3

A11-2015

STATE OF MINNESOTA

IN SUPREME COURT

Bruce Nelson,

Relator,

v.

Commissioner of Revenue,

Respondent.

RELATOR'S OPENING BRIEF & 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).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

LEGAL ISSUES 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 4

ARGUMENT 18

I. THE TAX COURT ERRED BY DENYING NELSON'S REQUEST FOR AN OPPORTUNITY TO DEPOSE THE DEPARTMENT OFFICIALS WHO FILED, BUT LATER WITHDREW, THE STORES LIENS. 18

A. Summary Judgment Is Proper Only Where There Are No Genuine Issues Of Material Fact In Dispute. 19

B. Where Summary Judgment Has Been Requested, A Non-moving Party's Motion For Additional Time To Conduct Discovery Should Be Liberally Granted. 19

C. The Department's Reasons For Filing And Later Withdrawing The Stores Liens Were Facts Material To Nelson's Estoppel Claim. 21

D. Through His Motion To Compel, Nelson Sought An Opportunity To Discover The Department's Reasons For Filing And Withdrawing The Stores Liens. 24

E. The Tax Court Erroneously Concluded That The Department's Reasons For Filing And Withdrawing The Stores Liens Were Not Material, And This Error Of Law Caused The Court To Improperly Deny Nelson's Motion To Compel Depositions Of Relevant Department Officials. 26

F. Nelson Was Entitled To Depose The Department Officials Who Had Filed But Subsequently Withdrawn The Stores Liens. 28

CONCLUSION 34

TABLE OF AUTHORITIES

Page

STATUTES

Minn. Stat. § 270C.56 2

Minn. Stat. § 296A.10 ..... 5, 6

FEDERAL CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 22

McCarty v. United States, 437 F.2d 961 (Ct. Cl. 1971) 23, 24

MINNESOTA CASES

Beehner v. Cragun Corp., 636 N.W.2d 821 (Minn. Ct. App. 2001) 21, 34

Bixler v. J.C. Penny Co., 376 N.W.2d 209 (Minn. 1985) 1, 21, 29

Bond v. Comm'r of Revenue, 691 N.W.2d 831 (Minn. 2005) 22, 26

Cherne Contracting Corp. v. Wausau Ins. Cos.,
572 N.W.2d 339 (Minn. Ct. App. 1997) 19, 28

City of North Oaks v. Sarpal, 797 N.W.2d 18 (Minn. 2011) 16, 22

Dalco Corp. v. Dixon, 338 N.W.2d 437 (Minn. 1983) 19, 34

Dunshee v. Douglas, 255 N.W.2d 42 (Minn. 1977) 21, 28

Gaspord v. Washington County Planning Commission,
252 N.W.2d 590 (Minn. 1977) 19

Hasan v. McDonald's Corp., 377 N.W.2d 472 (Minn. Ct. App.
1985) 29

Kmart Corp. v. County of Stearns, 710 N.W.2d 761 (Minn. 2006) 22

Liberty Mut. Ins. Co. v. Northeast Concrete Products, LLC,
756 N.W.2d 93 (Minn. Ct. App. 2008) 21

Lundgren v. Eustermann, 370 N.W.2d 877 (Minn. 1985) 19

Rice v. Perl, 320 N.W.2d 407 (Minn. 1982) .....passim

Ridgewood Dev. Co. v. State, 294 N.W.2d 288 (Minn. 1980) 1, 22

State v. Askland, 784 N.W.2d 60 (Minn. 2010) 28

RULES

Minn. R. Civ. P. 56.03 19

Minn. R. Civ. P. 56.06 .....20, 21, 28, 33

LEGAL ISSUES

Where summary judgment has been requested, a non-moving party's motion for additional time to conduct discovery should be liberally granted. Here, seeking to develop an estoppel claim, Nelson filed a motion to compel discovery seeking the opportunity to depose Department officials who filed, but later withdrew, liens against one of the companies that was jointly liable for the tax arrearage for which Nelson was personally assessed. Whether the Tax Court erred by denying Nelson's motion to compel and, therefore, prematurely disposed of this case on summary judgment.

- The tax court erroneously concluded that the Department's reasons for filing and later withdrawing the liens against the joint obligor were not material to Nelson's estoppel claim, denied Nelson the opportunity to depose relevant Department officials, and disposed of the case on summary judgment.

  Rice v. Perl, 320 N.W.2d 407 (Minn. 1982)

  Bixler v. J.C. Penny Co., 376 N.W.2d 209 (Minn. 1985)

  Ridgewood Dev. Co. v. State, 294 N.W.2d 288 (Minn. 1980)

STATEMENT OF THE CASE

This case involves approximately $4 million in unpaid petroleum tax incurred by Twin Cities Avanti and Twin Cities Stores between September 2008 and March 2009. During that time, Avanti and Stores functioned as a single economic unit operating gas stations and convenience stores. Both were wholly-owned subsidiaries of R.M. Group, Inc., a Delaware corporation of which Nelson was majority shareholder.

The tax arose primarily from the sale of petroleum products by Avanti and Stores.[1] Initially, the Department of Revenue assessed—and filed tax liens against—Avanti alone. In June 2009, however, counsel for Avanti and Stores informed the Department that both entities were liable for the tax arrearage, and that any viable payment plan must include the assets and cash flows of both entities. Accordingly, the Department filed liens against Stores as well, but ultimately rejected the companies' repayment plan. Also, pursuant to section 270C.56, the Department assessed Nelson and Scott Stevens (collectively, "Taxpayers") as individuals personally liable for the unpaid petroleum tax of Avanti and Stores.

In June 2009—now both subject to substantial tax liens—Avanti and Stores filed bankruptcy petitions. Seven months later, in January 2010, they filed a Joint Plan of Reorganization ("Joint Plan") under which: (i) Stores would sell one of its facilities to provide the Department with an immediate $750,000 payment; and (ii) Stores and Avanti would pay the remaining tax arrearage over 48 months.

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[1] Also in issue is also approximately $7,759 in outstanding sales tax for February and April 2009.

Shortly after Avanti and Stores filed the Joint Plan—and a full seven months after it had first filed liens against Stores—the Department suddenly withdrew those liens. Because Stores had significantly greater assets than Avanti, the Department's lien withdrawals destroyed Avanti and Stores' ability to repay through bankruptcy their tax arrearages. More generally, the Department's lien withdrawals forced the companies to abandon their reorganization plan, and to convert their Chapter 11 filings to Chapter 7 liquidations.

Taxpayers filed separate tax court actions challenging the Commissioner's personal liability assessments against them. The matters were consolidated, and the Commissioner moved for summary judgment.

