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In the

Supreme Court of the United States

1979 OCT 10 PM 3 32

RANDAL RUSH, ET AL.,

APPELLANTS,

V.

JEFFREY D. SAVCHUK,

APPELLEE.

No. 78-952

Washington, D. C.  
October 3, 1979

Pages 1 thru 39

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IN THE SUPREME COURT OF THE UNITED STATES

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RANDAL RUSH, ET AL.,

Appellants,

v.

JEFFREY D. SAVCHUK,

Appellee.  
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No. 78-952

Washington, D. C.,

Wednesday, October 3, 1979

The above-entitled matter came on for oral argument  
at 11:03 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States  
WILLIAM J. BRENNAN, JR., Associate Justice  
POTTER STEWART, Associate Justice  
BYRON R. WHITE, Associate Justice  
THURGOOD MARSHALL, Associate Justice  
HARRY A. BLACKMUN, Associate Justice  
LEWIS F. POWELL, JR., Associate Justice  
WILLIAM H. REHNQUIST, Associate Justice  
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

OSCAR C. ADAMSON, II, ESQ., Meagher, Geer, Markhan,  
Anderson, Adamson, Flaskamp & Brennan, 2250 IDS  
Center, 80 South Eighth Street, Minneapolis,  
Minnesota 55402; on behalf of the Appellants

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Borkon & Ramstead, Ltd., 485 Pillsbury Building,  
608 Second Avenue South, Minneapolis, Minnesota  
55402; on behalf of the Appellee

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in 78-952, Rush v. Savchuk.

Mr. Adamson, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF OSCAR C. ADAMSON, II, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. ADAMSON: Mr. Chief Justice, and may it please the Court:

This case comes before this Court on appeal from a judgment of the Supreme Court of the State of Minnesota. The issue presented by this appeal succinctly stated is whether or not the Minnesota courts may exercise constitutionally permissible quasi in rem jurisdiction over a non-resident tortfeasor who has absolutely no minimum contacts whatsoever with the State of Minnesota by permitting the plaintiff to garnish the defendant's liability insurance policy on the basis that the defendant's insurer does business within the State of Minnesota. That is the issue presented by this appeal.

The operative facts are very simple but they provide I think the necessary background. Back in 1972, Mr. Rush and Mr. Savchuk were involved in an automobile accident in Indiana. At that time, both Mr. Rush and Mr. Savchuk were residents and citizens of the State of Indiana. About a year

and a half later Mr. Savchuk decides to emigrate to Minnesota and about a year after that he commenced this lawsuit against Mr. Rush by serving a garnishment summons on State Farm, Mr. Rush's liability insurer in the State of Minnesota. I might say that Mr. Rush's liability insurers, State Farm, is his liability insurer by reason of a contract of insurance which was written and issued in the State of Indiana. There was no point of contact with any of these activities at all until Mr. Savchuk's going to Minnesota and then commencing this action.

As soon as this was done, Rush and State Farm immediately challenged the jurisdictional basis of the garnishment quasi in rem jurisdiction by appropriate motion and the Minnesota District Court and the Minnesota Supreme Court found no due process problems whatsoever with the procedure.

We then appealed to this Court and this Court vacated the judgment of the Minnesota Supreme Court and remanded it back to the Minnesota Supreme Court with directions to reconsider their prior determination in light of *Shaffer v. Heitner*. The Minnesota Supreme Court duly reconsidered the matter and found no problem whatsoever with the quasi in rem jurisdiction in this case and felt that *Shaffer v. Heitner* did not change a thing. This second appeal followed and this Court noted probable jurisdiction.

Now, before talking about *Shaffer* a little bit, I

would like to express to the Court my understanding of the reasoning followed by the Minnesota Supreme Court in ignoring Shaffer.

QUESTION: By what?

MR. ADAMSON: By ignoring, I say. Maybe that is an inappropriate word -- distinguishing it.

QUESTION: Misunderstanding.

MR. ADAMSON: I would like to use that word, yes, sir.

First of all -- and I think this is rather interesting -- the Minnesota Supreme Court, after talking about the facts in Shaffer, said that it considered the decision unclear. It also said that Minnesota's interest in facilitating recoveries for resident plaintiffs -- notice that language, facilitating recoveries for resident plaintiffs -- not only requires a local forum in Minnesota but may override traditional choice of law analysis.

Now, it may be there that the Minnesota Supreme Court was mixing jurisdiction and choice of law which we all have so much trouble with, but at any rate that is what it said.

The Minnesota Supreme Court went on to say that Minnesota possesses sufficient contacts -- without identifying them -- and that due process is not violated in this quasi in rem action because of three things, and here they are. One,

notice was given to the defendant, it sure was. There is no doubt about that. Two, the defendant cannot be held liable for more than his policy limits in Minnesota pursuant to this quasi in rem proceeding. And three, the procedure is available only to Minnesota residents and it is not available to non-residents, it is available to only Minnesota residents.

Now, these are the three bases which the Minnesota Supreme Court enunciated as providing the due process basis for this quasi in rem proceeding that I have described.

