

NO. A11-851

State of Minnesota
In Court of Appeals

In re John Ward Gillman
Engraved June 20, 1775 Copper Printing Plate:

State of New Hampshire,

Appellant,

vs.

Gary Eldon Lea,

Respondent,

vs.

Heritage Auctions, Inc.,

Defendant.

REPLY BRIEF OF APPELLANT STATE OF NEW HAMPSHIRE

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SUMMARY OF ARGUMENT IN REPLY

The Respondent's attempt to distinguish *Shaffer v. Heitner*, and reduce its considered and well-accepted holding to mere dicta is not successful. In *Shaffer*, the Supreme Court had no choice but to approach the problem with a broad rule. The matter was fully briefed to the Court and considered carefully and thoroughly. At bottom in *Shaffer* is the same legal issue that is presented in this case and regardless of the factual distinctions, prudence would suggest that this Court should apply *Shaffer's* minimum contacts and fairness analysis to this set of facts.

In addition, Respondent's argument that Minnesota Rule 4.04 is analogous to 28 U.S.C. § 1655 also misses his mark. The two laws are not analogous because section 1655 earns its constitutionality with federal jurisdiction and nationwide service of process. In any case, the Respondent did not comply with Rule 4.04 in serving his papers and thus cannot rely upon the argument now.

Justice Scalia's *Burnham* plurality opinion has little force to it and provides no support for the Respondent's position. In the wake of more recent Supreme Court jurisprudence of *Goodyear Dunlop Tires Operations, S.A. v. Brown*, the case for the power of the District Court to exercise traditional and accepted forms of jurisdiction became more difficult. *Goodyear Dunlop* grounds the Supreme Court's jurisprudence quite solidly in the inescapable conclusion that *Shaffer* and *International Shoe* apply to all forms of process employed by a party in state courts and are here to stay.

The idea that because this is a declaratory judgment action it ought to be removed from the requirements of due process has no foundation in law or the facts of this case.

Finally, there is no reason to remand this case to the District Court. The record for a proper determination of minimum contacts and due process is there and the evidence points to dismissal.

ARGUMENT

I. THE RESPONDENT IS WRONG TO IGNORE *SHAFFER'S* HOLDING AS DICTA

Both the District Court and the Respondent have brushed aside the Supreme Court's decision in *Shaffer v. Heitner*, 433 U.S. 186 (1977), as dicta. The Respondent cites *Dahlin v. Kroening*, 784 N.W.2d 406 (Minn. Ct. App. 2010) and *State ex rel. Foster v. Naftalin*, 74 N.W.2d 249, 266 (Minn. 1956), for the proposition that dicta is little more than the individual author of the opinion's views and not binding in subsequent cases. Respondent's Brief at 7. Paradoxically, as presented in *Dahlin*, the proposition is itself dicta under this rule as it was only necessary in *Dahlin* for the purpose of the majority opinion to comment upon the reasoning of the dissent. *Dahlin*, 784 N.W.2d at 410 (prefacing the discussion of dicta with the expression: "We also digress . . ."). It also lacks authority because the Minnesota Supreme Court affirmed the judgment but did not adopt this part of this Court's decision. 706 N.W.2d 503 (2011).

Regardless, the Respondent goes too far with the dicta policy in this case because he does not appreciate that the focus in analyzing a court's opinions for whether something is dicta is not with respect to strict case by case distinctions based on fact patterns but is based instead on whether a legal issue is necessary to the decision that was fully briefed and analyzed by the court. With respect to dicta, the Minnesota Supreme Court in *Naftalin* explained,

The questions actually before the court and argued by counsel are thoroughly investigated, deliberately considered with care, and

when so investigated and considered, a decision on one of those issues is entitled to respect in future cases. *Obiter dictum*, on the other hand, is a statement of the judge on an issue not so deliberately investigated and for that reason is not entitled to the same respect.

Naftalin, 74 N.W.2d at 266; see *City of Saint Paul v. Eldredge*, 788 N.W.2d 522, 527 (Minn. Ct. App. 2010) (focus is on difference in “legal issue”).

The Respondent’s argument also goes too far because it does not appreciate the extent to which the Supreme Court actually considered, investigated and analyzed the argument presented to it in *Shaffer*, which is that minimum contacts analysis applies to all exercises of state court jurisdiction regardless of the denomination.

Shaffer was precisely about the legal issue at stake in this case: is the presence of personal property in a jurisdiction sufficient to convey upon the court personal jurisdiction over a party regardless of minimum contacts and traditional notions of fair play and substantial justice. The legal issue in *Shaffer* was not dependent upon the Delaware sequestration facts to the degree that the Respondent wishes they were. The legal issue in *Shaffer* was: must state court jurisdiction comport with the Constitution’s requirement of due process of law?

