

NO. A11-2020

State of Minnesota
In Supreme Court

Scott L. Stevens,

Relator,

vs.

Commissioner of Revenue,

Respondent.

RELATOR'S BRIEF AND APPENDIX

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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).

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LEGAL ISSUES

I. Whether the Respondent, Commissioner of Revenue, is equitably estopped from assessing personal liability against a responsible person, assuming arguendo that the Relator is a responsible person, for unpaid petroleum taxes when the Respondent Commissioner of Revenue's action in releasing liens against one of the two taxpaying entities made payment of the taxes through a Chapter 11 Plan of Reorganization impossible?

Trial court held: Equitable Estoppel is not an appropriate remedy in this case against the Commissioner of Revenue.

The most apposite cases for this legal issue are *Mesaba Aviation Div .v. County of Itasca*, 258 N.W. 2d 877, 880 (Minn. 1977); *Petition of Halberg Const. & Supply, Inc.*, 385 N.W.2d 381 (Minn. Ct. App. 1986); *Ridgewood Development Co. v. State*, 294 N. W. 2d 288, 292 (Minn. 1980). The most apposite statute is Minn. Stat. §296A.10 (2011).

II. Whether Relator may be held to be a responsible person when the Respondent Commissioner of Revenue played a causal role in the taxes remaining unpaid by its improvident lien release which made a Chapter 11 Bankruptcy Plan of Arrangement impracticable, thereby becoming a supervening cause excusing Relator's from personal responsibility, assuming arguendo he was personally responsible?

Trial Court held: That causation is not an element in a finding of personal liability under Minn. Stat. §270C.56 (2011).

The most apposite cases for this legal issue are *Benoit v. Commissioner of Revenue*, 453 N.W.2d 336 (Minn. 1990); *George v. Estate of Baker*, 724 N.W. 2d 1, 10 (Minn. 2006); *Kryzer v. Champlin American Legion No. 600*, 494 N.W. 2d (Minn. 1992); *Kunza v. Pantze*, 527 N.W. 2d 846, 847 (Minn. App. 1995), *rev'd Kunza v. Pantze*, 531 N.W. 2d 839, 839 (Minn. 1995).

III. Whether there is a triable issue of fact of whether Relator, Scott L. Stevens, may be assessed as a responsible person for unpaid petroleum taxes pursuant to Minn. Stat. §270C.56 when he had no independent authority in regard to the financial management of the taxpaying entities?

Trial Court held: Trial Court granted Summary Judgment against Relator Scott L. Stevens holding him to be a responsible person for the unpaid petroleum taxes of Twin Cities Avanti Stores, LLC and Twin Cities Stores, Inc., operating under the name of Oasis Markets.

The most apposite cases for these legal issues are *Benoit v. Commissioner of Revenue*, 453 N.W.2d 336 (Minn. 1990); *Wold v. Commissioner of Revenue*, 1994 WL 12406 (Minn. Tax. 1994); *Hames v. Commissioner*, 1991 WL 25493 (Minn.Tax 1991); *Schmidt v. Commissioner of Revenue*, 1990 WL 108063 (Minn.Tax 1990).

* * * * *

STATEMENT OF THE CASE

This case arose as a result of Relator's Appeals to the Minnesota Tax Court of a series of Orders of the Respondent, Commissioner of Revenue, assessing personal liability against Relator Scott Stevens for the unpaid petroleum and sales taxes of Twin Cities Avanti Stores, LLC ("TC Avanti"). Three of these Orders were issued on June 16, 2009 and after the Minnesota Tax Court granted a 30 day extension to file the appeal, the appeals were timely filed on September 11, 2009. These appeals were docketed by the Minnesota Tax Court as Docket Number 8144-R; Docket Number 8145-R; and Docket Number 8146-R. The Respondent Commissioner of Revenue issued a fourth Order on September 23, 2009 which Relator timely appealed on November 23, 2009. This appeal was docketed by the Minnesota Tax Court as Docket Number 8167-R.

The Respondent filed a Motion for Summary Judgment on November 1, 2010. (References to this filing will be abbreviated as “Comm MSJ” (Commissioner’s Motion for Summary Judgment) and a reference to the specific document.) Relator Scott Stevens responded to the Motion for Summary Judgment on November 24, 2010. (References to this filing and accompanying documents will be abbreviated as “Stevens OSJ” (Stevens’ Opposition to Summary Judgment) and a reference to specific documents.) The Court heard oral arguments on December 3, 2010 and by a Final Order dated September 14, 2011, the Minnesota Tax Court, the Honorable George W. Perez, granted the Respondent’s Motion for Summary Judgment.

* * * * *

STATEMENT OF FACTS

The taxes at issue in this matter were assessed against Twin Cities Avanti Stores, LLC (Avanti). However, another entity, Twin Cities Stores, Inc. (Stores), generated the majority of these sales. Both entities operated convenience stores generally using the name Oasis Markets. (These combined entities will sometimes hereinafter be referred to as “Oasis Markets.”) These stores offered gasoline, diesel fuel and propane for sale as well as typical convenience store items along with car washes, ATM’s, video rentals, Sirius radio cards, phone cards and gift cards. Both Stores and Avanti were one hundred percent owned by the RM Group. The RM Group in turn was owned by a collection of individuals with Bruce

Nelson owning 84.6% of the stock and Scott Stevens owning 0.99% of the stock. (Stevens OSJ, Pridgeon Affidavit, Exhibit I, Interrog. Answer Nos. 3, 4 and 6)

Mr. Bruce Nelson also owned Good Times Stores, Inc. which operated stores out of El Paso, Texas. Most of the accounting for Stores and Avanti was done out of the El Paso office of Good Times Stores, Inc. (Stevens OSJ, Pridgeon Affidavit, Ex. A, Scott Stevens Deposition, p. 25-26)

