

**APPELLATE COURT CASE NO. A06-0881**

**STATE OF MINNESOTA  
IN COURT OF APPEALS**

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ALLETE, INC.,  
d/b/a MINNESOTA POWER, INC.,

Plaintiff,

vs.

Court File No. C7-04-600200  
The Hon. Shaun F. Floerke

GEC ENGINEERING, INC. and  
JERRY W. BROUGHER,

Defendant.

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**REPLY BRIEF AND APPENDIX  
OF DANIELLE DELHOMME, GARNISHEE**

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**REPLY BRIEF AND APPENDIX  
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**INTRODUCTION**

This appeal involves only the matter of the attempted garnishment by Plaintiff of Granishee Danielle Delhomme (“Delhomme”), a Texas resident. This garnishment action by Plaintiffs seeks the possession of a prototype industrial engine which had previously been owned by CEC, which then had been abandoned by GEC and which was later bought by Delhomme from the Missouri company which had been working on the engine, CK Engineering. Delhomme was not part of the original action by Plaintiff. Plaintiff obtained a default judgment against Jerry Brougher, but Plaintiffs have neither sought or obtained a judgment against Delhomme personally.

The Trial Court heard cross motions for summary judgment by Plaintiff and Garnishee Delhomme. The Trial Court properly held that the Security Agreement held by Plaintiff did not

cover the prototype engine and that Garnishee Delhomme therefore was not subject to garnishment of the prototype engine in her possession in Texas.

Delhomme wishes to note that Plaintiff makes a number of assertions in its appellate brief which are simply not substantiated by the affidavits or documents submitted to the Trial Court. Therefore, in reviewing the Trial Court's decision and determining whether there are genuine issues of material fact, the affidavits and documents submitted by Plaintiff must be used to determine whether there are genuine issues of material fact, rather than relying on unsupported assertions in Plaintiff's appellate brief or trial briefs.

#### **STANDARD OF REVIEW**

The Trial Court granted summary judgment in favor of Garnishee Delhomme. Summary judgment was granted on the basis of the documents and affidavits submitted to the Court. There was no trial. The Trial Court properly granted summary judgment in favor of Garnishee Danielle Delhomme.

On an appeal from summary judgment, the appellate court must determine whether there are genuine issues of material fact and whether the District Court erred in its application of the law. State by Cooper v. French, 460 N.W.2d (Minn. 1990); Offerdahl v. Univ. of Minn. Hosps. & Clinics, 426 N.W.2d 425 (Minn. 1988); Betlach v. Wayzata Condominium, 281 N.W.2d 328 (Minn. 1979). The evidence should be viewed in the light most favorable to the party against whom summary judgment was granted. Fabio v. Bellomo, 502 N.W.2d 758 (Minn. 1993).

Garnishee Delhomme moved for Summary Judgment pursuant to Minnesota Rules of Civil Practice 56.02. Said Rule provides that judgment shall be rendered if there is no genuine issue

as to any material fact and if the party is entitled thereby to judgment as a matter of law. Rule 56.05 provides specifically that where a Motion is made and supported as provided in Rule 56:

An adverse party may not rest upon the mere averments or denials of the adverse party's pleadings but must present specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

It, therefore, is well established that there must be specific facts shown which are sufficient to create genuine issues of material fact. Ford Motor Credit Co. v. BJL Corp., 411 N.W.2d 605 (Minn. App. 1987); Eakman v. Burger, 285 N.W.2d 95 (Minn. 1979). Alleged issues of material fact that were merely restatements of the legal issues in the action, were not sufficient to withstand summary judgment. Highway Chateau, Inc. v. Minnesota Dept. of Public Welfare, 365 N.W.2d 804 (Minn. App. 1984).

Clearly, in a Motion for Summary Judgment, the District Court must view evidence in the light most favorable to the non-moving party. Grondahl v. Bulluck, 318 N.W.2d 240 (Minn. 1982). However, once the moving party has established support for the Summary Judgment Motion, the burden then shifts to the other party to produce contrary facts. Thiele v. Stich, 425 N.W.2d 580 (Minn. 1988).