In addition to disputing the personal liability assessments, Taxpayers alleged that the Department was equitably estopped from pursuing them personally. At the urging of Avanti and Stores, the Department had filed tax liens against Stores. This ultimately induced Stores to file bankruptcy along with Avanti (which formerly had been the sole tax debtor). After the companies filed the Joint Reorganization Plan, however, the Department had suddenly withdrawn the liens against Stores, thereby destroying the viability of the Joint Plan, and forcing both companies into Chapter 7 liquidations.

Seeking to investigate and develop their estoppel theory, Taxpayers served the Commissioner with discovery seeking information about which Department officials had decided to file—and subsequently to withdraw—the tax liens against Stores. In addition, they inquired whether any third parties had urged the Department to release the liens.

Unsatisfied with the Commissioner's discovery responses, Taxpayers served a Joint Motion to Compel Discovery seeking to depose relevant Department officials. That motion was heard simultaneously with the Commissioner's motion for summary judgment. Erroneously concluding that the Department's *reasons* for filing and withdrawing the Stores liens were not relevant to Taxpayers' estoppel claim, the Tax Court refused to order or allow additional discovery and, accordingly, refused to defer consideration of the Commissioner's summary judgment motion. These rulings improperly denied Nelson the opportunity to develop his estoppel claim.

STATEMENT OF FACTS

The $3,985,621 petroleum tax liability was incurred by Avanti and Stores, two wholly-owned subsidiaries of R.M. Group, Inc., a Delaware corporation of which Nelson was majority shareholder.[2] During the relevant period—September 2008 through March 2009—Avanti and Stores functioned as a single economic unit operating gas stations and convenience stores primarily under the trade name "Oasis Markets."[3] Avanti and Stores used the same corporate office in Burnsville, were controlled by the same management team, and operated under the same business plan.[4] Scott Stevens was the president of

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[2] App-49, ¶2.

[3] App-49, ¶2.

[4] App-49, ¶2; Not. of Hearing and Joint Mot. for Order Authorizing Joint Administration ¶¶16, 23 (attached to Commissioner's Jan. 6, 2011 Supplemental. Mem. Supp. Mot. Summ. J).

both companies.[5] Although the entities internally observed corporate formalities, Avanti and Stores were indistinguishable to the outside world.[6]

Avanti purchased all of the petroleum products ultimately sold by both Avanti and Stores.[7] Correspondingly, Avanti filed—using its tax identification number only—the petroleum tax returns for the combined entities. Nevertheless, Stores facilities sold approximately 73% of the petroleum purchased by Avanti for both companies, while Avanti facilities sold the remaining 27%.[8] Under Minnesota law, therefore, Stores was liable for unpaid tax on the petroleum products sold by its facilities. *See* Minn. Stat. § 296A.10 ("It is a duty of ... any person who sells ... gasoline ... received ... by the ... person, ... to know whether the tax has been paid on the fuel. If the tax ... has not been paid, it is that person's duty ... to pay the tax ....").

Because Avanti had made all petroleum purchases and had filed all petroleum tax returns for the combined companies, the Department had assessed Avanti alone for the companies' joint petroleum tax liability.[9] In March 2009, Avanti contacted the Department to discuss its petroleum tax arrearages, and submitted to the Department a

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[5] App-49, ¶2.

[6] App-49, ¶2; Not. of Hearing and Joint Mot. for Order Authorizing Joint Administration ¶¶16, 23 (attached to Commissioner's Jan. 6, 2011 Supplemental. Mem. Supp. Mot. Summ. J).

[7] App-49, ¶¶2, 3; DeMeules Stevens Aff. Exhibit A: Stevens Deposition at 102-03 (attached to Commissioner's Nov. 1, 2010 Mem. Supp. Summ. J.)

[8] App-49, ¶3.

[9] App-49, ¶3.

proposed payment plan.[10] By letter dated April 2, 2009, the Department rejected that plan, but offered Avanti the opportunity to request reconsideration.

In April 2009, on behalf of Avanti and Stores, attorney Brian McCool sent a letter to Department employee Joe Saenger formally requesting reconsideration.[11] Elaborating on earlier telephone discussions,[12] McCool explained that Avanti and Stores actually functioned as a single economic unit and, accordingly, that the Department's assessment of Avanti alone did not reflect the economic reality of the companies' joint operation and resulting joint petroleum tax liability.[13] As required by Minnesota law, McCool reported to Saenger that Stores facilities had actually sold a substantial majority of the total petroleum products purchased by Avanti.[14] *See* Minn. Stat. § 296A.10 (imposing upon any seller of petroleum products who knows that tax has not already been paid a duty to report the same and to pay the tax). McCool wrote: "Simply stated, this joint economic entity, not [Avanti] alone, is responsible for the taxes owed currently to the State."[15]

Having clarified that both Avanti and Stores were liable for the tax arrearages, McCool reasoned, "it likewise makes sense to consider the cash flows from and the assets owned by both of these entities in evaluating how these taxes may be repaid to the

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[10] App-48, ¶1.

[11] App-48, ¶1.

[12] App-36.

[13] App-49, ¶3.

[14] App-49, ¶3.

[15] App-49, ¶3.

State."[16] McCool had previously explained to Saenger by telephone that (unlike Avanti) Stores owned most of its facilities, and that Stores planned to sell specified facilities to pay down the outstanding petroleum taxes.[17] (In April 2009, for example, Stores was negotiating the sale of Store No. 572 at 2111 Ford Parkway in St. Paul, Minnesota and expected to generate in excess of $1,000,000 in proceeds after repayment of the debt and closing costs that could be used to substantially reduce the companies' petroleum tax liability.)[18]

Although McCool's written request for reconsideration recognized that "the repayment terms of this proposal are similar to the proposal submitted to the State previously," he reasoned that "this proposal is substantially different in that these payments are now being supported by the cash flows and assets of both [Avanti and Stores]."[19] Indeed, McCool emphasized that any viable plan to pay the companies' tax arrearages must include the cash flow and assets of Stores.[20]

> [O]ur proposal is being made with the assumption that the repayment of these taxes would be a joint undertaking of these two companies. That said, we believe it would eliminate the prospect for future challenges to the organization's joint repayment of these taxes if the Department of Revenue were to formally recognize that both [Avanti and Stores] are taxpayers responsible for the repayment of these petroleum taxes.[21]

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[16] App-49, ¶1.

[17] App-36.

[18] App-50, ¶1.

[19] App-50, ¶7.

[20] App-49, ¶¶1, 3.

[21] App-49, ¶3.