In the second half of 2008, Oasis Markets began experiencing financial difficulties. As a result, it failed to fully pay the petroleum taxes and some minor amounts of sales taxes for September through April 2009. Oasis Markets personnel engaged in numerous discussions with representatives of the Minnesota Department of Revenue but attempts to resolve these unpaid liabilities through a payment agreement proved unsuccessful. During these discussions, Oasis Markets and its counsel learned that the representatives of the Minnesota Department of Revenue were aware of Avanti's existence because it filed the sales tax returns reporting all of Oasis Markets petroleum sales, both those made by Avanti and those made by Stores, but were not aware of Stores existence and its assets and revenues. Counsel for Oasis Markets made the Minnesota Department of Revenue representatives aware of Stores existence and encouraged them to file a tax lien against Stores for these unpaid taxes so the Department would have a secured position in Stores' assets and revenues. (*Id.*, Affidavit of Brian McCool, ¶¶3-5,

attached letter dated April 24, 2009). The Department did so and pursued other collection efforts as well. Due to the collection efforts of the Department, both Oasis entities filed for bankruptcy protection under Chapter 11. In that proceeding, both entities filed a proposed plan that would have paid the liabilities over four years. Among the proceeds that would be used to pay the state tax obligation would be \$750,000 from the sale of a store owned by Stores. However, this plan became impossible after the Minnesota Department of Revenue suddenly released the tax liens it had filed against Stores in late January 2010. This lien release meant Respondent was no longer a secured creditor in the assets of Stores. (*Id.*, Affidavit of Brian McCool, ¶ 8-12) As a result, Respondent was no longer entitled to a secured position in the proceeds of the sale(s) of Stores assets and monthly payments pursuant to the plan. Therefore, the proposed Reorganization was no longer viable, the Chapter 11 plans were converted into Chapter 7 liquidation proceedings and the taxes were not paid. (*Id.*)

The Minnesota Tax Court granted Summary Judgment in favor of the Respondent Commissioner of Revenue on the issue of whether Relator Scott Stevens was a responsible person pursuant to Minn. Stat. §270C.56 (2008) for the unpaid petroleum and sales taxes of Avanti. The Court pointed to Mr. Stevens authority to act on behalf of Avanti, as its President, his influence over business strategy, his role in negotiating with the Minnesota Department of Revenue over

payment plans to resolve the unpaid tax obligations, his role as one authorized to sign checks and various email communications to support the conclusion that Mr. Stevens should be held personally liable for the taxes at issue in this matter.

Authority to Act on Behalf of Avanti

In regard to Mr. Stevens' authority to act on behalf of Avanti, the Court made a finding that "Avanti operates with governance of a Board of Managers. Appellant is the Sole Manager and Member of the Board of Managers." Minnesota Tax Court Opinion at page 4. This finding apparently refers to a set of documents purporting to be Joint Written Actions of Sole Member bearing Bruce Nelson's signature. The first document states that Bruce Nelson, as the sole manager, appointed Scott L. Stevens as the Treasurer of Twin Cities Avanti Stores, LLC as of October 15, 2005. Furthermore, in another document to take effect as of January 1, 2006, Mr. Stevens was named the President, Secretary and Treasurer of Twin Cities Avanti Stores LLC. Two further documents affirm Mr. Stevens' alleged election to those offices on January 1, 2007 and January 1, 2008. (Stevens OSJ, Pridgeon Affidavit; Affidavit of Scott Stevens, ¶3, Exhibit 1-4). In his deposition, Mr. Stevens made it very clear that he never served as Treasurer or Secretary (*Id.*, Pridgeon Affidavit, Ex. A, Scott Stevens Deposition, p. 34-35) and his Affidavit makes it clear he was not aware of his "election" to these positions. These statements are not contradicted by any evidence in the record.

Then the Court found that Relator Scott Stevens “authorized or approved disbursements for purchases and debt payments...Relator acknowledged there was no specific dollar limit on his decision making authority...Relator and Nelson would review the proposed disbursements for the week and approve payments made based on expected cash revenues.” Minnesota Tax Court Opinion, p.5.

Thus the Court’s findings present a process of payment approval as a joint project between Relator Scott Stevens and Mr. Bruce Nelson. However, no such joint process actually existed. Mr. Nelson exerted dictatorial control over the finances of these entities. Mr. Nelson’s domination and control over the finances of these entities and Mr. Stevens’ non-existent control are shown by numerous incidents and email communications involving Mr. Nelson, Mr. Lovejoy, Mr. Stevens, Oasis personnel and personnel at the Good Times Stores accounting office in El Paso, Texas. Most significantly, in October 2008, Mr. Stevens met with Mr. Nelson to discuss the ongoing cash flow problems of Oasis Markets which included difficulties with paying the October petroleum tax and with creditors other than the Minnesota Department of Revenue. Mr. Stevens recommended closing down the business because of its poor cash position going into the lean winter months for convenience stores. Mr. Nelson summarily rejected that suggestion. (Stevens OSJ, Pridgeon Affidavit, Ex. A, Scott Stevens Deposition, pp. 43-45).

Secondly, a series of incidents demonstrated that Mr. Stevens had no independent authority in matters of finance. He tried to maintain good relations with Oasis Market's vendors only to have Mr. Nelson repeatedly undercut him by refusing to authorize payments. (Stevens OSJ, Pridgeon Affidavit, Ex. A, Scott Stevens Deposition, *p. 115*). Mr. Stevens arranged a meeting between Mr. Nelson, himself and the entities' primary grocery supplier to discuss Oasis Markets two million dollar account receivable with the vendor, Farner-Bakken (hereinafter "Farner"). Mr. Nelson coolly informed the vendor's representatives that they had made a loan to Oasis Markets of two million dollars and that "is where it is going to stay." (*Id.* P. 115). Soon thereafter Farner discontinued deliveries to the entities. (*Id.* P. 115-116).

