

NO. 33871

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

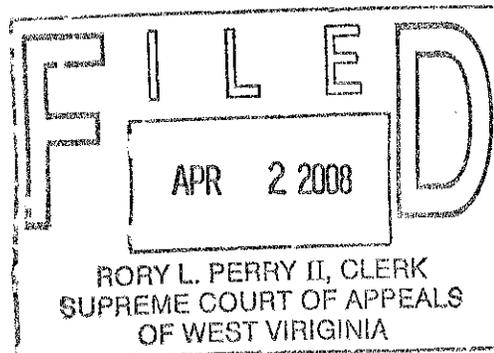
**PROSECUTING ATTORNEY OF
KANAWHA COUNTY, WEST VIRGINIA,**

Appellee,

v.

BAYER CORPORATION,

Appellant.



BRIEF OF APPELLANT BAYER CORPORATION

Dated: April 2, 2008

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v.

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BRIEF OF APPELLANT BAYER CORPORATION

This case presents the question of whether the Circuit Court of Kanawha County (“Circuit Court”) improperly substituted its judgment for that of the Kanawha County Commission (“Commission”), which heard and considered testimony and other evidence, and concluded that Bayer Corporation (“Bayer”) was entitled to recover its undisputed overpayment of tax because the overpayment resulted from an inadvertent mistake, and not from culpable negligence. The decision of the Circuit Court should be reversed because, even if the Prosecuting Attorney had standing to appeal the Commission’s decision – and he did not – that decision should have been reviewed under the traditional deferential standard of review applicable to tax exoneration decisions by a County Commission and affirmed because the ruling was well supported by substantial evidence under the applicable legal standards.

I. THE KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER TRIBUNAL

Pursuant to the provisions of West Virginia Code § 11-3-27, Bayer, the Appellant here, by letter dated August 21, 2003 applied to the Commission for relief from erroneous personal property tax assessments for tax years 2001, 2002, and 2003. There was no dispute that Bayer had overpaid its taxes by \$457,000 for these three years. *See* November 6, 2003 Hr'g Tr. 153 ("Hearing Tr."). Instead, the Commission heard testimony and received evidence limited to the issues of whether Bayer's request for exoneration was timely and whether the nature of the errors entitled Bayer to relief. After considering the testimony of Bayer's witnesses, the Commission granted Bayer's request for exoneration. The State Tax Commissioner, who appeared at the hearing to "defend the interests of the state, county, and districts," declined to seek review of this decision. Nonetheless, the Prosecuting Attorney of Kanawha County filed a petition for a writ of certiorari in the name of the State of West Virginia in the Circuit Court of Kanawha County seeking review of the Commission's decision.

By Order dated August 10, 2006, the Circuit Court reversed the decision of the Commission. On April 30, 2007, the Circuit Court denied Bayer's Motion for New Trial and Motion for Reconsideration. Bayer timely filed its Petition for Appeal, which was granted by this Court on February 28, 2008.

II. THE FACTS OF THE CASE

In connection with taxability cases filed by Bayer for tax years 2001, 2002, and 2003, Bayer discovered four types of errors or discrepancies in its property tax returns and appraisals for two of its plants in Kanawha County that it had purchased from Lyondell Company in 2000. Those errors or discrepancies were all inadvertent and included (1) reporting inventory data for the wrong month, (2) reporting raw materials as finished goods, (3) reporting

materials as being in inventory that were actually in transit and had not yet arrived in Kanawha County, and (4) granting a Freeport exemption for raw materials for one plant for one tax year. The net effect of those errors was that Bayer overpaid its taxes for all three years by a total of approximately \$457,000. Hearing Tr. 157.

A. Proceedings Before the Commission.

In this case, there is no dispute that Bayer overpaid its taxes for the years in question by \$457,000. *See* Hearing Tr. 153. The West Virginia Legislature has provided a mechanism by which overpayments of tax may be corrected, and relief is appropriate if an overpayment by a taxpayer resulted from “a clerical error or a mistake occasioned by an unintentional or inadvertent act as distinguished from a mistake growing out of negligence or the exercise of poor judgment.” W. Va. Code § 11-3-27. Section 11-3-27 vests jurisdiction and authority in the County Commission to hear evidence and then determine whether (i) a request to correct an erroneous assessment is timely, and (ii) the mistake leading to the erroneous assessment is of a nature that entitles the taxpayer to relief. *Id.*

On those issues, the Commission accepted oral testimony and documentary evidence submitted by Bayer reflected in a transcript that exceeds 200 pages. At that hearing, the State Tax Commissioner did not call any of his own witnesses to testify. With respect to the timeliness of its request for relief, Bayer submitted and the Commission credited substantial evidence that Bayer sought exoneration within one year of discovering the errors in question and those errors could not “reasonably . . . have been discovered” earlier. W. Va. Code § 11-3-27(a). Specifically, as to Bayer’s 2003 tax return, there was no dispute that Bayer’s petition was timely filed. *See, e.g.,* Hearing Tr.16, 38. As to 2001 and 2002, Bayer presented evidence that it was able to discover the errors in 2003 only after “extraordinary” efforts. *See, e.g., id.* at 57-58, 75-

81. After hearing this evidence, the Commission found that Bayer's petition was timely filed for all three years at issue. *Id.* at 163.

