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DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

No. 43405-9-II

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

KRISTINE FAILLA,

Respondent,

v.

FIXTUREONE CORPORATION;
and KENNETH A. SCHUTZ,

Appellant.

RESPONDENT KRISTINE FAILLA'S
OPENING BRIEF

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A. STATEMENT OF THE CASE

Respondent Kristine Failla (hereinafter referred to as "Failla" initiated this lawsuit to recover wages and exemplary damages from the appellant Kenneth Schutz (hereinafter referred to as "Schutz") and FixtureOne Corporation. Failla was not able to obtain service on FixtureOne and though counsel for Schutz appeared for FixtureOne, it refused to allow counsel to accept service on its behalf, so Schutz was the only active defendant before the Trial Court. (CP 12)

FixtureOne sells fixtures, casework and displays made of wood, metal, glass and plastic to businesses for use in retail stores. Schutz is the founder and CEO of FixtureOne Corporation. (CP 23) In October 2009 Failla applied for a sales position with FixtureOne. (CP 93-94) In response to Failla's initial email expressing her interest in a position with FixtureOne, Schutz was excited about the possibility of hiring a sales representative in Washington. (CP 91) In his first email to Failla sent October 17, 2009 Schutz stated "FixtureOne does not have a sales representative in that area of the country and there may be a fit." (CP 93)

During his interview with Failla Schutz discussed the advantages that would accrue to FixtureOne from having a sales representative located in the western United States and specifically in Washington. (CP 91) Schutz stated to Failla that there were benefits to FixtureOne of obtaining a sales representative in

Washington, not the least of which being that the company was trying to do business with Starbucks. (CP 91) Schultz forwarded an email to Failla with the subject identified as "Starbucks", discussing the company's previous efforts to obtain certification of various fixtures it produced that would be beneficial in doing business with Starbucks. (CP 95) Failla's location in Washington was an asset to the company in its efforts to land Starbucks as a customer. (CP 92)

In November, 2009 Schutz hired Failla as an Account Executive. (CP 24) The terms of Failla's employment were outlined by the Defendants in an email from Schutz to Failla dated November 9, 2009. (CP 24, 30-31) The terms of Failla's employment included payment of a salary of $75,000.00 per year and an additional three percent (3%) commission on sales. (CP 24, 30-31)

In January 2011 Failla became Vice President for Sales. (CP 24) Failla's base salary was raised to $135,000.00, though she remained entitled to additional commissions on sales. (CP 33-34) Failla continued to perform her duties as an Account Executive and a Vice President of FixtureOne until late May, 2011, when her employment was terminated by Schutz as a result of FixtureOne's financial difficulties. (CP 24-25)

FixtureOne paid Failla her monthly salary through May, 2011. However, FixtureOne failed to pay Failla for any of the commissions she earned during the course of her employment with FixtureOne. (CP 25)

In December 2010, at the end of her first full year of employment with FixtureOne, Failla sent an email to Schutz asking that he prepare an accounting of what commissions were due to her to date, as well as for payment of those commissions. (CP 25, 33-34) Schutz in turn instructed his staff via an email message to prepare a report identifying the commissions due to Failla through the end of 2010. (CP 25, 36) After waiting over three months for the accounting, Failla in early April sent Schutz a follow up request for the accounting and commissions payment. On April 21, 2011 Schutz sent Failla an accounting that he himself had prepared, which showed that Failla was owed $21,025.06 in commissions for 2010. (CP 25, 38-40)

On May 6, 2011, not having received payment for her commissions with her next pay check as she had expected, Failla sent yet another inquiry to Schutz. Schutz responded two days later, stating that he had instructed the payment to be made and that he would ensure it was taken care of. However, no payment of commissions was made. (CP 25-26, 42)

Instead, in response to an email from Failla regarding a delivery that FixtureOne had failed to make to one of her customers,

Schutz informed Failla via an email message dated May 26, 2011 that he had determined that FixtureOne was not able to fulfill its obligations and would likely need to shut its doors. He further informed Failla that he needed to end her employment as of the next day, May 27, 2011. Yet again he promised that "we will pay your commissions and expenses asap in the next several weeks as we complete operations." However, no payment of Failla's commissions was made. (CP 26, 44)

On June 6, 2011 Failla sent yet another email to Schutz, informing him that she had not yet received the promised payment of her 2010 commissions, and further asking for an accounting of her 2011 commissions due. (CP 26-27, 46) Schutz responded later that same day, stating that "I know that Ed cut a payroll check for you and I signed it – I assume it would have been sent overnight and will check on it. I will check the status of your expenses and calculate the 2011 commissions." (CP 26-27, 46) Despite Schutz's assurance, no payment of Failla's commissions was made and no accounting of her 2011 commissions was provided, though documentation in Plaintiff's possession indicates that she is owed at least an additional $8,779.00 in commissions for 2011. (CP 27, 48)