Hearsay evidence is not sufficient to avoid summary judgment. . A party cannot rely on hearsay to avoid summary judgment. Rademacher v. FMC Corp., 431 N.W.2d 879, 881 (Minn.App.1988). And a district court must disregard inadmissible hearsay evidence when considering a summary-judgment motion. Bersch v. Rgnonti & Assocs., Inc., 584 N.W.2d 783, 788 (Minn.App.1998). To defeat a motion for summary judgment, the evidence offered must be admissible at trial. Minn. R. Civ. P. 56.05; Murphy v. Country House, Inc., 307 Minn. 344, 349,

240 N.W.2d 507, 511 (1976)(hearsay evidence not sufficient to avoid summary judgment). A party opposing summary judgment must submit evidence which could be admissible at trial.

This issue is important here since Minnesota Power makes allegations in its affidavits and briefs which are unsupported allegations of GEC's intentions and understandings. At best, these allegations would be hearsay even if the Minnesota Power affidavits alleged that specific statements were made by GEC representatives such as Mr. Brougher. If there was a hearsay statement by a GEC representative, then there might at least be an argument that it would be admissible as an admission against interest. However, there are not even any claimed specific statements of Mr. Brougher or other relevant GEC representatives which allege specific agreement that the Missouri UCC-1 filing expanded the Minnesota Security Agreement. Therefore, the unsupported allegations by Minnesota Power that GEC agreed to expand the clear and limited Minnesota Security Agreement are not sufficient to avoid summary judgment.

Therefore, summary judgment must be granted if the other party does not present specific materials facts which evidence a genuine issue of material fact. Marose v. Hennameyer, 347 N.W.2d 509 (Minn. App. 1984). Such evidence has not been presented in this case, and consequently summary judgment was properly granted.

It should be noted that Defendants moved the Trial Court for summary judgment on several independent grounds, each of which were independently sufficient to grant summary judgment. The Trial Court granted summary judgment only on the basis that the Minnesota Security Agreement did not cover the prototype engine. However, the other grounds also were sufficient to grant summary judgment. While the Trial Court did not specifically rule on those

other grounds, they were properly presented to the Trial Court. Therefore, this Appellate Court can affirm summary judgment on these other alternate grounds as well.

It also should be noted that Plaintiff requested an award of attorneys' fees from the Trial Court. The Trial Court denied such a request. Because Plaintiff's claims clearly are frivolous and not warranted by existing law or a reasonable extension of existing law, Defendant Danielle Delhomme should be awarded her attorneys' fees.

## STATEMENT OF FACTS

There was a company called "GreenRun" which was developing a novel engine technology where a diesel engine would be converted for use with natural gas and utilizing a water injection and spark system. The hope was that the engine would work at high efficiency and with very low emissions. A man by the name of Sid Binion took the lead in developing this technology.

Green Run apparently came upon hard times. A new corporation, GEC Engineering, then was formed. GEC decided to purchase a junk engine from a salvage yard in Minnesota. Therefore, on April 15, 1999, it had an engine shipped from southern Minnesota directly to its operations at CK Engineering in Ballwin, Missouri. The engine went directly to Ballwin. It did not go to Aurora, Minnesota. Apparently no parts, or any thing else relating to the engine, were ever in Aurora, Minnesota.

After the engine had been purchased and shipped to Missouri, Minnesota Power entered into a Security Agreement with GEC dated December 28, 2000 (Exh. B). The Security Agreement gave Minnesota Power a security interest in all of the equipment of GEC located in Aurora, Minnesota (Exh. B-1). It did not have a more general statement of a security interest at all locations in Minnesota or any other place. It was quite specific that the security interest was in equipment located in Aurora, Minnesota. Again, this engine was never in Aurora, Minnesota, either before or after the security interest was created.

CK Engineering did substantial work with the engine, and only received partial pay for that work. By the time work ceased, long before that, CK Engineering had a lien on the engine for its unpaid work pursuant to Missouri Statute §430.020. See the prior Affidavit of Harold

McCormick (Exh. I-9). Minnesota Power earlier commenced a garnishment action against CK Engineering. That was dismissed by the Minnesota Court on summary judgment. See Court File No. C7-04-600200.

On May 3, 2001, Minnesota Power filed a UCC Statement in the State of Missouri. However, a financing statement could not expand the security interest which Minnesota Power had pursuant to the security agreement. Moreover, CK Engineering had a prior garageman's lien on the engine pursuant to Missouri Statute §430.020.

