No. _____

In The

Supreme Court of the United States

KENNETH A. SCHUTZ,

Petitioner,

v.

KRISTINE FAILLA,

Respondent.

On Petition For Writ Of Certiorari To The Washington Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Two separate but related Washington state wage statutes provide that (1) any employer *or* officer of any employer who willfully and intentionally deprives an employee of any wages shall be guilty of a misdemeanor, and (2) any employer *and* any officer of any employer who commits such misdemeanor shall be liable to the employee for twice the amount of the unpaid wages, as exemplary damages.

Petitioner Schutz is the president of FixtureOne Corp., a Pennsylvania corporation with its sole office in Philadelphia. Respondent Failla is a resident of Washington. Failla solicited employment with FixtureOne by email, and traveled to Pennsylvania for an interview at her own expense. Schutz interviewed respondent there and communicated to her by email the corporation's decision to employ her as a sales executive. FixtureOne allowed its sales executives to perform their duties remotely wherever internet and telephone service was available. Failla chose to conduct sales from her home by telephone and email or by traveling to the potential customer's site. She made no sales to Washington residents. Nothing in the record shows any sales efforts directed by her to any Washington resident. All communications between Schutz and/or FixtureOne and Failla were by email or telephone and if initiated by Schutz or FixtureOne, were initiated from Pennsylvania. FixtureOne paid Failla by checks issued in Pennsylvania and mailed from Pennsylvania. Schutz has

QUESTIONS PRESENTED – Continued

never been to Washington, or engaged in business in Washington. Failla sued Schutz in Washington, serving the summons and complaint on his wife at their home in Philadelphia. Failla never served the summons and complaint on FixtureOne. The Washington Court of Appeals held that the Washington state courts have no jurisdiction over Schutz under the Washington long-arm statute, Wash. Rev. Code § 4.28.185. The Washington Supreme Court reversed. The questions presented are:

(1) May Washington state courts exercise jurisdiction over a Pennsylvania corporate officer based upon the alleged foreseeability that his electronic communications from Pennsylvania to a Washington employee might subject him to exemplary damages under Washington wage laws, when the only contact with Washington was the plaintiff's choice to conduct sales to customers in other states from her home in Washington by telephone and email, and all communication to her from the defendant was initiated from Pennsylvania?

(2) In this age of mobile communication, does a Pennsylvania individual defendant who is an officer of a Pennsylvania corporate employer "reach out beyond" Pennsylvania to Washington by directing electronic communications to an employee who happens to be, at her discretion, in Washington, thereby enabling Washington state courts to exercise jurisdiction over him?

PARTIES TO THE PROCEEDINGS

The petitioner is Kenneth A. Schutz. Petitioner was defendant and appellee below.

The respondent is Kristine Failla. Respondent was plaintiff and appellant below.

FixtureOne Corp. was named as a party, but was never served and did not participate in the litigation.

CORPORATE DISCLOSURE STATEMENT

There are no corporate parties to the petition.

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PETITION FOR A WRIT OF CERTIORARI

Kenneth A. Schutz respectfully petitions for a writ of certiorari to review the judgment of the Washington Supreme Court.

OPINIONS BELOW

The decision of the Washington Supreme Court is reported at 181 Wash. 2d 642, 336 P.3d 1112 (2014) and appears in the Appendix ("App.") at App. 1-21. The Washington Supreme Court's order denying petitioner's motion for further reconsideration is unreported and appears in the Appendix at App. 51. The Washington Supreme Court's order changing its opinion is unreported and appears in the Appendix at App. 22-23. The decision of the Washington Court of Appeals is reported at 177 Wash. App. 813, 312 P.3d 1005 (2013) and appears in the Appendix at App. 24-40. The decision of the Pierce County, Washington Superior Court granting respondent's motion for summary judgment is unreported and appears in the Appendix at App. 48-50. The decision of the Pierce County, Washington Superior Court denying petitioner's motion to dismiss is unreported and appears in the Appendix at App. 41-44. The amended order of the Pierce County, Washington Superior Court granting respondent's motion for summary judgment is unreported and appears in the Appendix at App. 45-47.

JURISDICTION

The Washington Supreme Court denied reconsideration on November 25, 2014 of its decision entered on October 2, 2014. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law." The statute setting forth acts submitting a person to jurisdiction of courts in the state of Washington when personal service of process is effected outside of the state of Washington, Wash. Rev. Code § 4.28.185, is reproduced at App. 52-53. Wash. Rev. Code § 4.28.185 is coextensive with federal due process. *Easter v. American West Financial*, 381 F.3d 948 (9th Cir. 2004). Washington's statutes regarding the willful withholding of wages, Wash. Rev. Code §§ 49.52.050 and 49.52.070, are reproduced at App. 54-55.

STATEMENT

A Washington state court haled Petitioner Kenneth A. Schutz, a Pennsylvania corporate officer, to Washington to impose statutory exemplary damages against him personally for wages withheld by the

Pennsylvania corporate employer in Pennsylvania. Washington's wage claim statute makes certain corporate officers strictly liable for exemplary damages equal to double the amount of the unpaid wages. The conduct by petitioner occurred entirely in Pennsylvania. All communications between the employee and him were by email or telephone. When initiated by Schutz, they were initiated from Pennsylvania. The only contacts with Washington were that the plaintiff conducted sales, at her choice, from her home in Washington by telephone and email to customers in other states. The corporate employer did not care where the plaintiff was physically located when she made sales.

The Washington Supreme Court held that it was reasonable to require the individual defendant to appear in a Washington state court because it was foreseeable that he would be required "to answer for failing to comply with [Washington wage] laws." App. 13. The holding is wrong.

In *Walden v. Fiore*, ___ U.S. ___, 134 S. Ct. 1115 (2014), this Court held that, for a state to exercise jurisdiction over a foreign defendant consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum state. First, the relationship must arise out of contacts that the defendant *himself creates* with the forum state. Second, the defendant's contacts must be *with the forum state itself*, not solely with the plaintiff who resides there. "But the plaintiff cannot be the only link between the defendant and the forum.

Rather, it is the defendant's conduct that must form the necessary connection with the forum state that is the basis for its jurisdiction over him." 134 S. Ct. 1115, 1122-1123.

Consideration of those factors here compels but one conclusion: Schutz did not purposefully establish minimum contacts with the state of Washington. The only contacts involved in this case are contacts between Failla and Washington, and between Schutz, in his capacity as corporate officer, and Failla. All communication initiated by Schutz was initiated by phone and email in Pennsylvania. In this age of mobile communication, the communication could have been received and responded to by Failla nearly anywhere. The electronic communication by Schutz cannot be said to have been directed at Washington, or that he reached out beyond Pennsylvania expressly to Washington. All contacts with Washington were created by Failla and were incidental to the employment relationship between the parties. The only link between Schutz and Washington is that Failla lives there.

In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), this Court held that, when addressing personal jurisdiction, a court must evaluate the details of the parties' contract. "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." 471 U.S. 462, 479.

All of the factors discussed in *Burger King Corp. v. Rudzewicz*; prior negotiations between Failla and FixtureOne, the terms of their agreement, and the parties' course of dealing; occurred in Pennsylvania. Schutz was not a party to the employment contract. He was an officer of the Pennsylvania corporate employer, residing in Pennsylvania, with no contact with Washington. The Washington Supreme Court's holding that the Washington state trial court had jurisdiction over Schutz because Washington has an interest in applying its wage laws to "a company that knowingly employs a Washington resident" is constitutionally deficient. App. 13. This Court's authoritative guidance is urgently needed.

I. Washington's Wage Statutes

Wash. Rev. Code §§ 49.52.050 and 49.52.070 create liabilities for actions of individuals and corporations. §49.52.050 imposes misdemeanor criminal liability upon "any employer *or* officer . . . of any employer" who "willfully 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. . . ." Wash. Rev. Code § 49.52.070 imposes civil liability for exemplary damages for nonpayment of wages upon "any employer *and* any officer . . . of any employer" that violates § 49.52.050(1) or (2), simply because that individual is an officer of the employer. *(Emphasis added.)*

II. The contacts of FixtureOne and Petitioner with Washington

Petitioner Kenneth A. Schutz is the President of FixtureOne Corporation ("FixtureOne"). FixtureOne is a Pennsylvania corporation with its sole office in Philadelphia specializing in the design and production of custom store fixtures and furnishings. FixtureOne has never transacted business in Washington. FixtureOne never registered to do business in Washington. FixtureOne has never had operations, offices, sales, or markets in Washington. FixtureOne neither committed any act in Washington, nor expressly aimed any act there. FixtureOne was never served by respondent and has never been a party to this lawsuit.

Schutz has never been to Washington. He has never transacted any business in Washington. He has not performed any act in Washington or expressly aimed any act there. He has not employed any Washington resident. All communication initiated by Schutz was initiated by phone and email in Pennsylvania. He signed Failla's paychecks in Pennsylvania, and the checks were mailed from there. Schutz is a resident of Philadelphia, Pennsylvania. A copy of the summons and complaint in this lawsuit was served on his wife at their residence in Philadelphia, Pennsylvania.

III. Respondent's Employment by FixtureOne

In October or November 2009, Respondent Kristine Failla contacted FixtureOne by an unsolicited email to petitioner in which she asked about the possibility of being hired as a sales executive with FixtureOne. FixtureOne never conducted a hiring campaign in Washington. FixtureOne did not initiate contact with Failla. Schutz replied to Failla by email from Pennsylvania and offered to interview her at the corporate office in Pennsylvania.

Failla flew to Philadelphia for the interview at her own expense. Following the interview there, FixtureOne offered Failla a position as sales executive, which she accepted. Schutz conveyed the employment offer in an email on November 9, 2009 from Pennsylvania to Failla's email address.

FixtureOne hired Failla although it had no operations, offices, customers, or markets in Washington. FixtureOne did not require its sales executives to relocate to Pennsylvania or to work from any specific location. FixtureOne allowed its sales executives to perform their duties remotely wherever internet and telephone service was available because accounts could be managed by telephone and email, with occasional travel. Failla chose to work from her home. Every sale Failla made and account she managed for FixtureOne was for customers outside of Washington.

On December 16, 2010, respondent requested a pay raise in an email she sent to Schutz. On December

31, 2010, Schutz notified Failla by email from Pennsylvania that FixtureOne had increased her base salary, adjusted her commission, and promoted her to Vice President of Sales. In addition, he made her promotion contingent on the execution of a written employment agreement, attached to Schutz's email. The employment agreement included a Pennsylvania choice-of-law provision. For reasons unknown, the parties did not execute it.

On May 26, 2011, Schutz notified Failla by email from Pennsylvania that FixtureOne was closing and that her employment would end on May 27. On June 6, 2011, he notified Failla by email from Pennsylvania that he had signed her payroll check. In the email, Schutz said that he would check the status of reimbursement of her expenses and have any remaining commissions calculated. On July 26, 2011, Schutz notified respondent by email from Pennsylvania that FixtureOne did not owe her any commissions.

