

STATE OF MICHIGAN  
COURT OF APPEALS

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BALLARD POWER SYSTEMS, INC.,

Petitioner-Appellant,

v

CITY OF DEARBORN,

Respondent-Appellee.

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UNPUBLISHED

June 14, 2007

No. 268458

Tax Tribunal

LC No. 00-305749

Before: Servitto, P.J., and Jansen and Schuette, JJ.

PER CURIAM.

Petitioner appeals as of right from an order of the Michigan Tax Tribunal (MTT) granting summary disposition for respondent pursuant to MCR 2.116(C)(4) and (C)(10).<sup>1</sup> We affirm.

We first address petitioner's argument that the MTT erred by granting summary disposition for respondent under MCR 2.116(C)(4) based on its determination that it lacked subject-matter jurisdiction over this dispute. We review de novo a decision granting a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In addition, whether a lower court or tribunal has subject-matter jurisdiction is a question of law that we review de novo on appeal. *Calabrese v Tendercare of Michigan, Inc.*, 262 Mich App 256, 259; 685 NW2d 313 (2004). Absent fraud, this Court reviews a decision of the MTT to determine whether the tribunal legally erred or adopted an incorrect legal principle. *Ford Motor Co v Woodhaven*, 475 Mich 425, 438; 716 NW2d 247 (2006) ("*Ford II*" or "*the Ford cases*").<sup>2</sup>

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<sup>1</sup> The Michigan court rules, including MCR 2.116, generally apply to proceedings before the MTT. See, e.g., *Herald Co v Tax Tribunal*, 258 Mich App 78, 88; 669 NW2d 862 (2003); see also *Federal-Mogul Corp v Dep't of Treasury*, 161 Mich App 346, 356; 411 NW2d 169 (1987).

<sup>2</sup> *Ford II* involved three separate appeals from this Court, namely *Ford Motor Co v Bruce Twp* 264 Mich App 1; 689 NW2d 764 (2004) ("*Ford I*"), *Ford Motor Co v Sterling Hts*, unpublished opinion per curiam of the Court of Appeals, issued October 5, 2004 (Docket No. 246379), and *Ford Motor Co v Woodhaven*, unpublished opinion per curiam of the Court of Appeals, issued October 5, 2004 (Docket No. 246378). Our Supreme Court granted leave in all three cases, and

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This Court addressed the issue of subject-matter jurisdiction in *Ford Motor Co v Bruce Twp* (“*Ford I*”), 264 Mich App 1; 689 NW2d 764 (2004), rev’d 475 Mich 425 (2006), which involved facts similar to those in the instant case. In *the Ford cases*, Ford Motor Company (Ford) filed personal property statements with three different taxing jurisdictions. However, Ford mistakenly misreported some of the information, thereby overstating the quantity of taxable property it owned. The taxing jurisdictions’ assessors relied on Ford’s statements as accurate, and thus issued excessive tax bills, which Ford paid. Ford filed petitions with the MTT seeking a refund of the excess taxes paid under MCL 211.53a when it realized its errors. *Ford II, supra* at 428-430.

In *Ford I, supra* at 5-6, this Court addressed Ford’s argument that the MTT erroneously determined that it lacked subject-matter jurisdiction over the case. Ford contended that pursuant to MCL 205.731(b), the MTT had jurisdiction over its petition requesting a refund of taxes under MCL 211.53a because of a mutual mistake of fact. *Id.* at 6. This Court determined that because the MTT has the power and authority to adjudicate tax refund cases, it had jurisdiction over Ford’s petition. *Id.*

MCL 205.731 provides in relevant part:

The tribunal’s exclusive and original jurisdiction shall be:

\* \* \*

(b) A proceeding for refund or redetermination of a tax under the property tax laws.

Further, MCL 211.53a provides:

Any taxpayer who is assessed and pays taxes in excess of the correct and lawful amount due because of a clerical error or mutual mistake of fact made by the assessing officer and the taxpayer may recover the excess so paid, without interest, if suit is commenced within 3 years from the date of payment, notwithstanding that the payment was not made under protest.

Despite its determination that that the MTT had subject-matter jurisdiction over Ford’s petition, this Court nevertheless affirmed the MTT’s dismissal of the petition on the basis that Ford failed to state a claim on which relief could be granted and that allowing Ford to amend its petition would be futile. *Ford I, supra* at 5-6, 15. In his dissenting opinion, Judge Griffin disagreed with this conclusion. Like the majority, Judge Griffin determined that the nature of Ford’s claim was a request for a refund of excess taxes paid and that the MTT has exclusive and original jurisdiction over such proceedings. *Id.* at 18 (Griffin, J., dissenting). Judge Griffin opined that the MTT “confused the issue of subject-matter jurisdiction, MCR 2.116(C)(4), with the defense of failure to state a claim on which relief can be granted, MCR 2.116(C)(8).” *Id.* at

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decided them together in one opinion, “*Ford II*” or “*the Ford cases.*”

17. He further stated that the MTT erred by determining that it lacked subject-matter jurisdiction based on its finding that Ford failed to allege a mutual mistake of fact. *Id.* at 17, 25.

