

**In the Supreme Court
State Of North Dakota**

July 20, 2018

Supreme Court No. 20180013

Grand Forks County Case No. 18-2017-CV-00020

David Knapp,

Petitioner and Appellant,

v.

Commissioner of Minnesota
Department of Revenue, *et al.*,

Respondent and Appellee

APPEAL FROM FINAL JUDGMENT OF
THE DISTRICT COURT OF GRAND FORKS COUNTY,
NORTH DAKOTA, NORTHEAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE LOLITA HARTL ROMANICK, PRESIDING

REPLY BRIEF OF PETITIONER AND APPELLANT
DAVID KNAPP

DEWAYNE JOHNSTON (ND ID # 05763)
ATTORNEY FOR APPELLANT
JOHNSTON LAW OFFICE
221 SOUTH 4TH STREET
GRAND FORKS, ND 58201
Ph. (701) 775-0082
dewayne@wedefendyou.net

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

LAW AND ARGUMENT.....¶1

 I. The Nature of the Proceeding.....¶2

 II. Jurisdictional Authority.....¶7

 III. The Writ of Prohibition is
 Appropriate.....¶15

CONCLUSION.....¶22

TABLE OF AUTHORITIES

CASES

American Standard & Life Accident Ins. Co. v. Speros, 494 N.W.2d 599, 605-6 (1993) Footnote 1

Black Gold OilField Servs., LLC v. City of Williston, 2016 ND 30, ¶ 14, 875 N.W.2d 515, 522. ¶19

Chicago, R.I. & P.R. Co. v. Sturm, 174 U.S. 710, 717-718 (1899)..... ¶12, 14

Darling & Co. v. Burchard, 69 N.D. 212, 222 (N.D. 1939)..... ¶6

Givens v. Del. Harness of Racing Comm’n, No. N10M-10-100, LEXIS 518 at *17 .. ¶16

Granite Rock Co. v. Int’l Bhd. Of Teamsters, 561 U.S. 287, 318 (2010) ¶21

Hanson v. Denckla, 357 U.S. 235, 246 78 S. Ct. 1228 (1958) ¶8

In re Estate Coleman, 98 N.W.2d 784, 788 (N.D. 1959) ¶8

Mor-Gran-Sou Elec. Coop v. Montana-Dakota Util. Co. 160 N.W. 2d 521, 523 (N.D. 1968). ¶4, 16

Nagel v. Western, 865 N.W.2d 325, 332 (Minn. Ct. App. 2015)..... ¶14

National Bellas Hess, Inc. v. Departemnet of Revenue of Ill., 386 U.S. 753 (1967) ¶20

People ex rel. Town Court of Cicero v. Harrington, 171 N.E.2d 647, 648 (Ill. 1961) .. ¶5

Quill Corp v. North Dakota, 504, U.S. 298 (1992) ¶20

Safe Deposits & Trust Co. v. Virginia 280 U.S. 83, 92 (1929) ¶13

Schneider v. Ewing, 310 N.W.2d 581, 586 (N.D. 1981)..... ¶18

Schneider v. Seaworth, 376 N.W.2d 49, 51 (N.D. 1985). ¶17, 19

Shaffer v. Heitner, 433 U.S. 186, 210 (1977) ¶9, 10

South Dakota v. Wayfair Inc., 201 L. Ed. 2d 403 (2018). ¶20

State by Heitkamp v. Quill Corp., 470 N.W.2d 203, 212 (N.D. 1991)..... ¶20

State v. Hanson, 252 N.W.2d 872, 874 (N.D. 1977). ¶18

Wentz v. One White Diesel Three-Ton Tractor, 110 N.W.2d 178 (N.D. 1961)..... ¶3

Wilson v. St Louis & S.F.R. Co., 108 Mo. 588, 597 (Mo. 1891)..... ¶10

STATUTES

N.D.C.C. § 32-34-10 ¶19

N.D.C.C. § 47-07-01 Footnote 1

[1] LAW AND ARGUMENT

[2] **I. The Nature of the Proceeding**

[3] The critical issue relative to *in rem* jurisdiction is that the *res* in dispute is a North Dakota¹ Individual Retirement Account (IRA) which is both the **res and the Respondent**. *Wentz v. One White Diesel Three-Ton Tractor*, 110 N.W.2d 178 (N.D. 1961). The claimants to the *res*² are David Knapp (Knapp) a North Dakota resident and listed Petitioner who owns the IRA. Knapp requested the Writ of Prohibition to **stop the act of illegal levy before** the actions of claimant and listed Respondent, the Commissioner of the Minnesota Department of Revenue (MN_Rev), can act on its improperly issued notice of levy and intent to perfect the illegal levy attempted in the absence of any defensible legal process. Edward Jones is the custodian of the IRA and a listed Respondent located in Missouri.