QUESTION: Your brief indicates that this plaintiff has now moved out of the State of Minnesota.

MR. ADAMSON: Yes, he has emigrated again to Pennsylvania so that means I think he has lived in three states in six years. Probably that isn't material, but it does illustrate how fluid our population is when we are trying to arrive at a constitutional nexus based upon the transitory residence of a plaintiff in a given state at a given time.

Now, that isn't all the Minnesota Supreme Court did. I think it added the frosting on the cake really because after having reasoned all of this and had come to the conclusion that due process was satisfied, it really gave the coup de grace to Mr. Rush. It said that in this situation where Minnesota requires jurisdiction of an out-of-state accident over a non-resident and so forth, it will apply Minnesota substantive law -- "we are not a choice of law."

They found that not only do we have jurisdiction but the choice of law decision we are going to make, we are going to apply Minnesota law to this accident because it is more favorable to the plaintiff.

The consequences in this particular case is, Your Honors, that by so doing the Minnesota Supreme Court would strip from Mr. Rush what is basically an absolute defense, the guest statute of Indiana which was certainly applicable to him and Mr. Savchuk at the time of the accident, and also would substitute a doctrine of comparative negligence for contributory negligence and also would prevent this action from being dismissed by reason of the running of the statute of limitation.

All of these things Mr. Savchuk got by being able to invoke the quasi in rem jurisdiction of the Minnesota Supreme Court. Now --

QUESTION: You had a divided vote on the court.

MR. ADAMSON: I beg your pardon, sir?

QUESTION: You had a divided vote on the court.

MR. ADAMSON: Yes, the vote was 6-3, Mr. Justice Otis dissenting, and Madam Justice Wahl writing the majority opinion.

QUESTION: A hundred years ago, Minnesota didn't have a guest statute, and am I correct in assuming that it still doesn't have one?

MR. ADAMSON: No, sir, Minnesota has never had a guest statute. Minnesota adhors guest statutes, the judiciary does.

QUESTION: And you also do not have a direct action statute, as Arkansas does?

MR. ADAMSON: No, we do not have a direct action statute. I believe only two or three states, Louisiana and Wisconsin do, but Minnesota does not.

Now, of course, in the last analysis, *Shaffer v. Heitner* is going to mean what this Court tell us what it means, but our understanding of the teaching of *Shaffer v. Heitner* is very simple and very, very easy to comprehend. We do not agree with the Minnesota Supreme Court about the lack of clarity of the opinion.

It seems to me that the heart of *Shaffer* comes right out and says that the standard for determining whether the exercise of quasi in rem jurisdiction is consistent with due process is the minimum contact standard enunciated in *International Shoe*. And you look to *International Shoe* and you find out what are those minimal contacts. They are the relationship among the defendant, the forum and the litigation.

If you applied that yardstick to the instant case, you would find two things immediately, and there can't be any argument about it, none whatsoever. There is absolutely no contact whatsoever between defendant Rush over in Indiana and

the state of Minnesota, none. And there is absolutely no to my understanding relationship between the litigation and the state of Minnesota. The only state in the union that has any meaningful contact with this litigation would be the state of Indiana, where everything happened, where Mr. Savchuk was allegedly injured and where he was made well.

Thus, if you read Shaffer as I have and read International Shoe as I have just done, that is the end of it, there is no due process here on this quasi in rem basis.

Now, the Minnesota court took a somewhat different view about these things. The Minnesota court first of all completely ignored the lack of relationship between the forum in the state of Minnesota and the litigation. It snubbed that matter completely. Instead of that, it placed its primary emphasis not on the defendant but upon the residency of the plaintiff.

Now, it may well be that the state of Minnesota has an understandably strong public policy as enunciated by its courts to provide its residents with a forum, but that policy does not establish due process. It almost begs the question. Assuming such policy, you nevertheless must ask the question does effecting that policy in this particular matter violate or not violate the due process clause.

QUESTION: Mr. Adamson, I assume -- maybe I should not -- that your principal client is the insurance company

rather than the individual and there could be a conflict I suppose here. What I wanted to know though is assume that the individual involved here felt as a matter of principle that he had no contact with Minnesota and he didn't care what the Minnesota judge said, he just wasn't going to go up there and testify. He lives in Indiana, he wanted to stay home. Could the Minnesota judge hold him in contempt for refusing to respond to a notice to appear and testify in court?

MR. ADAMSON: Mr. Justice Stevens, I would like to answer that question in two parts. I do consider Mr. Rush morally and ethically my client as well as the insurance company.

QUESTION: I am not suggesting an ethical problem, but there is an economic --

MR. ADAMSON: The economic problem -- this is what would transpire if jurisdiction were allowed in this case and Mr. Rush would refuse to cooperate in his defense. I think that is the way we would put it and so forth, and a default judgment would be entered against him.

QUESTION: For the policy limit?

MR. ADAMSON: Yes.

QUESTION: But he could not be held in contempt of court?

MR. ADAMSON: No, sir.