As to the nature of Bayer's errors, Bayer submitted and the Commission credited substantial evidence that Bayer's errors were not negligent, but were unintentional and inadvertent and therefore warranted relief under Section 11-3-27. Three types of errors are relevant here: (1) when reporting inventory in Kanawha County based on "July" inventory reports, Bayer inadvertently reported inventory from the end of July rather than the beginning of July, *see* Hearing Tr.63, 73-74, 188-90; (2) certain materials were mistakenly reported as "finished product" not subject to taxation when they were taxable "raw materials", *id.* at 39, 47, 176; (3) materials traveling in interstate commerce outside West Virginia mistakenly were reported as being in West Virginia, *id.* at 183-184, 193-197 ("All of those barges [were mistakenly] reported to be in Kanawha County. . . . We know that can't have been true. That was a mistake. What we know is, at most, at most, there was one barge in Kanawha County that had finished its interstate transit because that's the total capacity of the North Charleston terminal.").

Bayer's witnesses explained to the Commission that these errors were attributable to difficulties that arose when reconciling the accounting system of Bayer with that of Lyondell Chemical Company, which Bayer had purchased in 2000. Bayer's witnesses testified that Bayer made extraordinary efforts to reconcile and integrate the competing accounting systems of Bayer and Lyondell, but those efforts took significant time. Hr'g Tr.193-194 (detailing Bayer's efforts).

After listening to these witnesses and considering this evidence, the Commission exercised the statutory authority given it under Section 11-3-27 and found that Bayer's errors

were “occasioned by an unintentional or inadvertent act as distinguished from a mistake growing out of negligence.” Hearing Tr. 199-200.¹ In particular, Commissioner Hardy suggested that Bayer had made a “very, very strong record on why [it] made that inadvertent act or mistake” that entitled Bayer to exoneration. *Id.* at 201. Commissioner Hardy further recognized, based both on the testimony presented and his own experience working with accountants implementing new accounting software, that inadvertent acts or mistakes can occur without negligence. *Id.* at 202. Indeed, even the Tax Commissioner, representing the State of West Virginia, recognized that Bayer presented sufficient evidence at the hearing to sustain the Commission’s vote in Bayer’s favor. *See id.* at 203-204 (“I agree with Commissioner Hardy to the extent that there is enough evidence, I think, [that] you could have ruled either way.”).

Following its oral ruling, on February 19, 2004, the Commission entered a written order holding that Bayer’s overpayment “resulted from a clerical error or a mistake occasioned by an unintentional or inadvertent act as distinguished from a mistake growing out of negligence or the exercise of poor judgment.” Order at 1. President Carper filed a dissenting opinion. *See* Commissioner Carper’s dissent to the Order 2004-128 of the Kanawha County Commission.

B. Proceedings Before the Circuit Court.

The State Tax Commissioner did not appeal the Commission’s decision. Rather, the Prosecuting Attorney of Kanawha County filed a petition for writ of certiorari in the Circuit Court of Kanawha County on March 17, 2004. On May 14, 2004, Bayer moved to dismiss the petition for lack of standing to challenge the Commission’s order. On January 12, 2005, the circuit court denied Bayer’s motion.

¹ Commissioner Hardy concluded that Bayer was entitled to exoneration after he earlier had expressly stated that he was “interested to hear testimony on [whether] the accountants in Pittsburgh [were] negligent or did they make a mistake or inadvertent act,” and Bayer then made showings on the point. *Id.* at 169-70.

On August 10, 2006, the Circuit Court issued a final order granting the writ and denying Bayer relief. The Circuit Court did not take any new evidence, Final Order at 7, but nonetheless reviewed the Commission's factual findings *de novo*, *id.* at 4. The Circuit Court made factual findings diametrically opposed to those of the Commission, concluding that Bayer's errors were the result of negligence, *id.* at 11-16, and therefore denied Bayer any recovery of its tax overpayments, *id.* at 16.

Following the Circuit Court's Final Order, Bayer timely moved for a new trial. The Circuit Court denied that motion in an order prepared by outside counsel retained by the Prosecuting Attorney. *See* Reconsideration Order at 11. In the Reconsideration Order, the Circuit Court rejected Bayer's position that greater deference was owed to the Commission, and ruled that "the Commission made no findings of fact at all supporting its conclusion that the errors Bayer claimed 'were the result of clerical error or mistake occasioned by an unintentional or inadvertent act as distinguished from a mistake growing out of negligence or the exercise of poor judgment.'" *Id.* at 7. *But see* Nov. 20, 2003 Hearing Tr. at 16 (Commissioner Hardy: "I stated my reasons for ruling, they are on the record [of November 6] and I'll stand by them. They were taken down by this court reporter and you will rise or fall on appeal with [them].").

III. ASSIGNMENTS OF ERROR

A. No Proper Party Appealed the Commission's Tax Exoneration Ruling.

The real party in interest, the State Tax Commissioner, who appeared before the Commission to defend "the interests of the state, county and districts," declined to ask the Circuit Court of Kanawha County to review the decision. Accordingly, the decision below should be reversed because there was no proper party to petition the Circuit Court of Kanawha County for review of the County Commission's ruling.

B. The County Commission's Tax Exoneration Ruling Was Entitled to Deference and Was Supported by Substantial Evidence.

The *de novo* standard of review of the factual record employed by the Circuit Court was improper and contrary to this Court's precedent. *See Humphreys v. County Court of Monroe County*, 90 W. Va. 315, 110 S.E. 701 (1922). The Circuit Court erred in not deferring to the Commission's fact finding made based on the record before the Commission.

C. The Commission Properly Concluded That Bayer's Overpayment of Taxes Was the Result of Inadvertent Errors.

In law and in fact, the Commission properly concluded that the errors in Bayer's tax returns were the result of inadvertence, and that conclusion was supported by substantial evidence before the Commission.