Looking carefully at the Supreme Court’s Opinion it is clear that the Supreme Court in *Shaffer* was not merely expounding tangentially on an issue not properly presented to it. See *Naftalin*, 74 N.W.2d at 266; 4A Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 1070 (3d ed., rev. 2011) (discussing that holding in *Shaffer* means that jurisdiction based on property in *in rem* and *quasi*

in rem cases is no longer enough, courts must examine whether jurisdiction meets standards of fair play and substantial justice).

In *Shaffer*, the Supreme Court described the issue in the first line:

The controversy in this case concerns the constitutionality of a Delaware statute that allows a court of that State to take jurisdiction of a lawsuit by sequestering any property of the defendant that happens to be located in Delaware.

Shaffer, 433 U.S. at 189. The issue in this case is whether due process is met by a Minnesota statute that allows a court of that state to take jurisdiction of the Respondent's lawsuit against the State of New Hampshire by the fact that the Respondent is holding property of the State of New Hampshire that happens to be located in Minnesota. The controversy and legal issue that the Supreme Court faced in *Shaffer* was thus the same as what the District Court faced here. The underlying purpose of the lawsuit should have no more importance to that question than does the question of whether the Respondent or the State of New Hampshire is likely to prevail on the merits. What should be of great concern to the courts here, however, is how the District Court obtains lawful authority to determine the rights of an out-of-state, non-submitting party.

Shaffer was an appeal from a decision of the Delaware Supreme Court that was notably similar to the reasoning of the District Court in this case. The Delaware court had said,

'There are significant constitutional questions at issue here but we say at once that we do not deem the rule of *International Shoe* to be one of them. . . . The reason of course, is that jurisdiction under § 366 remains . . . *quasi in rem* founded on the presence of capital

stock here, not on prior contact by defendants with this forum. Under 8 Del. C. § 169 the “situs of the ownership of the capital stock of all corporations existing under the laws of this State . . . (is) in this State,” and that provides the initial basis for jurisdiction.’

Shaffer, 433 U.S. at 195. The Supreme Court reasoned, however,

The Delaware courts rejected appellants’ jurisdictional challenge by noting that this suit was brought as a *quasi in rem* proceeding. Since *quasi in rem* jurisdiction is traditionally based on attachment or seizure of property present in the jurisdiction, not on contacts between the defendant and the State, the courts considered appellants’ claimed lack of contacts with Delaware to be unimportant. This categorical analysis assumes the continued soundness of the conceptual structure founded on the century-old case of *Pennoyer v. Neff*, 95 U.S. 714 (1878).

Shaffer, 433 U.S. at 196. In order to address the issues raised in *Shaffer*, the Supreme Court therefore had to take on the facts, holding and progeny of *Pennoyer v. Neff*. *Shaffer*, 433 U.S. at 196-207. The legal issue in *Pennoyer* was whether the state court had jurisdiction in a dispute over ownership of property over a nonresident defendant simply because he claimed an interest in property in Oregon. In *Pennoyer*, the Supreme Court said, “yes.” In *Shaffer*, however, the Supreme Court reached a new conclusion with respect to *Pennoyer*, overruled it and said, “no.”

It is clear, therefore, that the law of state-court jurisdiction no longer stands securely on the foundation established in *Pennoyer*. We think that the time is ripe to consider whether the standard of fairness and substantial justice set forth in *International Shoe* should be held to govern actions *in rem* as well as *in personam*.

...

The case for applying to jurisdiction *in rem* the same test of ‘fair play and substantial justice’ as governs assertions of jurisdiction *in personam* is simple and straight forward.

Shaffer, 433 U.S. at 206-207; *see id.* at 211 (“We are left, then, to consider the significance of the long history of jurisdiction based solely on the presence of property in a State.” i.e. the *Pennoyer* rule). *Shaffer* overruled *Pennoyer*. *Payne v. Tennessee*, 501 U.S. 808, 828 n.2 (1991). In retiring the *Pennoyer* rule, i.e. presence of property is enough, the Supreme Court reasoned,

‘[T]raditional notions of fair play and substantial justice’ can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant.

Shaffer, 433 U.S. at 212 (internal citations omitted); *see Torgelson v. Real Property Known As 17138 880th Ave., Renville County, Minnesota*, 734 N.W.2d 279, 284 (Minn. Ct. App. 2007) (agreeing with *Shaffer* with this same proposition), *aff’d* 749 N.W.2d 24 (Minn. 2008).