As Mr. Stevens pointed out in his deposition, Stores and Avanti were not run the way normal companies are run. The company had two components: a financial component and an operational component. Mr. Stevens played a significant role in operations but had little if any discretion on finances (*Id.*, p. 18.) Mr. Steven's discretion and authority extended to mundane day-to-day operations. Any decisions of greater significance required Mr. Nelson's approval. (*Id.* p. 63, 85). Even in his communications with the entities creditors, Mr. Stevens was a "conduit, not the decision maker." (*Id.*, p. 43). While Mr. Nelson grew more tight-

fisted and dictatorial in his control over finances as the entities finances worsened, that control was always there. (*Id.* P. 97).

As noted in Mr. Robert Lovejoy's affidavit, any purchases approved by Mr. Stevens were "limited in amount by projected cash balances in cash flow forecasts prepared by Bruce Nelson." (Comm MSJ Robert Lovejoy Affidavit, ¶ 6 (11/1/10)). In regard to the sale of a group of stores "initiated by Mr. Stevens" we will explain in detail below that Mr. Nelson was the final decision maker in that transaction, not Mr. Stevens. When Mr. Stevens spoke with Respondent's representatives, it was Mr. Nelson who was pulling the strings behind the scenes.

Affidavits from key employees of Oasis Markets attest to the fact that the finances of these entities were controlled by Bruce Nelson. Richard Webber, the Director of Operations for Oasis Markets states that Bruce Nelson "exercised very tight control over the corporation's funds. Scott Stevens could not overrule Bruce Nelson. I am aware that Scott L. Stevens has been overruled by Bruce Nelson when it comes to the expenditure of funds." (Stevens OSJ, Affidavit of Richard Webber) The Affidavits of Karen Pehle, the Director of Management Information Systems for these entities affirms that Bruce Nelson kept very tight control of the finances. (*Id.*, Affidavit of Karen Pehle) Their statements are further affirmed by Daniel Price who served as the Director of Facilities Management and Capital Projects for Oasis Markets. (*Id.*, Affidavit of Daniel Price)

At one point, Bruce Nelson decided that it would be a good idea to sell sleds in the convenience stores operated by Oasis Markets and ordered the purchase of sleds to be sold in Oasis Markets. Mr. Stevens would have preferred spending the money to buy cigarettes which constituted about half of the convenience store sales. Mr. Stevens instructed the marketing individual, Joe O'Connor, to not buy the sleds, but Mr. Bruce Nelson overruled Mr. Stevens. (Stevens OSJ, Affidavit of Scott Stevens, ¶ 4)

The level of Mr. Nelson's control over disbursements is further shown by strings of emails between Bruce Nelson and various personnel at Oasis Markets. In the final email in one string of emails, Mr. Nelson orders that disbursements to most vendors be limited to the costs of current sales so that the amount due Marathon Oil could be reduced. He also inquires about expenditures as minute as those for employee reimbursements for mileage expenses incurred on Oasis Markets' business. Indeed, Mr. Nelson was receiving information about inventory items as small as \$1,000. (Stevens OSJ, Pridgeon Affidavit, Ex. A, Scott Stevens Deposition, Exhibit 29). A later email, dated February 2, 2009, shows that Mr. Nelson controlled expenditures down to less than \$2,000 amount, including once more, employee business expense reimbursements. (*Id.* Exhibit 34) Finally, another email from Robert Lovejoy directing several Oasis Markets personnel to refrain from printing any checks "pending approval by Bruce." (*Id.* Exhibit 35)

Indeed, so tangential was Mr. Stevens to much of this financial decision making that many emails concerning finances circulated among Oasis personnel without copying Mr. Stevens. (*Id.* Exhibits 31, 32, 33).

Further emails from later dates show Mr. Nelson's continuing firm control over the finances of the Oasis entities. An email of February 24, 2009 from Bob Lovejoy to Mary Bjonfald states that we "are under strict instructions to NOT release any checks without BLN [Bruce L. Nelson] approval...that includes utilities and municipalities, like Xcel and Centerpoint." (Brackets added) A series of emails between Mary Bjonfald, Bruce Nelson and Bob Lovejoy discussed payments of various items including Xcel and other vendors. Finally, an email on Tuesday, May 5, 2009 continues to demonstrate Mr. Nelson's control over payments in which he wants to cut back payments to Coke, Paramount Marketing and Valley News. (Stevens OSJ, Scott Stevens Affidavit, Exhibits 5-7 and 9) Finally, in an email on March 27, 2009 Bob Lovejoy orders the issuance of two checks to Roundtree, including \$10,000 as a management fee to Roundtree. (*Id.*, *Ex.* 8). Mr. Stevens was not copied on this communication.

This review of the record shows that Mr. Stevens' **operational role** functioned within the strict confines of Mr. Nelson's control over the finances. Mr. Stevens simply lacked the authority in this organization to make or even influence a decision to pay the taxes at issue. At the very least, the evidence

discussed here shows that we have a triable issue of material fact concerning the scope of Mr. Stevens' authority based not only on Mr. Stevens' deposition testimony but also on the affidavits of other Oasis employees and the voluminous email communications showing the very real limits on Mr. Stevens' authority.

Business Strategy.

In regard to business strategy, the Court made a series factual findings such as that Appellant Scott Stevens "reviewed the final audit report...reviewed proposed budgets prior to submission to Nelson for approval...provided input regarding which of Avanti's creditors would be paid, in what order they were to be paid, and when they were to be paid...discussed outstanding obligations of Avanti with its creditors." (MN Tax Court Opinion at pages 6-7.) The foregoing discussion of the actual financial decision making within Oasis Markets shows that Mr. Stevens had at most the power of suggestion while Mr. Nelson had the power of control and the final decision making authority which left Mr. Stevens which little or no discretion in regard to financial decisions. Two findings of fact relate to the sale of some of the Oasis stores to Holiday.