Shortly thereafter, in response to yet another inquiry from Failla regarding the payment of her commissions for 2010 and 2011, Schutz on July 26, 2011 sent Failla an email in which he stated that "legally we do not owe you any commissions." (CP 27,

50) The stated reason for this astonishing new position was that a $50,000.00 order from one of Failla's customers had been cancelled by the customer. That cancellation had happened long after Failla's employment had been terminated, and the order was cancelled due to FixtureOne's failure to timely fill the order. (CP 27-28)

In his July 26, 2011 email Schutz acknowledged that Failla was in no way responsible for the cancellation, stating "I am aware that that was no fault of yours." (CP 50) Moreover, even if Failla had somehow been responsible for the cancellation of the $50,000.00 order and as a result lost her right to a 3% commission for that order, Schutz failed in his email to provide any explanation as to how the cancellation of that $50,000.00 order in 2011 could have any impact on the commissions owed to Failla for her other sales in 2010 and 2011.

Because it had become increasingly clear to Failla that Schutz, despite his previous repeated assurances to the contrary, had no intention of paying the commissions that were owed to her, on July 28, 2011 she had her counsel send a demand letter to Schutz. (CP 28, 52-53) The letter informed Schutz that his willful refusal to pay the commissions owed to Failla would subject him to possible liability for double damages and attorney's fees under Washington law. (CP 52-53) Schutz did not respond to the letter or make any further payment to Failla, and this lawsuit followed. (CP 28)

On February 15, 2012 Failla filed a motion for summary judgment, seeking judgment against Schutz for her unpaid wages and exemplary damages, attorney's fees and costs pursuant to RCW 49.52.070. (CP 11-22) Failla submitted a declaration in support of her motion, in which she testified that Schutz, in his capacity as CEO of FixtureOne, had ultimate authority over and responsibility for her wage payments. (CP 23-53)

Prior to responding to Failla's motion, on March 1, 2012 Schutz filed a CR 12(b)(2) motion to dismiss, asserting that the Trial Court lacked jurisdiction over Schutz. (CP 54-61) The parties stipulated that Schutz's motion would be treated as a motion for summary judgment of dismissal and heard concurrently with Ms. Failla's summary judgment motion.

In support of his motion, on March 1, 2012 Schutz submitted his own declaration. (CP 62-82) In that declaration, which was the only testimony that Schutz submitted to the Court either in opposition to Failla's motion or in support of his own, Schutz did not deny that he had ultimate authority over and responsibility for Failla's wage payments. Nor did Schutz dispute the amount of wages owed to Failla, or advance any reason as to why Failla was not entitled to payment of the full amount of wages she claimed. Instead, Schutz's testimony focused solely on setting forth facts to support his contention that the Trial Court lacked jurisdiction over him because neither he nor FixtureOne had conducted any

business in Washington, and further that Failla's claims should be resolved by a Pennsylvania court. (CP 62-82)

The Trial Court rejected Schutz's contention that it lacked jurisdiction over him. As Schutz had raised no issue of material fact as to the amount of wages owed to Failla or as to Schutz's own responsibility for FixtureOne's failure to pay Failla's wages, the Trial Court entered judgment against Schutz for the amount of those wages, together with exemplary damages, attorney's fees and costs pursuant to RCW 49.52.070. (CP 125-127, 139-141)

B. ARGUMENT

1. Standard of Review.

When reviewing an order granting summary judgment, the Court of Appeals engages in the same inquiry as the Trial Court. Failor's Pharmacy v. DSHS, 125 Wn.2d 488, 493, 886 P.2d 147 (1994). The primary purpose of a summary judgment rule is to secure a just, speedy and inexpensive determination of every action by avoiding unnecessary trial. Mayberry v. City of Seattle, 53 Wn.2d 716, 336 P.2d 878 (1959).

Thus, where there is no genuine issue of material fact, granting summary judgment is proper. Tradewell Stores v. Fidelity Cas. Co. of New York, 67 Wn.2d 919, 410 P.2d 782 (1966). A material fact is one upon which the outcome of the litigation

depends. Amant v. Pacific Power & Light Co., 10 Wn.App. 785, 520 P.2d 481 (1974). Once the moving party has met its burden of offering evidence showing that it is entitled to a judgment as a matter of law, the burden shifts to the non-moving party to set forth facts showing that there is a genuine issue for trial. Graves v. P.J. Taggares Co., 94 Wn.2d 298, 616 P.2d 1223 (1980). A party may not rest upon pleadings or assertions, but must present evidence of fact on which that party relies. Leland v. Frogge, 71 Wn.2d 197, 427 P.2d 724 (1976).