In early May 2009, the Department rejected the revised payment plan proposed by McCool.[22] Nevertheless, based on McCool's disclosure of the true relationship between Avanti and Stores, and on his request that the Department "formally recognize that both [Avanti and Stores] are taxpayers responsible for the repayment of these petroleum taxes,"[23] Saenger filed tax liens against Stores.[24] More specifically, on June 4, 2009, the Department filed $3,985,621 in tax liens against Stores in Ramsey and Dakota Counties, and with the Minnesota Secretary of State.[25] These liens were filed after review by a Department Lead Worker.[26]

The Department's actions substantially changed the position of Avanti and Stores. Before the companies had approached the Department about a payment plan, the Department had assessed Avanti alone for the companies' unpaid petroleum taxes, and had filed liens against Avanti alone. Now, however, the Department had determined that Stores, too, was liable for tax arrearages, and had filed liens against Stores. Thus, whereas Nelson might formerly have elected to take Avanti alone into bankruptcy, the Department's newly-filed liens against Stores induced him to place both companies in bankruptcy if they sought to pursue a viable plan of reorganization that provided for full payment of the tax arrearages.

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[22] App-34.

[23] App-49, ¶3.

[24] App-34.

[25] App-24 to App-26.

[26] App-43.

Accordingly, on June 30, 2009, on behalf of Avanti and Stores, attorney McCool filed petitions with United States Bankruptcy Court.[27] In a subsequent filing seeking joint administration of the companies' bankruptcy cases, McCool emphasized in a section titled "Reasons for Filing Chapter 11" that the companies had filed for bankruptcy, in large part, because the Department had asserted liens against the assets of both companies.

> During late 2008 and early 2009, because of cash flow problems, Debtors became delinquent on their payment of petroleum taxes to the [Department]. As of the Filing Date, the State of Minnesota calculated the amount in arrears to be $3,985,620.67. Pursuant to Minnesota statutes, the State of Minnesota asserted liens against Debtors' assets for these unpaid taxes, and shortly before the Filing Date began collection efforts, including directing certain of Debtors' dealers to make their rent payments to the State of Minnesota.[28]

Concluding that the companies' bankruptcy filings were factually and legally connected, the Bankruptcy Court subjected the filings to joint administration.[29]

On January 18, 2010, the companies filed a Joint Second Amended Plan of Reorganization under Chapter 11 (the "Joint Plan").[30] Under the Joint Plan, Stores would sell its facility at 2111 Ford Parkway in St. Paul, Minnesota (Store No. 572), and would escrow $750,000 of the sale proceeds for immediate partial payment of the companies'

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[27] App-45, ¶6.

[28] Disclosure Statement Supp. Joint Bankruptcy Reorg. at 11 (attached to Commissioner's Jan. 6, 2011 Supplemental. Mem. Supp. Mot. Summ. J).

[29] App-45, ¶6.

[30] App-46, ¶8.

tax arrearages. The companies would pay down the remaining tax liability and interest over the ensuing 48 months.[31]

Creditors objected to the Joint Plan, *inter alia*, on the grounds: (a) that the companies were not both liable for the Minnesota petroleum tax arrearages; and (b) that the plan was not viable. In responding to the first point, the companies noted: "While [Avanti] was originally assessed for the claim, the State of Minnesota subsequently filed liens against the assets of [Stores] for the full amount of the tax debt. The State has never released or withdrawn these liens."[32] In responding to the second point, the companies emphasized—as they had when negotiating privately with the Department—that the repayment plan was viable specifically because Stores' assets and cash flow were available during reorganization, not just Avanti's:

> 9. [T]he evidence will show that there is a reasonable assurance that the Debtors' projections will be met and sufficient revenue will be generated under the plan because the Debtors have five new dealers who are prepared to begin operations as soon as the Plan is confirmed...
>
> . . .
>
> 11. The evidence will also show that the accuracy of the Debtors' projections and the feasibility of the Plan will be supported by [Stores'] sale of Store 572 to Semper Development, Ltd...
>
> 12. ... As for resources, in addition to the proceeds from the sale of Store 572, the cushion provided by Roundtree Capital's additional $200,000 cash

[31] App-46, ¶¶9, 10.

[32] Debtors' Joint Mem. Supp. Bankruptcy Plan Confirmation at 23 (attached to Taxpayers' Jan. 20, 2011 Joint Reply Mem. Opp'n Summ. J).

contribution will provide the Debtors with the working capital necessary to implement the Plan.[33]

The foregoing quotations are taken from attorney McCool's March 3, 2010, submission to the Bankruptcy Court. Unbeknownst to McCool and his clients, however, approximately six weeks earlier—on January 23 and January 27, 2010—the Department had suddenly released and withdrawn its tax liens against Stores.[34] This withdrawal eliminated the Department's secured position in Store No. 572 and all other Stores' properties.[35] Specifically, when the Department withdrew the State's tax liens against Stores, it surrendered the State's secured position to the $750,000 of proceeds that would have gone to the State of Minnesota.

The Department's release of the liens against Stores destroyed Avanti and Stores' Chapter 11 Joint Plan, and ultimately caused the companies to convert to Chapter 7 liquidations.[36] McCool had expressly informed the Department in April 2009 that its formal recognition of a joint tax debt "would eliminate the prospect for future challenges to the organization's joint repayment of these taxes."[37] As McCool had predicted, the Department's sudden withdrawal of its tax liens now rendered such challenges decisive. The cash flows and assets of both entities were no longer available to repay the $4 million state tax arrearage, and it was no longer possible for the companies to furnish the

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[33] Debtors' Joint Mem. Supp. Bankruptcy Plan Confirmation at 23 (attached to Taxpayers' Jan. 20, 2011 Joint Reply Mem. Opp'n Summ. J).

[34] App-27 to App-32.

[35] App-46, ¶11.

[36] App-46 to App-47, ¶¶11, 12.

[37] App-49, ¶3.

Department with the $750,000 initial payment contemplated by the Joint Plan. By destroying the viability of the Joint Plan, the Department's sudden withdrawal of the Stores liens directly foreclosed Avanti and Stores' ability to pay any part of the unpaid petroleum taxes.

After learning that the Stores tax liens had been withdrawn and released, on March 5, 2010, Ralph Mitchell, an attorney who took over the representation of Avanti in bankruptcy, contacted Roger Swanson, the Department's Director of Special Tax Division, which administers petroleum taxes.[38] Mitchell explained to Swanson that the release of the Stores tax liens foreclosed Avanti and Stores' ability to pay the $3.9 million in unpaid petroleum taxes.[39] Swanson stated that he did not know which Department officials had made the decision to remove the Stores liens, or why these liens had been removed. Swanson admitted, however, that the Department had received numerous calls concerning the case, and that someone had called and asked the Department to release the liens against Stores.[40]

After the Department's release and withdrawal of the Stores liens, it was unable to collect any petroleum taxes owed by Stores and Avanti from their cash flow and assets.

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[38] Pridgeon/Costello Aff. Exhibit G: Copy of a March 9, 2010 Memorandum prepared by Ralph V. Mitchell ("Mitchell Memo") at 1, ¶¶2 , 3 (attached to Nelson's Mem. Opp'n Summ. J.).

[39] Pridgeon/Costello Aff. Exhibit G: Mitchell Memo at 1, ¶3 (attached to Nelson's Mem. Opp'n Summ. J.).