As the briefs filed by the parties in *Shaffer* make clear, the question of whether due process and minimum contacts must apply in all types of jurisdiction involving property was properly before the Supreme Court and was fully presented by the parties. *See* Brief of Appellant R.F. Shaffer at *20, *Shaffer v. Heitner*, 433 U.S. 186 (1977) (no. 75-1812), 1976 WL 181712 (constitutional defect is that Delaware *quasi in rem* statute coerces nonresidents to submit to jurisdiction upon threat of forfeiture of their property within the state and arguing that “any assertion of jurisdiction must rest upon minimum contacts, citing

International Shoe and *Hanson v. Denckla*). The Delaware court in *Shaffer*, like the District Court in this case, had sought to brush *International Shoe* aside as inapplicable because of the *quasi in rem* nature of the action. *Shaffer* Appellant's Brief at 21. The *Shaffer* Appellant, however, argued, "*in rem* or *in personam*," "regardless of the label employed, the requirements of *International Shoe* must be met." *Id.* at *21. The *Shaffer* Appellant further relied upon *U.S. Indus., Inc. v. Gregg*, 540 F.2d 142, 156 (3d Cir. 1976), *cert. denied*, 433 U.S. 908 (1977), which similarly held that,

'We can only understand *Mullane* and *Hanson* as establishing a constitutional limit to state court jurisdiction wholly independent of the label *in rem*, *quasi in rem*, or *in personam*-that may be affixed to that jurisdiction. . . .we must assume that ultimately the test of *International Shoe* is determinative: That there be sufficient connection with the forum "such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."'

Shaffer Appellant's Brief at *22 (quoting *U.S. Indus. v. Gregg*, 540 F.2d at 156).

The *Shaffer* Appellant also argued from *Jonnet v. Dollar Savs. Bank*, 530 F.2d 1123, 1130-43 (3d Cir. 1976), which reasoned,

'there is no reason to believe that the Supreme Court presently recognizes such a distinction ... In short the same limitations of fundamental fairness apply to any exercise by the state of judicial powers, whether that exercise be denominated *in rem*, *quasi in rem* or *in personam*. One of those limitations ... is the *International Shoe* rule.'

Shaffer Appellant's Brief at *22 (quoting *Jonnet* from *U.S. Indus. v. Gregg*, 540 F.2d at 154). The *Shaffer* Appellant closed its argument saying, "whatever the label attached, Delaware courts ought not to be permitted to exercise such

jurisdiction in the absence of the minimum contacts required by *International Shoe*.” *Id.* at *25.

In response, the *Shaffer* Appellee reiterated the Delaware court’s holding and pointed out that it had addressed and rejected the *Shaffer* Appellant’s argument on the applicability of *International Shoe* to *quasi in rem* process as the “initial basis for jurisdiction.” Brief of Appellee Arnold Heitner at *12, *Shaffer v. Heitner*, 433 U.S. 186 (1977) (no. 75-1812), 1976 WL 181713, at *12.

The *Shaffer* briefs show that the legal issue necessarily faced by the parties to that decision was whether property based process, *regardless of the title*, when used as an initial basis for jurisdiction required application of *International Shoe*’s due process analysis. The legal issue was fully briefed and considered by the Supreme Court. The Supreme Court was compelled to address the breadth of the argument in front of it in large part because of the breadth of the holding in the court below and the federal precedents in the third circuit. It was not mere dicta, tangential to the holding, it was integral and necessary.

II. THE RESPONDENT’S RELIANCE ON 28 U.S.C. § 1655 IS NOT AVAILING BECAUSE THAT STATUTE IS NOT COMPARABLE TO MINNESOTA RULE OF CIVIL PROCEDURE 4.04 AND BECAUSE THE RESPONDENT DID NOT COMPLY WITH RULE 4.04.

The Respondent argues that 28 U.S.C. § 1655 allows for *in rem* jurisdiction without the requirement of minimum contacts due process analysis. Respondent’s Brief at 13-15. As a result, he suggests, this Court by analogy should provide the

same rule for Minn. Rule of Civ. P. 4.04. There are three primary flaws with the Respondent's argument.

First, the argument heedlessly assumes away the holdings of *Shaffer* and *International Shoe*, which as noted above, is not a viable notion under the Fourteenth Amendment or even a good idea. *See Shamrock Develop., Inc. v. Smith*, 754 N.W.2d 377, 383-84 & n.3 (Minn. 2008) (Rule 4.04 now delimited by *International Shoe* minimum contacts standards and subject to Minnesota's long arm statute). Courts should strive to be certain that their orders meet a well established standard for fundamental due process of law, not simply a traditional one that is an historical artifact. *See Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 340 (1969) ('the fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms'); *accord Turek v. A.S.P. of Moorhead, Inc.*, 618 N.W.2d 609, 611 (Minn. Ct. App. 2000) (emphasizing desirability for uniform predictable course of procedure applicable to all actions). Under *Shaffer* and *International Shoe* that means minimum contacts and a process which comports with traditional notions of fair play and substantial justice. As shown below, the minimum contacts test provides an appropriate and efficient method for resolving problems relating to jurisdiction in disputes involving property. *See infra* part V; 4A Wright & Miller, FEDERAL PRAC. & PROCEDURE § 1070 (3d ed. rev. 2011) ("With the expansive reach of most long-arm provisions and the requirement that the assertion of personal jurisdiction over a defendant meet the requirements of minimum contacts assuring

the defendant fair play and substantial justice, the appropriate sphere for *quasi-in rem* jurisdiction in the modern world seems limited indeed.”).