In October of 2005, Mr. Stevens recommended to Mr. Nelson that he sell several of the stores to generate funds that these entities could use to stock their stores with inventory. The sale generated proceeds of approximately \$1,000,000 but Mr. Nelson diverted \$500,000 to his Good Times Stores operations in El Paso

(Stevens OSJ, Pridgeon Affidavit; Scott Stevens Deposition, p. 47-49). While Mr. Stevens initiated this process, Bruce Nelson made the decision to sell the assets and he determined what the price would be to sell the stores. Mr. Nelson also decided that half of these funds would be transferred to his Good Times Stores operation, a decision which caused lasting damage to the Oasis Market entities.

(Id.)

Negotiating with the Minnesota Department of Revenue.

The Court also references Relator Scott Stevens role in attempting to negotiate payment arrangements with the Minnesota Department of Revenue.

(MN Tax Court Opinion at page 7.) The Court does note that Relator “discussed these terms with Nelson before sending the proposed terms to the Department.”

However, Mr. Nelson controlled the payment terms to be proposed.

Even in attempting to make a payment arrangement with the Respondent for the taxes at issue in this matter, Mr. Nelson controlled the proposals submitted to the Respondent. He dictated the payment terms to be requested (24 months) and refused to allow the proceeds of the sale of one of the stores to be offered to the Respondent as a down payment. (Stevens OSJ, *Id.* Pp. 173-174, Ex. 27). In fact, Mr. Nelson maintained as tight a control over gas tax payments as he did over all financial matters for the Oasis Markets entities. In one email attached to Mr. Lovejoy’s affidavit, Bob Lovejoy directs one of the accounting people in El Paso

to “NOT (*sic*) pay the gas tax this month until either Bruce or I give the “OK” (Bruce will decide, as the cash manager I’m a go-between.)” (Comm MSJ, Robert Lovejoy Affidavit (11/1/10), Ex. 6). An email dated February 20, 2009 from Bob Lovejoy shows Bruce Nelson expressing a desire to make payments of \$20,000 on the gas tax debt every day the next week. (Stevens OSJ, Scott Stevens Affidavit (11/24/10), Exhibit 5) It is noteworthy that Scott Stevens, allegedly a kingpin in communications between the Minnesota Department of Revenue and the Oasis entities is not copied on this email. At all times while the petroleum taxes at issue went unpaid, Mr. Stevens desired and would have preferred to have seen those taxes paid, but Bruce Nelson refused to authorize payment of those taxes and Mr. Stevens did not have the authority to order their payment. (Stevens OSJ, Scott Stevens Affidavit (11/24/10), ¶ 5)

Check Signing Authority.

The Court correctly notes that Relator Scott Stevens signed several TCF Bank forms as “President” of Avanti and was an authorized signer on these accounts. However, the foregoing discussion (pages 10-18) of the way the finances of Oasis were handled shows that the actual payments were tightly controlled by Mr. Nelson and that Mr. Stevens signature was applied by a machine. In other words, the check signing authority was strictly ministerial.

* * * * *

ARGUMENT

I. The Respondent, Commissioner of Revenue, is estopped from assessing personal liability against the responsible persons, assuming arguendo that the Relator is a responsible person, for unpaid petroleum taxes when the Commissioner of Revenue's action in releasing liens against one of the two taxpaying entities made payment of the taxes through a Chapter 11 Plan of Reorganization impossible.

A. The Minnesota Tax Court is a Court of Equity

The Minnesota Supreme Court has emphasized that this Court has been given unique judicial powers. *Wulff v. Tax Court of Appeals*, 288 N.W. 2d 221 (Minn. 1979). Indeed, the Supreme Court has held that the Tax Court "unlike other administrative agencies, is given uniquely judicial powers" and that as such, its decisions "are accorded the same finality and deference as those of the district court." *In re McCannel*, 301 N.W. 2d 910, 919 (Minn. 1980).

The Legislature bestowed on the Tax Court "sole, exclusive, and final authority" to decide all state tax law questions, subject only to review by the Supreme Court:

"The Tax Court shall have statewide jurisdiction. Except for an appeal to the supreme court or any other appeal allowed under this subdivision, the Tax Court shall be the sole, exclusive, and final authority, for the hearing and determination of all questions of law and fact arising under the tax laws of the state, as defined in this subdivision, in those cases that have been appealed to the Tax Court and in any case that has been transferred by the district court to the Tax Court."

Minn. Stat. §271.01, subd. 5 (emphasis added).

The statutory language designating this Court as the “sole, exclusive, and final authority” for all issues raised in a particular case strongly indicates that the Legislature “intended that the Tax Court have the power to decide each case completely.” See, *McCannel* at 920. (Supreme Court held the Tax Court had jurisdiction to decide all issues in a case, including all constitutional issues).

The Minnesota Tax Court has on occasion suggested that it is not a court of equity. See, *Bakewell v. Commissioner of Revenue*, 2009 WL 427029 (2009). *Stelzner v. Commission*, 2000 WL 37865 (2000). While these decisions propose that the Tax Court is not a court of equity, they provide no reasoning or underlining legal authority and are directly contrary to the very statute which created the Tax Court and defines its jurisdiction.

Indeed, Minn. Stat. §271.01, subd. 5, grants the Tax Court full authority to resolve all issues of statutory interpretation arising under the state’s tax laws, not just as an administrative agency, but as a “court of record” staffed by “judges” who are expressly subject to the same constitutional prohibition against holding non-judicial office, the same commission on judicial standards, and the same Code of Judicial Conduct as judges within the judiciary. Minn. Stat. §271.01, subd. 1. The Legislature designated the Tax Court as the “sole, exclusive, and final authority” for all issues raised in a particular case and the Tax Court has the power to decide each case completely. Based on this statutory language and the broad scope of the

statutory grant of jurisdiction to the Tax Court, the Tax Court is a court of equity where determining equitable issues is necessary to decide all issues in a case completely.