[40] Pridgeon/Costello Aff. Exhibit G: Mitchell Memo at 1, ¶3 (attached to Nelson's Mem. Opp'n Summ. J.).

On August 11 and 12, 2010, Taxpayers separately served the Commissioner with discovery regarding, among other things: (i) the identities of all Department officials involved in the decision to file tax liens against Stores, and the reasons for filing such liens; (ii) the identities of all Department officials involved in the decision to withdraw or release the Stores liens; and (iii) the identities of all third-parties who had contacted the Department regarding withdrawal of the Stores liens.[41]

On September 30, 2010, Commissioner asserted that these discovery requests were vague, ambiguous and overly broad, but nevertheless stated: (i) that Department employee Ron Schwagel was "generally involved" in the decision to file tax liens against Stores, and that they were filed at the request of Avanti[42]; and (ii) that Schwagel was likewise knowledgeable about the decision to withdraw the liens, and that they were withdrawn because the Commissioner had never filed an order assessing Stores with the underlying tax liability.[43] The Commissioner did not respond to Taxpayers' request for information regarding third-party contacts with the Department regarding the release of the Stores liens.

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[41] Pridgeon/Costello Aff. Exhibit A: Commissioner's Responses to Stevens Interrogatories 9 and 10, at 6-8; Costello Aff. Exhibit 2: Commissioner's Responses to Nelson Interrogatories 9 and 10, at 6-8 (both attached to Nelson's Mem. Opp'n Summ. J.).

[42] Pridgeon/Costello Aff. Exhibit A: Commissioner's Response to Stevens Interrogatory 9, at 6-7; Costello Aff. Exhibit 2; Commissioner's Responses to Nelson Interrogatory 9, at 6-7 (both attached to Nelson's Mem. Opp'n Summ. J.).

[43] Pridgeon/Costello Aff. Exhibit A: Commissioner's Response to Stevens Interrogatory 10, at 7-8; Costello Aff. Exhibit 2: Commissioner's Response to Nelson Interrogatory 10, at 7-8 (both attached to Nelson's Mem. Opp'n Summ. J.).

Attached to the Commissioner's discovery responses was a Department activity log related to Stores. This log indicates that on May 26, 2009, liens were proposed against Stores "for the debts owed by [Avanti] (5392952) they are one in the same."[44] Subsequently, tax liens were filed against Stores in Dakota and Ramsey Counties, and with the Minnesota Secretary of State.[45] The activity log further provides that, on January 22, 2010, the Department withdrew the Stores liens:

> ID used in the lien belongs to Twin Cities Stores, but the debt belongs to Twin Cities Avanti with its pwn (*sic*) ID, although they are sister stores, cannot apply a lien to an entity that the debt does not belong to, the two stores Twin Cities Stores & Twin City of Avante (*sic*) are recognized separate with their own ID's.[46]

Taxpayers were not satisfied with these discovery responses, and on October 6, 2010, contacted the Commissioner to schedule a "meet and confer conference" under Minn. R. Gen. Pract. 115.10.[47] During that October 15 conference, the parties discussed the Commissioner's responses to Interrogatories 9 and 10. The Commissioner's counsel asserted that the Department's logs adequately responded to the Interrogatories, and that she was not aware of any third-party communications with the Department regarding the release or withdrawal of the Stores liens.[48] Later that day, however, counsel emailed to Taxpayers additional activity logs that had not been produced on September 30, 2010,

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[44] App-43.

[45] App-24 to App-26.

[46] App-40.

[47] Pridgeon/Costello Aff. at ¶7 (attached to Nelson's Mem. Opp'n Summ. J.).

[48] Pridgeon/Costello Aff. at ¶7 (attached to Nelson's Mem. Opp'n Summ. J.).

due to a self-admitted oversight.[49] The Commissioner's counsel continued to assert that the requested material was irrelevant.[50]

Still not satisfied, Taxpayers filed on November 11, 2010, a Joint Motion to Compel Discovery. Briefly, Taxpayers argued: (1) that they had complied with Minnesota law by informing the Department that Stores was also responsible for the Avanti tax arrearage; (2) that in recognition of this fact, the Department had filed tax liens against Stores; (3) that the Department's liens prompted them to file—and were essential to the success of—the Joint Plan of Reorganization; and (4) that the Department's sudden withdrawal of the liens thus destroyed the viability of the Joint Plan and forced the companies into Chapter 7 liquidations. Taxpayers argued that they were entitled to further pursue information about which Department officials had filed and withdrawn the liens, their reasons for doing so, and which third parties had contacted the Department about the liens.

> [Taxpayers] believe that [the Commissioner's] unilateral release of the liens and the resulting destruction of the Chapter 11 plan for paying the petroleum taxes at issue resulted in a detrimental reliance on the part of [Stores, Avanti] and Mr. Nelson and Mr. Stevens justifying the application of equitable estoppel. The discovery sought in this motion may lead to evidence relevant to that claim.[51]

On December 3, 2010, the Tax Court held a hearing to consider (1) the Commissioner's motion for summary judgment on the personal liability assessments

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[49] App-33.

[50] App-33.

[51] Taxpayers' Joint Mem. Supp. Mot. Compel at 12.

against Taxpayers, and (2) Taxpayers' joint motion to compel discovery.[52] After hearing argument on the motion to compel, the Tax Court granted that motion in part and denied it in part.

The court granted the motion insofar as it ruled that Taxpayers could present their estoppel argument by supplemental post-hearing memorandum.[53] It denied the motion, however, insofar as it ruled that no further discovery to develop the estoppel claim would be permitted.[54] More specifically, the court denied Taxpayers the opportunity to depose the Department officials who had filed and subsequently withdrawn the Stores liens, and who had indicated that third-parties had contacted the Department about releasing the liens.[55] The court so ruled even though a government estoppel claim requires proof that the government action inducing detrimental reliance was "wrongful."[56]

Based on its ruling that further discovery was unnecessary, the Tax Court proceeded to hear argument on the Commissioner's motion for summary judgment on the personal liability assessments against Taxpayers.[57] Pursuant to the Tax Court's oral order during the combined hearing, the parties submitted post-hearing supplemental memoranda on the estoppel issue.

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[52] *See generally* transcript of hearing on the Commissioner's Motion for Summary Judgment and Taxpayers' Joint Motion to Compel Discovery ("T.").

[53] Add-20 to Add-21.

[54] Add-19 to Add-20.

[55] *See* (T.14); Add-19 to Add-20.

[56] *See, e.g., City of North Oaks v. Sarpal*, 797 N.W.2d 18, 25 (Minn. 2011).

[57] (T.35-61).