IV. DISCUSSION OF LAW

A. The Decision Below Should Be Reversed Because the Prosecuting Attorney and Interveners Lacked Standing to Seek Review in the Circuit Court.

As a logical matter, before addressing matters of substance, this Court first should assess whether there was jurisdiction in the Circuit Court below. Here, the judgment of the Circuit Court should be reversed and the Commission's decision reinstated because neither the Prosecuting Attorney nor the Interveners had standing to seek review of the Commission's tax exoneration decision.

1. By Allowing the County Prosecuting Attorney to Override the State's Decision Not to Appeal, the Circuit Court Undermined Rule 17 and Decisions of this Court.

Under West Virginia law, actions may be prosecuted by only the real party in interest. W. Va. R. Civ. P. 17(a). The record reflects that the State Tax Commissioner was the real party in interest to Bayer's taxation appeals, and thus the County Prosecuting Attorney's subsequent involvement in this case before the Circuit Court was improper given his lack of standing. Because the Circuit Court lacked jurisdiction, the Commission's decision should be reinstated.

Here, the State Tax Commissioner was the real party in interest because he had exclusive responsibility to appraise Bayer's industrial personal property, and to review the tax returns underlying Bayer's claims relate to the Tax Commission's appraisals. *See* W. Va. Code § 11-1C-10(b), (c), *compare* Syllabus Pts. 9-11, *Killen v. Logan County Comm'n*, 170 W. Va. 602, 295 S.E.2d 689 (1982) (holding that Tax Commissioner has a duty to value property and levy taxes, whereas county assessors carry out ministerial functions). In the proceedings below, the Commission recognized that the Tax Commissioner "defend[ed] the interests of the state, county and districts" at the hearing. Commission Order at 1; *see also* Hearing Tr. at 4-5 (recognizing that proceedings could not begin until the Tax Commissioner appeared). Moreover, as this Court has explained, a real party in interest must have the "power to make final and binding decisions concerning the prosecution, compromise, and settlement" of the claims at issue. Syl. pt. 5, *Keesecker v. Bird*, 200 W. Va. 667, 490 S.E.2d 754 (1997). Because only the Tax Commissioner has power to appraise property and levy taxes, the State Tax Commissioner is in the best position to evaluate Bayer's tax exoneration claims. In fact, prior to proceedings

before the Commission, the Tax Commissioner met with Bayer to review the magnitude of each error and agreed to the underlying dollar amounts at issue. *See* Hearing Tr. at 17-18.

By contrast, the County Prosecuting Attorney had no power to settle Bayer's claims, much less to appeal an adverse decision regarding those claims. The contrary conclusion of the Circuit Court (1) usurps the well-defined relationship between the State of West Virginia and its counties, and (2) is contrary to the recognized purposes of Rule 17(a). The Circuit Court's holding to the contrary runs afoul of several precedents of this Court and, if permitted to stand, would rewrite established West Virginia law.

First, as this Court held in *Killen*, on matters of taxation, the county is "answerable . . . to the state in the person of the tax commissioner." 170 W. Va. at 621, 295 S.E.2d at 708. In other words, the "state-county relationship . . . is *not one of federalism, of co-sovereigns*. Fifty-five sovereign entities do not exist within the sovereign state of West Virginia. Rather, 55 geographically-defined governmental organizations exist to *carry out the purpose of state government*." *Id.* (emphasis added). Here, Kanawha County and its Prosecuting Attorney are "subject to supervision by state officials acting for the state government." *Id.*² In this case, however, the real party in interest, the State Tax Commissioner, made a decision to forgo any appeal from the Commission's adverse decision. Nov. 20 Tr. 4, 17; *see also* Hearing Tr. at 168, 203. The Prosecuting Attorney should not be permitted to second-guess that discretionary decision, and, in doing so, to usurp the authority of the State Tax Commissioner. As such, the Circuit Court's decision should be reversed because allowing the

² Of course, in its supervisory power, the Tax Commissioner could have delegated the responsibility to defend the valuation and taxation decisions at issue here to the Prosecuting Attorney. *See, e.g.,* W. Va. Code § 11-3-27 (explaining that "either" the State Tax Commissioner or the prosecuting attorney must appear to defend "the interests of the state, county and districts"). Here, however, the Tax Commissioner did not delegate his authority the Prosecuting Attorney.

County Prosecutor to seek appellate review cannot be squared with the *Killen* Court's recognition of the extent of a county's powers.³

Second, by allowing the Prosecuting Attorney to file an appeal where the Tax Commissioner was the real party in interest, the Circuit Court violated this Court's decisions interpreting Rule 17(a). As this Court explained in *Keesecker v. Bird*:

The requirement that claims be prosecuted only by a real party in interest enables a responding party to avail himself of evidence and defenses that he has against the real party in interest, to assure him of finality of judgment, and to protect him from another suit later brought by the real party in interest on the same matter. *In its modern formulation, Rule 17(a) protects a responding party against the harassment of lawsuits by persons who do not have the power to make final and binding decisions concerning the prosecution, compromise, and settlement of a claim.*

Syllabus Point 5, *Keesecker, supra* (emphasis added). When the Tax Commissioner made the discretionary judgment not to appeal the County Commission's ruling, Bayer was entitled to the "finality of judgment" discussed in *Keesecker*. Instead, Bayer was presented with an appeal by an entity that lacked "power to make [a] final and binding decision[]" concerning the settlement of Bayer's claims.