QUESTION: So really it is in the nature of a suit

against the insurance company on the policy.

MR. ADAMSON: But if Mr. Rush were to avail himself of that privilege of not cooperating with his insurance company and what have you --

QUESTION: And the insurance company could sue him.

MR. ADAMSON: -- there would be quite a problem about enforcing that judgment against the insurance company because of his breach of the insurance contract of cooperation.

QUESTION: Well, suppose at the outset of the litigation he said I am simply not going to go up to Minnesota and if you want to terminate your coverage, go ahead and terminate it, and they terminate the coverage. Then there is no longer a basis for a quasi in rem jurisdiction, is there?

MR. ADAMSON: If I understand your hypothetical, of course, a termination of coverage as of the time Mr. Rush told State Farm he didn't want any more to do with it would not affect the period of time when there was coverage at which time the accident had happened.

QUESTION: But would it not extinguish their duty to defend?

MR. ADAMSON: No, sir.

QUESTION: They have a duty to defend even if he breaches his obligation to cooperate?

MR. ADAMSON: Even if he breaches his obligation to

32 cooperate, yes, sir.

34 QUESTION: They then still have the duty to defend?

36 MR. ADAMSON: Yes, sir.

38 QUESTION: I see. So he could do that --

40 MR. ADAMSON: That period is very brief, as I understand it.

42 QUESTION: I see. But you would agree that he could not personally be subjected to any discipline or any court order by the judge in Minnesota.

44 MR. ADAMSON: There is not a shadow of doubt in my mind about that, Mr. Justice Stevens.

46 QUESTION: Yes.

48 MR. ADAMSON: He could not be.

50 QUESTION: Well, there is not a shadow of doubt in your mind that the Minnesota court was wrong in this case either, as you submitted it to us, but what do you think the Minnesota courts would hold? The courts have held that they have personal jurisdiction over Mr. Rush at least to the extent of the limits of liability on the insurance policy.

52 MR. ADAMSON: They have held that they have quasi in rem jurisdiction over Mr. Rush to the extent of the liability policy.

54 QUESTION: To enter a judgment against him.

56 MR. ADAMSON: There is no in personam jurisdiction in this --

QUESTION: -- to enter a judgment against him to the extent of the limits of liability of the liability policy.

MR. ADAMSON: Yes. And then the --

QUESTION: Don't you think it might follow in view of the Minnesota court that the Minnesota court had the power to punish him for contempt for refusing to obey a subpoena?

MR. ADAMSON: No, Your Honor, Mr. Justice Stewart, I do not.

QUESTION: You don't --

MR. ADAMSON: There is just no basis for it. This is a civil action --

QUESTION: Well, you think there is no basis for the Minnesota court opinion in this case.

MR. ADAMSON: I want to answer your specific question without getting off on this tangent here. This is a civil action. There is no process in the state of Minnesota that can require Mr. Savchuk to come there and testify.

QUESTION: Nothing more than a notice and a request.

MR. ADAMSON: Yes, they can request him but they can't subpoena him because of the limitations of the state lines.

QUESTION: And the penalty is a default judgment.

MR. ADAMSON: Default judgment, a civil penalty which is imposed in that way but not to put him in jail or fine him or do something of that nature.

QUESTION: The judgment that may be entered against him is not a personal judgment.

MR. ADAMSON: No, sir.

QUESTION: It is in a sense that it would -- the judgment entered would not be enforceable against him in another state.

MR. ADAMSON: If we are talking about a default judgment, the answer to that is no. If we are talking about a judgment as a result of this case being litigated, I am not so sure. This is one of the --

QUESTION: Well, say a judgment is entered and the person who gets the judgment prefers to enforce it in Indiana. against him personally.

MR. ADAMSON: Mr. Justice White, is this a default judgment or --

QUESTION: No, it is after a trial.

MR. ADAMSON: It is an adversary judgment.

QUESTION: And he has never shown up.

MR. ADAMSON: All right. Well, of course, I don't know why my friend over here would do such a thing when he has got the insurance company right there in Minnesota, why would he want to run off to --

QUESTION: Well, because he doesn't want to fight with you because he has just heard you say in court that if Rush doesn't show up there may be a terrible problem of

enforcing your liability on the policy.

MR. ADAMSON: But the point that you raise that hadn't occurred to me, I suppose if State Farm went bankrupt in the interim he might go to Indiana looking for Mr. Rush.

QUESTION: Well, what is the basis for personal jurisdiction of it?

MR. ADAMSON: There isn't any, if I understand your question, Mr. Justice White.

QUESTION: That is the question I had and I am not sure I quite got your answer. Assume the company goes bankrupt, can you enforce the judgment against the individual?

MR. ADAMSON: I don't know. You might well try. It is a quasi in rem, but the assets supposedly are the policy and --

QUESTION: But the race is now the security.