After GEC ceased operations at the end of 2001 or start of 2002, nothing further happened with the engine or with GEC for some time. CK Engineering had this large engine taking up space and incurring storage charges. It, therefore, contacted Danielle Delhomme at some point and negotiated to have Danielle Delhomme purchase the engine for \$18,000.00. The engine then was shipped to her from Missouri to Texas on about August 5, 2004 (Exh. F and G)). She has had possession of the engine since that time. The engine sits on a pallet and is not presently workable. Minnesota Power seeks possession of the engine located in Texas, from Danielle Delhomme. Minnesota Power waited over four years after it filed the Missouri UCC-1 to do anything to seek possession of the engine. It knew that the engine was at CK Engineering in Ballwin, Missouri during this time. There was no reason for CK Engineering to not sell the engine to Delhomme since it did not know of the UCC-1 and had no contact from Minnesota Power, while the engine was taking up space and incurring storage charges at CK Engineering. CK Engineering had over \$40,000 in unpaid charges due from GEC (Exh. I-6).

Danielle Delhomme was a shareholder at GEC since 1998. GEC was dissolved pursuant to statute by the Minnesota Secretary of State in January of 2006. Danielle Delhomme was a

Director of GEC, apparently from sometime early in 2002. However, she was never the CEO of the company. She has no knowledge of being elected as an officer of the company. The company was run as a private fiefdom by Sid Binion and Jerry Brougher, conducting business without her knowledge or consent.

Danielle Delhomme did not sign any of the documents related to Minnesota Power and its loans or security interests. Minnesota Power has known since the inception of its garnishment that the engine was located in Texas. It learned soon after the inception of this garnishment action that the engine never was in Aurora, Minnesota, and was shipped from Minnesota to Missouri before the Minnesota security agreement was ever executed. Minnesota Power, therefore, should have known from the inception of this matter that it had no basis for claiming jurisdiction by the Minnesota courts over this engine now located in Texas. Garnishee Danielle Delhomme, therefore, requests that the Court order Minnesota Power to pay her attorney's fees incurred since she proved to Minnesota Power that the engine never was subject to the Minnesota security agreement, and was not located in the State of Minnesota.

It should be noted that Minnesota Power continues to misrepresent Ms. Delhomme's role in GEC. She was an investor, who invested and lost over \$1 million either in her own investments or those of family members and close friends. She was listed on the Board of Directors but did not have any power, and was not involved in the important decisions or meetings relating to Minnesota Power or many other affairs. Minnesota Power continues to characterize her as the CEO. She was not the CEO. Indeed, the documents filed by Minnesota Power confirm that Mr. Brougher was the CEO. See Paragraph 2 on Page 38 of the Appendix, Page 41 of the Appendix. She has denied that she was the CEO, and she, in fact, was not the

CEO. She was not the Chair of the Board of Directors. She was not the President. Those roles were filled by Mr. Brougher. She was a substantial investor, with losses of over \$1,000,000 together with her relatives and friends who invested in GEC. Although she had a substantial investment, she had far from a controlling interest in GEC and did not control its affairs. She was emphatically not in control of the company. If she had been, she would have done things very differently. Brougher and Binion operated the company on their own and cheated her out of much more than Minnesota Power lost in this venture. Her presence on the Board of Directors was largely a formality since Brougher and Binion operated the company largely without her knowledge or consent.

She never signed any of the Minnesota Power documents, and did not consent to the Minnesota Power documents. The matter in dispute here is the validity of the security interest, and these issues probably are tangential and important. Ms. Delhomme never signed the Security Agreement. She never signed, or even knew about, the Minnesota or Missouri UCC Statements until the present litigation was commenced. However, she wants to make clear that these misrepresentations are false; that she was not the Chairman of the Board; and she was not the CEO. She also wants to make it clear that Minnesota Power did not even loan its money until after GEC was moribund by the beginning of 2001, having run out of money despite MP's promises of financial assistance. Minnesota Power let the company die due to its delays, and then seeks judgment against Brougher and the company, and seeks the prototype partly completed engine from Garnishee Delhomme.

In Mr. Hanson's Affidavit, he alleges that Ms. Delhomme could not contest the alternative interpretation of the Security Agreement. He stated that Ms. Delhomme was not part of the

negotiations leading to the loan. That is true; however, he alleges that she served as the Chair of GEC's Board of Directors. That is false. She was a substantial shareholder, and lost a great deal of money as a result, but she had no control over the corporation and knew very little of what was being done by Brougher and Binion. Note that the Affidavit of Mr. Hanson is not signed.