Failla maintains that Washington has personal jurisdiction over Schutz because Schutz knew that Failla lived in Washington and would perform her duties from her home, because Schutz and Failla had electronic communication while Failla was in Washington, and because Failla did not receive in Washington commissions she believes she was owed.

IV. Federal question raised in all stages of the proceedings

After her termination, on September 21, 2011 respondent brought this action against FixtureOne and Schutz in the Pierce County, Washington Superior Court. Failla never served FixtureOne or pursued her claim against it. On February 15, 2012, Failla moved for summary judgment seeking judgment against Schutz for unpaid commissions she alleged were due to her from FixtureOne, pursuant to Washington's unpaid wage statutes, Wash. Rev. Code §§ 49.52.050 and 49.52.070. Schutz moved to dismiss Failla's complaint on March 1, 2012 under Washington Rule of Civil Procedure 12(b)(6) because "this Court cannot exercise specific personal jurisdiction – pursuant to Washington's long-arm statute – over Kenneth A. Schutz. The factors of the due process test are not present in this case." On April 13, 2012, the superior court granted Failla's motion for summary judgment, thereby implicitly denying Schutz's motion to dismiss. The April 13, 2012 summary judgment order was amended on April 27, 2012 to include an award of attorney fees. Schutz's motion to dismiss was explicitly denied by the superior court's written order on the same date.

On May 7, 2012, Schutz appealed the April 13, 2012 superior court judgment, the April 27, 2012 order denying Schutz's motion to dismiss, and the amended summary judgment order of the same date to the Washington Court of Appeals. Schutz assigned error by the trial court based on lack of personal

jurisdiction over Schutz under the Washington long-arm statute consistent with the Fourteenth Amendment. In a decision published on November 13, 2013, the Washington Court of Appeals held that "the superior court lacked personal jurisdiction over Schutz and, for that reason, we reverse the superior court's denial of Schutz's dismissal motion and its grant of summary judgment in favor of Failla."

On December 12, 2013, Failla petitioned the Washington Supreme Court for discretionary review of the Washington Court of Appeals decision. Schutz filed his reply to the petition for review on January 14, 2014, in which he argued that the assumption of jurisdiction over Mr. Schutz violated due process. The Washington Supreme Court accepted review and issued its published decision on October 2, 2014, framing the question as "[w]hether Washington's long-arm statute, RCW 4.28.185, confers personal jurisdiction over an officer of a foreign corporation that employs a Washington resident. On the facts before us, we conclude it does for wage claims arising from that employment relationship and reverse the Court of Appeals."

REASONS FOR GRANTING THE WRIT

The issues are important and worthy of this Court's review. This Court should grant this petition because the Washington Supreme Court's decision directly conflicts with this Court's due process jurisprudence, including *Walden v. Fiore*, ___ U.S. ___, 134

S. Ct. 1115 (2014); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); and *Helicopteros Nacionales, de Colombia S.A., v. Hall*, 466 U.S. 408 (1984). The Washington Supreme Court also improperly applied *Calder v. Jones,* 465 U.S. 783 (1984).

"Due process limits on the State's adjudicative authority principally protect the liberty of the nonresident defendant – not the convenience of plaintiffs or third parties." *Walden v. Fiore*, 134 S. Ct. 1115, 1122. By its decision, the Washington Supreme Court utterly failed to advance the purpose of the Due Process Clause. To the contrary, the Washington Supreme Court based the exercise of jurisdiction on the foreseeability that conduct in Pennsylvania may have effects in the distant state of Washington:

> A Pennsylvania employer that employs a Washington resident, and through that employee, conducts business from Washington for over two years forms a sufficient connection to the state such that it should reasonably anticipate defending a wage dispute here . . . .
>
> . . .
>
> Likewise, it does not offend fair play or substantial justice to require Schutz to defend Failla's wage claim here. It is not unreasonable to require a company that knowingly employs a Washington resident to abide by this state's wage laws, nor is it unreasonable to require the individual responsible for payroll to answer for failing to

> comply with those laws. Schutz knew from the outset that he was hiring an employee in Washington and, as Failla's primary contact at FixtureOne, was ultimately responsible for paying her. Employers have fair notice of our laws governing the employer-employee relationship, including RCW 49.52.050 and .070, which impose individual liability.

App. 10-11, 13.

The Washington Supreme Court simply got it wrong with regard to foreseeability. The issue is important. For decades, this Court has consistently rejected basing personal jurisdiction on mere foreseeability that conduct in one state may have effects in a distant forum. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 474 (1985); *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 295 (1980). Under the Fourteenth Amendment, a court may exercise jurisdiction over a defendant only when the defendant has sufficient contacts with the forum "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945) (internal quotation marks omitted).

The issue is cleanly presented.

The Washington Supreme Court has confused jurisdiction with choice of law. Whether or not a person is bound by Washington wage laws, the forum court must have a constitutionally-recognized basis to assert jurisdiction. If, as here, no such basis exists,

the appropriate remedy for Failla is to bring the action in a court that has personal jurisdiction, applying Washington law under traditional choice of law concepts.

The Washington Supreme Court cited *Calder v. Jones* as authority for asserting jurisdiction over Schutz. App. 8, 11. The Washington Supreme Court's reliance upon *Calder* is misplaced, as that case is so factually disparate from this case as to have no application here. In *Calder*, the actions of the individual defendants were intentionally tortious, were committed in California, and caused harm to the plaintiff there. 465 U.S. 783, 785-786.

This Court should grant the petition and reverse the decision of the Washington Supreme Court, holding that Washington state courts have no jurisdiction under the Fourteenth Amendment over Schutz.

I. This Court Should Grant Review Because the Washington Supreme Court's Decision Conflicts with this Court's Long-Standing Fourteenth Amendment Jurisprudence.

The Washington Supreme Court's decision conflicts with this Court's jurisprudence. In *Walden v. Fiore*, this Court reiterated that, for a state court to exercise jurisdiction under its long-arm statute consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State. First, the relationship with the

forum must arise out of contacts that the "defendant himself" creates. *Walden v. Fiore*, ___ U.S. ___, 134 S. Ct. 1115, 1122 (2014). Second, "minimum contacts" analysis looks to the defendant's contacts with the forum state itself, not the defendant's contacts with the plaintiff who resides there. "But the plaintiff cannot be the only link between the defendant and the forum. Rather, it is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him." *Walden v. Fiore*, ___ U.S. ___, 134 S. Ct. 1115, 1122 (2014).

The Washington Supreme Court identified Schutz as "the officer directly responsible for the hiring, firing, promotion, and payment of Failla's wages." App. 13. The Washington Supreme Court held that the sole act of FixtureOne in hiring respondent constituted a "transaction of any business within this state" because respondent lived in Washington and would solicit customers outside of Washington from her home in Washington. App. 12. On that basis alone, the Washington Supreme Court held that "Schutz's contacts with the state of Washington were sufficient to confer jurisdiction over him for wage disputes arising from those contacts." App. 13. In her dissenting opinion, Washington Supreme Court Justice Owens correctly pointed out that respondent's decision to reside in Washington was hers alone, and was not an appropriate consideration in deciding whether Schutz had sufficient minimum contacts there:

In this case, the only contact that the defendant had with this state was his contact with the plaintiff, who chose to reside here. The plaintiff was the one who initiated the relationship by contacting the defendant in Pennsylvania, seeking employment. She then flew to Pennsylvania to interview for the position. The plaintiff then conducted all of her work via phone, e-mail, and occasional travel. She did not solicit any business in Washington, and there is no record that the business made any sales or did any advertising in Washington. Even the payroll checks signed by the employer were signed in Pennsylvania. In sum, the defendant did not initiate any contact with Washington nor did he conduct any business in Washington. The only contact the defendant had with Washington came from the plaintiff . . . .

. . .

Furthermore, the decision of the plaintiff to reside in Washington was hers alone. The "unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction." *Helicopteros Nacionales de Colombia, SA v. Hall,* 466 U.S. 408, 417, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984). If the plaintiff had chosen to move to another state, there is no indication that the move would have had any effect on the defendant, his actions, or his business. The defendant had no contact with

> the state other than the plaintiff's unilateral choice to reside here. This is insufficient to confer personal jurisdiction over the defendant.

App. 18-20.

"[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

> This "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts (citations omitted), or of the "unilateral activity of another party or a third person," *Helicopteros Nacionales de Colombia, S.A. v. Hall*, *supra*, 466 U.S., at 417, 104 S.Ct., at 1873. Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a "substantial connection" with the forum State.

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (citing *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223 (1957)).

The Washington Supreme Court's decision conflicts with the holding in *Burger King Corp. v. Rudzewicz*, which requires a court, when addressing personal jurisdiction, to evaluate the details of the parties' contract to determine whether the defendant

purposefully directed his conduct at the forum. In *Burger King Corp. v. Rudzewicz*, the Michigan franchisee was found to be subject to the jurisdiction of the courts in Florida, the state in which Burger King was headquartered. This Court held:

> Yet this franchise dispute grew directly out of "a contract which had a substantial connection with that State." *McGee v. International Life Insurance Co.*, 355 U.S., at 223, 78 S.Ct., at 201. (emphasis added). Eschewing the option of operating an independent local enterprise, Rudzewicz deliberately "reach[ed] out beyond" Michigan and negotiated with a Florida corporation for the purchase of a long-term franchise and the manifold benefits that would derive from affiliation with a nationwide organization. *Travelers Health Assn. v. Virginia*, 339 U.S., at 647, 70 S.Ct., at 929. Upon approval, he entered into a carefully structured 20-year relationship that envisioned continuing and wide-reaching contacts with Burger King in Florida. In light of Rudzewicz' voluntary acceptance of the long-term and exacting regulation of his business from Burger King's Miami headquarters, the "quality and nature" of his relationship to the company in Florida can in no sense be viewed as "random," "fortuitous," or "attenuated."

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 479-480.

Here, application of Wash. Rev. Code § 4.28.185 to Schutz is unconstitutional because Schutz never reached out from Pennsylvania to Washington. Rather, Failla reached out beyond Washington to Pennsylvania. The solicitation of employment by Failla, and her employment, occurred in Pennsylvania. The notification by FixtureOne of Failla's hiring, the communication by FixtureOne to her of her promotion, the drafting of the terms of the written employment agreement, the inclusion in the employment contract of a Pennsylvania choice-of-law provision, the signing and mailing of Failla's paychecks, and the sending of notification to Failla that her employment had ended, were all initiated in Pennsylvania. Transmission by email and phone were all initiated in Pennsylvania. The fact that Failla chose to work from her home in Washington was merely random, fortuitous or attenuated because her physical location was irrelevant to Schutz and to FixtureOne.