[4] MN_Rev mistakenly concludes the writ of prohibition is improper as it requires a finding of personal jurisdiction over the Commissioner³. (Appellee Br. ¶ 27). MN_Rev misstates the law as the writ does not operate within the confines of a traditional lawsuit. The writ of prohibition serves to stop an action before it has taken place, “not the undoing of something already done.” *Mor-Gran-Sou Elec. Coop. v. Montana-Dakota Util. Co.*, 160 N.W. 2d 521,523 (N.D. 1968). The writ in

¹ Individual Retirement Accounts may not be garnished in a state where the owner of the IRA is not domiciled because the IRA account is property the situs of which is the state in which the owner is domiciled. *Macatawa Bank*, 822 N.W.2d XXX, 238 (court and date); N.D.C.C. § 47-07-01 supported by *American Standard & Life Accident Ins. Co. v. Speros*, 494 N.W.2d 599, 605-6 (1993).

² Mr. Knapp’s IRA account #XXX-XX108-1-6.

³ Alternatively, Knapp has established that the north Dakota District Court has Jurisdiction to issue the Writ affecting MN_Rev claims to the IRA.

this case is stopping the illegal taking of funds from Knapp's IRA. The preliminary writ properly stopped the removal of Knapp's property. [App. 33, Doc. #011]. Thus the Writ of Prohibition is the legally appropriate vehicle given the facts and circumstances.

[5] The Grand Forks District Court as the "Superior Court" in these proceeding can exercise its power in North Dakota over the inferior MN State Agency to "prevent inferior tribunals or persons from exercising a jurisdiction with which they have not been vested by law." *People ex rel. Town Court of Cicero v. Harrington*, 171 N.E.2d 647, 648 (Ill. 1961).

[6] In light of settled jurisprudence Knapp is not required to seek legal remedies in a foreign jurisdiction prior to moving for the Writ in North Dakota. The Petitioner argued this precise point at the hearing on August 10, 2017. Transcript of the August 10, 2017 hearing (pg. 10, ln. 4-10). The Supreme Court of North Dakota *will not require a North Dakota citizen to subject themselves to a foreign tribunal:*

... besides the hardships and inconvenience that would be caused by denying all other remedy, *it is familiar doctrine that the courts of a state will never compel their own citizens to resort to a foreign tribunal for relief which they themselves can accord*" (quoting 2 Black, Judgments, 2d ed. P. 1337).

Darling & Co. v. Burchard, 69 N.D. 212, 222 (N.D. 1939) (emphasis added).

The writ of prohibition is Knapp's legally appropriate and only remedy in North Dakota.

[7] **II. Jurisdictional authority.**

[8] *In rem* jurisdiction applies to the IRA account also referred to as the *res*. “*In rem* jurisdiction [is] founded on physical power. The basis of [*in rem*] jurisdiction is the presence of the subject property within the territorial jurisdiction of the forum State.” *Hanson v. Denckla*, 357 U.S. 235, 246 78 S. Ct. 1228 (1958). “Tangible property poses no problem for the application of this rule [*in rem*], but the situs of intangibles is often a matter of controversy”. *Id.* 246-47. The Supreme Court of North Dakota adamantly holds “generally intangible personal property....has its situs at the domicile of the owner.” *In re Estate Coleman*, 98 N.W.2d 784, 788 (N.D. 1959). A Minnesota State Agency is forbidden from lodging a levy extinguishing rights in property when it has no jurisdiction to do so. *Denckla*, 357 U.S. 235 at 250. MN Rev has cited to no judicial authority granting them the power to seize the property of Knapp in North Dakota.

[9] It is axiomatic that:

While an individual “should not be able to avoid payment of his obligations by the expedient of removing his assets to a place where he is not subject to an *in personam* suit” (quoting restatement (second) of Conflict of laws § 66 cmt. 1 (1971)), **the State where property is located holds jurisdiction over that property.**

Shaffer v. Heitner, 433 U.S. 186, 210 (1977). (emphasis added)

There is no question on this record that Knapp has been a North Dakota resident for decades. [App. 13, Doc. #003]. Additionally, Knapp has never done business in Minnesota. [App. 9, Doc. #001]. Knapp has also never tried to remove his IRA

from another state simply to reap the benefits of North Dakota law. The IRA situs is North Dakota and so sets the controlling legal jurisdiction.