B. Relators Have Proven the Necessary Elements Of Estoppel Against Respondent.

The Minnesota Tax Court determined that estoppel is not an available remedy in this case. (Minnesota Tax Court Opinion pages 9-12.) The standard of review of a grant of summary judgment is *de novo review*. *SCI Minnesota Funeral Services, Inc. v. Washburn-McReavy Funeral Corp.*, 795 N.W. 2d 855 (Minn. 2008); *de novo review of a grant of summary judgment denying equitable relief*; *Kratzer v. Welsh Companies LLC*, 771 N.W. 2d 14 (Minn. 2009).

The Court's de novo review focuses on whether there are any genuine issues of material fact and whether the lower court erred in its application of the law. The evidence must be viewed in a light most favorable to Mr. Stevens, the party against whom summary judgment was granted. Any doubts as to the existence of an issue of material fact should be resolved in Mr. Stevens' favor. *STAR Centers, Inc. v. Faegre & Benson, LLP*, 644 N.W. 2d 72 (Minn. 2002). *Wartnick v. Moss & Barnett*, 490 N.W. 2d 108, 112 (Minn. 1992).

In *Brown v. Minnesota Department of Public Welfare*, 368 N.W. 2d 906 (Minn. 1985) the Minnesota Supreme Court described estoppel as:

[A]n equitable doctrine addressed to the discretion of the court and ***** intended to prevent a party from taking unconscionable advantage of his own wrong by asserting his strict legal rights. To establish a claim of estoppel, plaintiff must prove that defendant made representations or inducements, upon which plaintiff reasonably relied, and that plaintiff will be harmed if the claim of estoppel is not allowed.

Brown, at 910.

The plaintiff must demonstrate that the defendant, through language or conduct, induced the plaintiff to rely, in good faith, on this language or conduct to the plaintiff's injury, detriment or prejudice. *Ridgewood Development. Co. v. State*, 294 N. W. 2d 288, 292 (Minn. 1980).

Where justice demands, estoppel may be applied against the government. *Mesaba Aviation Div .v. County of Itasca*, 258 N.W. 2d 877, 880 (Minn. 1977). Estoppel against the government requires a showing of inducement, as well as a demonstration of some fault by the agency or department against whom a party seeks to estop. *Ridgewood Development*, at 292-3.

Prior to 1977, the Minnesota Supreme Court recognized a distinction between sovereign and proprietary activities and refused to allow the remedy of equitable estoppel against governmental body acting in a sovereign capacity. In *Mesaba Aviation*, the Court set aside the sovereign-proprietary distinction but noted that "the governmental-proprietary distinction ... does reflect a relevant concern: The danger that estoppel will hinder government and frustrate public

policy.” *Id.* at 880. Instead of the sovereign-proprietary distinction, the Court adopted the following approach:

“[T]he equities of the circumstances must be examined and the government estopped if justice so requires, weighing in that determination the public interest frustrated by the estoppel.”

Id. Therefore, *Mesaba Aviation* articulated a balancing test in which the hardships to the individual are balanced against the potential frustration of public purpose.

In the instant case, the factual record shows that Relators Bruce Nelson and Scott Stevens and Stores and Avanti changed their legal position when the Respondent Commissioner of Revenue filed tax liens against Stores. Specifically, Avanti and Stores filed petitions with the United States Bankruptcy Court once the Respondent Commissioner of Revenue filed tax liens against Stores. Further, in January 2010, Avanti and Stores filed a Joint Plan of Reorganization under Chapter 11 in reliance on and induced by the Respondent’s tax liens filed against Stores. Therefore, in both filing petitions with the Bankruptcy Court and pursuing a Joint Plan of Reorganization, Avanti and Stores reasonably changed their position and reasonably relied on the tax liens the Respondent filed against Stores. Avanti and Stores viable Joint Plan of Reorganization made provisions for full payment of all outstanding petroleum taxes-the same petroleum taxes Respondent now solely looks to Relators to pay. The Respondent’s subsequent withdrawal of the tax liens

on Stores and resulting destruction of the Joint Plan for paying the outstanding petroleum taxes caused injury, detriment, and prejudice to Relators.

The withdrawal of these liens involved elements of fault and wrongful conduct on the part of the Respondent. As shown by the Affidavit of Brian McCool previously referenced and incorporated by reference, Mr. McCool as counsel for Stores and Avanti informed the Respondent that Stores was selling almost three quarters of the product generating the petroleum tax liabilities at issue in this matter. Minn. Stat. §296A.10 provides:

“It is the duty of every distributor, dealer, and person who sells or uses gasoline manufactured, produced, received, or stored by the distributor, dealer, or person, and of every person using gasoline in motor vehicles or special fuel in licensed motor vehicles to know whether the tax has been paid on the fuel. If the tax has not been reported or if the tax has not been paid, it is that person's duty to report to the commissioner the quantity of the gasoline or special fuel sold or used and to pay the tax as provided in this chapter. All provisions of this chapter relating to the calculation, collections, and payment of the tax shall be applicable to any such person, dealer, or distributor.”

Mr. McCool, as counsel for both Stores and Avanti, complied with this statutory obligation when he informed the Respondent of Stores role in the sale of the petroleum generating the taxes at issue here. The Respondent in filing the tax liens acted reasonably and in compliance with the statute to enforce this statutory obligation. Counsel for the Respondent has stated in the Minnesota Tax Court during oral arguments that the reason for the withdrawal of the tax liens was that

no assessment against Stores had been issued by the Commissioner. (Tr. 19)

However, no Order was issued against Avanti for these taxes because they were set forth on a self-reporting tax return filed by Avanti. The statements, both oral and written, by Mr. McCool to the Respondent served the same purpose as a tax return—an acknowledgement of an uncontested tax obligation. The filing of the tax liens against Stores by the Respondent was as fully supported by the statute as the withdrawal was unsupported by the statute.