Thus, both the majority and dissenting opinions in *Ford I* determined that the MTT had subject-matter jurisdiction over Ford's petition seeking a refund of taxes under MCL 211.53a. In *Ford II, supra* at 447-448, our Supreme Court did not specifically address these determinations, but rather addressed the majority's conclusion that the MTT did not abuse its discretion by denying Ford's motion to amend its petition. Our Supreme Court stated:

Contrary to the conclusions reached by the MTT and the Court of Appeals majority, Ford has stated valid claims under MCL 211.53a. As such, futility is not a legitimate particularized reason by which the MTT could have denied Ford's motion to amend. Therefore, the MTT abused its discretion in this respect. [*Id.* at 448.]

The Court further determined that the MTT abused its discretion by denying Ford's motion to amend on the ground that Ford's amended petition would violate an MTT rule of procedure. *Id.*

The foregoing analysis demonstrates that, pursuant to MCL 205.731(b), the MTT has subject-matter jurisdiction over a petition seeking a refund of excess taxes under MCL 211.53a. In *Ford II*, our Supreme Court did not overturn or otherwise call into question the jurisdictional determination reached in both the majority and dissenting opinions of *Ford I*. Applying this principle to the instant case requires the conclusion that the MTT had subject-matter jurisdiction over petitioner's petition, which sought a refund of alleged excess taxes under MCL 211.53a. The MTT determined that it lacked subject-matter jurisdiction, reasoning that its grant of summary disposition under MCR 2.116(C)(10) meant that no mutual mistake of fact could have existed. However, the MTT apparently confused the issue of subject-matter jurisdiction under MCR 2.116(C)(4) with the defense of failure to establish a genuine issue of material fact under MCR 2.116(C)(10). See *Ford I, supra* at 17 (Griffin, J., dissenting). The MTT erred by granting respondent's motion for summary disposition pursuant to MCR 2.116(C)(4) based on lack of subject-matter jurisdiction.

We now turn to petitioner's argument that the MTT erroneously granted respondent's motion for summary disposition under MCR 2.116(C)(10). A motion for summary disposition under MCR 2.116(C)(10) is properly granted if no factual dispute exists and the moving party is entitled to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). In deciding a motion brought under subrule (C)(10), a court considers all the evidence, affidavits, pleadings, and admissions in the light most favorable to the nonmoving party. *Id.* at 30-31. The nonmoving party must present more than mere allegations to establish a genuine issue of material fact for trial. *Id.* at 31.

Petitioner contends that respondent failed to satisfy its initial burden under MCR 2.116(G) when it moved for summary disposition. Because petitioner did not raise this argument until it moved for reconsideration of the MTT's order, it is not preserved for appellate review. *Pro-Staffers, Inc v Premier Mfg Support Services, Inc*, 252 Mich App 318, 328-329; 651 NW2d 811 (2002). Nevertheless, because it involves a question of law and all the facts necessary for its resolution have been presented, this Court may review the issue. *Brown v Loveman*, 260 Mich

App 576, 599; 680 NW2d 432 (2004). Our review, however, is limited to plain error affecting substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

Petitioner contends that respondent failed to satisfy MCR 2.116(G)(3), which requires a moving party to submit affidavits, depositions, admissions, or other documentary evidence in support of its motion. Petitioner further argues that respondent failed to satisfy MCR 2.116(G)(4), which provides:

A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.

We conclude that respondent's motion minimally complied with MCR 2.116(G)(3) and (G)(4). Although petitioner argues that respondent's motion did not identify the issues regarding which it argued there was no genuine issue of material fact, a review of the motion shows that it was respondent's position that there was no factual dispute concerning the existence of a mutual mistake of fact. Further, respondent's motion specifically refers to exhibits that were attached to its motion or at least included in the MTT record. While most of the exhibits referenced relate to petitioner's allegedly dilatory manner in pursuing its request for a tax refund, respondent submitted as an exhibit the MTT's order determining that the assessments at issue were not the result of a mutual mistake of fact under MCL 211.53a. Respondent also submitted as an exhibit the MTT's order granting petitioner's motion for reconsideration for the sole purpose of conducting discovery to determine whether the assessments were the result of a mutual mistake of fact and whether petitioner properly invoked the MTT's subject-matter jurisdiction. Thus, respondent's evidence showed that the MTT had already determined that no mutual mistake of fact existed and that it granted reconsideration only for the purpose of ascertaining whether there was any evidence to the contrary. We conclude that respondent minimally complied with MCR 2.116(G) in this case.