This Court's analysis in *Burger King Corp. v. Rudzewicz* compels the conclusion that Pennsylvania, not Washington, has exclusive jurisdiction over Schutz and FixtureOne. The wage dispute grew directly out of a contract with a substantial connection with Pennsylvania. Respondent sent an email to FixtureOne there, unsolicited, to inquire of a sales job. FixtureOne had made no solicitations for employment either to respondent directly, or to Washington residents generally. Respondent flew to Pennsylvania to be interviewed, at her own expense. Schutz notified her from Pennsylvania that she had been hired.

Schutz paid Failla by checks issued in Pennsylvania and mailed from Pennsylvania. Respondent's request for a raise was accepted in Pennsylvania. The written employment agreement, with its Pennsylvania choice of law clause, was drafted (although never signed) in Pennsylvania. Failla's employment was terminated by email sent from Pennsylvania. The contract has a substantial connection to Pennsylvania. The only connection to Washington is too attenuated; Failla lived there and worked from her home there. However, that was solely her choice. Her place of performance of her duties was irrelevant to Schutz and FixtureOne. Failla solicited no business in Washington. All of the sales she made were to non-Washington residents.

Failla "reached out beyond" Washington and negotiated with a Pennsylvania corporation; the Pennsylvania corporation did not "reach out beyond" Pennsylvania. The relationship envisioned continuing and wide-reaching contacts with Pennsylvania, not with Washington. Failla could have lived in, or moved to, Boise or Portland and it would have made no difference to the parties' employment relationship. The relationship to Washington was random, fortuitous, or attenuated.

The Washington Supreme Court held that "employing a Washington resident to perform work in Washington constitutes the 'transaction of any business within this state' under RCW 4.28.185(1)(a) . . . . Jurisdiction is proper in Washington for wage claims arising from that employment . . . ." App. 12. That

holding is wrong. The Washington Supreme Court improperly focused on the contacts between Failla and Washington, rather than any contacts Schutz created with Washington. The Washington Supreme Court's holding cannot be reconciled with this Court's long-standing due process jurisprudence. The Washington Supreme Court made personal jurisdiction over Schutz dependent entirely on the extent to which he, as president of the corporate employer, could foresee that his actions would harm Failla in Washington. "Although it has been argued that foreseeability of causing injury in another State should be sufficient to establish such contacts there . . . the Court has consistently held that this kind of foreseeability is not a 'sufficient benchmark' for exercising personal jurisdiction." *Burger King,* 471 U.S. at 474 (quoting *World-Wide Volkswagen,* 444 U.S. at 295); see also *J. McIntyre Machinery, Ltd. v. Nicastro*, ___ U.S. ___, 131 S. Ct. 2780, 2789 (2011) (plurality op.) ("This Court's precedents make clear that it is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment."). Instead, the defendant must have purposefully directed his actions toward the forum. *Burger King,* 471 U.S. at 472-475. This Court's review is sorely needed.

II. The Washington Supreme Court's Reliance Upon *Calder* is Misplaced.

The Washington Supreme Court cited *Calder v. Jones,* 465 U.S. 783, as authority for extending jurisdiction over Schutz personally. *Failla v. FixtureOne*

Corp., 181 Wash. 2d 651. In *Calder,* this Court affirmed the assertion of jurisdiction over Calder and South, nonresident defendants whose intentional conduct in a foreign state was calculated to cause injury to the plaintiff, Shirley Jones, in the forum state. Jones sued Calder and South in California, claiming that they had libeled her in an article written and edited by them in Florida. The defendants objected to the district court's exercise of jurisdiction on the ground that their contact with the forum state occurred only in their capacity as employees of the corporation. The impact in California of the defendants' defamatory publication was profound. 600,000 copies of the offending publication in which the authors knew the article would appear, were sold in California. In *Walden v. Fiore*, this Court described its basis for finding jurisdiction in *Calder*:

> We found those forum contacts to be ample: The defendants relied on phone calls to "California sources" for the information in their article; they wrote the story about the plaintiff's activities in California; they caused reputational injury in California by writing an allegedly libelous article that was widely circulated in the State; and the "brunt" of that injury was suffered by the plaintiff in that State. 465 U.S., at 788-789, 104 S.Ct. 1482. "In sum, California [wa]s the focal point both of the story and of the harm suffered." Id., at 789, 104 S.Ct. 1482. Jurisdiction over the defendants was "therefore proper in California based on the 'effects' of their Florida conduct in California." *Ibid.* . . .

. . .

> Indeed, because publication to third persons is a necessary element of libel, see *id.*, § 558, the defendants' intentional tort actually occurred *in* California.

Walden v. Fiore, ___ U.S. ___, 134 S. Ct. 1115, 1123-1124.

Here, in contrast, Schutz committed no tortious act in Washington, let alone an intentional one. Schutz's actions in this case were the ordinary actions of an officer of a corporate employer acting in performance of an employment agreement that originated in Pennsylvania.

The Washington Supreme Court discussed a number of actions by Schutz in performing the employment agreement with Failla. "During the two-year course of her employment, Schutz set her salary, issued her payroll checks, promoted her, gave her a raise and calculated her commissions." App. 8. None of those actions occurred in Washington. Schutz hired Failla in Pennsylvania, set her salary in Pennsylvania, issued her paychecks in Pennsylvania, promoted her in Pennsylvania, gave her a raise in Pennsylvania and calculated her commissions in Pennsylvania. Schutz, when acting as her primary contact, was also in Pennsylvania. The only evidence of Schutz's expectation about which state would have jurisdiction over the employment relationship between respondent and FixtureOne is the employment contract submitted to respondent for her signature, which provided that

Pennsylvania law would govern interpretation of the contract. "Nothing in our cases, however, suggests that a choice-of-law *provision* should be ignored in considering whether a defendant has "purposefully invoked the benefits and protections of a State's laws" for jurisdictional purposes." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 482 (1985). *(Emphasis in the original.)*

The Washington Supreme Court, in its passing reference to *Calder*, makes no attempt to analyze *Calder*'s "effects" test before improperly applying it to this case. The "effects" test applies to intentional tort cases. *Calder,* 465 U.S. at 789. "To meet the effects test, the defendant must have (1) committed an intentional act, which was (2) expressly aimed at the forum state, and (3) caused harm, the brunt of which is suffered and which the defendant knows is likely to be suffered in the forum state." *Bancroft & Masters, Inc. v. Augusta Nat. Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000). Courts apply different purposeful availment tests to contract and tort cases. *Ziegler v. Indian River Cnty.*, 64 F.3d 470, 473 (9th Cir. 1995). Consistent with this Court's holding in *Burger King*, merely contracting with a resident of the forum state is insufficient to confer specific jurisdiction over a nonresident. *Ziegler v. Indian River Cnty*., 64 F.3d 470, 473. The Washington Supreme Court's use of the *Calder* effects test is inappropriate. The *Calder* test is designed for tort cases. This is a contract case. The statute in question imposes "exemplary damages" upon certain parties for breach of the employment

contract. The parties' relationship in this case is based on an employment contract. *Calder* is inapplicable.

III. The Issues Raised by the Washington Supreme Court's Decision are Important and Worthy of This Court's Review.

The decision of the Washington Supreme Court is worthy of this Court's review. If the Washington Supreme Court's decision is allowed to stand, the Washington long-arm statute may be used to hale into Washington state courts individuals who have never purposefully directed actions toward Washington, but who are merely officers of foreign corporate employers, and, by virtue of their position, are made strictly liable for exemplary damages for the corporation's failure to pay wages to the Washington resident. Washington case law applies the enhanced damages to any officer responsible for payment of the wages, and defines "willful" in terms of the wages intentionally not being paid. Thus, a corporate officer could be liable under the statute if an employer corporation simply has insufficient operating funds and must apply its scarce resources to keeping the doors open, even if that decision is made by others. This Court specifically rejected that approach in *Hanson v. Denckla*, 357 U.S. 235; *Calder v. Jones*, 465 U.S. 783; *Keeton v. Hustler Magazine, Inc*, 465 U.S. 770 (1984); *World-Wide Volkswagon Corp. v. Woodson,* 444 U.S. 286; *McGee v. International Life Insurance Co.,* 355 U.S. 220; *Walden v. Fiore*, *supra*.

In its majority opinion, the Washington Supreme Court tried to distinguish *Walden v. Fiore* by examining Schutz's long-distance communication with respondent. "Schutz's connection to Washington was not random and fortuitous. It was the product of deliberate negotiation with Failla over the terms of her employment and salary and apparently stemmed in part from his decision that FixtureOne needed a sales representative in that part of the country." App. 12. The source of that contact with Washington was not Mr. Schutz or the employer "reaching out" to Washington. It was the election by Ms. Failla to live in Washington, which was not in any way material to the employment relationship or to the employer.

"Due process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the 'random, fortuitous, or attenuated' contacts he makes by interacting with other persons affiliated with the State." *Walden v. Fiore*, 134 S. Ct. 1115, 1123. By focusing on respondent's presumed presence in Washington when she received electronic communication from Schutz, the Washington Supreme Court repudiated this Court's analysis in *Walden v. Fiore*. Telephone calls and emails sent by Schutz from Pennsylvania could be received by Failla on her smartphone, in this age of wireless communication, anywhere that she had a cellular connection. If Failla had moved to Oregon and had continued to conduct sales from her new home, with the employer's knowledge, would Oregon have had jurisdiction over Schutz when she received

his Pennsylvania-based transmissions there? Schutz submits that it would not. Such a move would create a choice of law issue, not a jurisdictional issue. Failla's place of conducting sales was unimportant to FixtureOne.

The rationale of the Washington Supreme Court leads Schutz to urge this Court to accept review to correct the fundamental flaw in the reasoning of the Washington Supreme Court.

CONCLUSION

For the reasons stated above, Schutz respectfully requests that this Court grant his petition for certiorari and consider the full case on the merits.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

KRISTINE FAILLA, Petitioner, v. FIXTUREONE CORPORATION; and KENNETH A. SCHUTZ Respondents.	No. 89671-2 En Banc Filed Oct 02 2014

YU, J. – This case asks whether Washington's long-arm statute, RCW 4.28.185, confers personal jurisdiction over an officer of a foreign corporation that employs a Washington resident. On the facts before us, we conclude it does for wage claims arising from that employment relationship and reverse the Court of Appeals.

FACTS AND PROCEDURAL HISTORY

In 2009, Kristine Failla, a Washington resident and experienced salesperson, was looking for a job she could perform from her Gig Harbor home. She e-mailed Kenneth A. Schutz looking for such a position. Schutz is the founder and chief executive officer (CEO) of FixtureOne Corporation, which sells fixtures, casework, and displays for use in retail stores. Clerk's Papers (CP) at 62. Both FixtureOne and Schutz are based in Pennsylvania, and at the time of Failla's e-mail, FixtureOne had no physical presence or customers in Washington.