In this case, Oasis Markets asked Respondent to place tax liens on Stores so that the Respondent would be a secured creditor and better able to collect the outstanding petroleum taxes. The Respondent's improvident withdrawal of these liens requires that Respondent now be estopped from collecting these taxes from Relators. Justice demands this equitable result because the Respondent turned its back on the viable payment plan outlined in the Joint Plan. Indeed, the public interest in collecting the petroleum tax was, in fact, directly frustrated by the release of the tax liens. The Respondent has no one to blame but itself for allowing the potential payment set forth in the Joint Plan to die. The equities of these facts and circumstances tip the scale in favor of Relator and justice and fair play requires that Respondent be estopped from collecting the outstanding petroleum and sales tax from Relator Scott Stevens.

Given the unique facts in this case, the Minnesota Tax Court should have exercised its equitable powers and found that Respondent is estopped from collecting the petroleum and sales taxes, interest, and penalties thereon from Relator.

C. The Minnesota Tax Court Misapplied the Doctrine of Equitable Estoppel in this Case.

The Minnesota Tax Court held that the Respondent was not subject to equitable estoppel in this matter because “it did not give Appellant [Relator] improper advice.” (Tax Court Opinion at page 11.) However, conduct as well as advice can form the basis of equitable estoppel. In *Petition of Halberg Const. & Supply, Inc.*, 385 N.W.2d 381 (Minn.Ct.App. 1986), a transportation company (Halberg Construction & Supply, herein after “Halberg”) was cited for operating outside its permit authority and sought clarification of its geographic scope in a proceeding before an administrative law judge. Halberg obtained its permit from Kirscher Bulk Transport when it purchased Kirscher which had state-wide permit. The Public Service Commission notified Kirscher before the purchase by Halberg that after the purchase the permit would be limited to 7 northern counties in Minnesota. Halberg never received the order limiting the scope of the transferred permit and was not informed of the new limitations on the Permit. Halberg’s

purchase price for Kirscher was based on state wide authority. Halberg operated on a state wide basis after its Kirscher acquisition.

The Department of Transportation had every reason to know that Halberg was operating outside the scope of its permit. The Department audited Halberg ten or eleven times from 1971 to 1984. Halberg's trucks stopped at weigh stations well outside of its permit area. The Department issued Special permits to Halberg to haul oversize or overweight loads outside of its permit area. Notwithstanding all these reasons to know of the Halberg's reliance on a misunderstanding of its permit, the Department did nothing until the proceeding to assert the limitations on Halberg's permit.

The Court of Appeals held that the Department of Transportation was equitably estopped from asserting the limitations of the permit. Estoppel can be based on conduct (silence in this case) as well as verbal representations. The court found the equities favored Halberg: it might go out of business if it lost the state wide business and had purchased specialized equipment to serve state wide customers. The state's interest in a well regulated shipping industry would not be frustrated because both competitors and customers were accustomed to Halberg's presence in the state wide market.

The parallels with this case are apparent. The Department should be estopped for its conduct: releasing the tax liens in Stores assets. As noted above,

Stores and Avanti changed their positions by filing the bankruptcy proceedings in reliance on the liens. The withdrawal of the liens destroyed the Chapter 11 Plans and made payment of these tax debts through the Plan impossible, thereby frustrating both the public interest in payment of these taxes and saddling Relator, potentially, with an enormous personal liability that could have been paid in the bankruptcy proceeding.

The Minnesota Tax Court also stated that Relator “misconstrues Avanti’s liability. Avanti’s liability is not limited in any way by...Stores liability.” (Tax Court Opinion at page 11.) Relator did not make that argument before the Tax Court and is not making that argument here. Obviously, Avanti’s liability is not limited by Store’s liability for the same debt. Store’s assets should have been available and used to pay the joint obligation of both entities since both entities created the obligation and both should be liable and responsible for the debt.

II. Relator may not be held to be a responsible person when the Respondent Commissioner of Revenue played a causal role in the taxes remaining unpaid by its improvident lien release which made a Chapter 11 Bankruptcy Plan of Arrangement impracticable, thereby becoming a supervening cause excusing Relator’s from personal responsibility, assuming *arguendo* he was personally responsible.

In the Minnesota Tax Court, Relator Scott Stevens argued that the functional test derived from *Benoit v. Commissioner of Revenue*, 453 N.W.2d 336 (Minn. 1990), created an implied element of causation. In other words, the functional test focused on those individuals within a tax defaulting entity who actually caused the

failure to properly pay the required taxes. The Tax Court rejected this argument by stating, in a footnote, which noted a Minnesota Supreme Court case rejecting a “best efforts” defense as well as noting that willfulness is not a requirement for liability under Section 270C.56. Appellant made neither contention in the Minnesota Tax Court. (Tax Court Opinion at page 15, footnote 7.) As noted above, the standard of review for this issue, as part of a grant of summary judgment is *de novo* review. *SCI Minnesota Funeral Services, Inc. v. Washburn-McReavy Funeral Corp., supra* and *Kratzer v. Welsh Companies LLC, supra*. See discussion at pages 18-19.

A review of certain of the responsible person cases will illustrate the argument. In *Fondungallah v. Commissioner of Revenue*, 20102010 WL 4923937 (MN Tax Court 2010), the Tax Court held that Mr. Fondungallah was not liable as a responsible person because he played no role in the day-to-day operations of the defaulting corporation or its financial decision making. Also, he did not have signatory authority over the corporation’s principal operating account (although he did have signature authority over an inactive account associated with a line of credit). Although the Court couched its decision in terms of the five *Benoit* factors, a case can also be made that Mr. Fondungallah did not *cause* and was *not in a position to cause* the taxes to go unpaid.