It also might be noted that there is an Amended Complaint as part of the Appellate's Appendix, on Page 8-28 Exhibit C. Ms. Delhomme, to the best of her knowledge, was never served with a second Amended Complaint. She was served with a Garnishment Summons, and it is the Garnishment Summons which subject to the present action. It should be noted that the Appendix filed by Minnesota Power is devoid of any references to Ms. Delhomme, and no documents were signed by her. They clearly do not establish that she was CEO, President or any other officer of the company. They do not establish her knowledge or the detailed affairs of the company or her control of the company.

It is not agreed that GEC and Minnesota Power agreed to amend the Security Agreement by reason of a Missouri UCC-1 filing, contrary to the assertions of Minnesota Power. Indeed, the only fact that is established is that there was a Missouri UCC-1 filing. Minnesota Power has no other evidence in the record establishing any intent to amend the Security Agreement. There was no amendment of the Security Agreement. Plaintiff apparently did not include the clear Security Agreement in its Appendix. A copy is enclosed in Respondent's Appendix.

Note that this assertion by Minnesota Power that "there is no question that GEC and Minnesota Power agreed to amend the agreements collateral description by preparing, executing and filing the Missouri UCC-1 Financing Statement" is really an assertion that is not documented

whatsoever in the record. Indeed, the facts are quite clear and are undisputed. The original Security Agreement is explicit in attaching only to equipment located in Aurora, Minnesota. It does not attach to after-acquired equipment. It is no evidence of any intent of the parties to amend the Security Agreement itself. The UCC-1 statement filed in Minnesota contained the same description. The UCC-1 statement filed in Minnesota was filed, and the Security Agreement was executed after the engine had already left Minnesota.

The new UCC-1 statement filed in Missouri states what it states. There was no amendment of the Security Agreement. Danielle Delhomme did not sign and did not know of the Missouri UCC-1 filing. The question, therefore, becomes whether the mere filing of the Missouri UCC-1 statement was sufficient to amend the Minnesota Security Agreement. Plaintiff asserts in its brief that GEC agreed to expand the scope of the original security agreement by signing the UCC-1 that was filed later in Missouri on May 3, 2001. The UCC-1 was allegedly signed by GEC President Jerry Brougher. However, there is no affidavit or deposition or other evidence from Mr. Brougher establishing his understanding of the purpose and scope of the Missouri UCC-1. The Missouri UCC-1 was prepared on a Minnesota UCC-1 form by a Minnesota Power representative. All that the affidavit of Minnesota Power representative Hanson asserts is the Minnesota Power asserts that the UCC-1 reflected GEC's agreement that there was a security interest in the engine when it was located in Ballwin, Missouri. Mr. Hanson alleges that he was involved in negotiating various agreements with GEC. However, he does not allege any conversations with Mr. Brougher regarding Mr. Brougher's intentions regarding the scope and intent of the Missouri UCC-1.

Indeed, Mr. Hanson obviously misstates the scope of the Security Agreement. In his unsigned affidavit he alleges that “our agreement called for Minnesota Power to have a security interest in the engine, regardless of where it was located, or moved to.” (Appellant’s Appendix A-35). This assertion is plainly contrary to the clear and specific language of the Security Agreement that the interest was limited to equipment located on Aurora, Minnesota. There was no original or later language that it applied to other assets of GEC regardless of where they were located or moved to. The only change was the Missouri UCC-1 that referred to equipment located at a specified address in Ballwin, Missouri. Plaintiff erred in negotiating the original security agreement with GEC if Plaintiff and GEC were to agree that the security agreement would cover all equipment, wherever located and wherever moved. Mr. Hanson’s assertion that GEC agreed to a security interest in all equipment, wherever located and wherever moved, is belied by both the original Security Agreement, the Minnesota UCC-1 and the later Missouri UCC-1. Mr. Hanson’s unsupported assertions are not entitled to credence, and certainly do not reflect the intent of GEC.

There are no genuine issues of material fact. These facts are simple and clear. The applicable law of the relevant States, Minnesota, Missouri and Texas, also are clear. After Danielle Delhomme bought the engine from CK Engineering in Missouri, she had it shipped to the State of Texas where it remains to this day.

