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DIVISION II

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STATE OF WASHINGTON

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NO. 43405-9-II

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

KRISTINE FAILLA,

Respondent,

v.

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

Appellant.

APPELLANT KENNETH A. SCHUTZ'
REPLY BRIEF

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I. SUMMARY OF ARGUMENT

Respondent Kristine Failla has the burden of showing that the exercise of personal jurisdiction over appellant Ken 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.

Whether Washington courts have jurisdiction over Mr. Schutz requires examining his activities and contacts with this state. Ms. Failla's sole basis for the exercise of personal jurisdiction over Ken Schutz is that she happens to be a resident of this state. She claims that when FixtureOne hired her as an employee, Ken Schutz "engaged in and consummated a transaction in Washington." *Respondent's Brief* at 11. Thus, she construes her employment with FixtureOne as a "contact" of Mr. Schutz to arrive at the self-serving conclusion that Mr. Schutz is subject to personal jurisdiction here. Ms. Failla offers no facts demonstrating that Mr. Schutz has individually engaged in any business activities in the State of Washington.

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 FixtureOne. She does not state what cognizable tort claim Mr. Schutz committed in Washington. Mr. Schutz has never been to the State of Washington, thus he could not have committed a tortious act in Washington.

Nevertheless, Ms. Failla contends that Mr. Schutz is deemed to have committed a tort in Washington because she suffered a nonphysical injury here when FixtureOne allegedly failed to pay her the wages she claims that FixtureOne owed to her. Ms. Failla claims that Mr. Schutz violated RCW 49.52.050, a statute that imposes criminal misdemeanor liability. She does not explain how a violation of this statute creates tort liability. 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.

Assuming *arguendo* that Mr. Schutz committed a tort, the injury “occurred” in Washington only if the last event necessary to impose liability for the alleged tort occurred in Washington. *Oertel v. Bradford Trust Co.*, 33 Wash. App. 331, 337, 655 P.2d 1165, 1168 (1982). Ms. Failla admits that Mr. Schutz was “physically present in Pennsylvania when he decided not to pay Failla’s wages.” *Respondent’s Brief* 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 Ms. 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*, *supra*.

In her response brief, Ms. Failla does not address any of the due process considerations presumably because her attempt to do so would be futile. Mr. Schutz has not purposefully availed himself of the privilege of

transacting business here – he has never been here much less personally transacted any business here. Ms. Failla’s cause of action arises from her employment relationship with FixtureOne, not from any connection Mr. Schutz has with this state. Given that Mr. Schutz has no connections with this state, the assumption of jurisdiction over him offends traditional notions of fair play and substantial justice.

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 FixtureOne. In fact, the email communications exchanged between Mr. Schutz and Ms. Failla indicate that he was assisting her in resolving the payment issue, and that there was a bona fide dispute concerning whether FixtureOne was obligated to pay those wages. Without evidence that Mr. Schutz acted willfully with the intent to deprive Ms. Failla of her wages, Mr. Schutz cannot be found to have violated RCW 49.52.050. Thus, he cannot be liable for exemplary damages under RCW 49.52.070. Pursuant to RAP 2.5(a)(2), the respondent’s failure to establish facts upon which relief may be granted may be considered for the first time on appeal.

II. 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].

Respondent 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*, *supra*, due process is not offended.

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

The cases respondent 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) in 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 the respondent's cause of action is not linked to Mr. Schutz having transacted business in Washington. The cause of action arises from the respondent's employment relationship with FixtureOne Corporation. Respondent pursued employment with FixtureOne. She solicited FixtureOne about open sales positions with the company by contacting the corporate headquarters in Pennsylvania. She traveled to FixtureOne's corporate headquarters in Pennsylvania for an interview. FixtureOne hired the respondent. There is no employment relationship or contract between Ken Schutz and the respondent, and the respondent does not claim otherwise. Ken Schutz was

not the respondent's employer. The assumption of jurisdiction under RCW 4.28.185(1)(a) is improper here because the respondent's cause of action does not arise from Ken Schutz having personally transacted business in this state.

2. *The respondent's cause of action does not arise from any tort committed in the State of Washington by Ken 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.*

Respondent 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.” *Respondent's Brief* at 14. Respondent 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. Respondent 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 FixtureOne's alleged non-payment of wages caused her physical harm.

In support of her argument that Ken Schutz is subject to personal jurisdiction under RCW 4.28.185(1)(b), Respondent 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.