On August 30, 2011, the Tax Court granted the Commissioner's motion for summary judgment, ruling that Nelson could be held personal liable for the unpaid petroleum taxes of Avanti.[58] In its written order and memorandum, the court said that it had rejected Nelson's estoppel claim on the ground that "there is no evidence the Department misrepresented to [Nelson] he would not be personally liable for the unpaid taxes of Avanti if the lien against T.C. Stores remained intact."[59]

As the foregoing clearly demonstrates, however, Nelson never alleged that he had received any such representation from the Department. Instead, Nelson had claimed that *even if he could he found personally liable*, the Department should be estopped from collecting from him. Consequently, in addition to preventing Nelson from conducting the depositions that would support the estoppel claim he actually sought to develop, the Tax Court denied an estoppel claim Nelson never asserted.

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[58] *See* Add-1 to Add-2. Judgment was subsequently entered on September 14, 2011. Relator notes that the Tax Court's Order is erroneously dated "August 30, 2010," rather than its actual filing date of August 30, 2011.

[59] Add-8 to Add-9.

ARGUMENT

I. THE TAX COURT ERRED BY DENYING NELSON'S REQUEST FOR AN OPPORTUNITY TO DEPOSE THE DEPARTMENT OFFICIALS WHO FILED, BUT LATER WITHDREW, THE STORES LIENS.

Nelson asserted in the Tax Court that even if the Department could personally assess him for the unpaid petroleum tax, it should nevertheless be estopped from collecting from him. By placing liens against Stores in June 2009, the Department had asserted to the world—and perforce to Nelson—that Stores was a joint obligor for the unpaid petroleum tax. In reasonable reliance upon this assertion, Nelson had caused Stores to file bankruptcy along with Avanti, and had emphasized in the Joint Plan that the combined assets of Stores and Avanti would be available to pay down the joint tax arrearage, and otherwise to fund the Joint Plan. Approval of the Plan would have garnered the Commissioner an immediate $750,000 payment, and a 48-month stream of future payments.

It is undisputed that the Department withdrew the Stores liens in January 2010, and thus surrendered its secured position in Stores' assets. This ensured that the Commissioner would *not* receive an immediate $750,000 payment, and more generally destroyed the overall viability of the Joint Plan. Nelson claimed that because the Department's actions ensured that it would *not* be paid by Avanti and Stores, the Department should be equitably estopped from collecting from him personally.[60]

To establish estoppel against the Department, however, Nelson needed to prove not just that the Department had filed and withdrawn the liens. He also needed to show

[60] Taxpayers' Joint Mem. Supp. Mot. Compel at 12.

that the Department's handling of the liens was "wrongful." The Tax Court's improper refusal to allow Nelson to depose Department officials about their reasons for filing and withdrawing the liens was based directly upon its erroneous conclusion that the fact of the withdrawals *was itself sufficient* to support Nelson's estoppel claim, and that the Department's *reasons* for filing and later withdrawing the liens, were not "material."

A. Summary Judgment Is Proper Only Where There Are No Genuine Issues Of Material Fact In Dispute.

Summary judgment is proper only where there are no genuine issues of material fact in dispute and a determination of the applicable law will resolve the controversy. *Gaspord v. Washington County Planning Commission*, 252 N.W.2d 590, 590-91 (Minn. 1977); Minn. R. Civ. P. 56.03. Summary judgments are to be granted with great caution, and are not intended as a substitute for trial when there are fact issues to be determined. *Lundgren v. Eustermann*, 370 N.W.2d 877, 882 (Minn. 1985). "[A]ll doubts as to the existence of a genuine issue of material fact must be resolved against the party moving for summary judgment ...." *Dalco Corp. v. Dixon*, 338 N.W.2d 437, 441 (Minn. 1983).

B. Where Summary Judgment Has Been Requested, A Non-moving Party's Motion For Additional Time To Conduct Discovery Should Be Liberally Granted.

Where summary judgment has been requested, "[t]here is a presumption in favor of granting a request for a continuance to allow additional time for discovery." *Cherne Contracting Corp. v. Wausau Ins. Cos.*, 572 N.W.2d 339, 345 (Minn. Ct. App. 1997) (citing *Rice v. Perl*, 320 N.W.2d 407, 412 (Minn. 1982)). Minnesota Rule of Civil Procedure 56.06 provides:

> Should it appear from the affidavits of a party opposing the [summary judgment] motion that the party cannot for reasons stated present, by affidavit, facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Minn. R. Civ. P. 56.06.

This Court has held that a motion to continue a summary judgment hearing to allow additional time for discovery "should be liberally granted. This is especially true when the party seeking the continuance is doing so because of a claim of insufficient time to conduct discovery." *Rice v. Perl*, 320 N.W.2d 407, 412 (Minn. 1982).

> "A continuance or permission to engage in further discovery should not be denied to a party *except in the most extreme circumstances*. * * * As a practical matter, the court should be liberal in granting additional time for purposes of preparing affidavits or discovery if a party has any real reason to believe that facts can be established by such means."

Rice, 320 N.W.2d at 412 (emphasis added) (quoting 2 J. Hetland & O. Adamson, *Minnesota Practice* 588 (1970)).

"Sufficient time for discovery is considered especially important when the relevant facts are exclusively in the control of the opposing party ... Indeed, the majority of the continuances granted under [the analogous federal provision] involve cases in which one party has exclusive knowledge of the relevant facts." *Rice*, 320 N.W.2d at 412 (quoting 10 C. Wright & A. Miller, *Federal Practice and Procedure* § 2741 at 733-34 (1973)).

In light of the presumption favoring continuances for additional discovery, a district court should grant such a continuance if the requesting party: (1) has been diligent in obtaining and seeking discovery prior to requesting the continuance; and

(2) has a good-faith belief that material facts will be uncovered. *Rice*, 320 N.W.2d at 412; *Beehner v. Cragun Corp.*, 636 N.W.2d 821, 831 (Minn. Ct. App. 2001).

A formal motion for continuance under Rule 56.06 is not necessary so long as the moving party sufficiently explains why it currently cannot "present, by affidavit, facts essential to justify the party's opposition [to summary judgment]." Minn. R. Civ. P. 56.06. "While the counsel's affidavit does not constitute a formal motion for a continuance, under Rule 56.06, Minn.R.Civ.P., a trial court may grant a continuance to permit further discovery even absent such a formal motion." *Bixler v. J.C. Penny Co.*, 376 N.W.2d 209, 216 (Minn. 1985).[61]

The district court has the discretion whether to grant a continuance to allow for further discovery. *Dunshee v. Douglas*, 255 N.W.2d 42, 45 (Minn. 1977). A reviewing court will not overturn a lower court's refusal to grant a continuance absent an abuse of that discretion. *Id.*

C. The Department's Reasons For Filing And Later Withdrawing The Stores Liens Were Facts Material To Nelson's Estoppel Claim.