### **ARGUMENT**

Garnishee Danielle Delhomme submits this Memorandum of Law in support of her request for affirmance of the Trial Court’s grant of Summary Judgment in favor of Garnishee Delhomme. The Court should dismiss Minnesota Power’s appeal, affirm the grant of summary judgment to

Danielle Delhomme, and make an award to her of her costs, disbursements and attorney's fees incurred in this matter. Minnesota Power never has had a sound legal and factual argument that the Minnesota Court has the jurisdiction or the legal authority to order Danielle Delhomme to turn over the engine, located in the State of Texas, to Minnesota Power (Exh. J, letter to Minnesota Power). Minnesota Power does not have a security interest in that engine, and Minnesota has no in rem jurisdiction over that engine.

This Memorandum is supported by Garnishee Danielle Delhomme's sworn Answers to Interrogatories which have been filed with the Court. It is also supported by the documents filed by her with those Answers to Interrogatories, and especially the documents showing shipment of the engine from the State of Minnesota on about April 15, 1999, before Minnesota Power ever obtained a security interest in any property of the Garnishee located in Minnesota.

It should also be noted that this matter was commenced in the Trial Court with the service on Garnishee Delhomme of a Garnishment Summons. It is believed by her that the Second Amended Complaint found in Appellant's Appendix at A-28 to A-32 was never served on her.

#### **NON-WAIVER OF JURISDICTIONAL DEFENSES**

Danielle Delhomme has answered this matter while reserving her jurisdictional defenses. Allete has consented to her retention of her jurisdictional defenses (Exh. C). She was not served with the process in this State. She was sent process in the State of Texas, where she resides. Moreover, the engine, which is the subject of this garnishment, is located in the State of Texas, and not in the State of Minnesota. No action has been commenced in Texas, Missouri, or in any other State apart from Minnesota.

**THE MINNESOTA SECURITY AGREEMENT  
DOES NOT COVER THIS ENGINE.**

A copy of the Minnesota Security Agreement was not attached to the documents filed by Minnesota Power. Paragraph 2 establishes the security interest of Minnesota Power. The date of the Agreement was December 28, 2000.

The security agreement cannot be expanded beyond its plain language. The security agreement only applies to the equipment of GEC which is located in Aurora, Minnesota. It does not apply generally to all equipment of GEC located anywhere in the State of Minnesota. Danielle Delhomme does not know how that particular language in the security agreement was arrived at. Perhaps it was a result of a mistake by Minnesota Power in drafting the agreement or determining where the assets of GEC were located. However, Danielle Delhomme was not involved in negotiating that language. She did not sign the security agreement.

Minnesota Power alleges that it was the intent of the agreement that it would apply to all of GEC's equipment, wherever located. However, that parol evidence is plainly contrary to the specific language of the security agreement. Moreover, the security agreement was executed long after the engine had left Minnesota and was located in the State of Missouri. It can hardly apply to GEC equipment which is located in a different State and never was subject to the Minnesota security agreement. Even if the security agreement were expanded to include all equipment of GEC located in the State of Minnesota, instead of just in Aurora, Minnesota, it still would not cover this engine which left the State of Minnesota long before the security agreement was executed.

Appellant in its memorandum on page 16 refers to a special meeting of the GEC of June 13, 2002. The notice or minutes of the meeting were not in its Appendix. It does not show that Delhomme attended the meeting, just that she was apparently sent notice of the meeting. Most telling, the excerpt cited by Appellant states that Minnesota Power, the IRAA and East Range Joint Powers Board have a “potential lien against the property.....” (emphasis added). It is true that Minnesota Power had a “potential lien” against the property. The lien did not take effect until the property resided in Aurora, Minnesota. This meeting was held after the Missouri UCC-1 filing. If GEC had agreed that the Missouri UCC-1 filing in 2001 created a present interest in the property, all of which then was in Ballwin, Missouri, then the lien would not have been “potential” on June 13, 2002. This citation confirms that the Missouri UCC-1 filing did not expand the Minnesota Power security interest.

Appellant asserts that Delhomme knew of the Missouri UCC-1 filing before she bought the engine in 2004 from CK Engineering of Ballwin, Missouri. That assertion is false and is unsupported. Minnesota Power has not shown any documents signed by Delhomme or which she received before that purchase by her, which would establish her knowledge. CK Engineering did not know about the Missouri filing and had no reason to know about it. See the CK Engineering documents and the Delhomme affidavit. Garnishee Delhomme did qualify as a buyer in the ordinary course of business for these purposes. Moreover, that issue is relevant only if Minnesota Power did have a valid security interest in the engine. Because it did not have a security interest in the engine, Delhomme does not have to show either lack of knowledge or that she was a buyer in the ordinary course of business. However, she has established both of these other grounds and Minnesota Power has put forth no contrary evidence, just unsupported assertions.