If a plaintiff's response "fails to make a showing sufficient to establish the existence of an element essential to his case," then defendants' motion for summary judgment should be granted. Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990). When plaintiff fails to establish the existence of an essential element of its case, then there is no genuine issue as to any material fact and summary judgment is appropriate. Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

The Court of Appeals may affirm the Trial Court's judgment "on any grounds established by the pleadings and supported by the record." Truck Ins. Exch. v. VanPort Homes, Inc., 147 Wash.2d

751, 766, 58 P.3d 276 (2002); In re Marriage of Rideout, 150 Wash.2d 337, 77 P.3d 1174 (2003).

2. Washington Courts Have Jurisdiction Over Schutz.

RCW 4.28.185 provides in pertinent part as follows:

> (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; or
> > (b) The commission of a tortious act within this state;

In Shute v. Carnival Cruise Lines, 113 Wn.2d 763,767, 783 P.2d 78 (1989), the Washington Supreme court stated In order to subject nonresident defendants and foreign corporations to the *in personam* jurisdiction of this state under RCW 4.28.185(1)(a), the following factors must coincide:

> (1) The nonresident defendant or foreign corporation 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.

Washington courts have also acknowledged the legislature's intent to protect Washington employees' wages. "We liberally construe the wrongful withholding statute "to advance the Legislature's intent to protect employee wages and assure payment." Schilling v. Radio Holdings, Inc., 136 Wn.2d 152, 159, 961 P.2d 371 (1998) As the Court of Appeals stated in Cofinco of Seattle, Ltd. v. Weiss, 25 Wn.App. 195, 197, 605 P.2d 794 (1980) in deciding that Washington law should apply to a contract between a Washington employer and an out of state employee, "[the employee's] employment contract afforded him, at the very least, the protection of Washington's laws affecting employer-employee relationships..."

RCW 49.52.050 provides in pertinent part as follows:

> Any employer or officer, vice principal or agent of any employer, whether said employer be in private business or an elected public official, who...(2) Willfully and with intent to deprive the employee of any part of his 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.

RCW 49.52.070 provides in pertinent part as follows:

> Any employer and any officer, vice principal or agent of any employer who shall violate any of the provisions of subdivisions (1) and (2) of RCW 49.52.050 shall be liable in a civil action by the aggrieved employee or his 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.

The above statutes provide that any employer, or any officer or agent of that employer, who willfully withholds payment from a Washington employee is liable to that employee for exemplary damages, attorney's fees and costs. By employing Failla, knowing that she lived in and would perform her duties in Washington, Schutz engaged in business in and consummated a transaction in Washington.

In Toulouse v. Swanson, 73 Wn.2d 331, 438 P.2d 578 (1968), an out of state defendant had employed an attorney in Washington to represent his interest in an estate being probated in Washington. The Supreme Court's specific basis for determining that Washington's courts had jurisdiction over the defendant in no way turned on the location of the probate or the number of visits the defendant made to meet with the attorney. Instead, the Court explicitly stated 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". Id. at 334.

The Court of Appeals quoted the first portion of that specific statement in Thornton v. Interstate Securities Co., 35 Wn.App. 19, 25, 666 P.2d 370 (1983), when determining that an out of state defendant was subject to jurisdiction in Washington. "As stated in

Toulouse v. Swanson, 73 Wash.2d 331, 334, 438 P.2d 578 (1968), '[i]t is beyond dispute that defendant consummated a transaction in this state when he employed plaintiff ...'" The mere act of employing the plaintiff in Toulouse was the basis for finding jurisdiction in Washington as noted by both the Supreme Court in Toulouse and the Court of Appeals in Thornton.

Schutz attempts to distinguish this case from the situation in Cofinco, supra. However, the holding in Cofinco only serves to highlight the futility of Schutz's efforts. In Cofinco, the individual non-resident employee found to be subject to the jurisdiction of the Washington court had never even been to Washington, let alone undertaken any acts in Washington. Yet the Court of Appeals held, over the employee's objection to being subject to jurisdiction in Washington, that "[the employee's] employment contract afforded him, at the very least, the protection of Washington's laws affecting employer-employee relationships..." Id. at 197. If Washington law and policy provides that a non-resident employee, who has never even been to the state, is entitled to the protection of Washington's laws, it is axiomatic that an actual resident of Washington, who performed her employment duties in Washington, is entitled to the protection of Washington's laws governing employment.