Failla's inquiry caught the interest of Schutz, who replied to Failla that she "may be a fit" for FixtureOne because the company did "not have a sales representative in [this] area of the country." CP at 93. The parties continued negotiating, and Schutz eventually invited Failla to interview with FixtureOne in Pennsylvania knowing she lived and planned to work in Washington. Schutz admits the nature of FixtureOne's business allows sales representatives to work anywhere with Internet and telephone access. CP at 63.

FixtureOne hired Failla as an account executive in November 2009 and agreed to pay her an annual salary of $75,000, plus an additional three percent commission on sales. Failla's job responsibilities included, among other duties, "leading the company" in "[p]lanning, execution and management of profitable growth and expansion of the company's revenue base and market share." CP at 30. The job also involved the "[d]esign, implementation and management of business development, client acquisition, and sales strategies." *Id.* Failla reported directly to Schutz, and the two communicated extensively by e-mail.

In December 2010, Failla requested a promotion and a raise. Schutz agreed and promoted her to FixtureOne's vice president of sales, increasing her salary to $135,000. Although there were outstanding commissions owed, Failla accepted the promotion and salary increase based on the assurances that the commissions would be paid. CP at 36. Schutz provided

a draft employment agreement for Failla to sign in connection with the promotion. Among other things, the agreement contained a provision that it would be interpreted in accordance with Pennsylvania law. Failla proposed revisions to the agreement, but for reasons unknown neither Failla nor Schutz ever signed it.

Failla continued working for FixtureOne from her Washington home until May 2011. She received regular paychecks, and the only issue in this case is the sales commissions owed to her that were not paid. On May 26, 2011, Schutz e-mailed Failla to tell her that FixtureOne was "clos[ing] its doors" and ending her employment the following day. CP at 44. He assured Failla that FixtureOne would "pay your commissions and expenses asap in the next several weeks." *Id.* For two months following her termination, Schutz returned Failla's requests for payment with various explanations as to why the commissions remained unpaid. At one point he told Failla that he signed her commission check and blamed another employee for not mailing it. At other times he faulted the company's comptroller for failing to calculate the commission amount. Schutz eventually advised Failla that she would not receive a commission check and for the first time disputed whether such commissions were even owed. CP at 50.

Failla filed suit against FixtureOne and Schutz for the wilfull withholding of wages, including an allegation that Schutz was individually liable under Washington's wage laws, RCW 49.52.050 and .070.

Failla served Schutz in Pennsylvania but was unable to serve FixtureOne. Consequently the suit proceeded against Schutz alone.

Failla and Schutz cross moved for summary judgment.[1] Schutz argued that the trial court lacked personal jurisdiction because he did not have the requisite minimum contacts with the state, and even if Washington could exercise jurisdiction over him, there were genuine issues of material fact preventing the entry of summary judgment. The trial court concluded it had personal jurisdiction and denied Schutz's summary judgment motion. Instead, the court granted summary judgment to Failla, awarding double damages pursuant to RCW 49.52.070, which provides for such damages when an employer wilfully withholds wages due an employee.

The Court of Appeals reversed, holding that Washington's long-arm statute did not reach Schutz because the employment relationship between Failla and FixtureOne was inadequate to confer jurisdiction over Schutz. *Failla v. FixtureOne Corp.,* 177 Wn. App. 813, 312 P.3d 1005 (2013). We granted review. *Failla v. FixtureOne Corp.,* 180 Wn.2d 1007, 321 P.3d 1207 (2014).

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[1] Schutz styled his motion as one to dismiss, but because he relied on materials outside the complaint, the superior court properly treated the motion as one for summary judgment. CR 12(b), 56.

Both parties agree FixtureOne, not Schutz, was the employer entity that hired Failla and that Failla performed work for FixtureOne in Washington. The disputed issue is whether Schutz, as the president and CEO of FixtureOne, is subject to Washington's jurisdiction and, if so, whether the trial court erred in finding he is liable under Washington's wage statute for nonpayment of wages under RCW 49.52.050 and .070. We hold that Schutz is subject to Washington's jurisdiction based on his level of contacts and transactions in Washington, regardless of whether he ever personally set foot in the state, and that the record supports the trial court's finding of liability.

ANALYSIS

I. Standard of Review

We review the grant of summary judgment de novo and engage in the same inquiry as the trial court, determining whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. *Lewis v. Bours,* 119 Wn.2d 667, 669, 835 P.2d 221 (1992). "In so doing, '[t]he court must consider the facts in the light most favorable to the nonmoving party, and the motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.'" *Id.* (alteration in original) (quoting *Marincovich v. Tarabochia,* 114 Wn.2d 271, 274, 787 P.2d 562 (1990)).

Similarly, a trial court's assertion of personal jurisdiction is a question of law that we review de novo, where, as here, the jurisdictionally relevant facts are undisputed. *Id.*

II. Personal Jurisdiction

Washington courts are authorized to assert personal jurisdiction over nonresident defendants to the extent permitted by the federal due process clause. *Shute v. Carnival Cruise Lines,* 113 Wn.2d 763, 766-67, 783 P.2d 78 (1989). States can exercise jurisdiction without violating due process if the nonresident defendant has certain minimum contacts with the state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Daimler AG v. Bauman,* ___ U.S. ___, 134 S. Ct. 746, 754, 187 L. Ed. 2d 624 (2014) (citing the Court's canonical opinion *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945)). The central concern of the federal constitutional inquiry is the relationship between the defendant, the forum, and the litigation. *Shaffer v. Heitner,* 433 U.S. 186, 204, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977).

Our long-arm statute, designed to be coextensive with federal due process, subjects nonresident defendants to personal jurisdiction of Washington courts for any cause of action that arises from the transaction of any business within the state, among

other conduct. RCW 4.28.185(1)(a). Three factors must coincide for the long-arm statute to apply:

> "(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 must not offend traditional notions of fair play and substantial justice, considering the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protections of state laws afforded the respective parties, and the basic equities of the situation."

Shute, 113 Wn.2d at 767 (quoting *Deutsch v. W. Coast Mach. Co.,* 80 Wn.2d 707, 711, 497 P.2d 1311 (1972)). This inquiry encompasses both the statutory and due process concerns of exercising personal jurisdiction. *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.,* 180 Wn.2d 954, 964, 331 P.3d 29 (2014).

Schutz argues he is not subject to Washington's jurisdiction because he has never been to Washington and because he acted only as an employee and officer of the corporation that employed Failla. He asserts that jurisdiction and liability, if any, rests exclusively with the employing corporation.

We agree that a corporation's actions cannot be simply imputed to a corporate officer or employee for purposes of determining whether there are minimum

contacts necessary to establish jurisdiction. But it is just as true that an officer or employee is not automatically shielded from personal jurisdiction just because his contacts occurred in the context of his employment. *Calder v. Jones,* 465 U.S. 783, 790, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984). Instead, "[e]ach defendant's contacts with the forum State must be assessed individually." *Id.*; *see also Davis v. Metro Prods., Inc.,* 885 F.2d 515, 522 (9th Cir. 1989) (affirming states' authority to assert personal jurisdiction over corporate officers based on contacts performed in that capacity). We determine personal jurisdiction on a case-by-case basis.

Schutz is the founder and CEO of FixtureOne. He was the individual who responded to Failla's job inquiry, interviewed her, and hired her because of the potential benefits to FixtureOne of having a sales representative in Washington. During the two-year course of her employment, Schutz set her salary, issued her payroll checks, promoted her, gave her a raise, and calculated her commissions. He appeared to be the primary contact for Failla, and in fact, there is no evidence in the record that Failla had contact with anyone other than Schutz. Failla was FixtureOne's employee located in the State of Washington who, while working in this state, generated over $700,000 in revenue for the company in 2010. CP at 40.

The Court of Appeals held that Washington could not exert jurisdiction over Schutz because

> FixtureOne did not register to do business in Washington and never had operations, officers, or customers in this state. Nothing about Schutz's employment of Failla anticipated that her activities in Washington would consist of more than residing here, working from home, and collecting a paycheck. Nothing in the record shows any attempt to do business with a Washington company, let alone any transactions with Washington companies.

Failla, 177 Wn. App. at 823-24. The Court of Appeals' analysis relies upon a finding that a person or company must target potential *consumers* in Washington, a subset of all this state's residents, to have transacted business here and to come within reach of the long-arm statute. But we have interpreted RCW 4.28.185(1)(a) more broadly.

For example, in *Toulouse v. Swanson,* 73 Wn.2d 331, 334, 438 P.2d 578 (1968), we held that it was "beyond dispute" that an Idaho resident transacted business in this state under the long-arm statute when he employed a Washington lawyer. We found it particularly relevant that the parties' contract "'called for services over an extended period of time,'" giving the nonresident defendant an ongoing connection to this state. *Id.* at 331 (quoting trial court order). Likewise, in *Thornton v. Interstate Securities Co.,* 35 Wn. App. 19, 23-25, 666 P.2d 370 (1983), the Court of Appeals determined that Washington could assert personal jurisdiction over a Kansas successor corporation on the basis that it consummated a transaction when it employed a Washington resident. "It

has availed itself, however, of the knowledge and services of [the Washington employee] to collect accounts receivable here. It has thus carried on activity which touched the matter in issue – use of [the employee's] services under the employment contract." *Id.* at 25.

Similarly, in *Cofinco of Seattle, Ltd. v. Weiss,* 25 Wn. App. 195, 196, 605 P.2d 794 (1980), the Court of Appeals exercised jurisdiction over a nonresident defendant who agreed to work for a Washington corporation selling shoes on the East Coast. Jurisdiction was proper despite the fact that the defendant, who lived and worked in New York, had never been to Washington, never owned real property situated in Washington, and "never engaged in any activities, business or otherwise, in the state." *Id.* The court correctly held that Washington courts had the jurisdictional power to adjudicate the employment dispute and that by entering into the employment contract, the employee purposefully availed himself of the privilege of conducting activities within the state of Washington. *Id.* at 197.

Logically, if a nonresident employee defendant in New York is afforded the protection of Washington's laws governing the employer-employee relationship, at the very least a Washington resident should also be afforded the statutory protection of Washington's wage laws. A Pennsylvania employer that employs a Washington resident, and through that employee, conducts business from Washington for over two years forms a sufficient connection to the state such

that it should reasonably anticipate defending a wage dispute here.[2]

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[2] A relevant inquiry in this case is whether Schutz could "'reasonably anticipate being haled into court'" in Washington. *Calder,* 465 U.S. at 790 (quoting *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980)). This standard "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or 'the unilateral activity of another party or a third person.'" *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985) (citations omitted) (quoting *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 774, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984)); *World-Wide Volkswagen,* 444 U.S. at 299; *Helicopteros Nacionales de Colombia, SA v. Hall,* 466 U.S. 408, 417, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984)).

