

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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LAURA FISHER,

Petitioner-Appellant,

and

BART FISHER,

Appellant,

v

CITY OF ANN ARBOR,

Respondent-Appellee.

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UNPUBLISHED

January 30, 2014

No. 313634

Michigan Tax Tribunal

LC No. 00-426196

Before: WHITBECK, P.J., and FITZGERALD and O'CONNELL, JJ.

PER CURIAM.

Bart and Laura Fisher appeal as of right the Order of Dismissal entered by the Michigan Tax Tribunal as a result of petitioner's failure to appear at a hearing as required by the notice of hearing. Petitioner argues that the tribunal abused its discretion and violated her due process rights in dismissing the case and violated her due process rights by denying a subpoena request. Petitioner further argues that the Ann Arbor Board of Review failed to apprise her of the reasons for its valuation, denying her right to that information. We reverse and remand for further proceedings.

Petitioner appealed the Board of Review's 2011 valuation of her property to the Tax Tribunal, and an in-person hearing was scheduled for May 2012. The hearing was adjourned upon the request of petitioner and Bart. The tribunal thereafter sent to petitioner a notice of hearing for August 14, 2012. The notice stated that failure to appear at the hearing would result in dismissal of the case. Petitioner failed to appear at the hearing and the tribunal issued an order dismissing petitioner's case on October 8, 2012. The Fishers subsequently moved to reinstate petitioner's case to the tribunal, explaining that they never received the notice for the August hearing. The tribunal denied the motion, finding that the notice of hearing was properly sent to petitioner's last known address of record and that petitioner failed to show good cause to reinstate the case.

“We review for an abuse of discretion a decision by the Tax Tribunal to dismiss a petition for failure to comply with its rules or orders.” *Grimm v Treasury Dep’t*, 291 Mich App 140, 149; 810 NW2d 65 (2010). “The abuse-of-discretion standard recognizes that there will be circumstances in which there will be more than one reasonable and principled outcome, and selection of one of these principled outcomes is not an abuse of discretion.” *Id.* Under 1999 AC, R 792.10231(4), “[f]ailure of a party to properly prosecute the proceeding, comply with these rules, or comply with an order of the tribunal is cause for dismissal of the proceeding.” “The power of the Tax Tribunal to dismiss a petition because of a petitioner’s noncompliance with a rule or order of the Tribunal is unquestionable.” *Stevens v Bangor Twp*, 150 Mich App 756, 761; 389 NW2d 176 (1986). However, before dismissal, the record should reflect that the tribunal “gave careful consideration to the factors involved and considered all its options in determining what sanction was just and proper in the context of the case before it.” *Grimm*, 291 Mich App at 150, quoting *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999). The factors are:

(1) whether the violation was willful or accidental; (2) the party’s history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the court’s orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. [*Grimm*, 291 Mich App at 149, quoting *Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501; 536 NW2d 280 (1995).]

Nothing in the order or record shows that the tribunal “gave careful consideration to the [Grimm factors] and considered all its options in determining what sanction was just and proper in the context of the case before it.” *Grimm*, 291 Mich App at 150.

We find that the tribunal abused its discretion by dismissing petitioner’s action here. While the tribunal record contains a proof of service indicating the notice of hearing was mailed to petitioner’s address of record, she advised the tribunal that she did not receive that notice and that her failure to appear at the hearing was not willful. Nothing in the record indicates that petitioner refused to “comply with previous court orders.” *Grimm*, 291 Mich App at 149. While respondent was arguably prejudiced because of the cost of preparing for the hearing, “[t]his cost could readily have been assessed against petitioner.” *Stevens*, 150 Mich App at 762. Nothing in the records shows a history of deliberate delay. *Grimm*, 291 Mich App at 149. Petitioner filed a motion for adjournment in May 2012 when she knew she would be unable to attend the first scheduled hearing, and petitioner also filed a timely motion to reinstate after entry of the Order of Dismissal. As soon as petitioner found out that the August hearing had taken place, she made telephone calls to try to figure out the situation before receiving the dismissal order. Once the Fishers received the dismissal, they filed a timely motion to reinstate. There is no indication in the record that the tribunal considered, or that it recognized that it had the discretion to consider, “a lesser sanction [that may] better serve the interests of justice.” *Id.* Other sanctions, such as assessing costs for the missed hearing against petitioner, *Stevens*, 150 Mich App at 762, may have better served the interests of justice. Under these circumstances, we conclude that the Tax Tribunal abused its discretion by dismissing the case. Because we reverse on these grounds, we

do not address petitioner's remaining due process arguments.<sup>1</sup> We also decline to address the issue raised by petitioner in her supplemental brief because the brief does not conform to the requirements of MCR 7.212(G). MCR 7.212(I).

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ E. Thomas Fitzgerald

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<sup>1</sup> Regarding petitioner's argument that she was denied due process when the MTT denied her subpoena request, we note that "[i]t is well settled that parties to judicial or quasi-judicial proceedings, including administrative proceedings, are not entitled to discovery as a matter of constitutional right." *In the Matter of Del Rio*, 400 Mich 665, 687 n 7; 256 NW2d 727 (1977).

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O'CONNELL, J. (*dissenting*).

I respectfully dissent. I would affirm the decision of the tax tribunal.

Petitioner appealed the Board of Review's 2011 valuation of her real property to the Michigan Tax Tribunal. The tribunal sent petitioner a notice of hearing for August 14, 2012. The notice clearly stated that failure to appear at the hearing would result in dismissal of the case. Petitioner failed to appear at the hearing, and the tribunal issued an order dismissing petitioner's case on October 8, 2012.<sup>1</sup>

On appeal, petitioner claims that the tax tribunal abused its discretion when it dismissed petitioner's case for failure to appear and prosecute their appeal on the scheduled date for the hearing. I disagree. Petitioner's notice of hearing clearly stated that if she failed to appear on the

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<sup>1</sup> Petitioner filed a motion for reinstatement, which was also denied by the tax tribunal.

trial date, her case would be dismissed. I see no abuse of discretion by the tax tribunal for dismissing a case when the petitioner fails to appear for trial.<sup>2</sup>

I would affirm the decision of the tax tribunal.

/s/ Peter D. O'Connell

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<sup>2</sup> The majority opinion cites *Grimm v Treasury Dep't*, 291 Mich App 140, 149; 810 NW2d 65 (2010), for its authority that the tax tribunal abused its discretion in this matter. Unfortunately for petitioner, *Grimm* is factually distinguishable from the present facts. *Grimm* did not involve a factual situation where a petitioner/plaintiff failed to appear for a hearing/trial and/or failed to prosecute their cause of action in a timely matter.