Secondly, section 1655 is a federal statute used by federal courts with nationwide service of process when acting under it. Section 1655 requires minimum contacts with the geographic domain of the sovereign’s court, which for federal courts, is the United States. *See, e.g., Max Daetwyler Corp. v. Myer*, 762 F.2d 290, 293-94 & n.3 (3d Cir.) (statutes such as section 1655 gain constitutionality in part from the nationwide service of process that they authorize and federal minimum contacts analysis), *cert. denied*, 474 U.S. 980 (1985); *Guy v. Citizens Fidelity Bank & Trust Co.*, 429 F.2d 828, 832 (6th Cir. 1970); *Kingsborough v. Sprint Communications Co.*, 673 F. Supp. 2d 24, 31 & n.11 (D. Mass. 2009) (section 1655 is a nationwide service of process statute). No State has extraterritorial sovereignty. Minnesota Rule 4.04’s limitations are manifest; it is not sufficient to secure a personal judgment against a non-resident party. *See* Respondent’s Brief at 12. To obtain the kind of declaratory judgment against the State of New Hampshire that the Respondent sought, Appx. at 21, and the District Court ordered, *see* Respondent’s Motion to Strike, Exhibit C, however, the long arm statute is required. Minn. Stat. 543.19. *See Shamrock*, 754 N.W.2d at 383-84 & n.3. The long arm statute of course requires minimum contacts. *Id.*

The third reason this argument fails is that the Respondent did not comply with Rule 4.04’s requirements when he served his papers on the State of New Hampshire. *See* Appx. at 37 (Affidavit of Personal Service simply saying

documents were delivered to the State of New Hampshire's attorneys' office in Concord, NH); *Shamrock*, 754 N.W.2d at 383 (service under Rule 4.04 must be pursuant to one of the enumerated circumstances which must be stated on the face of the Affidavit of Service and must in fact be true). With no facts in the record evidencing its correct application, Respondent cannot rely upon Rule 4.04 for the adequacy of jurisdiction. *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988) (“An appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below.”)

III. THE *BURNHAM* PLURALITY DECISION DID NOT ANNOUNCE A DEPARTURE FROM THE REQUIREMENTS OF DUE PROCESS BASED UPON MINIMUM CONTACTS, FAIRNESS AND SUBSTANTIAL JUSTICE.

The Respondent argues that Justice Scalia's plurality opinion in *Burnham v. Superior Court*, 495 U.S. 604 (1990), “signaled the limits” of *Shaffer* and “demonstrated that the true effect of *Shaffer* was more limited than its original language might suggest, and that traditional concepts of jurisdiction ...were still in force.” Respondent's Brief at 7 & 8. The judgment in *Burnham*, however, stands for little more than the somewhat unremarkable proposition that a natural person found within a state's borders can be subjected to personal jurisdiction simply by service upon him while he is there. As a plurality decision it is an odd vehicle to “signal” a new and significant jurisprudential boundary since its precedential effect is limited to its facts. *See, e.g., Worldcare Ltd. Corp. v. World Ins. Co.*, 767

F. Supp.2d 341, 352 (D. Conn. 2011) (“Where there was no majority opinion ... no complete consensus on the rationale ...it would be remiss of this Court to rely on *Burnham* to cursorily discard ‘minimum contacts’ due process analysis to evaluate personal jurisdiction over foreign corporations”); *Republic Properties Corp. v. Mission West Properties, LP*, 895 A.2d 1006, 1016 (Md. 2006); *MBM Fisheries, Inc. v. Bollinger Mach. Shop and Shipyard*, 804 P.2d 627, 631 & n.3 (Wash. Ct. App. 1991) (without a majority opinion *Burnham* is limited to its facts); *see also James v. Illinois Cent. R.R.*, 965 S.W.2d 594, 600 (Tex. App. 1998) (*Burnham* does not apply unless defendant is an individual). Minnesota courts generally cite *Burnham* for its reiteration of the now established rule that for courts to have power over nonresident parties there must be minimum contacts and the exercise cannot offend traditional notions of fair play and substantial justice. *E.g., Juelich v. Yamazaki Mazak Optonics Corp.*, 682 N.W.2d 565, 570 (Minn. 2004); *Christian v. Birch*, 763 N.W.2d 50, 59 (Minn. Ct. App. 2009). *But see Rykoff-Sexton, Inc. v. American Appraisal Assocs., Inc.*, 469 N.W.2d 88, 91 (Minn. 1991) (citing *Burnham* plurality and upholding the validity of Minnesota’s foreign agent consent to jurisdiction statute).