The dissent agrees the "contact" in question here is Schutz's correspondence with and decision to hire Failla. But it fails to evaluate the extent of contact and subsequent contacts under the proper precedent. Instead, the dissent concludes Washington lacks minimum contacts because Failla "did not solicit any business in Washington, and there is no record that [FixtureOne] made any sales or did any advertising in Washington." Dissent at 3. The dissent does not explain why Schutz would have been better able to foresee Failla's lawsuit for unpaid wages if FixtureOne had solicited more business in Washington.

Moreover, the dissent relies principally on *Walden v. Fiore,* ___ U.S. ___, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014), a case easily distinguishable. *Walden* involved a federal agent who stopped a couple at an airport in Georgia, seized from them $97,000 in cash, and allegedly filed a false and misleading affidavit in support of forfeiture. *Id.* at 1120-21. The couple, who had residences in California and Nevada, sued in Nevada. *Id.* at 1121. The United States Supreme Court unanimously held the Nevada court lacked personal jurisdiction over the agent, who "never traveled to, conducted activities within, *contacted anyone in, or sent anything or anyone to Nevada.*" *Id.* at 1124 (emphasis

(Continued on following page)

Thus, we hold that employing a Washington resident to perform work in Washington constitutes the "transaction of any business within this state" under RCW 4.28.185(1)(a) and satisfies the first *Shute* prong. Jurisdiction is proper in Washington for wage claims arising from that employment, and employees may seek redress in this state's courts absent an enforceable contract selecting an alternative forum and assuming fair play and substantial justice are not offended.

This analysis is a practical application of the principles delineated in *Toulouse, Thornton*, and *Cofinco* and conforms the long-arm statute to the "phenomena of [the] modern economy." *Griffiths & Sprague Stevedoring Co. v. Bayly, Martin & Fay, Inc.,* 71 Wn.2d 679, 684, 430 P.2d 600 (1967) (interpreting RCW 4.28.185 consistently with contemporary business practices). We recognize many employers no longer do business in physical buildings or rely upon hands-on or face-to-face presence for there to be actual presence in a geographical location.

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added). The plaintiffs' residence in Nevada was, from the point of view of the defendant, random and fortuitous.

Schutz's connection to Washington was not random and fortuitous. It was the product of deliberate negotiation with Failla over the terms of her employment and salary and apparently stemmed in part from his decision that FixtureOne needed a sales representative in that part of the country. For this reason, *Walden* is inapposite.

In this case, as outlined above, Schutz is not just *any* corporate officer, and we do not hold today that any corporate officer of a nonresident corporation may be subject to the state's jurisdiction. Rather, Schutz was the officer directly responsible for the hiring, firing, promotion, and payment of Failla's wages. Schutz's contacts with the state of Washington were sufficient to confer jurisdiction over him for wage disputes arising from those contacts.

Likewise, it does not offend fair play or substantial justice to require Schutz to defend Failla's wage claim here. It is not unreasonable to require a company that knowingly employs a Washington resident to abide by this state's wage laws, nor is it unreasonable to require the individual responsible for payroll to answer for failing to comply with those laws. Schutz knew from the outset that he was hiring an employee in Washington and, as Failla's primary contact at FixtureOne, was ultimately responsible for paying her. Employers have fair notice of our laws governing the employer-employee relationship, including RCW 49.52.050 and .070, which impose individual liability. We cannot say under the facts of this case that exercising jurisdiction violates due process. This satisfies the third *Shute* prong,[3] and the

[3] The second *Shute* prong is not at issue. Neither party contests that Failla's claim arises from Schutz's contacts with Washington (the non-payment of wages due under the employment relationship).

trial court was correct to exercise personal jurisdiction over Schutz.

III. Summary Judgment

The trial court entered judgment in favor of Failla under RCW 49.52.050 and .070. Together these statutes create a cause of action against

> [a]ny employer *or officer, vice principal or agent of any employer* . . . who . . .
>
> > [w]ilfully and with intent to deprive the employee of any part of his or her wages, [pays] any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract.

RCW 49.52.050(2) (emphasis added). The critical, but not stringent, prerequisite to liability is that the employer's (or officer's) failure to pay wages was "wilfull." *Schilling v. Radio Holdings, Inc.,* 136 Wn.2d 152, 159-60, 961 P.2d 371 (1998). The employee need show only that the refusal to pay was a volitional act, not the product of mere carelessness and not the result of a bona fide dispute. *Id.* at 160. Usually wilfullness is a question of fact, but as with all fact questions, summary judgment is proper as a matter of law if the evidence supports a single reasonable conclusion. *Id.*

We affirm the trial court's judgment. The evidence that Schutz offered the trial court – e-mails in which he faults other employees under his direction

for not calculating and paying the commissions to Failla – does not create a genuine issue of fact regarding wilfullness such that it requires a trial on the issue. RCW 49.52.050 and .070 express the legislature's "strong policy in favor of ensuring the payment of the full amount of wages earned." *Morgan v. Kingen,* 166 Wn.2d 526, 538, 210 P.3d 995 (2009). Corporations act only through individuals, and by extending personal liability to individual officers for wages owed by the corporation, the legislature recognized that "officers control the choices over how the corporation's money is used." *Id.* at 537. Thus, officers, vice principals, and agents act wilfully if those individuals exercise control over the employer's funds and still fail to pay their employees. *Ellerman v. Centerpoint Prepress, Inc.,* 143 Wn.2d 514, 522-23, 22 P.3d 795 (2001) (rejecting liability based on mere agency). We affirmed summary judgment for the employees in *Morgan* based on the employing CEO's ultimate control of the business's finances, which included the authority to hire employees and set compensation. 166 Wn.2d at 531.

Schutz's evidence creates a factual dispute only if we accept as reasonable his suggestion that he lacked power over FixtureOne's assets. The e-mails on which Schutz relies to negate wilfullness, all of which he sent after he terminated Failla, conflict with Schutz's obvious control of the company during Failla's employment. He interviewed her. He hired her. He unilaterally promoted her and directed the company's comptroller to increase her salary. Schutz even admitted

his fiscal authority in an e-mail to Failla. CP at 50 ("I know [the comptroller] cut a payroll check for you and I signed it."). The trial court found it possible to draw only one conclusion from this evidence – that Schutz controlled FixtureOne's finances, had the ability to pay Failla, and failed to do so wilfully. We agree.

Nor do we find persuasive Schutz's argument that a bona fide dispute exists regarding the amount of commissions owed to Failla. *See Schilling,* 136 Wn.2d at 160 (recognizing a bona fide dispute over wages negates wilfullness under RCW 49.52.050 and .070). Schutz offered the trial court no evidence refuting Failla's accounting and instead relies upon bare allegations in his summary judgment response. Unsupported allegations do not create a question of fact. *Young v. Key Pharm., Inc.,* 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

CONCLUSION

For the above stated reasons, we reverse the Court of Appeals and reinstate the judgment of the trial court.

/s/ Yu J

WE CONCUR:

/s/ Madsen, C.J. /s/ Wiggins, J.

/s/ C. Johnson J. /s/ González, J.

/s/ Fairhurst J. /s/ Gordon McCloud, J.

/s/ Stephens, J.

No. 89671-2

OWENS, J. (dissenting) – The constitutional right to due process prohibits courts from asserting personal jurisdiction over a defendant unless he or she has certain "minimum contacts" with the forum. U.S. Const. amend. XIV, § 1; *WorldWide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 291, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980). Importantly, the "'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Walden v. Fiore,* ___ U.S. ___, 134 S. Ct. 1115, 1122, 188 L. Ed. 2d 12 (2014). In this case, the out-of-state employer had no contacts with Washington other than hiring the plaintiff, who chose to reside here. Yet, the majority holds that Washington courts have jurisdiction over the employer in his personal capacity. Because this is contrary to the United States Supreme Court's rule that "it is the defendant, not the plaintiff or third parties, who must create contacts with the forum State," *id.* at 1126, I respectfully dissent.

ANALYSIS

A state's authority to assert jurisdiction over a nonresident defendant is limited by the due process

clause of the Fourteenth Amendment. *World-Wide Volkswagen,* 444 U.S. at 291. A nonresident defendant is subject to personal jurisdiction only when he or she has had "certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945) (quoting *Milliken v. Meyer,* 311 U.S. 457, 463, 61 S. Ct. 339, 85 L. Ed. 278 (1940)). The United States Supreme Court has reiterated that "the 'minimum contacts' inquiry principally protects the liberty of the nonresident defendant, not the interests of the plaintiff." *Walden,* 134 S. Ct. at 1125 n.9 (citing *World-Wide Volkswagen,* 444 U.S. at 291-92).

In evaluating whether a defendant had such "minimum contacts," courts look to the relationship between the defendant and the forum. *Id.* at 1121. The United States Supreme Court recently pointed out two key aspects of this relationship in a personal jurisdiction case: first, whether the relationship arose "out of contacts that the 'defendant *himself*' create[d] with the forum State," and second, whether the defendant had contacts with the forum state itself, not just contacts with persons who reside there. *Id.* at 1122.

In this case, the only contact that the defendant had with this state was his contact with the plaintiff, who chose to reside here. The plaintiff was the one who initiated the relationship by contacting the defendant in Pennsylvania, seeking employment. She

then flew to Pennsylvania to interview for the position. The plaintiff then conducted all of her work via phone, e-mail, and occasional travel. She did not solicit any business in Washington, and there is no record that the business made any sales or did any advertising in Washington. Even the payroll checks signed by the employer were signed in Pennsylvania. In sum, the defendant did not initiate any contact with Washington nor did he conduct any business in Washington. The only contact the defendant had with Washington came from the plaintiff.

The United States Supreme Court has "consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the *plaintiff* (or third parties) and the forum State." *Id.* (emphasis added). In fact, no matter how "significant the plaintiff's contacts with the forum may be," they cannot be decisive when determining whether the defendant had minimum contacts. *Id.* As described above, the employer's only contacts with Washington were his contacts with the plaintiff. He took no actions related to this state. The majority's inquiry is focused on the defendant's contact with the plaintiff, but none of those contacts related to Washington. Since the plaintiff has not demonstrated minimum contacts between the defendant and the state, there is not a sufficient basis for personal jurisdiction.

Furthermore, the decision of the plaintiff to reside in Washington was hers alone. The "unilateral activity of another party or a third person is not an appropriate consideration when determining whether a

defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction." *Helicopteros Nacionales de Colombia, SA v. Hall,* 466 U.S. 408, 417, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984). If the plaintiff had chosen to move to another state, there is no indication that the move would have had any effect on the defendant, his actions, or his business. The defendant had no contact with the state other than the plaintiff's unilateral choice to reside here. This is insufficient to confer personal jurisdiction over the defendant.