In response to respondent's motion, petitioner was required to present documentary evidence establishing that a genuine issue of material fact existed regarding whether the assessments were based on a mutual mistake of fact. MCR 2.116(G)(4); *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). Petitioner could not rely on mere allegations to establish a genuine issue of material fact for resolution at trial. *Rice, supra* at 31. Petitioner did not attach any documentary evidence to its response to respondent's motion for summary disposition, but did refer to e-mail correspondence with Ford that was attached to its first motion for reconsideration. The only documentary evidence that petitioner apparently relied on was this e-mail exchange.

Petitioner contends that the MTT should have denied respondent's motion because the documentary evidence was already in the record and was sufficient to establish a genuine issue of material fact. However, petitioner has cited no authority and we have found none requiring the MTT to search through the record to find documentary evidence supporting petitioner's position. Petitioner also relies on evidence that it identified in its motion for reconsideration of

the grant of summary disposition. However, this evidence was not properly before the MTT because, in deciding a motion for summary disposition, the MTT is required to consider only evidence available to it at that time. *Maiden v Rozwood*, 461 Mich 109, 126 n 9; 597 NW2d 817 (1999). In fact, petitioner essentially acknowledges that it failed to provide evidentiary support for its position by arguing that it is entitled to relief “if it can substantiate its allegations” and by admitting that it has stated “albeit not yet substantiated” a claim under MCL 211.53a. Petitioner has failed to demonstrate a plain error affecting its substantial rights with respect to these arguments.

As previously stated, the only evidence on which petitioner relied in response to respondent’s motion for summary disposition was the e-mail exchange with Ford. The critical question is therefore whether the e-mail correspondence was sufficient to establish a genuine issue of material fact regarding the existence of a mutual mistake of fact. Petitioner likens this case to the *Ford* cases and argues that a similar result is compelled.

In *Ford II*, *supra* at 442, our Supreme Court interpreted the meaning of “mutual mistake of fact” as that term is used in MCL 211.53a. The Court opined that the term has acquired a particular meaning in the law. *Id.* In accordance with that meaning, the Court interpreted the term “to mean an erroneous belief, which is shared and relied on by both parties, about a material fact that affects the substance of the transaction.” *Id.* Applying this interpretation in *the Ford cases*, our Supreme Court went on to reason:

Here, there is little doubt that a mistake occurred—the personal property statements erroneously overstated the amount of Ford’s taxable property, including reporting the same property twice. This resulted in excessive assessments that were paid in full. Further, the mistakes made in these cases are best characterized as mutual. In our view, each assessor’s erroneous belief that Ford’s personal property statement was accurate does not practically differ from Ford’s belief that the statement was accurate. In other words, if Ford believed that it owned certain personal property and reported it properly at the time, then Ford believed that each statement was accurate. Similarly, if each assessor believed that Ford’s statement was accurate, then the assessor likewise believed Ford owned certain personal property and reported it properly. As such, the parties shared a mistaken belief about a material fact that went to the very nature of the transaction—that all the personal property Ford claimed in its personal property statements was taxable. And the parties relied on this shared, erroneous belief—respondents when they assessed the property, and Ford when it subsequently paid the excessive assessments. Therefore, we conclude that Ford has stated valid claims under MCL 211.53a under the theory of mutual mistake of fact because the parties shared and relied on their erroneous beliefs about material facts that affected the substance of the assessments. [*Id.* at 443.]

Petitioner contends that a mutual mistake of fact existed because both it and respondent relied on the audit report as accurate when that report in fact erroneously attributed to petitioner property for which petitioner was not taxable. But petitioner’s own evidence belies this argument. The e-mail exchange with Ford demonstrates that petitioner did not rely on the audit report as accurate, but rather that petitioner suspected that the report might be inaccurate. This is not a case similar to *the Ford cases* in which petitioner reported information to respondent and

both parties relied on the information before petitioner discovered that it was erroneous. Here, petitioner's evidence shows that it doubted the accuracy of the audit report from the outset.<sup>3</sup>

Petitioner also argues that a material factual dispute existed regarding whether it believed that the audit report was accurate. Again, the e-mail exchange shows that petitioner did not believe that the report was accurate and that it in fact suspected that the report included assets for which it was not taxable. Because petitioner presented no evidence establishing a genuine issue of material fact concerning whether a mutual mistake of fact existed, the MTT properly granted summary disposition for respondent under MCR 2.116(C)(10).

Affirmed.

/s/ Deborah A. Servitto  
/s/ Kathleen Jansen  
/s/ Bill Schuette

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<sup>3</sup> Further, respondent's December 2002, letter to petitioner acknowledged petitioner's belief that Ford may have reported and paid taxes on the personal property at issue for certain tax years included in the audit period. Thus, the evidence shows that petitioner doubted the accuracy of the audit report before it even received the report.