

NO. A05-0440

State of Minnesota  
In Supreme Court

James L. Wilson,

*Relator,*

vs.

Commissioner of Revenue,

*Respondent.*

RELATOR'S REPLY BRIEF

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## ARGUMENT

- I. Respondent misstates the record regarding the gravity of any “misconduct” by Relator, Mr. Wilson, by minimizing the payments he made, or caused to be made, in response to the levy and by attempting to resurrect Respondent’s discredited “lost revenue” argument.

In the Respondent’s Statement of Facts in Respondent’s Brief, Counsel for Respondent makes statements that need to be corrected or elaborated upon. The first statement concerns payments made pursuant to the levy on the wages of Mr. J.R. Hanson, III, the taxpayer in this matter. While Hazardous Waste Controls of Bloomington, Inc. (hereinafter “HWC”) made only one payment to Commissioner, as stated by Respondent, at least two other payments were made pursuant to this levy as noted by the Minnesota Supreme Court Opinion in the second Wilson appeal. *Wilson v. Commissioner of Revenue*, 656 N.W.2d 547, 550-551 (Minn. 2003).

Respondent, at pages 11-13, quotes the language from the HWC Opinion to the effect that HWC in arranging to assume the new cleaning service contract at Valley Oldsmobile was “a sham” designed to circumvent a third party levy in effect at Valley Oldsmobile. Then Respondent continues to quote extensively from more of the harsh language that the

Minnesota Tax Court used about the HWC – J.R. Hanson employment relationship for janitorial services at Valley Olds in the HWC Opinion. The Minnesota Tax Court, in that opinion, failed to see what this court saw in that employment relationship.

Mr. Hanson had been providing janitorial services to Apple Valley Oldsmobile (“Valley Oldsmobile”) as an independent contractor. However, he was doing so illegally because his sales tax permit had been revoked. Furthermore, the Respondent had served a Notice of Levy on Valley Oldsmobile which allowed the Respondent to collect all the funds earned by Mr. Hanson there as an independent contractor. During Mr. Hanson’s and Relator’s efforts to negotiate a payment arrangement of Mr. Hanson’s numerous sales and income tax obligations, Respondent’s representatives specifically stated that Mr. Hanson could no longer work as an independent contractor at Valley Oldsmobile. Respondent’s representatives told Mr. Hanson that the only way he could provide janitorial services at the dealership was to work as an employee. Throughout this proceeding, Respondent has sought to penalize Relator for doing precisely that: making it possible for Mr. Hanson to provide janitorial services at Valley Oldsmobile as an employee. The Respondent has continually returned to

this “lost revenue” argument: the employment relationship meant that the State could receive only 25 percent of a wage levy on wages earned at \$6.00 an hour rather than 100 percent of a levy on an independent contractor’s earnings on wages earned at \$18.00 an hour. These facts are summarized in the second opinion by the Minnesota Supreme Court, *Wilson v. Commissioner*, 656 N.W.2d 547, 549-550 (Mn. Sup. Ct. 2003).

The best response to this “sham” language and the implication that Relator “pulled a fast one” on the Respondent is to quote the language from the Minnesota Supreme Court Opinion in the second appeal in applying the three part proportionality test articulated in *Solem v. Helm*, 463 U.S. 277 (1983), the Court discussed the “gravity of the offense” compared to the “harshness of the penalty.”

“First, we compare the gravity of the offense with the harshness of the penalty. We believe that the overall facts in this case serve to limit the gravity of Wilson’s offense. First, neither Wilson nor HWC participated in the creation of the underlying tax liability. Hanson was, and still is, the delinquent taxpayer. Second, in negotiations with Wilson and Hanson, the Commissioner told Hanson that the only way he could continue to work after his sales tax permit had been revoked was as an employee. Hanson thus complied with the Commissioner’s directions when he agreed to work at Valley Oldsmobile as a HWC employee. Third, the Commissioner is *precluded from claiming that HWC’s actions deprived the state of money it would have collected under the original Valley Oldsmobile third-party levy*. It would have been

illegal for Hanson to continue working as an independent contractor for Valley Oldsmobile under the existing third-party levy because his sales tax permit had been revoked. Had Hanson agreed to work as an employee of Valley Oldsmobile instead of HWC, the Commissioner still would have been entitled to only 25 percent of Hanson's wages. The Commissioner's revocation of Hanson's sales tax permit effectively limited Hanson's options; he could work as an employee or not at all. We conclude that the limited gravity of Wilson's conduct does not support the harshness of the personal assessment against Wilson." (emphasis added). *Id.* at 555-556.

This language shows that the Minnesota Supreme Court, in the second Wilson appeal, concluded that Mr. Wilson's conduct in this matter did not merit the opprobrium directed in his direction by the Respondent's brief and the opinion of the Minnesota Tax Court in the HWC case.