The Court of Appeals properly noted that "[n]othing about [the defendant's] employment of [the plaintiff] anticipated that her activities in Washington would consist of more than residing here, working from home, and collecting a paycheck." *Failla v. FixtureOne Corp.,* 177 Wn. App. 813, 823, 312 P.3d 1005 (2013), *review granted,* 180 Wn.2d 1007, 321 P.3d 1207 (2014). The Court of Appeals correctly concluded that the defendant did not have minimum contacts with the state and thus the state's courts lacked personal jurisdiction. *Id.* at 827. I would affirm.

CONCLUSION

As the United States Supreme Court has explained, "the plaintiff cannot be the only link between the defendant and the forum." *Walden,* 134 S. Ct. at 1122. Here, the plaintiff is the only link between the defendant and Washington. Following the rules laid out by the United States Supreme Court, I do not see

how the state courts have personal jurisdiction in this case.

I respectfully dissent.

/s/ Owens, J

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

KRISTINE FAILLA, Petitioner, v. FIXTUREONE CORPORATION; and KENNETH A. SCHUTZ, Respondents.	)	No. 89671-2 ORDER CHANGING OPINION

It is hereby ordered that the following change be made to the majority opinion of Yu, J., which was filed in the above cause of action on October 2, 2014:

> On page 15 of the slip opinion, beginning on line 16, the following language is inserted immediately after "the trial court.":
>
> > Failla is entitled to her costs and attorney fees on appeal. RCW 49.52.070; *Brandt v. Impero,* 1 Wn. App. 678, 683, 463 P.2d 197 (1969).

DATED this 25th day of November, 2014.

/s/ Madsen, C.J.
Chief Justice

APPROVED:

/s/ C. Johnson, J. /s/ Wiggins, J.

/s/ González, J.

/s/ Fairhurst, J. /s/ Gordon McCloud, J.

/s/ Stephens, J. /s/ Yu, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

KRISTINE FAILLA, Respondent, v. FIXTUREONE CORPORATION; and KENNETH A. SCHUTZ, Appellants.	No. 43405-9-II PUBLISHED OPINION (Filed Nov. 13, 2013)

BJORGEN, J. – Kenneth A. Schutz, president and chief executive officer of FixtureOne Corporation, appeals the denial of his motion to dismiss Kristine Failla's claims against him for unpaid wages and other relief and the granting of Failla's summary judgment motion on the same claims. Schutz argues that Washington State lacks personal jurisdiction over him because he does not have the requisite minimum contacts with the state; and, even if Washington did have personal jurisdiction, that summary judgment was inappropriate because genuine issues of material fact are present. Concluding that Washington lacks personal jurisdiction, we reverse the superior court's denial of Schutz's dismissal motion. Because Washington lacks jurisdiction, we also reverse the superior court's summary judgment in Failla's favor and the accompanying judgment and awards of prejudgment interest, attorney fees and costs.

FACTS

I. REMOTE EMPLOYMENT WITH PENNSYLVANIA CORPORATION

FixtureOne is a Pennsylvania corporation headquartered in Philadelphia, specializing in the design and production of custom store fixtures and furnishings for the retail industry. Schutz was the president and chief executive officer of FixtureOne Corporation and had been an officer and director of the company between 2004 and 2011.

In October 2009 Failla e-mailed Schutz seeking a sales position with FixtureOne that she could perform from her home near Seattle. Failla traveled to Pennsylvania for an interview with Schutz. Following the interview, Schutz offered Failla an account executive position with the company. The position required Failla to conduct her work via telephone, e-mail, and occasional airplane travel. Schutz told Failla that having a sales representative in her part of the country could be useful because he would like to do business with Starbucks. However, Failla did not pursue Starbucks or any other Washington company as a customer. Failla's compensation included $75,000 in annual salary and an additional three percent sales commission on new accounts.

At the end of 2010, Failla's first full year of employment with FixtureOne, she e-mailed Schutz asking for an accounting of her sales commissions

and payment of those commissions. Schutz instructed "Ed"[1] to identify and report Failla's 2010 sales commissions and to issue her a check. Clerk's Papers (CP) at 36.

Schutz promoted Failla to vice president for sales in 2011. He raised her base salary to $135,000 and continued her three percent sales commission, with the exception of one account. Additionally, Schutz informed Failla that she would need to sign the company's employment agreement, which, among other terms, provided that it "shall be interpreted in accordance with the laws of the Commonwealth of Pennsylvania." CP at 78. Failla responded that she would sign and mail the agreement that day. Three days later, Failla sent a version of the agreement back to Schultz [sic] with proposed revisions. Neither Schutz nor Failla took further action on the agreement.

In early April, Failla sent Schutz another request for the accounting and payment of her 2010 commissions. Schutz replied, "If Ed does not calculate soon, I will do so." CP at 38. Shortly thereafter, Schutz calculated Failla's 2010 commissions as $21,025.06. He e-mailed that calculation to Ed with instructions that Ed send a check for that amount to Failla by

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[1] The e-mail address associated with this person is "Ed Friedman." Clerk's Papers at 36. Otherwise, the record does not identify him. In the "Facts" section of Failla's brief, she refers to this person as "staff." *See* Br. of Resp't at 3.

overnight mail. Not having received payment in early May, Failla again asked Schutz about the situation. Schutz responded that he had instructed Ed to make the payment and that he would find out what happened.

In late May Schutz e-mailed Failla, informing her that FixtureOne could not execute its orders properly and needed to close. Schutz told Failla that the company needed to end her employment as of the next day, but he promised, "We will pay your commissions and expenses asap in the next several weeks as we complete operations." CP at 44.

In early June Failla again e-mailed Schutz, asking for her last payroll salary check, her expenses, her 2010 sales commissions, and for documentation for her 2011 commissions. Schultz [sic] responded, "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 at 46.

In late July Schutz e-mailed Failla stating, "Legally we do not owe you any commissions as the amount owed was negated when Juicy cancelled $50,000 of JFK . . . would like to pay you a severance in an amount equal to what the commission would have been assuming we are in a financial position to do so, however right now we are not in a financial position to do so." CP at 50.

Through counsel, Failla sent a letter to Schutz demanding immediate payment. The letter informed

Schutz that Washington subjected employers to liability for double damages and attorney fees.

II. PROCEDURE

Failla filed a complaint in Washington State seeking judgment for double her unpaid wages and for breach of her employment contract. Although Failla originally named both FixtureOne and Schutz, she was unable to obtain service on FixtureOne; therefore, she proceeded solely against Schutz and served him in Pennsylvania.

Failla moved for summary judgment against Schutz, seeking wages, exemplary damages, attorney fees, and costs under RCW 49.52.050 and .070. Schutz moved to dismiss for lack of personal jurisdiction under CR 12(b)(2). The parties agreed that the trial court would consider both motions concurrently.

The trial court denied Schutz's motion to dismiss and granted summary judgment for Failla.[2] The order included $59,608.12 as the principal amount, $3,129.42 for prejudgment interest, $8,150.00 in attorney fees, and $568.40 in costs. Schutz appeals.

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[2] The record before this court consists of only Clerk's Papers; the record does not contain the Verbatim Report of Proceedings.

ANALYSIS

Schutz argues that the Washington court lacked personal jurisdiction over him under the long-arm statute, RCW 4.28.185, because he lacks minimum contacts with the forum state. Schutz additionally argues that even if Washington has personal jurisdiction, summary judgment was inappropriate because questions of material fact remained. Failla responds that Washington has jurisdiction because Schutz knew that Failla lived and would perform her duties in Washington. Failla also responds that Schutz failed to raise any issue of material fact before the trial court. We hold that the superior court lacked personal jurisdiction over Schutz and, for that reason, we reverse the superior court's denial of Schutz's dismissal motion and its grant of summary judgment in favor of Failla.

I. STANDARD OF REVIEW

When reviewing a summary judgment order, we engage in the same inquiry as the trial court. We determine if there are any genuine issues of material fact and, if not, whether the moving party is entitled to judgment as a matter of law. *Lewis v. Bours,* 119 Wn.2d 667, 669, 835 P.2d 221 (1992). In this review, "'[t]he court must consider the facts in the light most favorable to the nonmoving party, and the motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.'" *Lewis,* 119 Wn.2d at 669 (quoting *Marincovich v.*

Tarabochia, 114 Wn.2d 271, 274, 787 P.2d 562 (1990)) (alteration in original). More specifically, where the "underlying facts are undisputed, the trial court's assertion of personal jurisdiction is a question of law reviewable de novo." *MBM Fisheries, Inc. v. Bollinger Mach. Shop & Shipyard, Inc.,* 60 Wn. App. 414, 418, 804 P.2d 627 (1991). Failla has the burden of establishing jurisdiction, but she need only make a prima facie showing. *CTVC of Hawaii Co., Ltd. v. Shinawatra,* 82 Wn. App. 699, 708, 919 P.2d 1243 (1996), *modified by* 932 P.2d 664 (1997).

II. JURISDICTION

Washington's long-arm statute, RCW 4.28.185, authorizes Washington courts to exercise jurisdiction over a nonresident defendant to the extent permitted by the due process clause of the United States Constitution. *MBM Fisheries, Inc.,* 60 Wn. App. at 423.

Specifically, RCW 4.28.185 provides in pertinent 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 or her is based upon this section.

To subject a nonresident defendant to the personal jurisdiction of this state under RCW 4.28.185, the following requirements must be met:

> (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.

Shute v. Carnival Cruise Lines, 113 Wn.2d 763, 767, 783 P.2d 78 (1989) (quoting *Deutsch v. W. Coast Mach. Co.,* 80 Wn.2d 707, 711, 497 P.2d 1311 (1972)).

We will not find jurisdiction under the long-arm statute unless a nexus exists between the plaintiff's cause of action and the defendant's activities in the state. 14 KARL B. TEGLAND, WASHINGTON PRACTICE: CIVIL PROCEDURE § 4.13, at 89 (2d ed. 2009). We determine the propriety of long-arm jurisdiction "on a case-by-case basis, based upon the specific parties and the specific facts." 14 WASHINGTON PRACTICE at 90.

A. No Transaction of Business within Washington

To meet the first step in the *Shute* test, set out above, the evidence must show that Schutz purposefully did some act or consummated some transaction in this state. *Shute,* 113 Wn.2d at 767. Personal jurisdiction "exists where the contacts create a substantial connection with the forum state." *SeaHAVN, Ltd. v. Glitnir Bank,* 154 Wn. App. 550, 564, 226 P.3d 141 (2010). We determine the sufficiency of the contacts "by the quality and nature of the defendant's activities, not the number of acts or mechanical standards." *Shinawatra,* 82 Wn. App. at 710.