## JURISDICTION IN REM

Minnesota Power claims jurisdiction over this engine located in Texas. However, Minnesota does not have jurisdiction over this engine which is not located in Minnesota. Moreover, this is not a case where the Minnesota Courts had jurisdiction over an engine which was then taken out of the State fraudulently and in an attempt to defraud creditors.

Jurisdiction in rem is jurisdiction by the Court over property within the state, regardless of where the owner resides. **Bullock v. Bullock**, 181 Minn. 564, 233 N.W. 312 (1930). In order to exercise a state's power over the "res", it is required that the res be within the borders of the state, that the res be seized by proceedings, and that the owner have an opportunity to be heard. **Pennington v. Fourth Nat'l. Bank**, 243 U.S. 269 (1917). Because the property is not located in the State of Minnesota, the Court has no jurisdiction over it. The State Court can only exercise in rem or quasi in rem jurisdiction over property which is within its territory. **First Trust Co. of St. Paul v. Matheson**, 187 Minn. 468, 246 N.W. 1 (1932). Furthermore, it has been held under Minnesota law that a garnishee must be dismissed and there is no valid garnishment where the garnishment was on a non-resident who has no property located in Minnesota. **Jeans v. Mitchell**, 418 F.Supp. 730 (D. Minn. 1976). Danielle Delhomme is a Texas resident, not a Minnesota resident. The engine is in Texas, not in Minnesota. She has no other assets in Minnesota. Therefore, there is no valid garnishment against her in the Minnesota Courts. Plaintiff cites no authority for its contention that it is able to garnish property located outside the State of Minnesota, and this authority cited by Garnishee Danielle Delhomme confirms that Minnesota Power has no right to do so.

**MINNESOTA COURT LACKS IN REM  
JURISDICTION IN THIS MATTER**

It is significant that the engine now is in the State of Texas. When Minnesota Power filed its UCC Statement in Missouri, the engine was in Missouri. The Minnesota Court can hardly have jurisdiction over personal property which is not located in this State. If Minnesota Power wished to pursue possession of the engine, it should do so in Texas, where the engine has long been located. The engine was never located in Minnesota during the time when the suit was pending. Therefore, this certainly is not a case where someone leaves the State in which an action is pending, and not attempting to divest the Court of jurisdiction. Minnesota does not have jurisdiction over this Texas engine.

**THE MISSOURI FINANCING STATEMENT DID NOT  
INCREASE THE SCOPE OF THE COLLATERAL**

The rights and obligations of the parties in secured transactions are governed by the UCC. See generally Article 9. The Minnesota Code provides for a notice of filing procedure whereby only a minimum of information is required in the filed Financing Statement and the actual security interest is governed by the Security Agreement. **James Talcott, Inc. vs. Franklin Nat'l Bank**, 292 Minn. 277, 194 N.W.2d 775 (1972). The description of the collateral on the UCC Financing Statement, the UCC-1, does not function to identify the collateral and define the property which the creditor may claim, but it rather warns other subsequent creditors of the prior interest so that they can determine the nature of the security interest. **Production Credit Assn. of West Cent. Minnesota v. Bartos**, 430 N.W.2d 238 (Minn. 1988); **Thorpe Commercial Corp. v. North Gate Industries, Inc.**, 654 F.2d 1245 (8th Cir. 1981). Consequently, the Missouri UCC-1 does not create a security interest, but merely places creditors on notice that Minnesota

Power claimed a security in property which was more particularly described in its particular Security Agreement. It should be noted again that Minnesota Power has introduced no admissible evidence that GEC intended to expand the scope of the Security Agreement through the Missouri UCC-1. Indeed, the GEC meeting notes mentioned by Minnesota Power of June 13, 2002 indicate that GEC did not intend that Minnesota Power had a present security interest in the Missouri equipment. As the Trial Court appropriately noted in its Memorandum, if the parties had intended to amend the Security Agreement, they could have readily done so. They did not do so. The Security Agreement quite specifically covered only equipment located in Aurora, Minnesota. The prototype engine was never in Aurora, and had permanently left the State of Minnesota long before the Security Agreement was executed.