MR. ADAMSON: The race is the policy so I suppose it wouldn't work. But we are off on this, and this is another -- you are touching, the Court is touching on an area which is very disturbing to us and that is, while Minnesota says, look, we will not enforce this judgment against Mr. Rush -- the jury had come in for a million dollars, the policy is \$50,000 -- we will not enforce this judgment here in Minnesota for more than \$50,000. Now, that is all very nice because that is the amount of the insurance policy. What is to prevent somebody suing Mr. Rush anew some place else so they

can get some basis of jurisdiction?

QUESTION: I know, but you would at least concede that they couldn't sue them on that judgment for over the \$50,000.

MR. ADAMSON: I don't know. I don't know. Suppose it is a million dollar judgment?

QUESTION: Suppose it is.

MR. ADAMSON: He goes over --

QUESTION: What if they were relying on Housley?

MR. ADAMSON: He goes over to North Dakota and he says I have a deficiency and you have a gold mine over here.

QUESTION: Well, it may be but --

MR. ADAMSON: You've had your day in court --

QUESTION: -- it is a different question though I think whether they can -- if they started an independent action, a new action in Indiana and relying on Park Lane or some doctrine of collateral estoppel, but they couldn't rely -- just take this judgment in Indiana and sue on it.

MR. ADAMSON: I would start a brand new action and seek collateral estoppel against him --

QUESTION: Would you suggest that?

MR. ADAMSON: --- and say you have had your day in court and ---

QUESTION: Well, it may be but that would be in a new lawsuit.

MR. ADAMSON: Yes, sir, it would.

QUESTION: But how about this judgment?

MR. ADAMSON: This judgment --

QUESTION: The million dollar judgment that --

MR. ADAMSON: The Minnesota judgment in Minnesota is worth \$50,000 and no more.

QUESTION: Well, is it worth any more in Indiana? Is that judgment --

MR. ADAMSON: I can't answer that question.

QUESTION: Say you started a suit on that judgment in Indiana, like you normally would to collect a judgment.

MR. ADAMSON: He shouldn't be able to, but I don't know the answer to that because of the very, shall we say, unusual jurisdictional basis that we have here to begin with. If we were playing a true quasi in rem ball game, the answer to these questions would be all very easy. Obviously, a quasi in rem judgment isn't good for anything more than the asset which comprises the race, and that is all you've got to use to liquidate your judgment.

QUESTION: Mr. Adamson, may I ask this question of you.

MR. ADAMSON: Yes, Mr. Justice Powell.

QUESTION: Assume that the plaintiff in this case, in order to protect himself against the possibility that Minnesota would not have taken jurisdiction, had simultaneously

instituted a personal damage suit in Indiana, the situs of the accident. Would that have changed the situation?

MR. ADAMSON: Well, if he had commenced the lawsuit in Indiana prior to the running of the Indiana statute of limitations, of course it would change the situation and he would have a valid in personam action going for him in Indiana and he wouldn't need a quasi in rem proceeding in Minnesota at all. But after the Indiana statute of limitations has run, he is foreclosed from doing that.

QUESTION: Well, he may have thought it more convenient to litigate in Minnesota but just as an anchor to win with, he may also have sued in Indiana so that if his insurer paid \$50,000 in Minnesota, the plaintiff still might recover the rest of that million dollars you mentioned in Indiana if you had a solvent defendant, if this was a 20-year-old young man --

MR. ADAMSON: That's right.

QUESTION: -- presumably incapable of responding to further judgment. But what I was asking is under Minnesota law would the simultaneous institution of an in personam action in Indiana have ousted in rem jurisdiction in Minnesota.

MR. ADAMSON: Again, since there is no determinations by any court in this area, I would be just giving you my expert opinion. I would think that the Minnesota court

under those circumstances would give comity to the Indiana action which was an in personam thing and hold their quasi in rem action in abeyance until the Indiana action --

QUESTION: Nobody knows. No one knows.

MR. ADAMSON: No one knows what the Minnesota courts would do in that area.

QUESTION: Mr. Adamson, where do you suppose the limitation imposed by the Supreme Court of Minnesota that this procedure is available only to residents of the forum state came from?

MR. ADAMSON: They told us in their opinion -- I think it was the first subject opinion, where Chief Justice Sheran made it clear that without the plaintiff's connection -- we are using International Shoe language now -- without plaintiff's connection to the state of Minnesota, Minnesota was --

QUESTION: You mean by residence, by being domiciled there.

MR. ADAMSON: That's right, by being a resident citizen of the state of Minnesota, without plaintiff's connection with the state of Minnesota, Minnesota would lack sufficient contacts with the suit to justify jurisdiction. This is what the Minnesota Supreme Court said.

QUESTION: But the sufficient contacts, as you are submitting, has to do with the defendant and not the plaintiff.

MR. ADAMSON: Yes, Your Honor. And I think that to predicate the constitutional basis of this doctrine on the residency of plaintiffs and saying it is not available to non-residents raises another horrible constitutional problem and that is a denial of non-residence for the right of citizenship in the state of Minnesota. The courts are closed to them as far as this is concerned. Again, this is not before the Court, but it illustrates the problems we get into when we try to I think emasculate the Shaffer decision and go down this line.