Indeed, the circumstances here mirror the scenario that this Court sought to prevent in *State ex rel. McGraw v. Burton*, 212 W.Va. 23, 569 S.E.2d 99 (2002). There, this Court held: "[I]n all instances when an executive branch or related State entity is represented by counsel before a tribunal, the Attorney General shall appear upon the pleadings as an attorney of record" *Id.* 212 W.Va. at 41, 569 S.E.2d at 117. This Court explained that the Attorney

³ Even if the County had some independent interest in the County Commission's ruling, this is a case where the Prosecuting Attorney essentially acted on behalf of the dissenting Commissioner to seek review of the Commission's own decision. See generally Appendix B to Petition for Appeal (reporting that President Carper, who dissented from the Commission's ruling, "sued himself" because the Tax Commissioner refused to take an appeal). Allowing the Prosecuting Attorney to do so violated the West Virginia Constitution, which provides that "two [County] commissioners shall be a quorum for the transaction of business." W. Va. Const. Article IX Section 9.

General's active participation in actions in which the State is a party is necessary to insure that the broader, sometimes conflicting, interests of the State are fully considered. *Id.*, 212 W.Va. at 39, 569 S.E.2d at 115 (recognizing "a central legal office . . . can consider the issues in a given case in light of the broader interests of the State and in view of the impact on the full range of State entities"). Here, however, the Prosecuting Attorney unilaterally purported to represent the State of West Virginia before the Circuit Court. Indeed, the Prosecuting Attorney affixed an "*ex rel. Michael T. Clifford*" designation in the caption following the real party in interest, the "State of West Virginia." See County Attorney's Cert. Petition at 1; see also Bayer's Petition for Appeal at 21-22 (explaining that the State Tax Commissioner is part of the executive branch).

The Prosecuting Attorney's petition appealing to the Circuit Court plainly fails to satisfy the requirement that the Attorney General appear as counsel of record. And, by permitting the Prosecuting Attorney to take such unilateral action, the Circuit Court nullified this Court's concern that a single legal voice must represent the State's sovereign interest to ensure that the State's interests are fully considered. See *McGraw*, 212 W. Va. at 39, 569 S.E.2d at 115; see also *Killen*, *supra* (recognizing that the county's interests derive from the goals of the State).

Because the Prosecuting Attorney lacked standing to appeal the Commission's ruling under West Virginia Rule of Civil Procedure 17, *McGraw* and *Killen*, the Circuit Court's order should be reversed.

2. The Prosecuting Attorney Lacked Authority and Forfeited Any Ability to Appeal the Commission's Ruling.

The Circuit Court's judgment should be reversed because the Prosecuting Attorney had no statutory standing to challenge the Commission's decision.

First, under certiorari jurisdiction, the Prosecuting Attorney had no standing. As this Court has explained, certiorari review is available only to individuals that "will suffer a

special injury beyond that which will affect him in common with the public *or others similarly situated.*” *Barker v. City of Charleston*, 134 W. Va. 754, 758, 61 S.E.2d 743, 746 (1950) (emphasis added); *see* Syl. Pt. 5, *Corliss v. Jefferson County Bd. of Zoning Appeals*, 214 W. Va. 535, 591 S.E.2d 93 (2003) (requiring such individual “suffer special or peculiar damage or inconvenience not common to all”). Here, the Prosecuting Attorney’s alleged injury is indistinguishable from that sustained by the State of West Virginia. As described above, the County of Kanawha’s interest is wholly derivative of the interest of the State of West Virginia.

Here, the County Prosecuting Attorney expressly invoked the State’s rights through his artificial “*West Virginia ex rel.*” caption. He should not be allowed to argue that his rights are now distinguishable. Finally, *Barker* holds that a party may not pursue certiorari “where another sufficient remedy through public instrumentalities is available.” *Id.*, 134 W. Va. at 758, 61 S.E. 2d at 746. Because the Tax Commissioner clearly could have petitioned the circuit court for review, another sufficient remedy was available.

Second, contrary to his argument before the Circuit Court, the Prosecuting Attorney also had no statutory standing under W. Va. Code § 11-3-25. Here, the Prosecuting Attorney incorrectly alleged that the circuit court had jurisdiction pursuant to section 11-3-25. *See* Prosecuting Attorney’s Response to Bayer’s Motion to Dismiss at 4. Section 11-3-25 does not provide jurisdiction to review the Commission’s tax exoneration decision. But even if it did, section 11-3-25 imposes a jurisdictional requirement that the Prosecuting Attorney did not satisfy here:

Any person claiming to be aggrieved by any assessment in any land or personal property book of any county *who shall have appeared and contested the valuation . . . apply for relief to the circuit court*

W. Va. Code § 11-3-25 (emphasis added); *see also* W. Va. Code § 58-3-3 (limiting right to appeal from proceedings before County Commissions to “part[ies] to any such proceeding”).

The State Tax Commissioner was the only party who appeared at the Commission's November 6 and November 20, 2003 hearings. Accordingly, no other entity was entitled to apply for relief to the circuit court. *See id.*; Syllabus point 3, *Tug Valley Recovery Center, Inc. v. Mingo County Commission*, 164 W. Va. 94, 261 S.E.2d 165 (1979).