This Court recently reiterated that "a governmental agency may be estopped from taking an enforcement action when the plaintiff demonstrates '[1] that the defendant, through his language or conduct, induced the plaintiff [2] to rely, in good faith, on this

[61] The Court of Appeals has likewise concluded that the two-factor Rule 56.06 analysis applies where—rather than submitting a formal motion for continuance under Rule 56.06—the moving party makes, and properly supports, a functionally equivalent motion. *See, e.g., Liberty Mut. Ins. Co. v. Northeast Concrete Products, LLC*, 756 N.W.2d 93, 105 (Minn. Ct. App. 2008) (applying Rule 56.06 analysis to motion for additional time to conduct discovery); *Beehner*, 636 N.W.2d at 830-32 (applying Rule 56.06 analysis to district court's ruling on plaintiff's motion for continuance of summary judgment hearing).

language or conduct [3] to his injury, detriment or prejudice.'" *Kmart Corp. v. County of Stearns*, 710 N.W.2d 761, 771 (Minn. 2006) (Court's alterations) (quoting *Ridgewood Dev. Co. v. State*, 294 N.W.2d 288, 292 (Minn. 1980)). One asserting estoppel against a governmental entity has a "heavy burden of proof." *Ridgewood Dev. Co. v. State*, 294 N.W.2d 288, 292 (Minn. 1980).

The discharge of this heavy burden "requires a showing not only of error on the part of the government, but of 'wrongful conduct.'" *Kmart*, 710 N.W.2d at 771 (quoting *Ridgewood*, 294 N.W.2d at 293). Indeed, "wrongful conduct is the most important element of equitable estoppel." *City of North Oaks v. Sarpal*, 797 N.W.2d 18, 25 (Minn. 2011) (citing *Ridgewood*, 294 N.W.2d at 293). This Court had clarified that wrongful conduct is *not* established by "simple inadvertence, mistake, or imperfect conduct." *Bond v. Comm'r of Revenue*, 691 N.W.2d 831, 838 (Minn. 2005). Put another way, "a simple mistake by a government official is not wrongful." *Sarpal*, 797 N.W.2d at 26 (footnotes omitted).

In Minnesota, then, the government's *reasons* for undertaking actions inducing detrimental reliance are plainly "material" to a government estoppel claim. A fact is "material" if it would "affect the outcome of the suit under governing law," and a dispute about a genuine issue of material fact exists if the evidence is such that "a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To make out his estoppel claim, therefore, Nelson had to demonstrate that the Department's handling of the Stores liens involved some from of "wrongful conduct." The fact of the lien withdrawals alone was plainly not enough.

It is worth noting, by analogy, that federal courts will not estop IRS collection action against a personally assessed individual unless the Service abused its discretion by failing to properly pursue payment from the entity for whose tax debt the individual was assessed. In *McCarty v. United States*, 437 F.2d 961 (Ct. Cl. 1971), for example, taxpayer was personally assessed for the unpaid withholding taxes of his principal, Marine Aircraft Corporation. *Id.* at 962, 966. The Service also filed liens against Marine's assets for the tax arrearage, *id.* at 964, although it later entered an agreement with Marine which "provided that the tax liens would not be enforced if Marine would pay up the arrears at the rate of $8,000 monthly ... and would also meet its current taxes when due." *Id.* at 964.

When Marine failed to satisfy its contractual payment obligations to the IRS, however, the Service failed to enforce its liens. *Id.* at 969-70 (noting Service's "complete inaction and its failure to foreclose its tax liens on Marine's unencumbered property worth more than $98,000").

> This amounted to a waiver by the IRS of its tax lien and this had the effect of absolving the plaintiff of liability for the delinquent taxes to this extent. This is true for the obvious reason that taxes equal to the value of Marine's property could have been collected by IRS had it foreclosed its tax liens upon default of the payments of the tax arrears as provided in the agreement with Marine. The record shows that the IRS never foreclosed its tax liens on Marine's property even in Marine's bankruptcy proceedings, and by such failure completely waived such liens, all to the detriment of the interests of the plaintiff, as well as the IRS.

Id. at 969-70.

The *McCarty* Court noted that, per IRS policy, successful collection of the tax arrearage from Marine would have barred IRS collection from the individually assessed

taxpayer. *Id.* at 971-72. Consequently, had the IRS foreclosed its liens against Marine, "plaintiff would have been released from his tax obligation to the extent of the amount realized from such foreclosures, as is provided in the above policy memorandum of the IRS." *Id.* at 972. Because the Service had simply abandoned its liens, the court concluded "that the [IRS] Commissioner abused his discretion in failing to collect the tax from the corporation." *Id.* The court accordingly held that "the plaintiff was released from his liability for the payment of the delinquent withholding taxes and the government is barred from collecting them from him." *Id.* at 973.

D. Through His Motion To Compel, Nelson Sought An Opportunity To Discover The Department's Reasons For Filing And Withdrawing The Stores Liens.

On November 11, 2010, Taxpayers filed a Joint Motion to Compel Discovery requesting an order requiring the Commissioner to make available for deposition all Department officials with knowledge of the Department's reasons for filing and then withdrawing the Stores liens.[62] After setting forth the general theory of their estoppel claim,[63] Taxpayers argued that they were entitled to further pursue information about which Department officials had filed and withdrawn the liens, their reasons for doing so, and which third parties had contacted the Department about the liens.[64]

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[62] Taxpayers' Joint Mem. Supp. Mot. Compel at 12-13.

[63] Taxpayers' Joint Mem. Supp. Mot. Compel at 11-12.

[64] Taxpayers' Joint Mem. Supp. Mot. Compel at 12.

On December 3, 2010, the Tax Court held a hearing to consider, *inter alia*, Taxpayers' joint motion to compel discovery.[65] Concerning Taxpayers' estoppel claim, counsel repeatedly noted that the Department's sudden lien withdrawals had destroyed its right to be paid through the Avanti and Stores bankruptcies, and therefore directly increased the *amount* Taxpayers would be asked to pay. Counsel noted: "[I]f the taxes were paid in bankruptcy, the personal assessments would be irrelevant."[66] Discovery concerning the Department's reasons for filing and withdrawing the liens (including any third-party contacts) was therefore critical.[67]

The Tax court clearly understood that Taxpayers sought information about the *reasons* the liens had been filed and released: "Okay. So, Counsel, basically your inquiry is you want to know why the liens were released, and by whom they were released? That's the focus of your Discovery is you want to know who did it and why?"[68]

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[65] *See generally* transcript of hearing on the Commissioner's Motion for Summary Judgment and Taxpayers' Joint Motion to Compel Discovery.

[66] Add-19. *See also* (T.13) ("[I]f these obligations are paid by Twin Cities Stores, there is nothing owed ...."). The Tax Court clearly appreciated that amounts paid by Avanti and Stores through bankruptcy would reduce the amount Nelson owed personally. *See* (T.28) (noting this relationship).