Appellant cites cases to the effect that writings describe the security interest of a party, and that more than one writing can define the security interest. However, none of the cases cited by Appellant deal with the more specific cases cited by the Trial Court and by Respondent to the effect that the UCC-1 does not define the security interest, but merely puts third parties on notice of a possible security interest, which interest is then defined by the security agreement itself. The Appellant cites **In re Nickerson & Nickerson, Inc.**, 452 F.2d 56, (C.A.8, 1971). However, in that case the parties executed a generic security agreement and at that time attached separate financing statements for each of twelve states, with the separate financing agreements not changing the scope of the security agreement to include other goods, but repeating the same scope of the goods and stating that it applied in each specific state. The financing statements therefore were held to have been incorporated into the security agreement since they were stapled to the security agreement and were created at the same time. That is very different from the present

case, and the other cases cited as authority by Respondent, where there was a later filed financing statement which differed from the security agreement. Therefore, Nickerson, supra, supports the decision of the Trial Court.

Missouri has also adopted the Uniform Commercial Code. Missouri Statute §400.9-504 appears to be identical to Minnesota Statute §336.9-504. It appears that Missouri law is the same, that the UCC-1 does not create a security interest, but is simply notice of a claim of a security interest. Minnesota Power certainly has not shown that Missouri law provides otherwise.

Texas law is in accord with Minnesota law.

Missouri law clearly establishes that it is the security agreement, and not the financing statement, that creates the scope of the security interest.

Centerra Bank National Association v. Missouri Farmers Association, Inc., 715 S.W.2d 336 (MO 1986), specifically holds that, under the UCC, it is the Security Agreement and not the Financing Statement that defines the scope of a security agreement, and that the financing statement cannot enlarge the scope of the security agreement. This was also confirmed in Polk County Bank v. Graven, 745 S.W.2d 793 (MO 1988). In that case, it was similarly held that “the purpose of a financing statement is simply to give notice to the world that designated parties have entered into a security transaction covering described collateral; the details must be learned from the parties -- and if after acquired property is to be included as collateral, the security agreement is where that matter shall be provided for -- the debtor’s intent to create a security interest must be ascertained and adjudged by the language of the security agreement, not the financing statement.” This was confirmed yet again in Central Production Credit Association v. Hopkins, 810 S.W.2d 108 (MO 1991). It also held that the security interest is determined by

the security agreement, not the financing statement. It was also later confirmed that you have to look at the security agreement in order to determine the scope of that security agreement, not the financing statement. **MFA Incorporated v. Pointer**, 869 S.W.2d 109 (MO 1993).

It, therefore, is clear that under the UCC as interpreted by the Missouri Courts, as well, the Financing Statement does not create a security interest, but simply puts creditors on notice of a possible security interest. The security interest itself must be determined by reviewing the Security Agreement itself.

The property presently is in Texas. Texas similarly has adopted the UCC. Minnesota, of course, operates under the UCC, as well. It appears that the revised UCC was adopted by Minnesota, Missouri and Texas and that the respective statutes are identical in the three States. The Texas statutes dealing with the UCC fall under Chapter 9. Minnesota Statutes §335.9-320, and Texas Statute §9.320(a) provide that a buyer in the course of business takes free of a security interest. Minnesota Statute §336.9-102(39) and Texas Statute §9.102(39) define “financing statement.” Texas Statute §9.301 defines “perfection” and determines that when collateral is located in a jurisdiction, the local law of that jurisdiction controls perfection.

The same rule is found in Minnesota Statute §336.9-301, providing that Texas law would apply here because the property is located in the State of Texas. Minnesota Statute §336.9-307 and Texas Statute §9.307 define the “location of the debtor.” Minnesota Statute §336.9-310(a) and Texas Statute §9.310(a) state that a financing statement must be filed to perfect its security interest. Nothing has been filed in Texas.

Minnesota Statute §336.9-301 provides as follows:

336.9-301 Law governing perfection and priority of security interests.

Except as otherwise provided in sections 336.9-303 through 336.9-306, the following rules determine the law governing perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral:

(1) Except as otherwise provided in this section, while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral.

(2) While collateral is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a possessory security interest in that collateral.