The *Burnham* plurality is not an especially persuasive authority for the Respondent for several other reasons. In his opinion, Justice Scalia in fact confirmed the correctness of the State of New Hampshire’s argument about *Shaffer* and said that it,

... places all suits against absent nonresidents on the same constitutional footing, regardless of whether a separate Latin label is attached to one particular basis of contact.....

See Burnham, 495 U.S. at 621 (Scalia, J., plurality opinion). It is also notable that Justice Scalia's language of departure from *Shaffer* that the Respondent believes is helpful to him, was expressly repudiated by Justice Brennan in his concurrence.

See Burnham, 495 U.S. at 628-40 (Brennan, J., concurring). As a result, Justice Scalia's view that tradition is enough, even if it is not in accord with norms of fair play and fundamental fairness, is dicta and not a part of the Supreme Court's judgment. Moreover, Justice Brennan went to some length to clarify that he believed that the jurisdiction found acceptable in *Burnham* did survive a constitutional due process analysis. Finally, Justice Scalia's argument appears to focus on the simplistic idea that a particular form of jurisdiction's "validation is its pedigree." *Burnham*, 495 U.S. at 621 (Scalia, J., plurality opinion).

The State of New Hampshire does not agree that *Shaffer* and *International Shoe* have not already closed the book on this particular "ancient form" nor, as the Respondent suggests, that it is still open for debate as a "traditional form" even though flawed for due process purposes. *See Burnham*, 495 U.S. at 629 (Brennan, J., concurring) ("I believe that the approach adopted by Justice Scalia's opinion today – reliance solely on historical pedigree – is foreclosed by our decisions in *International Shoe* and *Shaffer*."). The State of New Hampshire also does not agree that *quasi in rem* type I jurisdiction to obtain a judgment against a sovereign State falls within what Justice Scalia considered "firmly approved by tradition and

still favored.” *Burnham*, 495 U.S. at 622 (Scalia, J., plurality opinion); *accord Torgelson*, 734 N.W.2d at 284.

Unmistakably, where the two states are equal sovereigns, neither has sovereign judicial power, i.e. jurisdiction, over the other. *See Alden v. Maine*, 527 U.S. 706, 713 (1999). As the Supreme Court said in *World-Wide Volkswagen*,

the Framers also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980).

Furthermore, it is clear that “[m]inimum contacts ... acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.” *Id.* at 291-92. Without such “lawful power,” Minnesota cannot impose a judgment against the State of New Hampshire or its property. *See J. McIntyre Mach. Ltd. v. Nicaastro*, U.S. Supreme Court docket no. 09-1343 (6/27/2011), Slip Op. at 9 (Kennedy, J. plurality opinion). As the Supreme Court held in *World-Wide Volkswagen*,

Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, *acting as an instrument of interstate federalism*, may sometimes act to divest the State of its power to render a valid judgment.

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. at 294 (emphasis added).

Nowhere is the concern for the limits of jurisdiction out of respect for “interstate federalism” stronger than in a case like this, where the State of Minnesota seeks to bind a sister sovereign state and its property to a judgment of its courts. As a consequence, even under Justice Scalia’s notion of “firmly approved and still favored,” traditional forms of jurisdiction from *Burnham*, the District Court could not use Minnesota Rule of Civil Procedure 4.04 to bind the sovereign State of New Hampshire to a judgment determining the ownership rights of the John Ward Gilman Plate without offending basic principles of sovereignty. *See Nicastro*, Slip Op. at 4 (Kennedy, J. plurality opinion) (“neither statute nor judicial decree may bind strangers to the State”); *World-Wide Volkswagen*, 444 U.S. at 293 (sovereign power not to be subject to other State’s power is “express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment”). Offending sovereignty in our federal system cannot be seen as an accepted and validated tradition.

In contrast, a far more decipherable signal about the direction of the jurisprudence of *Shaffer* is the unanimous decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, U.S. Supreme Ct., No. 10-76, June 27, 2011. There the Supreme Court, said

The Due Process Clause of the Fourteenth Amendment sets the outer boundaries of a state tribunal’s authority to proceed against a defendant. *Shaffer v. Heitner*, 433 U.S. 186, 207 (1977). The canonical opinion in this area remains *International Shoe*, 326 U.S. 310, in which we held that a State may authorize its courts to exercise personal jurisdiction over an out of state defendant if the 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.’”

Goodyear Dunlop Tires Operations, S.A. v. Brown, Slip Op. at 6. In *Goodyear Dunlop*, the Supreme Court eschewed the kind of “sprawling view” of jurisdiction that the Respondent argues is validated by Rule 4.04 – that the presence of a single article of property in the State in which a defendant claims an interest is sufficient to bind the non-submitting non-resident defendant to a judgment. *See Goodyear Dunlop*, Slip Op. at 12-13. It is clear today that regardless of the commentary about the validated pedigree of “traditional forms,” the Supreme Court’s unanimous opinion is that “[a] state court’s assertion of jurisdiction exposes defendants to the State’s coercive power, and is therefore subject to review for compatibility with the Fourteenth Amendment’s Due Process Clause.” *Id.* at 2.