[10] The Appellees fail to refute the *in rem* jurisdiction of North Dakota over the IRA and concede that there is no legal authority stating “*in rem* jurisdiction alone will not support the issuance of a writ of prohibition forbidding MN_Rev from levying against property in North Dakota”. (Appellees Br. ¶ 27). The Supreme Court of the United States unequivocally states that a foreign state cannot exercise authority over property where it lacks jurisdiction. *Shaffer v. Heitner*, 433 U.S. 186, 210 (1977). The Supreme Court of Missouri also explains the following:

The tribunals of one state have no jurisdiction over persons of other states, unless found within their territorial limits; they cannot extend their process into other states, any attempt of the kind would be treated in every other forum as an act of usurpation, without any binding efficacy.

Wilson v. St Louis & S.F.R. Co., 108 Mo. 588, 597 (Mo. 1891).

[11] A letter written to MN_Rev by Mike Juntunen explained:

[the levy] even if valid seeks to enforce a non-judicial assessment of North Dakota Assets and North Dakota residents. I am not aware of any North Dakota – Minnesota compact which would allow levying on North Dakota property without a judicial foreign recorded judgement.

[App. 20-21, Doc. #004.]

[12] MN_Rev fails to cite specific authority granting it the power to seize assets outside of its jurisdiction. It is impermissible for the State of Minnesota to implicate its state administrative law against a non-resident company in relation to

property in the State of North Dakota owned by a resident of the State of North Dakota absent a judicial determination. *See Chicago, R.I. & P.R. Co. v. Sturm*, 174 U.S. 710, 717-718 (1899).

[13] The Supreme Court of the United States has defined a taxing agencies authority over non-residents. In *Safe Deposits & Trust Co. v. Virginia*, the Court held that Virginia could not tax securities held in Maryland. 280 U.S. 83, 92 (1929). While Minnesota is not taxing the IRA it is seeking to extend its taxing authority without any judicial process to seize the IRA as payment for a tax debt alleged to be due in Minnesota – not in North Dakota.

[14] MN_Rev in making a claim against the *res* or IRA must do so in North Dakota.

The decisional law in Minnesota requires the same:

... the essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a nonresident to the defeat of his creditors. To do it, you must go to the domicile of his debtor [(the garnishee)], and can only do it under the laws and procedure in force there. (quoting *Chicago R. I. & P. R. Co. v. Sturm*, 174 U.S. 710, 715-716 (1899)).

Nagel v. Western, 865 N.W.2d 325, 332 (Minn. Ct. App. 2015).

The record below is clear in that Knapp has never subjected himself to the jurisdiction of Minnesota, and persuasively argues that this dispute should be decided by North Dakota law. [App. 14, Doc. #003].

[15] **III. The Writ of Prohibition is Appropriate**

[16] MN_Rev's attempt to exercise its authority beyond its jurisdictional boundary makes a writ of prohibition is necessary. The North Dakota Supreme Court holds:

the writ [of prohibition] is not a writ of right. It is an extraordinary writ, to be issued with caution, in cases of extreme necessity, and is available only when the inferior court, body or tribunal is about to act without or in excess of jurisdiction.

Mor-Gran-Sou Elec. Coop v. Montana-Dakota Util. Co., 160 N.W. 2d 521, 523 (N.D. 1968) (emphasis added).

Furthermore,

the writ of prohibition may be issued where the inferior tribunal has acted to violate an individual's fundamental constitutional rights, thus stripping itself of jurisdiction.

Givens v. Del. Harness of Racing Comm'n, No. N10M-10-100, LEXIS 518 at *17 slip opinion. (Del. Super. Ct. 2011). (emphasis added)

[17] Knapp's case can be classified as one of extreme necessity, requiring the issuance of a writ of prohibition,

[the writ] is an appropriate method of attacking the constitutionality of a statute and it can provide a convenient way of reaching the constitutional question without the expense and delay of a full trial."

Schneider v. Seaworth, 376 N.W.2d 49, 51 (N.D. 1985).

[18] A writ is issued in cases such as this where, there is an inadequate alternative remedy. *Schneider v. Ewing*, 310 N.W.2d 581, 586 (N.D. 1981). The writ of prohibition is the appropriate remedy when a tax commission exceeds its jurisdictional authority, as was the case here. *State v. Hanson*, 252 N.W.2d 872, 874 (N.D. 1977).