Similarly, in *Hames v. Commissioner*, 1991 WL 25493 (Minn.Tax 1991), the Minnesota Tax Court held that an individual who was the Vice President and Field Operations Manager was not a responsible person for the purposes of the statutory predecessors of Section 270.56C. This individual had no control over the payment of payroll, paying the payroll taxes or signature authority over the general bank account for the defaulting corporation. The Court did not explicitly use “causation” analysis but again an argument can be made that this individual’s lack of authority put him outside the chain of causation.

The present case is an extremely unusual case. In the usual officer liability case, there is little, if any, question of causation. Somebody with substantial power inside the defaulting entity caused a decision to be made that lead to the default in tax payments. In many cases, an actor outside the defaulting entity intervenes to cause the failure to pay the taxes. Usually that outside actor is a creditor who takes control of the entity’s finances and therefore its tax payments. In such a situation, the creditor could then become responsible under the officer liability statute. The Minnesota Supreme Court has twice approved a personal assessment against a lender who was not a corporate officer, director or employee but who had taken control of a corporation’s finances. *Larson v. Commissioner*, 581 N. W.2d 25 (Minn. 1998); *Peterson v. Commissioner of Revenue*, 566 N.W.2d 710 (Minn. 1997). While such results were couched in the language of responsibility, a



causation analysis also applies. These outside actors cause the liability so the application of the statute imposes the liability upon them.

As noted above, this is an unusual case because the Respondent Minnesota Department of Revenue became a causal agent in these tax liabilities going unpaid. Specifically, the withdrawal of the tax liens scuttled a proposed Chapter 11 Plan that would have paid the taxes at issue in this matter.

A reference to tort law provides substantial analytical help in analyzing causation in this matter. Under Minnesota tort law, an act is a “direct, or approximate, cause of harm if the act was a substantial factor in the harm’s occurrence.” *George v. Estate of Baker*, 724 N.W. 2d 1, 10 (Minn. 2006). Factual causation alone, sometimes described as “but for causation” is insufficient to establish liability in Minnesota because “in a philosophical sense, the causes of an accident go back to the birth of the parties and the discovery of America.” *Id.* p. 10-11, quoting William L. Prosser, *the Minnesota Court on Proximate Cause*, 21 Minn. L. Rev. 19-22 (1936).

Furthermore, the acts of a third party can break the chain of causation from a party’s acts to the harm suffered by a tort plaintiff. Three dram shop cases illustrate the intervention of third parties’ vitiating the many initial causal relationships between the initial act and the subsequent harm. In *Kryzer v. Champlin American Legion No. 600*, 494 N.W. 2d 35 (Minn. 1992), an intoxicated

patron was ejected from a bar by a bar employee who injured her in the process of removing her from the premises. The Minnesota Supreme Court concluded that the patron's intoxication and the bar's serving her alcoholic beverages, while a possible occasion for the injury, was not the cause of her injuries. It was the employee's actions while removing the patron that caused the injury. Therefore, the bar was not liable under the dram shop statute.

In *Crea v. Bly*, 298 N.W.2d 66, 66 (Minn. 1980) an intoxicated female bar patron encouraged a male patron to attack the plaintiff, which the male patron did. The Court held that the actions of the female patron caused a break in any chain of causation from the serving of alcoholic beverages to the harm suffered by the Plaintiff. In *Kunza v. Pantze*, 527 N.W. 2d 846, 847 (Minn. App. 1995), *rev'd* *Kunza v. Pantze*, 531 N.W. 2d 839, 839 (Minn. 1995), the Defendant became intoxicated at a bar and then left the bar with his wife in their car. While driving, the Defendant began abusing his wife and she jumped out of the car to avoid further abuse. The Supreme Court held that no proximate cause existed between the Defendant's intoxication and the wife's injuries incurred upon jumping out of the car because her jumping out of the car was a voluntary act thereby severing the causal chain.

To summarize, the cases discussed above establish that under Minnesota case law, "but for causation" is insufficient to establish liability in Minnesota

because it is too general and does not allow for the intervention of the voluntary actions of independent third parties. Applying that reasoning to this case, the failure to pay the petroleum taxes provides the “occasion” for the taxes going unpaid, but the actions of the Minnesota Department of Revenue in withdrawing the liens served as the action of an independent third party which should break the chain of causation just as the employees ejection of the plaintiff in *Kryzer*, the female bar patrons incitement of a male patron to attack the Plaintiff in *Crea* and the abuse by the husband and the wife’s leaping from the van in *Kunza* served as an independent actions that broke the chain of causation from the sale of alcoholic beverages. Therefore, under the legal standards elucidated in the dram shop cases discussed above and applying the implied causation element in the officer liability cases of this Court and the Minnesota Supreme Court, the actions of the Commissioner serve as a break in the chain of causation. Therefore, Relator is no longer a primary causal agent in this tax default and should be excused.

In addition, *Osborn v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 373 (Minn. 2008), notes that whether proximate cause exists in a particular case is a question of fact for the jury or fact finder in this case to decide.

III. The record in this case presents a triable issue of fact on whether Relator, Scott L. Stevens, may be assessed as a responsible person for unpaid petroleum taxes pursuant to Minn. Stat. §270C.56 when he had no independent authority in regard to the financial management of the taxpaying entities.

The standard of review for this issue, as part of a grant of summary judgment is *de novo* review. *SCI Minnesota Funeral Services, Inc. v. Washburn-McReavy Funeral Corp.*, *supra* and *Kratzer v. Welsh Companies LLC*, *supra*. See discussion at pages 18-19.

Minn. Statutes §270C.56 provides:

A person who, either singly or jointly with others, has the control of, supervision of, or responsibility for filing returns or reports, paying taxes, or collecting or withholding and remitting taxes and who fails to do so, or a person who is liable under any other law, is liable for the payment of taxes, penalties, and interest arising under chapters 295, 296A, 297A, 297F and 297G, or sections 290.92 and 297E.02.