[67] (T.10-11).

[68] (T.14). *See also* Add-19 ("Okay. Basically, the questions the Appellants are asking for in this Motion to Compel Discovery is why the liens were released, by whom than third-party issue [sic]").

E. The Tax Court Erroneously Concluded That The Department's Reasons For Filing And Withdrawing The Stores Liens Were Not Material, And This Error Of Law Caused The Court To Improperly Deny Nelson's Motion To Compel Depositions Of Relevant Department Officials.

After hearing argument on Taxpayers' motion to compel, the Tax Court granted that motion in part and denied it in part. As relevant here, the court denied Taxpayers the opportunity to depose the Department officials who had filed but later withdrawn the Stores liens, and those who had indicated that third-parties had contacted the Department about releasing the liens.[69]

The Tax Court's denial of further discovery was based upon its erroneous view that the Department's *reasons* for filing and withdrawing the Stores liens were not material given that the withdrawals themselves were undisputed fact:

> BY THE COURT: ... [T]he facts that you have before you already are that for whatever reason the Department did release this lien. So that's already a fact.
>
> By whom there has been some information given, but it seems to me that what you're really – that the real argument is that the liens were released. I mean, we can find out, or try to find out why they were released, but the real issue is they were released. And because they were released, [taxpayers] are making an argument as to an equitable argument ....[70]

This reasoning is incorrect because the "wrongful" conduct essential to a government estoppel claim is *not* established by "simple inadvertence, mistake, or imperfect conduct." *Bond*, 691 N.W.2d at 838. The "real argument," therefore, is *not* simply that

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[69] (T.14); Add-19 to Add-20.

[70] Add-19.

the liens were released (for whatever reason); it is that they were filed and released *wrongfully*.

The Tax Court's mistaken view that the Department's reasons were not material also led the court to erroneously conclude that third-party contacts concerning the liens were immaterial:

> BY THE COURT: ... It seems like there may be enough information here to say the lien was released and to make the argument.
>
> I don't know how fruitful the third-party, you know, information is going to yield if, you know, if there isn't any information on that deposing a series of people.
>
> ... [T]he liens were released, and that's a fact that is out there and it can enable [taxpayers] to make their argument ....[71]

Again the lower court's analysis is incorrect. For if the Department improperly released valid liens because third-parties urged it to do so—and the Department thereby increased the amount Taxpayers would have to pay from their own pockets—the third-party contacts would be directly material to the "wrongfulness" element of estoppel.

The record makes plain that the Tax Court improperly denied Taxpayers' joint motion to compel the deposition of relevant Department officials based solely upon its mistaken legal conclusion that the fact of the lien withdrawals *alone* could support Taxpayers' estoppel claim, and that the Department's reasons for acting as it did were not material. "A district court abuses its discretion when it bases its conclusions on an

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[71] Add-19 to Add-20. *See also* Add-20 ("[I]t seems like there is a fact here that the lien release occurred, and that that is what is the essence of this argument that [Taxpayers] want to make. And I think they can make that argument based on that fact, and then make your arguments accordingly.").

erroneous view of the law." *State v. Askland*, 784 N.W.2d 60, 64 (Minn. 2010). Consequently, the Tax Court abused its discretion by denying the joint motion to compel. *Dunshee*, 255 N.W.2d at 45.

F. Nelson Was Entitled To Depose The Department Officials Who Had Filed But Subsequently Withdrawn The Stores Liens.

Applying a Rule 56.06 analysis to Taxpayers' Joint Motion to Compel, this Court should conclude that the Tax Court erred by denying that motion, by failing to grant a continuance, and by prematurely disposing of the case through summary judgment.

First, Taxpayers' joint motion to compel was heard simultaneously with the Commissioner's motion for summary judgment.[72] In this procedural posture in particular, "[t]here is a presumption in favor of granting a request for a continuance to allow additional time for discovery." *Cherne,* 572 N.W.2d at 345.

Second, Taxpayers' moving papers explained why Taxpayers were currently unable to present by affidavit "facts essential to justify [their] opposition" to the Commissioner's summary judgment motion.[73] *See* Minn. R. Civ. P. 56.06. Specifically, the Commissioner had not sufficiently identified all persons who had knowledge of the Department's reasons for filing and withdrawing the liens, and who had knowledge of Department contacts with third-parties.[74] Indeed, *during the hearing on Taxpayers'*

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[72] *See generally* transcript of hearing on the Commissioner's Motion for Summary Judgment and Taxpayers' Joint Motion to Compel Discovery.

[73] *See generally* Taxpayers' Joint Motion to Compel Discovery and accompanying Mem. Supp. Mot. Compel Discovery.

[74] *See* Taxpayers' Joint Mem. Supp. Mot. Compel at 10-12; Pridgeon/Costello Aff. ¶¶4-10 (attached to Nelson's Mem. Opp'n Summ. J.); Add-19.

motion to compel, the Commissioner produced an additional witness with relevant knowledge who actually addressed the Tax Court.[75] Taxpayers' motion to compel was functionally equivalent to a motion for a continuance under Rule 56.06, and should be analyzed as such by this Court. *See, e.g., Bixler*, 376 N.W.2d at 216 (holding that a formal motion under Rule 56.06 is unnecessary); *Hasan v. McDonald's Corp.*, 377 N.W.2d 472, 475 (Minn. Ct. App. 1985) (reciting Rule 56.06 factors and holding that "[t]he same test applies to Hasan's motion to compel discovery before the motion for summary judgment was considered.").

Third, information concerning the Department's reasons for filing and withdrawing the Stores liens was possessed either principally or exclusively by the Commissioner himself. The majority of continuances under Rule 56.06 are granted under these circumstances. *See Rice*, 320 N.W.2d 412 (so stating with respect to analogous federal rule).

Finally, Taxpayers were entitled to an order allowing them to depose relevant Department officials because they satisfied the two-factor test for evaluating motions under Rule 56.06. The first factor requires that the party seeking a continuance has been diligent in obtaining and seeking discovery prior to requesting the continuance. *See Rice*, 320 N.W.2d at 412. Taxpayers satisfied this requirement.

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[75] *See* Add-19 (Commissioner's counsel asked Assistant Attorney General Jeremy D. Eiden to relate to the Tax Court his knowledge about the Department's withdrawals of the Stores liens and its contacts with third-parties about those liens).