Even if the Prosecuting Attorney lacked notice of the November 6, 2003 hearing as he claims, there is no dispute that he received notice of the November 20, 2003 hearing. Despite that notice, the Prosecuting Attorney failed to appear for that hearing, and failed to raise any objection to the Commission's explicit finding that the November 6 hearing had been properly noticed. *See* Hearing Tr. at 2 ("this matter has been duly noticed"). As such, any claims are now barred on appeal. *See, e.g., Hartwell v. Marquez*, 201 W. Va. 433, 443, 498 S.E.2d 1, 11 (1997) ("[T]he issue of lack of notice is not properly raised on appeal unless it was first raised below."). Indeed, having failed to object before the Commission, the Prosecuting Attorney should not be permitted to argue on a basis of claims that could have but were not made before the Commission. *See generally State v. Bingman*, 221 W. Va. 289, 654 S.E.2d 611, 615 (2007) (per curiam) (recognizing that allowing a party to raise on appeal an objection waived below would allow parties to improperly "sandbag trial judges") (internal quotation marks and citations omitted). Of course, it is apparent why the Prosecuting Attorney did not appear, namely because the Tax Commissioner was, and is, the only real party in interest and those interests were amply represented by the State.

For these reasons, the judgment of the circuit court should be reversed because the Prosecuting Attorney had no standing to challenge the Commission's order.

B. The Circuit Court Erred by Reviewing *De Novo* the Commission's Factfinding.

In considering the Prosecuting Attorney's challenge to the Commission's exoneration ruling, the Circuit Court concluded that it was obligated to assess the Commission's factfinding under a *de novo* standard of review. *See* Final Order at 2-6. In doing so, the Circuit Court rejected the arguments of both parties, which agreed that the Commission's factfinding was subject to "a clearly erroneous standard," *id.* at 2 n.2 . The Circuit Court instead concluded that it was compelled to substitute its factfinding for that of the County Commission. That ruling should be reversed.

1. This Court's Precedent Provides That the Circuit Court Should Defer to the County Commission's Factfinding in Tax Exoneration Cases.

The decision of the Circuit Court is contrary to long-standing precedent of this Court. In 1922, this Court explained that, upon writ of certiorari, deference is owed to a County Commission's (formerly, a county court's) factfinding in tax exoneration proceedings. *See Humphreys v. County Court of Monroe County*, 90 W. Va. 315, 110 S.E. 701 (1922).⁴ In *Humphreys*, this Court considered a circuit court's judgment affirming, on writ of certiorari, the county court's denial of a request for a tax exoneration. *See id.*, 90 W. Va. 319, 110 S.E. at 702-03. This Court first explained that it reviews the decision of a circuit court *de novo*, that is, "upon a writ of error, this court can render such judgment as the circuit court should have entered." *Id.*, 90 W. Va. at 318, 110 S.E.2d at 702. Turning to the merits of the case, this Court reviewed the evidence presented to the County Court and concluded that "[t]he presumption in favor of correctness and regularity of the assessment was *clearly and fully rebutted* and

⁴ *See also* W. Va. Code § 53-3-2 (setting forth types of cases reviewable upon certiorari); Syllabus, *Humphreys*, 90 W. Va. 315, 110 S.E. 701 (recognizing that a county court acts judicially in deciding questions of taxability and exoneration, and accordingly review in the circuit court is available by writ of certiorari); *cf. Quesenberry v. State Road Comm'n*, 103 W.Va. 714, 721, 138 S.E. 362, 365 (1927) ((holding that "[o]nly judicial or quasi judicial action is reviewable" upon certiorari).

overthrown by the admissible evidence.” *Id.* 90 W. Va. at 321, 110 S.E.2d at 703 (emphasis added). In doing so, it overturned “the judgments of the circuit court and the county court [because they] are *clearly erroneous*.” *Id.* In sum, *Humphreys* stands for the proposition that a circuit court, and this Court, review a County Commission’s factfinding in a tax exoneration with deference, overturning that factfinding only upon a showing that the facts found by the Commission be “clearly and fully rebutted,” *i.e.*, that they are “clearly erroneous.” *Id.* The Circuit Court erred by failing to follow these principles and by instead substituting its own view of the factual record for that of the County Commission.

The error in the Circuit Court’s approach is further confirmed by (i) an examination of this Court’s history of reviewing proceedings following certiorari in a variety of contexts, and (ii) the original purposes of certiorari review in West Virginia generally.

The great weight of authority involving certiorari review in West Virginia makes plain that considerable deference is owed to the factfinding conducted by administrative agencies such as the County Commission in its role addressing matters such as exoneration appeals. For example, in a case involving a statutory provision authorizing Circuit Court review of the State Water Commission’s determinations, this Court recognized that: “*Whether the proceeding before the court be regarded as certiorari or appeal, the court cannot substitute its discretion for that of the commission lawfully exercised.*” *Danielley v. City of Princeton*, 113 W.Va. 252, 255, 167 S.E. 620, 622 (1933) (emphasis added). Instead, “it was the duty of the circuit court under [the statute], as it would have to do in the event there had been no statutory review and certiorari had been invoked to ascertain whether the commission’s finding . . . *is clearly wrong or against the preponderance of the evidence.*” *City of Huntington v. State Water Comm’n*, 135 W.Va. 568, 578, 64 S.E.2d 225, 230 (1951) (emphasis added).

