a disputed debt from the wages admittedly owed, the employer has not willfully withheld wages. *Pope*, 121 Wash.2d at 490, 852 P.2d 1055. *Allstat v. Edwards*, 114 Wash. App. 625, 634, 60 P.3d 601, 605 (2002)

. . . , our case law on the existence of a bona fide dispute sufficient to preclude a finding of willfulness under the statute is well developed. The dispute must be “bona fide,” i.e., a “fairly debatable” dispute over whether an employment relationship exists, or whether all or a portion of the wages must be paid. See *Brandt*, 1 Wash.App. at 680-81, 463 P.2d 197 (no bona fide dispute where employer failed to pay logger wages because of

economic reverses and falsified tax records); *Simon v. Riblet Tramway Co.*, 8 Wash.App. 289, 293, 505 P.2d 1291 *162 (dispute over bonus-no double damages), *review denied*, 82 Wash.2d 1004 (1973), *cert. denied*, 414 U.S. 975, 94 S.Ct. 289, 38 L.Ed.2d 218 (1973); *Ebling*, 34 Wash.App. at 500-02, 663 P.2d 132 (no bona fide dispute regarding commission amounts actually owed sailboat salesman-double damages upheld); *Cannon v. City of Moses Lake*, 35 Wash.App. 120, 663 P.2d 865 (dispute over accumulated sick/vacation leave fairly debatable-no double damages), *review denied*, 100 Wash.2d 1010 (1983); *Cameron v. Neon Sky, Inc.*, 41 Wash.App. 219, 703 P.2d 315 (deduction by employer of a disputed debt from wages owed-no double damages), *review denied*, 104 Wash.2d 1026 (1985); *Moran v. Stowell*, 45 Wash.App. 70, 81, 724 P.2d 396 (sick leave dispute-no double damages), *review denied*, 107 Wash.2d 1014 (1986); *Lillig*, 105 Wash.2d at 659-60, 717 P.2d 1371 (conflict over incentive bonuses, dispute over actual amount owing-no double damages); *Chelan County Deputy Sheriffs' Ass'n v. Chelan County*, 109 Wash.2d 282, 300-303, 745 P.2d 1 (1987) (dispute over deputy on-call time payments-no double damages); *Yates v. State Bd. for Community College Educ.*, 54 Wash.App. 170, 176-77, 773 P.2d 89 (dispute over professional improvement credits-no double damages), *review denied*, 113 Wash.2d 1005, 777 P.2d 1050 (1989); *Pope*, 121 Wash.2d at 489-91, 852 P.2d 1055 (University withheld disputed social security taxes from wages of student employees ineligible for retirement system-no double damages). In *Department of Labor and Indus. v. Overnite Transp. Co.*, 67 Wash.App. 24, 34-36, 834 P.2d 638 (1992), *review denied*, 120 Wash.2d 1030, 847 P.2d 481 (1993), the Court of Appeals emphasized the need for a "bona fide" dispute when it held an employer's explanation for refusing to pay its truck drivers overtime wages-the alleged preemption of state overtime wage laws by the federal Motor Carriers Act-was not fairly debatable. *Schilling v. Radio Holdings, Inc.*, 136 Wash. 2d 152, 161-62, 961 P.2d 371, 376 (1998)

Ordinarily, the issue of whether an employer acts "willfully" for purposes of RCW 49.52.070 is a question of fact. *Pope v. University of*