Taxpayers served their initial discovery in this case—including discovery directed to the filing and withdrawal of the Stores liens—on August 11 & 12, 2010.[76] They then granted the Commissioner a two-week extension within which to respond.[77] The Commissioner served his initial responses on September 30, 2010. Taxpayers' counsel were not satisfied with the Commissioner's responses to their inquiries concerning the Department's reasons for filing and withdrawing the Stores liens or those pertaining to the Department's third-party contacts about those liens.[78] Consequently, the parties met and conferred on October 15, 2010.[79] That afternoon, the Commissioner's counsel furnished additional disclosure pertaining to these inquires, but continued to assert that the requested material was irrelevant.[80] Still not satisfied, Taxpayers' counsel served their Joint Motion to Compel Discovery on November 11, 2010.[81] That motion was heard—along with the Commissioner's motion for summary judgment—three weeks later, on December 3, 2010.[82] This procedural summary demonstrates that Taxpayers were diligent in obtaining and seeking discovery about the lien issue prior to requesting the continuance. *See Rice*, 320 N.W.2d at 412.

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[76] Pridgeon/Costello Aff. ¶¶4-5 (attached to Nelson's Mem. Opp'n Summ. J.).

[77] (T.9-10).

[78] Pridgeon/Costello Aff. ¶6 (attached to Nelson's Mem. Opp'n Summ. J.).

[79] Pridgeon/Costello Aff. ¶7 (attached to Nelson's Mem. Opp'n Summ. J.).

[80] App-33.

[81] *See generally* Taxpayers' Joint Motion to Compel Discovery.

[82] *See generally* transcript of hearing on the Commissioner's Motion for Summary Judgment and Taxpayers' Joint Motion to Compel Discovery.

Taxpayers also satisfy the second factor of the Rule 56.06 test because they had a good-faith belief that material facts would be uncovered had the requested depositions been ordered or allowed. *See Rice*, 320 N.W.2d at 412. As shown above, the Department's reasons for filing and withdrawing the Stores liens are "material" to Nelson's estoppel claim. Evidence in the record indicates the following:

- In April 2009, Attorney McCool told Department employee Joe Saenger that Stores facilities had actually sold a substantial majority of the total petroleum products purchased by Avanti.[83]
- Minnesota Statutes section 296A.10 imposes upon any seller of petroleum products who knows that the petroleum tax has not already been paid a duty to report the same and to pay the tax.
- In June 2009, based on McCool's disclosures, the Department filed $3,985,621 in tax liens against Stores in Ramsey and Dakota Counties, and with the Minnesota Secretary of State.[84]
- These liens were filed after review by a Department Lead Worker.[85]
- Department employee Roger Swanson told attorney Ralph Mitchell that the Department had received numerous telephone calls concerning the Stores bankruptcy, and that someone had called and asked the Department to release its liens against Stores.[86]
- On January 23 and January 27, 2010, the Department released and withdrew its tax liens against Stores.[87]
- Department activity logs indicate the Department withdrew the liens because it had never filed an order assessing Stores with the underlying tax liability.[88]

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[83] App-49, ¶3.

[84] App-24 to App-26.

[85] App-43.

[86] Pridgeon/Costello Aff. Exhibit G: Mitchell Memo at Page 1, ¶3 (attached to Nelson's Mem. Opp'n Summ. J.).

[87] App-27 to App-32.

In light of this evidence, Taxpayers surely had a good-faith belief that depositions of relevant Department officials would yield evidence material to their estoppel claim. The existing record indicates that the Department withdrew the liens because it had never assessed Stores for the underlying tax liability. This raises, at a minimum, the following factual questions:

1. What led the Department to suddenly conclude in January 2010—seven months after filing the Stores liens—that Minnesota law absolutely requires that a lien must be based exclusively upon a formal assessment?

2. If Minnesota law actually does provide that a lien must be based on a formal assessment, why did neither Saenger nor any other Department official consider this requirement when they respectively requested and approved filing the Stores liens in June 2009?

3. Considering that, on behalf of Stores, attorney McCool reported the Stores petroleum sales and specifically asked the Department "to formally recognize that both [Avanti and Stores] are taxpayers responsible for the repayment of these petroleum taxes,"[89] why did the Department not simply assess Stores (as McCool implicitly requested) or tell Stores to formally assess itself by filing suitable petroleum tax returns, and thereby ensure that its Stores liens would be properly supported?

4. Again considering McCool's disclosure and request, did the Department conclude in June 2009 that the Stores had waived the requirement of a formal assessment? Did the Department reconsider this conclusion in January 2010? What caused this reconsideration, if it did occur?

5. Which third-parties contacted the Department about the Stores bankruptcy, what were the dates of such contacts, and what was the substance of the communications?

6. What role, if any, did third-party contacts with the Department play in the Department's January 2010 decision to withdraw the Stores liens?

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[88] Pridgeon/Costello Aff. Exhibit A: Commissioner's Response to Stevens Interrogatory 10, at 7-8; Costello Aff. Exhibit 2: Commissioner's Response to Nelson Interrogatory 10, at 7-8 (both attached to Nelson's Mem. Opp'n Summ. J.).

[89] App-49 to App-50.

Because the Department's reasons for filing and withdrawing the Stores liens—including reasons based on contacts with third-parties—are material to the wrongfulness element of Taxpayers' government estoppel claim, Taxpayers had a good-faith belief that material facts would be uncovered through their further requested discovery. *See Rice*, 320 N.W.2d at 412. Taxpayers thus satisfy both elements of the Rule 56.06 test. And because "[a] continuance or permission to engage in further discovery should not be denied to a party *except in the most extreme circumstances,*" *Rice*, 320 N.W.2d at 412 (quoting 2 J. Hetland & O. Adamson, *Minnesota Practice* 588, (1970)) (emphasis added), the Tax Court erred in denying Taxpayers' motion to compel.

CONCLUSION

In the summary judgment context, "all doubts as to the existence of a genuine issue of material fact must be resolved against the party moving for summary judgment ...." *Dalco Corp.,* 338 N.W.2d at 441. Whether the Department acted wrongfully in filing, but then withdrawing, the Stores liens is a disputed material fact essential to Taxpayers' estoppel claim. This Court should conclude that the Tax Court erred by denying Taxpayers' motion to compel, by failing to grant them a continuance, and by prematurely disposing of this case through summary judgment.

If a reviewing court finds that material issues of fact need to be determined, it "must remand the case to the district court without deciding the legal issues." *Beehner,* 636 N.W.2d at 827 (citing *Caledonia Cmty. Hosp. v. Liebenberg Smiley Glotter & Assocs.*, 308 Minn. 255, 258-59, 248 N.W.2d 279, 281 (1976)). Accordingly, this Court should remand to the Tax Court for further proceedings.

Dated: 8 December 2011

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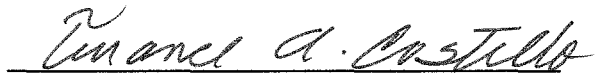
CERTIFICATE OF COMPLIANCE
WITH MINN. R. APP. P 132.01, Subd. 3

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subdivisions 1 and 3. It was prepared using a proportional spaced font size of 13 pt. The length of this brief is 8,413 words. The word count is stated in reliance on Microsoft Word 2008, Version 12.3.1, the word processing system used to prepare this submission.



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