# STATE OF MICHIGAN

# COURT OF APPEALS

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| PARS ICE CREAM COMPANY, INC,<br><br>Petitioner-Appellee, | UNPUBLISHED<br>August 14, 2012 |
| v | No. 305148<br>Michigan Tax Tribunal |
| DEPARTMENT OF TREASURY,<br><br>Respondent-Appellant. | LC No. 00-332949 |

Before: TALBOT, P.J., and WILDER and RIORDAN, JJ.

PER CURIAM.

The Department of Treasury ("DOT") appeals as of right the Michigan Tax Tribunal's ("MTT") grant of summary disposition[1] in favor of Pars Ice Cream Company, Inc. ("Pars"). We affirm.

Pars is a Michigan corporation engaged in the business of selling ice cream in bulk. The DOT issued an assessment to Pars for taxes, interest and penalties totaling $1,130,720.10, due on April 16, 2007. Pars appealed to the MTT. The parties filed a stipulation of facts, which the MTT adopted. On March 31, 2008, Pars moved for summary disposition.[2] The DOT's response was due within 14 days.[3] On May 19, 2008, the DOT filed its brief in response to Pars's motion for summary disposition ("MSD"), 35 days after the filing deadline. The MTT granted Pars's MSD on June 28, 2011.

The DOT argues that the MTT abused its discretion when it rejected its response to Pars's MSD as untimely. We disagree. The decision to accept or reject an untimely brief is

[1] MCR 2.116(C)(10).

[2] *Id.*

[3] Former Mich Admin Code, R 205.1230.

generally reviewed for an abuse of discretion.[4] An abuse of discretion occurs when the court's decision falls outside the range of "reasonable and principled outcome[s]."[5]

The DOT cites two cases in support of its assertion that the MTT abused its discretion: *Totman v Royal Oak School District*[6] and *Richter v Department of Natural Resources*.[7] This case, however, is distinguishable from both *Totman* and *Richter*. *Totman* addresses when dismissal of an appeal for failure to file a brief constitutes an abuse of discretion,[8] while *Richter* considers whether acceptance of an untimely filed brief constitutes an abuse of discretion.[9] Therefore, we find the DOT's reliance on these cases unpersuasive.

The parties do not dispute that during the relevant time period Rule 205.1230(1) provided that "[w]ritten opposition, if any, to motions shall be filed within 14 days after service." The DOT filed its untimely responsive brief on May 19, 2008, 49 days after Pars filed its MSD, and 35 days after the filing deadline. While the MTT refused to consider the contents of the DOT's response, the MTT did consider the DOT's arguments contained in the informal conference recommendation. Additionally, case law does not require that the MTT accept the untimely brief. Because the MTT's failure to accept the late brief does not fall outside the range of "reasonable and principled outcome[s]," the MTT's decision was not an abuse of discretion.[10]

The DOT also claims that its late response should have resulted in default proceedings, which the DOT would have been permitted to cure. Mich Admin Code, R 205.1247(1) states that a party's failure to follow MTT rules "may" result in the commencement of default proceedings. Additionally, Rule 205.1247(4) indicates that failure to comply with the rules is cause for "the scheduling of a default hearing." Pars did not move for default, and the MTT did not commence default proceedings as a result of the late filing. Because the initiation of default proceedings is permissive and not mandatory,[11] the DOT's argument must fail.

Although not included in its statement of the issues, the DOT briefly argues in its reply brief on appeal that the MTT failed to consider information contrary to the affidavit of Shelley Traywick that was contained in the informal conference recommendation in the light most favorable to the DOT to determine whether it created a genuine issue of material fact. The MTT stated in its order granting Pars's MSD that it "consider[ed], as necessary, information presented in [the DOT's] Informal Conference Recommendation" in determining the outcome of Pars's

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[4] See *Kemerko Clawson, LLC v RxIV Inc*, 269 Mich App 347, 349; 711 NW2d 801 (2005).

[5] *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

[6] *Totman v Royal Oak Sch Dist*, 135 Mich App 121; 352 NW2d 364 (1984).

[7] *Richter v Dep't of Natural Resources*, 172 Mich App 658; 432 NW2d 393 (1998).

[8] *Totman*, 135 Mich App at 124-126.

[9] *Richter*, 172 Mich App at 661-662.

[10] *Maldonado*, 476 Mich at 388.

[11] See *Oakland Co v State of Mich*, 456 Mich 144, 154 n 10; 566 NW2d 616 (1997).

motion. The order also states that the evidence was considered "in the light most favorable to the party opposing the motion."[12] Because the DOT's contention is not supported by the record, the argument lacks merit. Moreover, we find that because the MTT considered the DOT's assertions in the informal conference recommendation when deciding Pars's MSD, the MTT "secure[d] the just, speedy, and economical determination" of the case and "avoid[ed] the consequences of error that does not affect the substantial rights of the parties."[13]

Affirmed.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder
/s/ Michael J. Riordan

[12] *Sherry v East Suburban Football League*, 292 Mich App 23, 27; 807 NW2d 859 (2011) (citation and quotation omitted).

[13] MCR 1.105.