Similarly, in *Beverlin v. Board of Education of Lewis County*, 158 W.Va. 1067, 216 S.E.2d 554 (1975), after holding that the circuit court could hear, on certiorari review, a case first decided by the County Board of Education, this Court explained that the “the sole significant issue” was whether the board “acted *arbitrarily and capriciously* in suspending and dismissing [plaintiff], considering the evidence placed in the record.” *Id.* 158 W.Va. at 1072, 216 S.E.2d at 557 (emphasis added).⁵ Indeed, this Court’s review of decisions from county zoning authorities reflects a deferential standard for reviewing the factual findings of quasi-judicial bodies upon certiorari review. The Court long has recognized that zoning appeals boards—like the County Commission here—act in a quasi-judicial function. *See, e.g., Wolfe v. Forbes*, 159 W.Va. 34, 217 S.E.2d 899 (1975); *see also Appalachian Power Co. v. Pub. Serv. Comm’n of W. Va.*, 170 W. Va. 757, 759, 296 S.E.2d 887, 889 (1982) (“We recognize that the Legislature may create an administrative agency and give it quasi-judicial powers to conduct hearings and make findings of fact without violating the separation of powers doctrine.”); Office of the Attorney General, *Hon. Fred L. Fox; Tax Records: Clerical Error Corrected by County Court*, 35 W. Va. Op. Atty. Gen. 533, 1934 WL 30089, at *3 (W. Va. A.G. Apr. 19, 1934) (opining that county court has power to correct mistakes and “[m]ere errors”). In reviewing that

⁵ *Accord North v. W. Va. Bd. of Regents*, 160 W. Va. 248, 260, 233 S.E.2d 411, 418-19 (1977) (affirming that *Beverlin* “established that on a writ of certiorari the court may review the action of the lower tribunal to determine if it acted in an arbitrary and capricious manner, and if it did, its actions will be reversed”) (emphasis added); *Adkins v. W. Va. Dep’t of Educ.*, 210 W. Va. 105, 107-08, 556 S.E.2d 72, 74-75 (2001) (per curiam) (reiterating “this Court [has] established that on a writ of certiorari the court may review the action of the lower tribunal to determine if it acted in an arbitrary and capricious manner”) (citations omitted); *id.* 210 W. Va. at 108 n.3, 556 S.E.2d at 75 n.3 (recognizing “the standard of review [under the certiorari statute and for an APA appeal] is essentially the same”); *Clarke v. W. Va. Bd. of Regents*, 166 W.Va. 702, 714-715, 279 S.E.2d 169, 177-78 (1981) (holding, following circuit court’s certiorari review, that initial tribunal must make sufficient findings to satisfy the circuit court that it “has fulfilled [its] obligations as a fact finder and has not acted arbitrarily and capriciously in reaching his conclusions”); *id.* 166 W.Va. at 715, 279 S.E.2d at 178 (explaining that if the administrative record is deficient, the appeals courts are “powerless to review the administrative action” because they “are thrust into the position of a trier of fact and are asked to substitute [their] judgment for that of the hearing examiner,” which “[they] cannot do”).

quasi-judicial tribunal's findings, this Court has held that "on appeal there is a presumption that a board of zoning appeals acted correctly," and that presumption may be overcome only "where the board has applied an erroneous principle of law, was *plainly wrong in its factual findings*, or acted beyond its jurisdiction." *Wolfe*, 159 W.Va. at 45, 217 S.E.2d at 906 (emphasis added).

More recently, in *Jefferson Utilities, Inc. v. Jefferson County Bd. of Zoning Appeals*, 218 W.Va. 436, 624 S.E.2d 873 (2005) and *Corliss v. Jefferson County Bd. of Zoning Appeals*, 214 W.Va. 535, 591 S.E.2d 93 (2003), this Court confirmed the continuing vitality of the *Wolfe* standard in analyzing a Circuit Court's review of zoning board decisions on writ of certiorari.⁶ Thus, in *Jefferson Utilities*, this Court explained: "While on appeal *there is a presumption* that a board of zoning appeals acted correctly, a reviewing court should reverse the administrative decision where the board has applied an erroneous principle of law, was *plainly wrong in its factual findings*, or has acted beyond its jurisdiction." 218 W.Va. at 440-441, 624 S.E.2d at 877-878 (emphasis added; quoting *Wolfe*); *Corliss*, 214 W.Va. at 539-540, 591 S.E.2d at 97-98 (same). Again, this Court held that the standard of review in such cases mirrors that for statutory appeals from State administrative agencies under the APA even though review of the zoning decisions was pursuant to the certiorari statute.

This Court's decision in *Corliss* is particularly instructive. In *Corliss*, this Court held that the Circuit Court committed reversible error by failing to give the County Board's decision sufficient deference. *Id.*, 214 W.Va. at 540, 591 S.E.2d at 98. In language equally applicable here, this Court concluded that by "discarding the administrative determinations that the submitted [evidence] was adequate, the lower court appears to have *wrongly substituted its judgment for that of the administrative entities charged with handling zoning matters.*" *Id.*, 214

⁶ Both cases were reviewed under the provisions of W. Va. Code § 8-24-59. That provision has been replaced by a substantially similar statute, W. Va. Code § 8A-9-1.

W.Va. at 542, 591 S.E.2d at 100 (emphasis added). The Court added that “[i]t is axiomatic that ‘[i]nterpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.’ *Id.*, 214 W.Va. at 542-43, 591 S.E.2d at 100-01 (ruling that “the lower court overlooked its duty to give the appropriate amount of deference to the administrative decision and Zoning Board’s affirmance of that decision”) (internal citation omitted); *see also id.* Syllabus Points 3 & 4; *Jefferson Utils.*, 218 W.Va. at 449, 624 S.E.2d at 886 (“As in *Corliss*, we are hard pressed not to conclude that the trial court wrongly refused to grant the appropriate amount of deference to one of the administrative bodies charged with responsibility for enforcing the Ordinance”).