QUESTION: Well, would the Minnesota court under its present decision after the remand under Shaffer say that a resident of Minnesota can sue a defendant in any other state anywhere?

MR. ADAMSON: The Supreme Court of Minnesota in both of its decisions held that a resident may sue a non-resident involving any tort which occurred anywhere in the world providing he can get garnishment jurisdiction over the insurance company within the state of Minnesota. I believe that answers your question.

QUESTION: Well, what I am curious about is does Minnesota law require any contacts on the part of the defendant with the state?

MR. ADAMSON: None whatsoever.

QUESTION: Except through his insurer.

MR. ADAMSON: Except through the vehicle of the fact that the happenstance that his insurer happens to do business in the state of Minnesota.

QUESTION: That's it.

MR. ADAMSON: I beg your pardon, sir?

QUESTION: I said that's it.

MR. ADAMSON: That's it.

QUESTION: It depended on property there, i.e., his interest in the insurance policy.

MR. ADAMSON: Yes.

QUESTION: Of course, what he owns is precisely the protection of an insurance policy and what he owns is the promise of the insurance company to defend him against such suits as this.

MR. ADAMSON: That's right, and to pay --

QUESTION: It certainly is not just some chance property, something that is actually bought to defend him against suits.

MR. ADAMSON: But the point is, Your Honors, that as in Shaffer, the insurance contract itself is not the subject matter of the litigation. There is no quarrel about it. It is not even a Minnesota contract. It is there just as the stock would have been in Shaffer to satisfy a judgment rendered against those shareholders and directors.

QUESTION: But nobody bought the stock in order to

provide for -- in order to provide a way to respond to litigation, but that is what this insurance policy was bought for, one of the reasons.

MR. ADAMSON: Let me live dangerously and suggest a hypothetical to you. Suppose we change one fact in Shaffer. Suppose instead of corporate stock, the plaintiff in Shaffer had garnished in Delaware, an officers and directors liability insurance policy issued by some company out in Oregon or California and written by a company that happened to do business in Delaware. I cannot reach Shaffer as coming to an obvious result if that had been the case. Nobody was fighting about that insurance policy.

QUESTION: Well, are you suggesting that pre-Shaffer that this would have been all right?

MR. ADAMSON: Which would have been all right?

QUESTION: The Minnesota result.

MR. ADAMSON: Well, we were contending that it was the wrong -- before this Court had --

QUESTION: I know, but the way you depend on Shaffer you would think that it would have been quite proper before it.

MR. ADAMSON: Well, the reason we are depending so on Shaffer is that, of course, it is an utterance of the highest court in this land in a quasi in rem jurisdiction case and it carries extreme --

QUESTION: I don't blame you, but even before Shaffer your arguments sound like it would have been bad. Would it? Only New York before Shaffer --

MR. ADAMSON: Oh, you mean is the doctrine of Seider v. Roth what we are talking about, now the Minnesota garnishment rule and what have you, is that a bad thing before Shaffer?

QUESTION: Yes.

MR. ADAMSON: It certainly was.

QUESTION: Under what, International Shoe or --

MR. ADAMSON: I would say under International Shoe the trend of the case law, as Mr. Justice Marshall so clearly pointed out, was all going in this direction with this mechanical -- you see, up until Shaffer the underpinning of all of these Seider v. Roth cases was Harris v. Balk, just that naked power over the property in the state. That is all you had to have, the New York Court of Appeals said. That is all you had to have, the United States Court of Appeals for the Second Circuit said. And that was what was shot down in Sheffer, but I think it was bad before and it certainly is bad now in our judgment.

QUESTION: Mr. Adamson, on the Shaffer point, suppose that instead of an insurance policy the defendant had a bank account over the years and just kept \$50,000 in the state and had no other contact with the state, would you say

that under Shaffer the plaintiff could get jurisdiction, quasi in rem jurisdiction to the extent of \$50,000?

MR. ADAMSON: Under Shaffer, if the bank account had nothing to do with this litigation, that the only purpose was to acquire jurisdiction and to collect the judgment --

QUESTION: That's right.

MR. ADAMSON: -- under Shaffer he would have no right to garnish that bank account, none whatsoever, as I understand Shaffer.

QUESTION: But there would be a chance in --

QUESTION: But under Harris v. Balk he would.

MR. ADAMSON: Yes, sir, most definitely.

I would like to reserve the remainder of my time, if I may.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Borkon.

ORAL ARGUMENT OF EDWARD H. BORKON, ESQ.,

ON BEHALF OF THE APPELLEE

MR. BORKON: Mr. Chief Justice, and may it please the Court:

The facts are simple in this case as far as how the accident happened and where it occurred, but I think we have to look at what Minnesota was doing after Seider v. Roth and that type of case started out of New York, which had to do with automobiles and automobile liability insurance.

In 1969, Minnesota realized that in order to provide a forum for its residents, through the legislation they did pass the garnishment statute, the 571.41, adding subdivision 2, where they definitely had in mind this type of case, such as Savchuk v. Rush. They felt there where there would be a policy of insurance between a defendant and the insurance company, where the defendant had proper notice and the plaintiff was a resident of the forum or of Minnesota, he could then bring the action.