IV. THERE IS NO REASON TO ANALYZE DECLARATORY JUDGMENT JURISDICTION ANY DIFFERENTLY THAN ANY OTHER TYPE OF ACTION

Respondent claims that, because Minn. Stat. 555.11 permits a plaintiff to make parties of all persons who have a claim or interest that may be affected, the Court should dispense with the minimum contacts test for declaratory judgment actions. Respondent’s Brief at 26. There is nothing about a declaratory judgment action that suggests that due process should not apply. The absence of any authority cited in the Respondent’s Brief for this proposition is telling. The only published Minnesota decision where a nonresident party was subjected to a declaratory judgment action in a Minnesota court resulted in the dismissal of the

action as against that party for lack of personal jurisdiction. *See Zimmerman v. American Inter-Insurance Exch.*, 386 N.W.2d 825 (Minn. Ct. App. 1986).

The premises of the Respondent's argument also do not withstand scrutiny. Respondent asserts that Heritage Auctions was a necessary party because it was party to an auction contract with the Respondent (but not made part of the record). Respondent's Brief at 26-27. However, neither the Respondent's affidavit nor his complaint make any allegation suggesting that Heritage Auction had any interest or claim which would be affected by the declaration. Appx. at 4-6, 18-21. Indeed, as Respondent's agent, it would stand to reason that Heritage's interest in the declaration would be the same as the Respondent's, and thus more than adequately represented.

Respondent also asserts that jurisdiction over Heritage in New Hampshire would not be possible and therefore his only choice was to bring suit here. Appellant's Brief at 27. Contrary to the Respondent's assertions, however, it is quite possible that Heritage Auction has minimum contacts with New Hampshire specifically with respect to the John Ward Gilman Plate. *See* Appendix at 10 & 12 (pages from Heritage Auction catalog showing photograph of Dr. Frank Mevers, New Hampshire's State Archivist and quoting information obtained from him by Heritage while it investigated the provenance of the plate and referring to other investigations conducted in or with New Hampshire). The Respondent has not articulated any adverse interest or claim for Heritage, so leaving it out of the declaratory judgment would seem to have no consequence because Minn. Stat.

555.11 contemplates that some parties may not be available. Minn. Stat. 555.11 (“...no declaration shall prejudice the rights of persons not parties to the proceeding.”).

There is also no evidence in the record to suggest that the Respondent had no alternative but the Minnesota court. *Cf. Perkins v. Benguet Consol. Min. Co.*, 342 U.S. 437, 447-48 (1952) (jurisdiction by necessity found where corporation had some contacts with the forum state but not related to the claim and appropriate forum for that claim was Philippines Islands during Japanese occupation). While necessity may be the mother of invention, it is scarcely used as the mother of jurisdiction. *See Goodyear Dunlop*, Slip Op. at 8-9 (discussing *Perkins* and *Helicopteros*).

The decisions that the Respondent cites for the proposition that lack of any other forum –jurisdiction by necessity – is grounds for dispensing with minimum contacts and due process, do not actually say that, or are limited by their specific application in certain narrow federal statutory schemes. In *Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation*, 605 F.2d 648 (2d Cir. 1979), for example, the court did not rely upon “jurisdiction by necessity,” but instead conducted a *Shaffer* and *International Shoe* analysis to determine whether jurisdiction over the parties with rights in the property in question would be fair. *Amoco*, 605 F.2d 654-55 (“Under the regime of *Shaffer*, the test of ‘fair play and substantial justice’ that governs *in personam* jurisdiction controls *in rem* jurisdiction as well.”). The *Amoco* court mentioned that the case was in admiralty

and that there were “elements” of the jurisdiction by necessity concept involved in the analysis, but only to conclude that “maritime actors must reasonably expect to be sued wherever their property may be found.” *Amoco*, 605 F.2d at 655. It also referred to an agreement that designated New York as the place for arbitration as evidence that jurisdiction in New York was not unfair. *Id.* Obviously, the State of New Hampshire is not a maritime actor and the John Ward Gilman Plate is not a vessel. *Amoco*, therefore does not present the Respondent a safe harbor from the seas of due process and minimum contacts analysis. Instead, *Amoco* stands for the proposition that the Court should still accept *Shaffer* as governing *in rem* cases and that there must be an analysis to determine whether jurisdiction over a nonresident defendant comports with traditional notions of fairness and substantial justice. *Amoco*, 652 F.2d at 654.

V. APPLYING PROPER DUE PROCESS ANALYSIS TO THIS CASE SHOULD RESULT IN A DISMISSAL

Under Minnesota procedure (again assuming the long arm statute can be used against a sovereign state, *see* Appellant’s Brief at 8, & Appx. at 86) the District Court should have conducted the five-part test to determine whether jurisdiction over this dispute was proper. *See Juelich*, 682 N.W.2d at 573-78.