Schutz also asserts that even if FixtureOne as Failla's employer may be subject to Washington jurisdiction, Schutz should

be able to avoid liability in Washington under Washington's wage statutes because he did not personally employ Failla. But RCW 49.52.070 provides for liability for the failure to pay wages to an employee not only of the company employing a Washington employee, but also of each of its responsible officers. RCW 49.52.070 eliminates the corporate shield usually enjoyed by corporate officers when there is a willful failure to pay wages owed to an employee. Stated another way, the willful failure of any officer to pay wages to a Washington employee subjects that officer to liability under RCW 49.52.750 and thus to the jurisdiction of Washington's courts.

Schutz argues in his appellant brief that, based on the use of the word "and" in RCW 49.52.070 as opposed to the word "or" in RCW 49.52.050, RCW 49.52.070 makes any officer, regardless of involvement in or responsibility for payment of wages, liable for the employer's failure to pay wages. Schutz goes on to argue that such blanket liability should somehow impact whether an officer located out of state is subject to Washington Court's jurisdiction.

The logic of Schutz's argument is questionable at best, because if the Legislature had actually imposed blanket liability on officers of corporations as Schutz asserts, such blanket liability would actually be an additional argument in favor of exercising jurisdiction as such blanket liability would be evidence of the

legislature's extremely strong desire to protect Washington employees. However, Schutz's assertion that officers are subject to such blanket liability blatantly misstates the law in Washington.

> RCW 49.52.070 imposes individual liability against an "employer *and* any officer, vice principal or agent of any employer." (Emphasis added.) A person is a "vice principal," and personally liable under RCW 49.52.070 in a wrongful withholding of wages case when that person exercises control over the payment of funds and acts under that authority. Ellerman v. Centerpoint Prepress, Inc., 143 Wash.2d 514, 521, 22 P.3d 795 (2001). **In contrast, a person who has no control over the payment of wages on behalf of a corporation is not subject to liability.** Ellerman, 143 Wash.2d at 521, 22 P.3d 795.

Durand v. HIMC Corp., 151 Wn.App. 818, 835, 214 P.3d 189 (2009)(emphasis added). Thus, despite Schutz's assertions to the contrary, officers of a corporation are only liable under RCW 49.52.070 if they have some control over payment of wages. The Durand decision also notes that the liability of officers that do control payment of wages does not depend upon piercing the corporate veil, as such officers are directly liable under RCW 49.52.070. Id.

Regardless 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 when, as the officer responsible for

payment of Failla's wages, he failed to pay Failla the wages owed to her. A tort, as defined by Black's Law Dictionary 1526 (8th ed. 2004), is "a civil wrong, other than a breach of contract, for which a remedy may be obtained, usually in the form of damages; a breach of duty in a particular relation to one another."

Under Washington law "when an 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." Lewis By and Through Lewis v. Bours, 119 Wash. 2d 667, 835 P.2d 221 (1992) (quoting 14 L. Orland & K. Tegland, Wash.Prac., Trial Practice § 18, at 46–51 (4th ed. 1986). In the present case, though Schutz may have been physically in Pennsylvania when he decided not to pay Failla's wages, Failla suffered her injury in Washington when she did not receive the wages owed to her. Thus, in addition to being subject to jurisdiction in Washington as a result of doing business in Washington, Schutz is also subject to Washington jurisdiction as a result of committing a tortuous act in Washington.

3. Schutz Failed To Raise Any Issue Of Material Fact As To Whether He Had Violated Washington's Wage Statutes.

It is noteworthy that in the testimony that he submitted to the Trial Court, Schutz did not in any way dispute that as the president

and CEO of FixtureOne he was responsible for payment of Failla's wages. Nor did Schutz advance any excuse for his and FixtureOne's failure to pay Failla's commissions, raise any dispute as to the amount of wages owed to Failla or assert any argument regarding his responsibility for payment of Failla's wages. Schutz also did not in either his motion to dismiss for lack of jurisdiction or in his memorandum in response to Failla's motion for summary judgment claim there was any bona fide dispute as to whether Failla was entitled to payment of her wages.

Yet Schutz now asserts for the first time on appeal that the evidence before the Trial Court was insufficient to prove that he is personally liable for exemplary damages pursuant to RCW 49.52.070. Absent manifest constitutional error, the Court of Appeals does not consider a theory raised for the first time on appeal. RAP 2.5(a); Brown v. Labor Ready NW, Inc., 113 Wash.App. 643, 655, 54 P.3d 166 (2002). Because Schutz failed to assert any testimony or argument before the Trial Court that he was not responsible for payment of Failla's wages or that there was a bona fide dispute as to whether Failla was entitled to payment of her wages, the Court of Appeals cannot consider his belated arguments regarding these matters on appeal.