Respondent, on page 12 of his brief, notes that HWC "received between \$15,347.12 and \$17,175.12 from the automobile dealership" during the employment relationship with Mr. Hanson. It is hard to discern the point behind this statement but like all comments based on gross revenue alone, it is meaningless. Respondent has neglected the expenses which include the following (Exhibit numbers and transcript references from the trial on remand to the Minnesota Tax Court, July 17, 2001):

1. Wages to Mr. Hanson and his son totaling \$12,801.23 (Ex. 3).

2. Employment taxes paid directly to the Internal Revenue Service equaled \$1,261.79. (Tr. 50-51; Ex. 3: pp. 6 and 28)
3. Tax payments to the Internal Revenue Service through Highland Bank added up to \$1,075.25. (Tr. 50-51; Ex. 3: pp. 11, 14, 23, 34 and 36)
4. Payments to the Minnesota Department of Economic Security for unemployment insurance equaled \$253.22. (Tr. 51; Ex. 3: pp. 7, 29, 38)
5. Sales tax payments to Respondent equaled \$978.17. (Tr. 51-52; Ex. 3: pp. 4, 25, 35, 37)
6. Payments for legal services totaled \$500. (Tr. 54; Ex. 3: p. 33)
7. Compensation to Mr. Wilson for his services in the amount of \$500. (Tr. 53, Ex. 3: p. 15)
8. Payments of miscellaneous expenses totaled \$1,655.90. (Tr. 53-54; Ex. 3: pp. 5 and 24)
9. Payment of taxes through the purchase of a money order for \$300. (Tr. 54; Ex. 3: p. 39)

Once the expenses are reviewed, it is apparent that whatever sinister references Respondent wishes to draw from revenues alone are unfounded.

These expenses total \$19,325.56, thus exceeding revenues by over \$2,000.00. Even if items numbered 7, 8 and 9 are excluded, Respondent's figure for revenues exceed expenses by only \$305.43. Contrary to Respondent's implications, this venture was not wildly profitable.

**II. Respondent misunderstands the law regarding waiver and erroneously contends that Relator has waived argument on issues that are not pending before the court.**

Respondent contends, at numerous points in his brief, that Relator has waived argument on issues which are not presently before the Court. The Minnesota Tax Court ruling that Relator has appealed from simply held that Relator was not a "prevailing party" in this litigation. Therefore, Relator's brief addressed that point which is presently before the Minnesota Supreme Court. While Respondent has spilled a great deal of ink concerning whether Relator is entitled to recover attorney's fees in the prior Hazardous Waste Controls of Bloomington, Inc. cases or the appeals to the Minnesota Supreme Court in this matter, the Minnesota Tax Court's ruling appealed from was a single, simple holding: Relator was not the prevailing party in this litigation. Even the Respondent has conceded in Respondent's listing of the legal issues (pages 1-3, ¶III), these other issues are not before the Court. The Minnesota Tax Court did not reach the substantial justification

issue in the HWC issue or the Supreme Court appeals issues. Therefore, Respondent's argument fails both under the rules & precedents covering this Court's jurisdiction and the well established guidance concerning waiver.

It is well established that the jurisdiction of the Minnesota Supreme Court and the Minnesota Court of Appeals is limited. As noted by this Court in *Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63 (1979), "this Court is limited to reviewing questions *presented to and decided by the lower Court...*" *Id.*, 69 (emphasis added). The Minnesota Court of Appeals follows the same guidelines. *Schafer v. Commissioner of Public Safety*, 348 N.W.2d 365, 368 (Minn. Ct. App. 1984).

Respondent's argument also contradicts the well established law concerning waiver. Waiver is a "voluntary relinquishment of a known right." *Cohler v. Smith*, 280 Minn. 181, 189-190, 158 N.W.2d 574, 579 (1968). As the *Cohler* court noted, "there can be no waiver without actual or implied intent to waive." In this case, Relator could hardly be held to have waived an argument that is not properly before the Court.

However, Relator will briefly raise a response to Respondent's much lengthier arguments on the substantial justification position. Relator does

not do this to raise new matter but rather to counter Respondent's lengthy argument on an issue not presently before the Court. If the Court wishes to retain this case and decide the substantial justification issue rather than remanding it to the Minnesota Tax Court, Relator requests an opportunity to fully brief the substantial justification issue upon this Court's decision to take up that issue, which is not presently before the Court.

The basic premise of Respondent's position on the substantial justification issue is that the Respondent was entitled to proceed to attempt to impose an assessment against Mr. Wilson that the Minnesota Supreme Court found to be an unconstitutional Excessive Fine because it had no other option. However, the Supreme Court Opinion in the Relator's second appeal plainly shows that the Department of Revenue had another option. Minnesota Statutes §270.70, subs. 8, 9 (1994) authorized the Commissioner to assess personal liability against anybody failing, without reasonable cause, to surrender property or rights to property subject to levy but limited to the value of the property not surrendered. Subdivision 9 allowed the Commissioner to impose an additional penalty equal to 25 percent of the amount recoverable under subdivision 8. *Wilson v. Commissioner*, 656 N.W.2d 547, at 557-558 (2003). Respondent, for

reasons best known to Respondent, chose to proceed otherwise.

## CONCLUSION

In conclusion, the Minnesota Tax Court erred in denying the Motion for Attorney's Fees, Costs and Disbursements.

We respectfully request the Court to find the following:

1. That the Minnesota Tax Court erred in denying the Motion for Attorney's Fees, Costs and Disbursements on the grounds that Relator was not the prevailing party in this proceeding.
2. Remand the case to the Minnesota Tax Court with instructions to re-consider Relator's Motion for Attorney's Fees, Costs and Disbursements in light of this Court's determination that Relator is the prevailing party in this action.

Dated this 20<sup>th</sup> day of June, 2005.

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