They even used terms, as the Court knows, judgment, debtor and defendant. Following that statute, the first time I believe that Minnesota actually looked at the statute was in Judge Neville's opinion in the Rintalla case, and I think that goes to the heart of the matter here, is Judge Neville -- and we are right in line with the Shaffer case as far as saying fundamental fairness and contacts -- that really is the defendant getting due process under the statute and he looked at it and said, yes, because the insurance company and the defendant and the plaintiff are actually -- you have to look at all of them in the transaction, the automobile accident. You can't just isolate it on the defendant such as we have in the Shaffer case. Judge Neville then felt that the statute was constitutional, they have applied it and they have applied it in Minnesota over the last ten years.

So when Savchuk moved to Minnesota, actually his

30 father was transferred to Minnesota. Some year or so later  
31 he moved after the accident, we received the case in our  
32 office. Actually, the forum in Indiana, the statute of  
33 limitations had run and, of course, the Minnesota statute has  
34 run now because in 1974, when we obtained the garnishment and  
35 this procedure started, State Farm and along with its  
36 defendant through the policy has been bringing it before the  
37 court.

38  
39 Now, the important part of the decisions in  
40 Minnesota and what we look to is the fact of the insurance  
41 company is the real interest, the real party in interest in  
42 the case. There is no question that from the time that the  
43 accident happened, albeit in Indiana, the insurance company  
44 then comes in and calls the shots, if you please, from then  
45 on.

46  
47 QUESTION: Do you agree that the defendant as an  
48 individual had no contact with the forum? ,

49 MR. BORKON: That's correct, Your Honor.

50 QUESTION: And isn't it something of an over-  
51 simplification to say that the insurance company comes in and  
52 calls the shots, with the duty to settle, the duty to cooper-  
53 ate and so forth? There is a constant possibility of an  
54 adverse relationship developing between the insured and the  
55 insurance company.

56 MR. BORKON: Well, maybe the choice of words,

"calling the shots," is incorrect to use that term, but the plaintiff after the automobile accident occurred and the defendant gives notice through his insurance carrier from that time on, myself or as attorney for the plaintiff would then only contact -- the only contact we have is the attorney really for the insurance company, even though he is representing the defendant through the policy.

What I am saying is that if there is going to be settlement discussions, it is going to be with the insurance company, and if the insurance company is going to settle, it is the insurance company, they select the counsel they are going to use to defend, they tell when it is going to be settled, they say whether or not it is going to court, The defendant, especially in Minnesota, where the statute and the cases in the Supreme Court have stated, only the \$50,000 limit is involved.

QUESTION: You have never run into a case where the defendant individually hired his own lawyer because he felt the insurance company was refusing a reasonable offer of settlement and insisted that the insurance company settle, where the insurance company is unwilling to settle?

MR. BORKON: Yes, in bad faith.

QUESTION: Or where there was a risk of a judgment beyond the amount of the coverage.

MR. BORKON: That may be true, Your Honor, too.

Here I think that is why the Minnesota court, the Supreme Court and also the federal decisions, of which there are three in Minnesota, have all stated that that will comply with the minimum contacts and fair play and substantial justice because you are limiting it to the \$50,000, you are giving them notice to come in to defend, but it is this relationship that is so close between an insurance company and the defendant. In Shaffer --

QUESTION: Mr. Borkon, I am not sure I follow your argument. Are you saying that this relationship between the insurance company and the other parties is what controls in this case? Suppose the driver of the automobile that is alleged to be negligent had been a Rockefeller.

MR. BORKON: Had been a what?

QUESTION: Had been a Rockefeller, with many millions of dollars that could have paid any deficiency judgment, would you have dealt if you had the case originally with the insurance company or with the counsel for the wealthy defendant who could pay a million dollar judgment?

MR. BORKON: Well --

QUESTION: I don't understand whether you are saying that Minnesota has jurisdiction in this case only because the only party likely to respond to any judgment anywhere is the insurance company.

MR. BORKON: Well, it is to get jurisdiction is

proper because the insurance company is the one doing business in Minnesota. That is the number one insurance carrier writing liability insurance in Minnesota. So we look to get jurisdiction in Minnesota for the resident of Minnesota, so we would look to bring him into the forum where the insurance company is doing business, controlled by the state of Minnesota, they have their benefits, the insurance company is in Minnesota, they can be regulated by Minnesota, and we would look to the insurance company to the extent of the policy for the defendant.

QUESTION: But if the statute of limitations had not run in Indiana in the case that I put to you, you would have had to advise your client to sue in Indiana, wouldn't you?

MR. BORKON: If there would be unlimited resources, depending on his injuries.

QUESTION: Yes.

MR. BORKON: That's right.

QUESTION: Mr. Borkon, do you agree that if the insurance company should go bankrupt you could not -- assume you got a \$50,000 which I guess is the policy limit, you could not collect the judgment from the defendant individually?