It would be appropriate for this Court to apply the five factors outlined by the Supreme Court of Minnesota in *Juelich*, and not remand for the District Court as the Respondent urges in his brief. The matter was fully briefed by both parties to the District Court below and its erroneous conclusion on that issue is the reason

for this appeal. Appx. at 45-48, 56-76, 94-99, 104-06. There is no reason to remand for this question in light of the factual record made by the Respondent on jurisdiction, and because that “record permits only one resolution of the factual issue.” *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982); see Appx. at 19, 65-69, 76, 94-95. This is not a case where the facts and law needed for a determination were not before the court below, such as those cited by the Respondent.

Juelich, like this case, involved personal property as the basis for jurisdiction over a non-resident defendant. There the Minnesota Supreme Court reaffirmed the applicability of the five-factor test defined by *Hardrives, Inc. v. City of La Crosse*, 240 N.W.2d 814, 817-20 (Minn. 1976), to determine whether exercising personal jurisdiction over a foreign defendant comports with due process. *Juelich*, 682 N.W.2d at 573. Those five factors are: 1) the quantity of the defendant’s contacts with the forum state; 2) the nature and quality of the contacts; 3) the connection of the cause of action with these contacts; 4) the state of Minnesota’s interest in providing a forum; and 5) the convenience of the parties. *Id.* The test reflects the “canonical” principles set forth in *International Shoe. Goodyear Dunlop*, Slip Op. at 6; *Juelich*, 682 N.W.2d at 570. The first three factors determine whether sufficient “minimum contacts” exist; the last two factors ask whether the exercise of jurisdiction would offend traditional notions of fair play and substantial justice. *Id.* Courts accord greater weight to the first three factors, while the factors of state interest and convenience of the parties require

lesser consideration. *Juelich*, 682 N.W. 2d at 570; *Marshall v. Inn on Madeline Island*, 610 N.W.2d 670, 674 (Minn. Ct. App. 2000). The factors are considered in a sliding scale fashion, that is, the weaker the plaintiff's showing is on minimum contacts, the less the defendant must show on fairness to defeat jurisdiction. *Juelich*, 682 N.W.2d at 570-71.

On a motion to dismiss for lack of jurisdiction, the plaintiff must make a prima facie showing of sufficient Minnesota-related activities through the complaint and supporting affidavits. *Stangel v. Rucker*, 398 N.W.2d 602, 604-05 (Minn. Ct. App. 1986) (citing *Marquette Nat'l Bank v. Norris*, 270 N.W. 2d 290, 292 (Minn. 1978)). See *Hardrives, Inc.*, 240 N.W. 2d at 816. Here, the Respondent did not make the required prima facie showing of sufficient Minnesota-related activities through the complaint and supporting affidavits. In fact, the Respondent did not plead any "Minnesota-related activities" with regard to jurisdiction in the complaint. See Appx. at 19 ¶¶ 1- 6. Respondent's only reference to the State of New Hampshire in his Complaint with regard to jurisdiction was, "The State of New Hampshire . . . is a foreign state that has asserted a potential claim of ownership over the Copper Printing Plate, which is located in Fillmore County, Minnesota." Appx. at 19 ¶ 4. Instead, the Respondent attempted to argue in his motion papers, Appx. at 56-76 & 94-99, that minimum contacts were satisfied.

A. Factor 1 – The Quantity Of Contacts With The Forum State

The Respondent alleged that the State of New Hampshire has a long history of being a sister state with Minnesota. Appx. at 65-66. He also alleged that the State of New Hampshire precipitated his lawsuit by writing a letter to Heritage Auction in Texas, with a copy to Respondent's Attorney in Wisconsin. Appx. at 67 & 83. Further, Respondent alleged that the State of New Hampshire responded to the Complaint and obtained local counsel from the Minnesota Attorney General's office for limited purposes. Appx. at 66 & 77-82. And lastly, the Respondent alleged that the State of New Hampshire sought judicial relief in five family court matters in Minnesota between 1981 and 2010. Appx. at 66 & 76.

B. Factor 2 – The Nature And Quality Of The Contacts.

New Hampshire's status as a sister state to Minnesota is not a "contact" and, if anything, is instead a compelling reason why there should be no jurisdiction at all. *See supra* 13-15. New Hampshire's contact with the Minnesota Attorney General's office as its local counsel in this matter does not evidence purposeful availment of the forum state. If contacting local counsel constitutes minimum contacts for personal jurisdiction, then almost every defendant would be subject to personal jurisdiction regardless of contacts with the forum state.