The execution of a contract with a state resident alone does not fulfill the "'purposeful act'" requirement. *MBM Fisheries,* 60 Wn. App. at 423 (quoting *Burger King v. Rudzewicz,* 471 U.S. 462, 478-79, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)). To determine whether Schutz purposefully established minimum contacts with Washington by hiring Failla, we must

examine the entire transaction, including negotiations, "contemplated future consequences, the terms of the contract, and the parties' actual course of dealing." *MBM Fisheries,* 60 Wn. App. at 423.

Failla argues that Schutz consummated a transaction in Washington by employing her knowing that she lived in Washington, citing *Toulouse v. Swanson,* 73 Wn.2d 331, 438 P.2d 578 (1968), *Thornton v. Interstate Sec. Co.,* 35 Wn. App. 19, 21, 666 P.2d 370 (1983), and *Cofinco of Seattle, Ltd. v. Weiss,* 25 Wn. App. 195, 605 P.2d 794 (1980). These cases, however, do not support this proposition.

In *Toulouse,* 73 Wn.2d at 331, an Idaho resident employed a Washington lawyer to represent him in Washington in extended litigation involving his mother's estate. Toulouse was in the state of Washington on many occasions from 1956 to 1959 and was a frequent visitor, as a client, to his attorney's law office. *Toulouse,* 73 Wn.2d at 331. The court upheld Washington jurisdiction over Toulouse in a suit by his attorney for compensation, holding that Toulouse consummated a transaction in Washington by employing the plaintiff as his lawyer, that the present action arose from that transaction, and that sustaining Washington jurisdiction would not be "an affront to the 'traditional notions of fair play and substantial justice' necessary for due process of law." *Toulouse,* 73 Wn.2d at 334 (citations omitted).

In *Thornton,* a foreign corporation hired Thornton to expand into Washington and other northwest

states. Thornton worked in Washington, with Washington companies, and was chosen for employment

> [b]ecause of his numerous contacts in the industry, his position as vice-president and then president of the Washington State Consumer Finance Association, his dealings since 1956 with Washington State's Division of Banking, Department of General Administration, his knowledge of state laws regulating small loan companies, and his experience in the field since 1946.

Thornton, 35 Wn. App. at 21. When Thornton's employment was terminated, he sued the foreign corporation in the Washington courts. We held that Thornton's role and the company's reasons for hiring him raised sufficient contacts with Washington to sustain personal jurisdiction. *Thornton,* 35 Wn. App. at 25.

In *Cofinco,* 25 Wn. App. at 196, a Washington corporation with its principal place of business in Seattle, hired Weiss, a New York resident, to sell shoes for Cofinco on the east coast. Although Weiss never came to Washington, Cofinco provided him with goods, funds, and advancements as part of selling shoes for Cofinco. *Cofinco,* 25 Wn. App. at 196. We held that under these circumstances the long-arm statute gave Washington courts jurisdiction over Weiss in a contract dispute with Confinco [sic]. By entering into the employment contract, we held Weiss "purposefully [availed himself] of the privilege of conducting activities" within the state of Washington.

Cofinco, 25 Wn. App. at 197 (alteration in original) (citation omitted).

None of these cases stand for the rule that Schutz is subject to Washington jurisdiction merely because he hired Failla knowing that she lived in Washington. Instead, each decision rests its holding on contacts that are not present in the relationship between Failla and Schutz or FixtureOne.

Failla reached out to Schutz in Pennsylvania nd flew to Pennsylvania to interview. FixtureOne paid Failla by checks initiated, issued, and mailed from Pennsylvania. FixtureOne did not register to do business in Washington and never had operations, officers, or customers in this state. Nothing about Schutz's employment of Failla anticipated that her activities in Washington would consist of more than residing here, working from home, and collecting a paycheck. Nothing in the record shows any attempt to do business with a Washington company, let alone any transactions with Washington companies.

Federal case law strongly indicates that this level of contact is insufficient to sustain jurisdiction over Schutz. In *Peterson v. Kennedy,* 771 F.2d 1244, 1262 (9th Cir. 1985), the court held that use of mails or telephones ordinarily does not qualify as purposeful activity invoking the benefits and protections of the forum state. *Pennebacker v. Wayfarer Ketch Corp.,* 777 F.Supp. 1217, 1221 (E.D.Pa. 1991), held that the plaintiff's decisions to live in Pennsylvania and receive some paychecks there were unilateral decisions

on his part and did not support Pennsylvania jurisdiction over the New York employer. Similarly, *Romann v. Geissenberger Mfg. Corp.,* 865 F.Supp. 255, 261-63 (E.D.Pa. 1994), held that a salesman's unilateral decision to work partly in his home state of Pennsylvania did not establish jurisdiction over his New Jersey employer where the salesman had an office in New Jersey and his employer neither required nor encouraged him to live or work in Pennsylvania.

The business relationship between Schutz and Failla shares its essential characteristics with those relationships found inadequate to sustain jurisdiction in these federal cases. In contrast, the relationship between Schutz and Failla lacks the sort of additional contacts on which *Toulouse, Thornton*, and *Cofinco* relied to uphold jurisdiction. Thus, the case law leans heavily against the conclusion that the superior court had jurisdiction over Schutz.

Failla argues that her presence in Washington was more than simple residence, because Schutz had told her that having a sales representative here could be useful in obtaining business with Starbucks. However, the record merely shows that after Schutz hired Failla, he forwarded an e-mail to her with the subject line "Starbucks," mentioning that another company had certified FixtureOne's fixtures under a food equipment standard. CP at 95. The meaning of this e-mail is obscure. Other than this bare subject line, the record does not show any attempt to do business with Starbucks or any other Washington

company. Failla's employment began in November 2009 and ended in May 2011. During that time, there is no evidence of contact with Starbucks. During that time, there are no e-mails discussing attempts to make contacts, no meetings concerning Starbucks, and no mention of phone calls concerning Starbucks. Not only did FixtureOne fail to gain Starbucks or any other Washington company as a customer, there is no evidence that Failla or anyone at FixtureOne ever solicited Starbucks or any other Washington company's business. Without any action, preparations, or planning, a single mention of Starbucks in the subject line of an e-mail is without significance in determining whether Washington courts have jurisdiction over Schutz.

For these reasons, we conclude that Schutz did not transact business in Washington for the purpose of the long-arm statute. In reaching this holding, we do not ignore the potential effect of the recent, revolutionary advances in communications, such as e-mail, video conferencing, social media and the Internet, on the analysis of jurisdiction. If Schutz and FixtureOne had opened a physical branch office here, the case for jurisdiction over them would be much stronger. The availability of e-mail, the Internet and the rest invites consideration whether Failla's situation was effectively no different from a bricks and mortar branch office; whether it was qualitatively different from that of an employee working at home using just mail and the telephone. The case law rejects "'mechanical'" and "'conceptualistic'" approaches to

long-arm jurisdiction in favor of a "'highly realistic'" approach that considers actual course of dealing. *See Burger King Corp.,* 471 U.S. 462 at 478-79 (quoting *Int'l Shoe v. Washington,* 326 U.S. 310, 319, 66 S. Ct. 154, 90 L. Ed. 95 (1945) and *Hoopeston Canning Co. v. Cullen,* 318 U.S. 313, 316, 63 S. Ct. 602, 87 L. Ed. 777 (1943)). The factual record in this appeal does not allow proper consideration of the effect of the new electronic world on the "highly realistic" approach to long-arm jurisdiction required by the case law. That question awaits another day.

B. No Commission of Tortious Act within Washington

Failla also argues that Schutz committed a tortious act that established personal jurisdiction in Washington under RCW 4.28.185(1)(b). Specifically, Failla argues that Schutz committed a tort by failing to pay her wages and that he injured her in Washington because that is where she resided and should have been paid. Schutz correctly responds that because his alleged failure to pay did not occur in Washington, that action cannot subject him to its jurisdiction.

Under RCW 4.28.185(1)(b), a tortious act occurs in Washington when the injury occurs within our state. *Grange Ins. Ass'n v. State,* 110 Wn.2d 752, 757, 757 P.2d 933 (1988). An injury "occurs" in Washington for purposes of the long-arm statute, "if the last event necessary to make the defendant liable for the alleged

tort occurred in Washington." *MBM Fisheries,* 60 Wn. App. at 425. A nonphysical loss suffered in Washington is not sufficient in itself to confer jurisdiction. *Hogan v. Johnson,* 39 Wn. App. 96, 100, 692 P.2d 198 (1984). No jurisdiction exists when alleged fraud had an effect in Washington only because plaintiff had chosen to reside there. *DiBernardo-Wallace v. Gullo,* 34 Wn. App. 362, 366, 661 P.2d 991 (1983).

The *SeaHAVN* decision is also instructive in resolving this issue. SeaHAVN alleged that Glitnir Bank tortiously misrepresented that it had no conflicts of interest and that it would not disclose SeaHAVN's confidential information to benefit a competitor. *SeaHAVN,* 154 Wn. App. at 569. SeaHAVN argued that Washington had jurisdiction because SeaHAVN was a Washington based company and Glitnir had financially harmed SeaHAVN in Washington. *See SeaHAVN,* 154 Wn. App. at 569. Division One of this court concluded, however, that "[b]ecause the alleged misrepresentations did not occur in Washington, . . . Glitnir was not subject to jurisdiction under RCW 4.28.185(1)(b)." *SeaHAVN,* 154 Wn. App. at 570.

Here, Schutz allegedly committed a tort by failing to pay Failla's wages. His failure to pay occurred in Pennsylvania. Failla experienced nonphysical injury in Washington only because she chose to live in Washington. Because the failure to pay is the "last event necessary" to make Schutz liable and his alleged failure did not occur in Washington, he is not

subject to Washington jurisdiction. *See MBM Fisheries,* 60 Wn. App. at 425.

Failla does not show that Schutz either transacted business or committed a tort in Washington. Consequently, Failla does not meet the first prong of the three-part *Shute* test, and Washington courts lack personal jurisdiction over Schutz. *See Shute,* 113 Wn.2d at 767. With that conclusion, we need not consider the second or third parts of the *Shute* test.

We reverse the superior court's decision that, it had personal jurisdiction over Schutz and its denial of Schutz's dismissal motion. Because the superior court lacked jurisdiction, we reverse its grant of summary judgment in favor of Failla and the accompanying judgment award and award of prejudgment interest, attorney fees, and costs.

/s/ Bjorgen, J.
BJORGEN, J.

We concur:

/s/ Hunt, P.J.
HUNT, P.J.

/s/ Joel Penoyar
PENOYAR, J.