Wash., 121 Wash.2d 479, 490, 852 P.2d 1055, 871 P.2d 590 (1993), *cert. denied*, 510 U.S. 1115, 114 S.Ct. 1061, 127 L.Ed.2d 381 (1994); *Lillig*, 105 Wash.2d at 660, 717 P.2d 1371. *Schilling v. Radio Holdings, Inc.*, 136 Wash. 2d 152, 160, 961 P.2d 371, 375 (1998). In the case of *Hisle v. Todd Pacific Shipyards*, 113 Wash.App. 401, 54 P.3rd 687 (Div. 1, 2002) the Court of Appeals remanded a case to the trial court for a determination of whether there was a bona fide factual dispute, stating: Nonpayment of wages is willful in the context of these statutes “when it is the result of knowing and intentional action [as opposed to inadvertent] and not the result of a bona fide dispute as to the obligation of payment.” *Chelan County Deputy Sheriffs’ Ass’n v. Chelan County*, 109 Wash.2d 282, 300, 745 P.2d 1 (1987); *Schilling v. Radio Holdings, Inc.*, 136 Wash.2d 152, 160-61, 961 P.2d 371 (1998). Ordinarily, the question of whether a dispute is bona fide is a question of fact. *Hisle v. Todd Pac. Shipyards Corp.*, 113 Wash. App. 401, 428, 54 P.3d 687, 701 (2002) *aff’d*, 151 Wash. 2d 853, 93 P.3d 108 (2004).

In this case, there are two questions of material fact. First, whether there was a bona fide dispute regarding commissions allegedly owed to the respondent. The only evidence regarding the reason for nonpayment is the statement contained in Mr. Schutz’ e-mail of July 26, 2011 that legally the company did not owe the respondents any commissions, and the reason.

Second, the bulk of the evidence regarding payment of commissions indicates that Mr. Schutz was trying to get the commission paid to the respondent, not that he was willfully and intentionally causing FixtureOne not to pay the commission. The court must construe facts and all reasonable inferences from those facts in the light most favorable to the nonmoving party. Under those circumstances, summary judgment is not appropriate. This court should reverse the summary judgment and other orders entered herein, and this matter should be remanded to the trial court.

CONCLUSIONS

The assertion of jurisdiction by Washington courts over Mr. Schutz offends 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. Therefore, the assertion of jurisdiction violates the fundamental due process requirements set forth in *Tyee v. Dulien Steel*, supra, and *International Shoe*, supra.

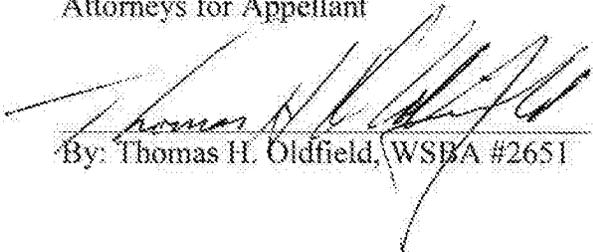
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In this case, there are two questions of material fact. First, whether there was a bona fide dispute regarding commissions allegedly owed to the respondent. Under those circumstances, summary judgment is not appropriate. This court should reverse the summary judgment and other orders entered herein, and this matter should be remanded to the trial court.

The summary judgment granted in favor of the respondent should be reversed, and an order should be entered granting summary judgment to Mr. Schutz dismissing the respondent's action against him.

Respectfully submitted,
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Attorneys for Appellant


By: Thomas H. Oldfield, WSBA #2651

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION II

KRISTINE FAILLA,

Plaintiff,

v.

FIXTUREONE CORPORATION; and
KENNETH A. SCHUTZ,

Defendants.

COURT OF APPEALS NO.
43405-9-II

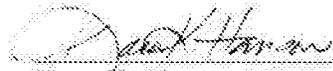
CERTIFICATE OF SERVICE

I certify that on the 26th day of July, 2012, I caused a true and correct copy of the Appellant Kenneth A. Schutz' Opening Brief and Certificate of Service to be served on the following by regular United States Postal Service mail and by email to the following:

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On the 26th day of July, 2012, I delivered by e-mail a true and correct copy of the foregoing Appellant Kenneth A. Schutz' Opening Brief and Certificate of Service to the Court of Appeals, Division II, to: coa2filings@courts.wa.gov.

Dated this 26th day of July, 2012.



Kara K. Hanson