The same is true here. In this case, the State Legislature has designated the County Commissions as the first level adjudicatory body to hear taxability disputes involving exoneration, and has provided statutory standards that a taxpayer must meet in order to have its exoneration request granted. The County Commission therefore is authorized by statute to hear and consider evidence relevant to the statutory factors set forth in 11-3-27, and to decide whether exoneration is appropriate under those statutory standards. Here, as in *Corliss*, the Commission conducted “a comprehensive and seemingly thorough public review” as to the nature of the errors that led to Bayer’s overpayment of taxes. Just as it was improper for the circuit court in *Corliss* to ignore the interpretations of the bodies charged with the administration of planning and zoning ordinances, the circuit court below committed reversible error by ignoring the Commission’s factfinding and application of the statutory standards it administers in Section 11-3-27. Because the Legislature designated County Commissions as the appropriate body to

decide exoneration requests, under the logic of *Corliss* and *Jefferson Utilities*, it is simply not proper for the Circuit Court to usurp that role.⁷

Second, since their first enactment in 1882 and amendment into their current form in 1889, this Court always has interpreted the statutes governing certiorari to require the same deference to factfinding that attaches in statutory appeals. See W. Va. Code § 53-3-1, *et seq.* For instance, in *Alderson v. Commissioners*, 32 W.Va. 454, 459, 9 S.E. 863, 865 (1889), this Court explained that although certiorari, at common law, allowed only narrow review of a limited category of errors, in passing the statutes, the legislature “remove[d] all doubt as to its reach,” deciding certiorari should “*afford, in its field of operation, the same relief against erroneous finding on the evidence as would be afforded by a writ of error on a motion for a new trial, on the ground that the finding was without sufficient evidence or contrary to the evidence.*” *Id.* (emphasis added). This Court consistently has explained that the writ of certiorari “is an appellate writ, the counterpart of the writ of error.” *Morgan v. Ohio River R. Co.*, 39 W.Va. 17, 21, 19 S.E. 588, 589-590 (1894). *Accord* Syl. Pt. 1, in part, *Michaelson v. Cautley*, 45 W.Va. 533, 32 S.E. 170 (1898) (“The writ of certiorari, when awarded in civil cases before justices, under sections 2, 3, c. 110, Code, is an appellate process, designed to effect the ends of justice...”); *McClure-Mabie Lumber Co. v. Brooks*, 46 W.Va. 732, 734, 34 S.E. 921, 921-922 (1899) (“True, the certiorari is tried by the record but it is only another name for appeal”).

These foundational principles illustrate the fundamental error of the Circuit Court’s analysis. Because certiorari is intended to afford a litigant the same opportunity for relief as an appeal provided by statute, it would be incongruous for the standard of review in

⁷ See *Corliss*, 214 W.Va. at 544, 591 S.E.2d at 102 (“Just as the circuit court completely sidestepped the Board’s decision as to adequacy, the court similarly ignored the expertise the administrative entities involved in this case have developed with regard to land measurement and its consequent obligation to accord such expertise/judgment a significant level of deference barring any clear error.”).

certiorari to permit a Circuit Court to substitute its own judgment for that of the inferior tribunal when it cannot do so in an appeal. That is particularly the case when the Circuit Court has not sought to go outside the record or adduce new evidence that was not before the County Commission. Instead, the Circuit Court reviewed the same record already before the County Commission, and therefore should not be permitted to substitute its assessment of the facts and to make its own credibility determinations when it lacks access to live witness testimony of the sort considered by the County Commission. See *Webb v. West Va. Bd. of Med.*, 212 W. Va. 149, 156, 569 S.E.2d 225, 232 (2002) (“[C]redibility determinations by the finder of fact in an administrative proceeding are ‘binding unless patently without basis in the record’”) (quoting *Martin v. Randolph County Bd. of Educ.*, 195 W.Va. 297, 304, 465 S.E.2d 399, 406 (1995)); *Michael D.C. v. Wanda L.C.*, 201 W. Va. 381, 388, 497 S.E.2d 531, 538 (1997) (“A reviewing court cannot assess witness credibility through a record”); *Gum v. Dudley*, 202 W. Va. 477, 484, 505 S.E.2d 391, 398 (1997) (same).

2. Applying *De Novo* Review to the Commission’s Factual Findings Violates the Constitutional Separation of Powers.

The decision below also is inconsistent with separation of powers principles. More than 100 years ago, the Court also recognized that the separation of powers provision in W. Va. Const. art. V, § 1 constrains the ability of inferior tribunals to review rulings from administrative agencies. In *Poteet v. Cabell County Com'rs*, 30 W.Va. 58, 3 S.E. 97 (1887), this Court examined several sections of the Constitution of West Virginia and related statutes and observed that all of these, taken together, could be interpreted as granting the circuit court authority to review “every possible case of any description, when the county court had made a final order, in any case or proceeding of any sort.” *Id.*, 30 W.Va. at 72, 3 S.E. at 105.

The Court then observed:

But broad and comprehensive as is the provision of the (1880) constitution above quoted, as well as the laws intended to carry it into effect, stated above, still there are cases of final orders of a county court which cannot be reviewed by certiorari, or in any other manner, by the circuit court, because such final orders, or the proceedings in which they were entered, are obviously not judicial in their character. It is true, by article 5 of our constitution (see Warth's Amended Code, p. 11) it is provided that "the legislative, executive, and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others."