Even assuming the family court matters listed by the Respondent, involved New Hampshire as a real party in interest, and that the contacts in those matters were not statutorily privileged and were countable for determining personal jurisdiction, New Hampshire's involvement in a handful of unrelated family court

cases dating back as far as 1981 does not constitute sufficient minimum contacts that are “continuous and systematic” such as to confer general jurisdiction over the State of New Hampshire. *See Goodyear Dunlop*, Slip Op. at 2, 6-7; *Morris v. Barkbuster, Inc.*, 923 F.2d 1277, 1281 (8th Cir. 1991) (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984)); *see also* Appellant’s Brief at 8, n.3 (describing legally privileged status of Uniform Interstate Family Support Act cases). Importantly, if contacts of this type were to be deemed to establish personal jurisdiction, it would necessarily mean that every one of the 50 states would be subject to jurisdiction in each of the others. Obviously, as a matter of interstate federalism, this cannot be the case.

Finally, the letter to Heritage in Texas, copied to Attorney Bennett in Wisconsin, was not a contact with Minnesota at all.

C. Factor 3 –The Connection Of The Cause Of Action With The Contacts.

Other than the limited and privileged contact the State of New Hampshire had with the Minnesota Attorney General’s Office to defend against the Respondent’s lawsuit, none of the contacts had any connection to the cause of action. The Respondent’s allegation that somehow the State of New Hampshire’s letter to Heritage caused the lawsuit and is therefore relevant makes no sense as a jurisdictional fact. The State of New Hampshire did not cause the John Ward Gilman Plate to come to Minnesota. In fact, when the State of New Hampshire claimed ownership over the John Ward Gilman Plate, the location of the item was

likely in Massachusetts. *See* Appx. at 5 (*Affidavit of Gary Eldon Lea*, dated 8/13/2010 describing the location of the property as in Massachusetts). The fact that the State of New Hampshire's property is here is only as "a result of unilateral actions of several other intervening" parties, including the Respondent, and "cannot satisfy the requirement of contact with the forum State." *Juelich*, 682 N.W.2d at 575 (quoting *World-Wide Volkswagen*, 444 U.S. at 298); Respondent's Brief at 1-2 (describing manner in which Respondent believes the John Ward Gilman Plate found its way to Minnesota).

Given the lack of contacts Respondent raised through the Complaint and supporting affidavits, the Respondent did not make a *prima facie* showing of sufficient Minnesota-related activities. Without such a showing, the case should be dismissed without need for further analysis. Yet, even with further analysis, in light of *Juelich's* instruction that where the plaintiff's showing on contacts is weak, less need be shown by the defendant with respect to the interest of the forum state and convenience of the parties, little needs to be said about the two remaining factors.

D. Factor 4 – The Interest Of The State Providing A Forum.

The Respondent claims that Minnesota has an interest in providing its citizens a means for resolving property ownership disputes. Appx. at 60, 64, 67. The State of New Hampshire, however, has an equal interest on that point, but also represents a public interest in seeing to the return of what the State of New Hampshire believes is public property. *See* Editorial, *Repatriating the Gilman*

Plate, THE CONCORD MONITOR, May 29, 2011 (urging the return of the John Ward Gilman Plate to New Hampshire). Thus, the State of New Hampshire's interest in its own forum is very strong.

E. Factor 5 – The Convenience Of The Parties

It appears likely that much of the evidence and the witnesses would come from New Hampshire. Thus, the inconvenience to the State of New Hampshire is in all likelihood, greater than the inconvenience to the Respondent. Regardless of where the case may be tried, however, some witnesses will be required to travel some distance out of state. "Therefore, convenience of the parties and witnesses is a neutral factor in the analysis." *Juelich*, 682 N.W. 2d at 575-76.

In the balancing of these factors, where minimum contacts of any quality and quantity are lacking, the contacts that do exist lack any connection to the litigation, and the fairness and justice factors tip in favor of the State of New Hampshire or are at best neutral, the assertion of jurisdiction in this case would not be consistent with due process. The Court should therefore order that the case be dismissed.

CONCLUSION

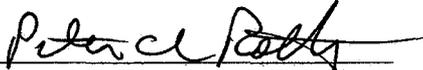
This Court should reverse the judgment and order of the District Court and order that the case be dismissed.

Respectfully submitted,

STATE OF NEW HAMPSHIRE

By its attorneys

MICHAEL A. DELANEY
NEW HAMPSHIRE
ATTORNEY GENERAL

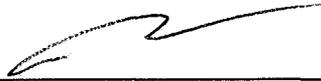

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Dated: July 21, 2011

CERTIFICATION OF WORD COUNT COMPLIANCE

I, Stephen M. West, do hereby certify pursuant to Minn. R. Civ. App. P. 132.01, subd. 3(b) that the foregoing Reply Brief of the Appellant, complies with the word count limit in the Rule. The word count of the Reply Brief, not including tables, is 6,829 words. In so certifying I relied upon the “Word Count” located in the “Tools” menu of Microsoft Word 2000 (9.0 8968 SP-3). I also certify that the Reply Brief complies with the typeface requirements of the Rule.

Dated: July 22, 2011



Stephen M. West
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