This statutory language and the similar language in earlier statutes does not impose strict liability by making all officers of a corporation liable for unpaid sales and income tax withholding. This language requires evaluating an individual's power and responsibility within the corporate structure to determine who “has the control of, supervision of, or responsibility for filing returns or reports, paying taxes, or collecting or withholding and remitting taxes...” *Id.*

The leading case on personal liability for withholding and sales taxes continues to be *Benoit v. Commissioner of Revenue*, 453 N.W.2d 336 (Minn. 1990). In *Benoit*, the Minnesota Supreme Court developed a multi factor standard for determining responsibility for unpaid sales taxes based on the federal “responsible person” standard for determining personal liability for federal withholding taxes. *Id.* at 341-44. The *Benoit* test is a “functional one which

focuses on those persons who have the power and responsibility to see that the taxes are paid.” *Id.* at 342 (citations omitted). In *Paddock v. Commissioner of Revenue*, 2008 WL 920611 (Minn. Tax 2008), the Court stated the review of the Benoit factors is not based upon “an isolated view of titles or specific acts but, rather, address a broad view of the person’s knowledge of and role in the financial matters of a company.” The *Benoit* factors provide guidelines for determining **which persons caused the underpayment of tax**. In *Benoit*, the Supreme Court listed five specific factors that should be used in determining personal liability:

- (1) The identity of the officers, directors and stockholders of the corporation and their duties;
- (2) The ability to sign checks on behalf of the corporation;
- (3) The identity of the individuals who hired and fired employees;
- (4) The identity of the individuals who were in control of the financial affairs of the corporation; and,
- (5) The identity of those who had an entrepreneurial stake in the corporation.

We review each of these factors in turn:

(1) The identity of the officers, directors and stockholders of the corporation and their duties;

Mr. Stevens was the President of the company but with severely circumscribed authority in financial matters. However, title alone is not

sufficient to make one responsible. For example, in *Wold v. Commissioner of Revenue*, 1994 WL 12406 (Minn. Tax. 1994), an individual had titles as Vice-President and Director of a corporation that failed to pay its sales and withholding taxes. Upon a review of the facts, the Minnesota Tax Court concluded that Mr. Wold's actual role and authority in the corporation was inconsistent with his titles. Therefore, he was not a person with control of or responsibility for the collection and payments of sales taxes. Here, Mr. Stevens had a title and operational responsibility but not the actual authority over finances sufficient to make him personally responsible.

In *Hames v. Commissioner, supra*, an individual with the title of Vice-President was not held to be a responsible person when his responsibilities were limited to operational matters. In fact, the Court noted that Mr. Hames was the "key employee" apparently due to his operational skills. The analogy to Mr. Stevens is patent. The control exercised by the 'sole owner' of the corporation removed Mr. Hames from the ranks of responsible persons. In *Hames*, it should be noted that Mr. Hames, like Mr. Stevens, could make recommendations regarding payment of creditors but the 'sole owner' of the corporation made the final decision.

(2) The ability to sign checks on behalf of the corporation;

Mr. Stevens did have check signing authority. However, that authority was exercised in a ministerial capacity: only payments approved by Mr. Nelson could be made. Furthermore, the actual signatures on the checks were placed there by the use of a signature machine. In *Krech v. Commissioner of Revenue*, 557 N.W.2d 335, 341 (1997), the Minnesota Supreme Court noted in regard to this factor “that check signing authority without further indicia of control is not enough to establish personal liability.” We submit that this is the situation with Mr. Stevens in this matter. He had the check signing authority but no further indicia of control. In *Schmidt v. Commissioner of Revenue*, 1990 WL 108063 (Minn.Tax 1990), the Minnesota Tax Court held that a Vice-President of a corporation could not be held liable as a responsible person when his check signing authority was “a matter of convenience” rather than authority. Given the iron fisted control exercised by Mr. Nelson, Mr. Stevens’ check signing authority is not a real indication of authority.

(3) The identity of the individuals who hired and fired employees;

Mr. Stevens, as President of the Company, had the authority to hire and fire employees.

(4) The identity of the individuals who were in control of the financial affairs of the corporation; and,

The evidence outlined in our factual discussion (pp.10-18) shows that Mr. Stevens had no control over the finances of the corporation which was retained by Mr. Nelson. At the very least, the evidence outlined there shows that we have a triable issue of fact concerning whether Mr. Stevens could be included within the group of those “in control of the financial affairs of the corporation.”

(5) The identity of those who had an entrepreneurial stake in the corporation.

Mr. Stevens held no ownership interest in Stores and Avanti. He did have a minor stake in the RM Group of less than one percent. For all intents and purposes, Bruce Nelson owned and controlled the RM Group which controlled the entities here. The Minnesota Tax court correctly concluded that Mr. Stevens did not have an entrepreneurial stake in Avanti. (Tax Court Opinion at page 18.)

The discussion above shows that Mr. Stevens’ role as an officer of the company and check signer was purely ministerial when it came to financial matters and that he had no entrepreneurial stake in the corporation. He did have the

authority to hire and fire employees but that is the only *Benoit* factor that applies to him.

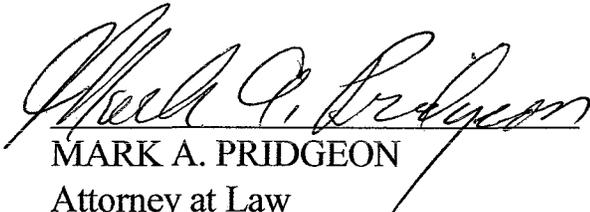
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CONCLUSION

The judgment of the Minnesota Tax Court should be reversed and the Tax Court should be directed to enter a judgment that the Respondent Commissioner of Revenue is estopped from collecting these taxes from Relator Scott Stevens. In the alternative, the summary judgment against Relator Scott Stevens should be reversed and the Tax Court should be directed to conduct a trial on the issue of his liability for these unpaid petroleum taxes.

December 8, 2011.

Respectfully submitted,



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