Respondent 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, the respondent 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 respondent’s contention that Mr. Schutz committed a tort here because the last event necessary for liability, the mental process – the decision – not to pay the wages that are claimed to be due, occurred in Pennsylvania, not Washington.

The respondent 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.

Respondent, a Washington resident, unilaterally contacted FixtureOne, a Pennsylvania corporation, in search of employment. FixtureOne hired respondent 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 FixtureOne was willing to hire Ms. Failla even though FixtureOne has no operations, offices, or customers in the State of Washington. The respondent 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*, the respondent 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 the respondent 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 Ken Schutz violates due process.*

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. 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, the respondent 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, the respondent 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. Duliem 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).

Ken 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.”) Ken 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 the respondent’s employer. He was not personally obligated to pay the respondent’s wages that she claims are owed by FixtureOne. The respondent reached out to FixtureOne soliciting it for employment. She interviewed for a position at FixtureOne’s offices in Pennsylvania.

Respondent attempts to create a basis for imposing jurisdiction upon Ken Schutz solely from her unilateral choice to live here and her decision to seek employment with FixtureOne, a Pennsylvania corporation.

The respondent 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.*

Respondent 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. *Respondent's Brief* at 13. The respondent 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. Respondent 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 FixtureOne 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 employer’s willingness to employ residents of this state.

E. *The respondent has failed to meet her burden that Ken Schutz willfully withheld the payment of her wages.*

In general, issues not raised in the trial court may not be raised on appeal. See RAP 2.5(a) (an “appellate court may refuse to review any claim of error which was not raised in the trial court”). *Roberson v. Perez*, 156 Wash. 2d 33, 39-40, 123 P.3d 844, 847-48 (2005). By using the term

“may,” RAP 2.5(a) is written in discretionary, rather than mandatory, terms. See, *State v. Ford*, 137 Wash.2d 472, 477, 484–85, 973 P.2d 452 (1999) (“By its own terms, however, the rule is discretionary rather than absolute.”). In addition to its discretionary nature, RAP 2.5(a) contains several express exceptions from its general prohibition against raising new issues on appeal, including the “failure to establish facts upon which relief can be granted.” For purposes of RAP 2.5(a), the terms “failure to establish facts upon which relief can be granted” and “failure to state a claim” are largely interchangeable. See, 1 Washington Court Rules Annotated RAP 2.5 cmt. (a) at 640 (2d ed. 2004) (“Exception (2) uses the phrase ‘failure to establish facts’ rather than the traditional ‘failure to state a claim.’ The former phrase more accurately expresses the meaning of the rule in modern practice.”). Thus, Mr. Schutz is not precluded from raising the respondent’s failure to prove facts that he willfully withheld payment of the respondent’s wages with intent to deprive her of those 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 the respondent to establish the requisite element of willful action on the part of Ken 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). The respondent has not shown any evidence that Mr. Schutz willfully caused FixtureOne 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.” *Respondent's Brief* at 17 [emphasis added]. Consistent with the theme of

her response brief, the respondent offers no authority for attempting to shift her burden of proof to Mr. Schutz.

Respondent solicited employment with FixtureOne. She traveled to Pennsylvania to interview with the company. Respondent 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. 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 his efforts 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 any 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."

There is nothing in the evidence showing any action by Mr. Schutz to cause FixtureOne not to pay commissions to respondent. The chain of communications from Mr. Schutz to the respondent indicates ongoing efforts by Mr. Schutz to get the respondent paid until 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.

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 [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.

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, virtually all of the evidence regarding payment of commissions shows 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. Summary judgment is inappropriate under these circumstances.

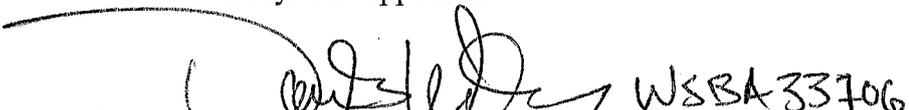
III. CONCLUSION

The respondent 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.

Summary judgment is not appropriate because there are two genuine issues of material fact: First, whether there was a bona fide dispute regarding commissions allegedly owed to the respondent. Second, whether Mr. Schutz willfully withheld the respondent's wages with the intent to deprive her of those wages. 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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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 24th day of September, 2012, I caused a true and correct copy of the Reply Brief and Certificate of Service to be served on the following by email:

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Dated this 24th day of September, 2012.


Cheri Helsdon