(3) Except as otherwise provided in paragraph (4), while tangible negotiable documents, goods, instruments, money, or tangible chattel paper is located in a jurisdiction, the local law of that jurisdiction governs:

(A) perfection of a security interest in the goods by filing a fixture filing;

(B) perfection of a security interest in timber to be cut; and

© the effect of perfection or nonperfection and the priority of a nonpossessory security interest in the collateral.

(4) The local law of the jurisdiction in which the wellhead or minehead is located governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in as-extracted collateral.

HIST: 2000 c 399 art 1 s 21; 2004 c 162 art 5 s 22

Consequently, this Minnesota Statute provides that Texas law presently governs, since that is where the engine is. At the time that the UCC-1 filing was made in Missouri, Missouri law governed since the engine was in Missouri. Regardless, the law of all three states is the same regarding the scope of the security interest and the effect of the UCC-1 filing in Missouri.

Texas case law confirms that it is the security agreement which governs, and not the financing statement. See **Crow Southland Joint Venture v. North Fort Worth Bank**, 838 S.W.2d 720 (TX 1992). That case confirms that the financing statement merely puts third parties

on notice. Once put on notice, a third party must make inquiry and discover the complete nature of the agreement between the debtor and creditor. That confirms that the financing statement description of the collateral does not define the scope of the security interest.

Indeed, all three States have adopted the UCC, and it appears that the statutes of all three States consequently are identical as relevant to the security interest and financing statement issues in the present case.

Consequently, Minnesota law does not apply to the validity of the Financing Statement to create a security interest. The property now is in Texas. Texas law applies that the Statement does not enlarge the scope of the Security Agreement. The engine was in Missouri. Missouri law also provides that the Financing Statement does not enlarge the scope of the Security Agreement. The engine originated in Minnesota before there was any security interest. However, even if Minnesota did apply, Minnesota similarly provides that the Financing Statement does not enlarge the scope of the Security Agreement, but simply puts third parties on notice that there should be further investigation done to determine the scope of the security interest. Consequently, under all permutations of choice of law, Minnesota Power does not have a security interest in this engine. The 8th Circuit has held in citing the law of several States, that “the financing statement is merely evidence of the creation of a security interest, not the agreement itself.” Shelton v. Erwin 472 F.2d 118 (8th Cir. 1973), citing Virginia, New Jersey and Arkansas cases to define elements of the Financing Statement in all instances. If the Court desires to see copies of the Missouri and Texas UCC sections to confirm that their language is in conformance with the Minnesota UCC, copies will gladly be provided by Garnishee Delhomme.

As noted earlier, Minnesota Power never did have a proper legal basis for this action. This analysis of the law confirms this. Danielle Delhomme has had to spend considerable funds quite unnecessarily to defend this matter after she earlier gave notice to Minnesota Power that it did not have a valid claim. She, therefore, should be awarded her attorney's fees and costs incurred in defending this matter.

**GARNISHEE DELHOMME'S REQUEST FOR  
AN AWARD OF ATTORNEY'S FEES**

The Court or Appeals should grant Garnishee Delhomme an award of her attorneys fees on this appeal.

Garnishee Danielle Delhomme will request an award of attorney's fees in this matter. She is aware of Minn. Stat. §549.211 which sets the standards for an award of attorney's fees. She is aware that the statute requires that the request for an award of attorney's fees must be made pursuant to a separate Motion. Therefore, should Summary Judgment be granted to her in this matter, she can make a separate Motion at a later time for an award of attorney's fees pursuant to Minn. Stat. §549.211. Consequently, Garnishee Delhomme will not deal in detail with the grounds for an award of attorney's fees at this point. However, it should be noted that the claims of Minnesota Power are not warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of a new law. The law is quite clear. The facts are quite clear, and Minnesota Power has neither evidentiary nor legal support for its claims against Garnishee Danielle Delhomme in this matter. These matters have involved considerable expense for her, which should be quite unnecessary.

**CONCLUSION**

Garnishee Danielle Delhomme submits that the Court of Appeals should dismiss Plaintiff's appeal and affirm the Trial Court and award Respondent her attorney's fees, costs and disbursements. There is no genuine issue of material fact. Garnishee is entitled to judgment as a matter of law. The Minnesota Power Security Agreement did not apply to the prototype engine which Delhomme purchased and which she has in her possession in the State of Texas.

DATED this 22nd day of August, 2006.



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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).