HONORABLE GAROLD E. JOHNSON
Hearing Date: April 13, 2012
Hearing Time: 9:00 AM
Room 214A

IN THE SUPERIOR COURT OF
THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

KRISTINE FAILLA, Plaintiff, vs. FIXTUREONE CORPORATION; and KENNETH A. SCHUTZ, Defendants	NO. 11-2-13799-1 ORDER DENYING DEFENDANT KENNETH A. SHUTZ' MOTION TO DISMISS (Filed Apr. 27, 2012)

THIS MATTER came on for hearing on the 13th day of April, 2012, upon the defendant Kenneth A. Schutz' Motion to Dismiss Pursuant to CR 12(b)(2).

The Court having heard oral argument of counsel, and having reviewed the records and files herein, and having considered the following:

1. Plaintiff's Complaint;

2. Answer and Affirmative Defenses of Defendant Kenneth A. Schutz;

3. Motion to Dismiss;

4. Declaration of Kenneth A. Schutz;

5. Plaintiff's Response to Defendant's Motion to Dismiss;

6. Defendant's Reply in Support of Motion to Dismiss;

7. Stipulation and Order Re Motion to Dismiss;

8. Response Declaration of Kristine Failla; and

9. Defendant Kenneth A. Schutz' Reply to Response Declaration of Kristine Failla and this Court being fully advised in the premises,

IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Defendant Kenneth A. Schutz' Motion to Dismiss is hereby DENIED.

DATED this 27 day of April, 2012.

/s/ Garold E. Johnson
Honorable
Garold E. Johnson

Presented by:

OLDFIELD & HELSDON, PLLC

/s/ Thomas H. Oldfield
Thomas H. Oldfield, WSBA #2651
Daniel G. Wilmot, WSBA #33706
Of Attorneys for Defendant
Kenneth A. Schutz

Approved for entry:

ROBERTS JOHNS HEMPHILL, PLLC

See attached page
Michael W. Johns, WSBA #22054
Attorneys for Plaintiff

7 Stipulation and Order Re Motion to Dismiss;

8 Response Declaration of Kristine Failla; and

9 Defendant Kenneth A. Schutz' Reply to Response Declaration of Kristine Failla and this Court being fully advised in the premises,

IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1 Defendant Kenneth A. Schutz' Motion to Dismiss is hereby DENIED.

DATED this _____ day of _____, 2012.

Honorable
Garold E. Johnson

Presented by:

OLDFIELD & HELSDON, PLLC

Thomas H. Oldfield, WSBA #2651
Daniel G. Wilmot, WSBA #33706
Of Attorneys for Defendant
Kenneth A. Schutz

Approved for entry:

ROBERTS JOHNS HEMPHILL, PLLC

/s/ Michael W. Johns
Michael W. Johns, WSBA #22054
Attorneys for Plaintiff

The Honorable Garold E. Johnson
Motion for Summary Judgment
Hearing Date: April 13, 2012
Time: 9:00 a.m.

IN THE SUPERIOR COURT OF
THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

KRISTINE FAILLA, Plaintiff, vs. FIXTUREONE CORPORATION; and KENNETH A. SCHUTZ, Defendants	NO 11-2-13799-1 **AMENDED ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** (Filed Apr. 27, 2012)

1.	Judgment Creditor	KRISTINE FAILLA
2.	Judgment Debtor	KENNETH A SCHUTZ
3.	Principal Judgment	$ 59,608 12
4.	Pre-Judgment Interest	$ 3,129 42
5.	Attorney Fees:	$ 8,150 00
6.	Costs:	$ 568 40

7 Judgment Amounts Shall Bear Interest at 12% Per Annum from date of entry of judgment.

8 Attorneys for Judgment Creditor: Michael W Johns and Roberts Johns & Hemphill, PLLC

ORDER AND JUDGMENT

This matter having come before the Court upon the Plaintiff's Motion for Summary Judgment, and the Court having considered the files and records of this case, including the following pleadings of the parties:

1. Plaintiff's Motion for Summary Judgment,

2. Declaration of Kristine Failla,

3 Motion to Dismiss,

4 Declaration of Kenneth A Schutz,

5 Plaintiff's Response to Defendant's Motion to Dismiss,

6 Defendant's Reply in Support of Motion to Dismiss,

7 Stipulation and Order Re Motion to Dismiss;

8 Response Declaration of Kristine Failla,

9 Defendant Kenneth A. Schutz' Response in Opposition to Plaintiff's Motion for Summary Judgment;

10 Defendant Kenneth A Schutz' Reply to Response Declaration of Kristine Failla;

11 Plaintiff's Reply in Support of Motion for Summary Judgment,

12. Plaintiff's Motion for Award of Attorney's Fees and Costs; and

13 Declaration of Michael W. Johns as well as the arguments of counsel, it is hereby,

ORDERED, ADJUDGED AND DECREED that the Plaintiff's motions for summary judgment and for an award of attorney's fees and costs are granted. It is further

ORDERED, ADJUDGED AND DECREED that the Plaintiff be and hereby is awarded judgment against the Defendant KENNETH A. SCHUTZ in the principal amount of $59,608 12, being twice the amount of the wages owed to the Plaintiff of $29,804.06, together with pre-judgment interest on the amount of wages due from May 27, 2011 in the amount of $3,129.42, attorney's fees in the amount of $8,150 00 and costs of $568.40, with interest to accrue at the rate of 12% per annum from the date of judgment until judgment is paid in full.

DONE IN OPEN COURT this 27 day of April, 2012.

/s/ Garold Johnson
JUDGE
GAROLD E. JOHNSON

Presented by:

ROBERTS JOHNS & HEMPHILL, PLLC

Michael W. Johns
MICHAEL W. JOHNS
WSBA No 22054
Attorneys for Plaintiff

The Honorable Garold E. Johnson
Motion for Summary Judgment
Hearing Date: April 13, 2012
Time: 9:00 a.m.

IN THE SUPERIOR COURT OF
THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

KRISTINE FAILLA, Plaintiff, vs FIXTUREONE CORPORATION; and KENNETH A. SCHUTZ, Defendants	NO 11-2-13799-1 **ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** (Filed Apr. 13, 2012)

1	Judgment Creditor	KRISTINE FAILLA
2.	Judgment Debtor.	KENNETH A SCHUTZ
3.	Principal Judgment	$ 59,608 12
4.	Pre-Judgment Interest	$ 3,129.42
5	Judgment Amounts Shall Bear Interest at 12% Per Annum from date of entry of judgment	
6	Attorneys for Judgment Creditor Michael W Johns and Roberts Johns & Hemphill, PLLC	

ORDER AND JUDGMENT

This matter having come before the Court upon the Plaintiff's Motion for Summary Judgment, and the Court having considered the files and records of

this case, including the following pleadings of the parties

1 Plaintiff's Motion for Summary Judgment;

2 Declaration of Kristine Failla;

3 Motion to Dismiss,

4 Declaration of Kenneth A Schutz,

5 Plaintiff's Response to Defendant's Motion to Dismiss;

6 Defendant's Reply in Support of Motion to Dismiss,

7 Stipulation and Order Re Motion to Dismiss.

8 Response Declaration of Kristine FaiIla;

9. Defendant Kenneth A Schutz' Response in Opposition to Plaintiff's Motion for Summary Judgment,

10 Defendant Kenneth A Schutz' Reply to Response Declaration of Kristine Failla; and

11. Plaintiff's Reply in Support of Motion for Summary Judgment as well as the arguments of counsel, it is hereby,

ORDERED, ADJUDGED AND DECREED that the Plaintiff's motion is granted It is further

ORDERED, ADJUDGED AND DECREED that the Plaintiff be and hereby is awarded judgment against the Defendant KENNETH A SCHUTZ in

the principal amount of $59,608 12, being twice the amount of the wages owed to the Plaintiff of $29,804 06, together with pre-judgment interest on the amount of wages due from May 27, 2011 in the amount of $3,129 42, with interest to accrue at the rate of 12% per annum from the date of judgment until judgment is paid in full.

DONE IN OPEN COURT this 13th day of April, 2012.

/s/ Garold Johnson
JUDGE
GAROLD E. JOHNSON

Presented by

ROBERTS JOHNS & HEMPHILL, PLLC

/s/ Michael W. Johns
MICHAEL W. JOHNS
WSBA No. 22054
Attorneys for Plaintiff

Approved as to Form

OLDFIELD & HELSDON, PLLC

/s/ Thomas H. Oldfield
THOMAS H. OLDFIELD
WSBA No 2651
Attorneys for Defendant
Kenneth A Schutz

THE SUPREME COURT OF WASHINGTON

KRISTINE FAILLA, Petitioner, v. FIXTUREONE CORPORATION; and KENNETH A. SCHUTZ, Respondents.	**ORDER DENYING FURTHER RECONSIDERATION** NO. 89671-2

The Court having considered Petitioner's "MOTION FOR PARTIAL RECONSIDERATION PURSUANT TO RAP 17" and Respondent "KENNETH A. SCHULTZ' [sic] MOTION FOR RECONSIDERATION", and the Court having entered an order changing opinion in the above cause on November 25, 2014;

Now, therefore, it is hereby

ORDERED:

That further reconsideration is denied.

DATED at Olympia, Washington this 25th day of November, 2014.

For the Court

/s/ Fairhurst, J.
for CHIEF JUSTICE

Revised Code of Washington

4.28.185. Personal service out-of-state – Acts submitting person to jurisdiction of courts – Saving

(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;

(c) The ownership, use, or possession of any property whether real or personal situated in this state;

(d) Contracting to insure any person, property, or risk located within this state at the time of contracting;

(e) The act of sexual intercourse within this state with respect to which a child may have been conceived;

(f) Living in a marital relationship within this state notwithstanding subsequent departure from this state, as to all proceedings authorized by chapter 26.09 RCW, so long as the petitioning party has continued to reside in this state or has continued to

be a member of the armed forces stationed in this state.

(2) Service of process upon any person who is subject to the jurisdiction of the courts of this state, as provided in this section, may be made by personally serving the defendant outside this state, as provided in RCW 4.28. 180, with the same force and effect as though personally served 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 or her is based upon this section.

(4) Personal service outside the state shall be valid only when an affidavit is made and filed to the effect that service cannot be made within the state.

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

(6) Nothing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law.

49.52.050. Rebates of wages – False records – Penalty

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) Shall collect or receive from any employee a rebate of any part of wages theretofore paid by such employer to such employee; or

(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; or

(3) Shall wilfully make or cause another to make any false entry in any employer's books or records purporting to show the payment of more wages to an employee than such employee received; or

(4) Being an employer or a person charged with the duty of keeping any employer's books or records shall wilfully fail or cause another to fail to show openly and clearly in due course in such employer's books and records any rebate of or deduction from any employee's wages; or

(5) Shall wilfully receive or accept from any employee any false receipt for wages;

Shall be guilty of a misdemeanor.

49.52.070. Civil liability for double damages

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: PROVIDED, HOWEVER, That the benefits of this section shall not be available to any employee who has knowingly submitted to such violations.