MR. BORKON: Well, I would agree with that because of the --

QUESTION: The quasi in rem.

MR. BORKON: -- the quasi in rem is the race of

the insurance policy that --

QUESTION: Would you also agree that the individual defendant should defy any court order and not risk contempt if he just didn't show up and just didn't respond to any notice or anything like that?

MR. BORKON: I would agree with that.

QUESTION: And if you got a judgment for a million dollars in Minnesota and the policy limits were \$50,000, you couldn't enforce the million dollar judgment personally against the defendant in Indiana?

MR. BORKON: That's correct, Your Honor. In fact, we have agreed to be bound by the policy limits by stipulation following Judge Neville's --

QUESTION: I take it you haven't agreed not to use this judgment as binding on him in a separate suit in Indiana.

MR. BORKON: Well, we have. We have agreed that this will be our lawsuit of \$50,000 and that is all.

QUESTION: I know in Minnesota, but what if you went to -- have you agreed not to sue him for anything in addition in Indiana?

MR. BORKON: Yes.

QUESTION: Didn't you sue originally for more than \$50,000?

MR. BORKON: Well, it was sued and then it was

amended to bring it within the \$50,000.

QUESTION: You brought it originally for \$125,000 or \$150,000, as I recall.

MR. BORKON: It was \$125,000 plus the 110 following the garnishment statute.

QUESTION: I see.

MR. BORKON: Then after State Farm answered the supplemental -- well, first they answered that they owed no doubt. Then under another statute in that same chapter we brought them into a lawsuit on a supplemental complaint, then we agreed to limit our lawsuit to \$50,000 and that pretty much now is the Minnesota law.

QUESTION: But how did you agree not to sue for more in Indiana if -- let's assume you got your \$50,000 judgment in Minnesota.

MR. BORKON: That's correct.

QUESTION: Now, in what form did you agree not to sue for more in Indiana in a separate suit?

MR. BORKON: Well, we stipulated following the Minnesota law that we would have to agree to the \$50,000 judgment in Minnesota and that you wouldn't be suing him.

QUESTION: Why? Is that the consequence of your stipulation?

MR. BORKON: Well, it is because we --

QUESTION: Just because you can only collect \$50,000

32 in Minnesota, why does that mean that you are barred from  
34 suing for the balance of what you claim your injury was in  
36 Indiana?

38 MR. BORKON: Well, we have agreed to it in this  
31 case.

36 QUESTION: In this case you aren't giving up any-  
38 thing because the statute had run in Indiana.

40 MR. BORKON: Well, they both have run now, of  
42 course, but we don't know --

44 QUESTION: But when the case came to you, the statute  
46 had run in Indiana?

48 MR. BORKON: Yes, Your Honor.

50 QUESTION: The statute is longer in Minnesota?

52 MR. BORKON: The statute has run in Minnesota as  
54 well.

56 QUESTION: I know now, but when you instituted the  
58 first action.

60 MR. BORKON: The statute in Minnesota had not run.

62 QUESTION: How about Indiana?

64 MR. BORKON: That's right, Your Honor.

66 QUESTION: So the statute in Minnesota was longer  
68 in a personal injury case than it is in Indiana?

70 MR. BORKON: That's correct, six years in Minnesota  
72 and two years in Indiana.

74 QUESTION: And also you have the doctrine of  
76

comparative negligence rather than contributory negligence.

MR. BORKON: That's correct, Your Honor, and we don't have the guest statute.

QUESTION: And if you can find a state with a longer statute of limitations, you can file another suit now, couldn't you?

MR. BORKON: Well, we are saying that at least from our viewpoint that we would only take a case where our plaintiff is a legitimate resident of Minnesota. He did live there for some five years.

QUESTION: And how he is in Pennsylvania?

MR. BORKON: That's correct, Your Honor, but he was there five years afterwards, plus it is at the time he brings the lawsuit and I think in this day and age, a wholesome young man that had business opportunity elsewhere than in Minnesota.

QUESTION: And also a favorable statute.

MR. BORKON: Well, I would have to say that I don't know if he knew that because we didn't have the case when he moved and for sometime afterwards. But it is for those reasons that I think is different from the Shaffer case where the —

QUESTION: Well, how could the state of Minnesota's law apply to this accident?

MR. BORKON: Through the insurance company. We feel

that in Shaffer, where the stock had nothing to do with the underlying action or the litigation whatsoever, and here we have an interest. Here I --

QUESTION: What you are really saying is it doesn't matter whether there was an accident or not, aren't you?

MR. BORKON: I am saying that Minnesota could follow the Shaffer case with no problem because it is a particular statute that the Minnesota courts or the legislature at first recognized and said when it comes to automobiles and automobile liability insurance, this will be the law, and we can still follow Shaffer and International Shoe because they are looking at the cases in Minnesota and saying that the minimum contacts have been met, that you can't take --

QUESTION: Oh, I get what you mean. You mean the Shaffer case as construed by the Minnesota courts.

MR. BORKON: That's true, Your Honor.

QUESTION: Oh, now I see.