Even if the Court of Appeals could consider Schutz's new argument, the record before the Trial Court conclusively demonstrated that Schutz was responsible for payment of Failla's

wages, and there is no evidence in the record to support any claim that there was a bona fide dispute as to Failla's entitlement to those wages.

Failla clearly testified that Schutz as president of FixtureOne was in charge of payment of wages responsible for payment of her wages, and Schtuz did not submit any testimony denying or disputing this. The emails from Schutz himself to Failla established that FixtureOne was required to pay Failla commissions of 3% of her sales. Commissions are considered wages under RCW 49.48 et seq. and RCW 49.52 et seq. See Dautel v. Heritage Home Center, Inc., 89 Wn.App. 148, 151-152, 948 P.2d 397 (1997). See also Durand v. HIMC Corporation, 151 Wn.App. 818, 214 P.3d 189 (2009)(quoting Dice v. City of Montesano, 131 Wn.App. 675, 689, 128 P.3d 1253 (2006) "Compensation applies to more than work actually performed; it applies to any form of compensation that is a byproduct of the employment relationship.") Under RCW 49.48.010, the commissions due to Failla were to be paid to her no later than at the end of the pay period covering her last weeks of employment in May, 2011.

Nor did Schutz provide any evidence to the Trial Court, or to this Court, that his failure to pay Failla was not willful. The only reference to any "dispute" as to whether Failla was entitled to

payment of her wages was an email in which Schutz made the bald statement that he and his company had determined they were not legally obligated to pay Failla her wages, but provided no explanation as to the basis for that position. (CP 27, 50)

A "bona fide" dispute is one that is fairly debatable whether all or a portion of the wages must be paid. Schilling, supra 161-62. Schutz has never advanced any argument that Failla was not entitled to payment of her wages, much less shown there was ever any bona fide dispute regarding the issue. While ordinarily the issue of whether an employer acts "willfully" for purposes of RCW 49.52.070 is a question of fact, where, as here, there is no dispute as to the material facts, the Court will resolve the case on summary judgment. Id. at 160.

4. Request For Attorney's Fees And Costs.

Pursuant to RAP 18.1, Failla requests that she be awarded her attorney's fees and costs incurred in this appeal. RCW 49.52.070 provides any officer of any employer who violates any of the provisions of subdivisions (1) and (2) of RCW 49.52.050 shall be liable in a civil action by the aggrieved employee for costs of suit and a reasonable sum for attorney's fees. Failla is therefore entitled to recover her reasonable attorney's fees and costs incurred in this appeal.

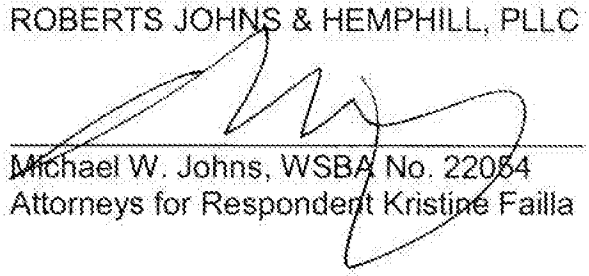
C. CONCLUSION

For all of the reasons set forth above, this Court should therefore affirm the decision of the Trial Court.

Dated: August 24, 2012.

Respectfully submitted

ROBERTS JOHNS & HEMPHILL, PLLC



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STATE OF WASHINGTON
BY
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CERTIFICATE OF SERVICE

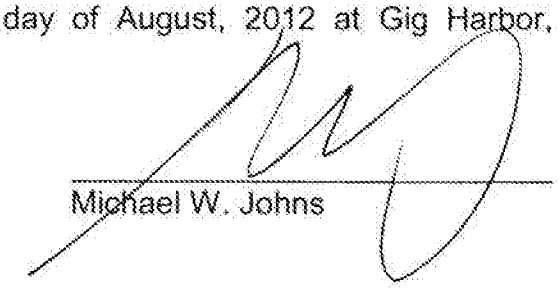
The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing RESPONDENT KRISTINE FAILLA'S OPENING BRIEF on the following individuals in the manner indicated:

Thomas H. Oldfield
Oldfield & Helsdon, PLLC
1401 Regents Blvd., Suite 102
Fircrest, WA 98466

(**XX**) Via Email to toldfield@tacomalawfirm.com
( ) Via U.S. Mail
( ) Via Facsimile
( ) Via Hand Delivery
( ) Via ECF
(**XX**) ABC Legal Services

SIGNED this 27 day of August, 2012 at Gig Harbor, Washington.



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