[19] A Court has wide discretion on whether to grant a writ of prohibition and it should be used “only in cases where there is no adequate remedy by appeal, or otherwise, **or where other equitable principles justify the use of the extraordinary writ of prohibition**” (emphasis add). *Schneider*, 376 N.W. at 51. The trial court abuses “its discretion if it acts in an unreasonable, arbitrary or unconscionable manner...” *Black Gold OilField Servs., LLC v. City of Williston*, 2016 ND 30, ¶ 14, 875 N.W.2d 515, 522. The District Court abused its discretion by dissolving the preliminary writ and denying a hearing on the petition for a permanent writ of prohibition. N.D.C.C. § 32-34-10 grants Knapp the right to be heard. The denial of a hearing and subsequent dissolution of the preliminary writ qualifies the abuse of discretion as “unreasonable, arbitrary and unconscionable.” *Black Gold OilField Servs.*, 2016 ND 30 at ¶ 14. Further, Knapp has the right to have his North Dakota exemptions heard in his state of domicile.

[20] Alternatively, Knapp has met his burden of providing minimum contacts and the Commissioner cannot say with a straight face that it would have no idea it could be a respondent in a court sitting in the State of North Dakota. This Court’s analysis of personal jurisdiction is modernizing the minimum contacts and physical presence analysis once set in *Quill Corp v. North Dakota*, 504, U.S. 298 (1992) and *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753 (1967) as the recent *South Dakota v. Wayfair Inc.*, 201 L. Ed. 2d 403 (2018) case reaffirms North Dakota’s original jurisprudence in *State by Heitkamp v. Quill Corp.*, 470 N.W.2d 203. Parties, including States who reach out beyond their

physical boundaries and create continuing relationships and obligations in another States are subject to regulation and sanction in the other State for the consequences of their activities. *State by Heitkamp v. Quill Corp.*, 470 N.W.2d 203, 212 (N.D. 1991)(Writ of certiorari granted 502 U.S. 808) (rev'd on other grounds). MN Rev has created such relationships with North Dakota residents and the State of North Dakota itself.

[21] MN_Rev claims that Knapp has abandoned any arguments on jurisdiction because they were not briefed. (Appellee Br. ¶22). The MN_Rev is mistaken in its interpretation of the law,

while “non-jurisdictional arguments not raised at that time may be deemed waived” jurisdictional arguments are never waived. (emphasis added).

Granite Rock Co. v. Int'l Bhd. Of Teamsters, 561 U.S. 287, 318 (2010) (Sotomayor, J. dissenting).

It is alleged by the Commissioner that personal jurisdiction lies at the crux of the argument and if that contention becomes dispositive the arguments related to that issue need to be heard. *Id.*

Conclusion

[22] For the reasons set forth above the Appellant respectfully asks this Court reverse the lower Court's ruling.

Dated this 20th day of July, 2018.

DeWayne Johnston is hereby introducing enrolled law student, Olivia Jureidini, to this North Dakota Supreme Court while certifying under R. Ltd. Practice of Law by Law Students, Rule III(D). and Rule VI. that he is a member of the North Dakota Bar admitted to practice law in North Dakota and is approved as a supervising attorney by the Dean of the University of North Dakota Law School for the Limited Practice of Law by Law Students Program and further certifies that he assumes the personal professional responsibility for the student's work on this Petitioner and Appellant's Reply Brief.

/S/ DeWayne Johnston
DeWayne Johnston (ND 5763)

JOHNSTON LAW

/S/ OLIVIA JUREIDINI
OLIVIA JUREIDINI
THIRD YEAR LIMITED PRACTICE
APPEARANCE

/S/ DEWAYNE JOHNSTON
DEWAYNE JOHNSTON
(ND ID #5763)
221 South 4th Street
Grand Forks, ND 58201
Telephone: (701) 775-0082
Fax: (701) 775-2230
dewayne@wedefendyou.net
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on July 20th, 2018, the following documents:

1. APPELLANT'S REPLY BRIEF

was filed electronically with the Clerk of Court through ELECTRONIC MAIL, and a copy of the above listed documents were mailed electronically to the following:

Madison, Thomas	Thomas.Madison@ag.state.mn.us
Monte Rogneby	mrogneby@VogelLaw.com
Jeffrey Strom	JStrom@OhnstadLaw.com

Dated this 20th day of July, 2018.

/s/ DeWayne Johnston
DeWayne A. Johnston (ND#5763)
dewayne@wedefendyou.net
Attorney at Law
221 South Fourth Street
Grand Forks, ND 58201
P: (701) 775-0082
F: (701) 775-2230
Counsel for Appellant