QUESTION: Does your client have accident insurance with -- he was injured -- or do you know? Is there anything in the case to indicate that? He was injured as a quest, is that it?

MR. BORKON: Yes, Your Honor.

QUESTION: And he suffered some injuries and he had some medical expenses, I suppose. Is that a --

MR. BORKON: I think the medical --

QUESTION: Or do you just think that is irrelevant?

MR. BORKON: Well, it could be for quasi in rem jurisdiction, but I think that the --

QUESTION: Mr. Borkon, could I ask you a question on an assumption on the policy terms. It is critical I guess to quasi in rem jurisdiction that there be an obligation of the insurance company to defend the insured. Suppose they changed their policy language to provide that they agreed to defend the insured in any forum in which personal jurisdiction can be obtained over the insured but they would have no obligation to defend when the only basis for jurisdiction was a quasi in rem theory, then you couldn't hold them, could you?

MR. BORKON: Well, I don't think so, Your Honor. I don't think Minnesota would allow them to write insurance, State Farm, possibly on that kind of grounds.

QUESTION: But maybe Indiana would let them write, because some states have considered this kind of litigation and decided not to adopt this kind of statute.

MR. BORKON: That's correct.

QUESTION: And in those states I assume they would permit -- say Indiana might well permit that kind of policy to be written and issued in Indiana, but that is what it said. I take it that would destroy the basis for quasi in rem jurisdiction.

MR. BORKON: It probably would.

QUESTION: It rests entirely on the terms of the contract between the insurance company and the insured.

MR. BORKON: Plus I don't think you can leave out the plaintiff. We realized that under the Shaffer case you are looking to the --

QUESTION: Yes, but there is no duty to defend and the mere fact that the plaintiff lives in Minnesota certainly is the sufficient basis for it.

MR. BORKON: Correct. But the main purpose for obviously having liability insurance is not only to cover yourself but if you have to answer to damages to someone else.

QUESTION: You don't have to answer if you have no contacts in Minnesota though. The defendant would have no risk if he is not subject to personal jurisdiction.

MR. BORKON: Well, he has no risk in this case because he is not going to give up anything. The insurance company is the only one possible that is going to give anything up. The defendant will give up nothing.

QUESTION: I understand.

QUESTION: But if you were uninsured, you would have no risk in Minnesota either.

MR. BORKON: Well, you would have no risk but to say that we -- it is rare if at all that we would take a case where the defendant is uninsured.

QUESTION: Well, I wasn't asking whether you would take the case. We were talking about risk, the defendant's risk. If he had never entered the state of Minnesota, all the physical action takes place in Indiana, he could be uninsured and still have no risk in Minnesota.

MR. BORKON: That's true.

QUESTION: Well, that is true about all in rem and quasi in rem jurisdiction if the defendant doesn't own real or personal property in the jurisdiction, there cannot be in rem or quasi in rem jurisdiction.

MR. BORKON: That's correct, Your Honor. We feel that it was the insurance policy but we feel that is the Minnesota Supreme Court and the federal court through Minnesota has interpreted that it is the insurance policy and the contact that it has with its own defendant, that that is different or unique, what have you, but still you can apply *Shaffer v. Heitner* and *International Shoe* and that is being fair to the defendant, but you can't isolate the defendant from his insurance company.

QUESTION: Mr. Borkon, in the original papers, the insurance company took the position that the debt was zero, as I understood it, because it was a contingent liability.

MR. BORKON: Right.

QUESTION: They never did deny that they had an obligation to defend though, did they?

MR. BORKON: No, they never denied that.

QUESTION: Nor an obligation to pay, a conditional obligation to pay.

MR. BORKON: That's correct, Your Honor. We feel that that is a different obligation to defend and there is an obligation to pay and the fact that the statute is there, so it takes away from the contingency that Mr. Justice Stevens talked about. In fact, in Minnesota you even have interrogatories that can find out the policy limits for what you are dealing with, and at least in 90 percent of the cases, at least in Minnesota, Mr. Adamson and his firm will be on that case if State Farm insurance is the policy writer for the insured.

Still, they have the forum for non-convenience statute as far as if the court feels more witnesses are located in a different area.

I would answer any questions that the Court has.

MR. CHIEF JUSTICE BURGER: Apparently there are no further questions.

MR. BORKON: Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Adamson?

ORAL ARGUMENT OF OSCAR C. ADAMSON, II, ESQ.,

ON BEHALF OF THE APPELLANTS -- REBUTTAL

MR. ADAMSON: Very briefly, I have listened to my

friend and I have not heard him touch at all upon what is, of course, the keystone language I believe is the Shaffer opinion, and that language is if a direct assertion of personal jurisdiction over the defendant would violate the Constitution, it would seem that an indirect assertion of the jurisdiction should be equally impermissible.

We have an attempt for an indirect assertion of jurisdiction here and to me it seems that it would be equally impermissible and therefore we ask that the judgment below be reversed and that the matter be remanded for the entry of a judgment of dismissal.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:48 o'clock p.m., the case in the above-entitled matter was submitted.)

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