Id., 30 W.Va. at 73, 3 S.E. at 105. In *Poteet*, the Court decided the County Court's power to investigate irregularities in voting and to rule on specific objections made the County Court's rulings judicial in nature, and therefore this Court held that the Circuit Court had jurisdiction to hear the case in certiorari. *See syllabus.*

Thereafter, in *State v. Huber*, 129 W.Va. 198, 40 S.E.2d 11 (1946), the Legislature gave Circuit Courts concurrent (with the beer commissioner) jurisdiction to revoke licenses to sell nonintoxicating beer. Upon such a revocation by the Circuit Court of Fayette County, the licensees appealed and this Court considered the meaning of the terms "legislative power," "executive power," and "judicial power." The Court explained that

(i) "[u]nquestionably, the power of regulation of public utilities, the licensing of businesses of all kinds, the regulation of such businesses, the general control thereof, including the power of revoking licenses or permits issued in connection therewith, is a legislative power", *id.* 129 W.Va. at 207, 40 S.E.2d at 18;

(ii) "executive power is more limited: it merely extends to the detail of carrying into effect the laws enacted by the Legislature, as they may be interpreted by the courts," *id.* 129 W.Va. at 207-08, 40 S.E.2d at 18), and

(iii) "judicial power" included "the power which a regularly constituted court exercises in matters which are brought before it, in the manner prescribed by statute, or established rules of practice of courts, and which matters do not come within the powers

granted to the executive, or vested in the legislative department of the Government.”

Id. 129 W.Va. at 208, 40 S.E.2d at 18. The Court then discussed at length the requirement that these powers be separated, observing that “[t]he separation of these powers; the independence of one from the other; the requirement that one department shall not exercise or encroach upon the powers of the other two, is fundamental in our system of government, State and Federal. Each acts, and is intended to act, as a check upon the others, and thus a balanced system is maintained. No theory of government has been more loudly acclaimed.” *Id.*, 129 W.Va. at 209, 40 S.E.2d at 18. Applying these principles, this Court highlighted the limited scope of judicial review of rulings by administrative or quasi-judicial bodies.

First, the Court recognized that strict separation was not practicable because “there has grown up a proceeding, authorized by statute, and recognized by this Court which, by the employment of what may be termed a legal fiction, administrative boards, commissions and officials are treated as possessing quasi judicial power.” *Id.*, 129 W.Va. at 219, 40 S.E.2d at 24. Nevertheless, the Court both defined the ability of courts to review such determinations and the limitations inherent in that review:

Apparently the law is settled in favor of the use of the appeal method, on the theory that duly constituted administrative boards and commissions do sometimes exercise quasi judicial power, and that, on that theory, there can be brought into play what is called judicial power. If there is an abuse of power; or if the power conferred by the Legislature be exceeded; or there is arbitrary or fraudulent exercise thereof; or any provision of the Constitution or the statute laws of the State is violated, a judicial question arises upon which the courts may pass judgment. But unless these administrative agencies are at fault in the respects noted above, their power to perform their functions, delegated to them by the Legislature, cannot be controlled by the courts; and, this being true, courts will not assume to exercise administrative power, *even though the Legislature may mistakenly authorize them to do so.*

Id. 129 W.Va. at 220-221, 40 S.E.2d at 24 (emphasis added).

Two cases illustrate these principles in practice. First, *Danielley, supra*, interpreted W. Va. Code § 16-11-7, which provided that “the circuit court shall review any order of the commission, and may hear and consider any pertinent evidence offered, etc., ‘and shall determine all questions arising on the law and evidence and render such judgment or make such order upon the whole matter, as law and equity may require.’” *Id.*, 113 W.Va. at 254, 167 S.E. at 622. The Court interpreted this language as requiring a decision on the merits of the case. *Id.*

Under that statute, the Court found that:

A hearing before the commission involves the determination (1) of whether the act complained of is a statutory pollution, and, if so (2) of the proper sewage treatment or system of filtration to reduce the pollution. The first determination is quasi judicial; the second is executive or administrative. An order of the commission properly determining these questions is an order on the whole matter. Upon appeal from the commission, the circuit court, in order to pass upon the whole matter, would have to review the identical questions primarily determined by the commission. A review of the system (for the regulation of the pollution) adopted by the commission and the approval of that or some other system by the court would require the court itself to exercise discretion; *i.e.*, executive power.

Id., 113 W.Va. at 255, 167 S.E. at 622. Since a decision on the merits would require the exercise of executive functions, the Court held the entire act to be an unconstitutional violation of West

Virginia’s separation of powers:

Whether the proceeding before the court be regarded as certiorari or appeal, the court cannot substitute its discretion for that of the commission lawfully exercised. The legislative, executive, and judicial powers, under the Constitution (article 5), are each in its own sphere of duty, independent of and exclusive of the other; so that, whenever a subject is committed to the discretion of the legislative or executive department, the lawful exercise of that discretion cannot be controlled by the judiciary.

Id., (emphasis added, additional citations omitted).

Second, after the Legislature amended the statutes invalidated by *Danielley*, this Court reviewed the amendments in *City of Huntington v. State Water Commission*, 135 W.Va. 568, 64 S.E.2d 225 (1951). As amended, W. Va. Code § 16-11-7 limited the Circuit Court's review in two ways: the review was confined (i) to the record made below, and (ii) to the question as to whether the act complained of constitutes pollution under the Code. The decision was to be certified back to the State Water Commission, which was to modify its order to be consistent with that of the Circuit Court. This Court interpreted the statute as not permitting the Circuit Court to hear new evidence or conduct a trial *de novo* because if the Circuit Court had that authority it would violate the separation of powers principles inherent in West Virginia law. To avoid that problem, this Court made clear that review of the Water Commission's ruling could not be *de novo*, and would instead be based on a deferential standard of review. *Id.*, 135 W.Va. at 578, 64 S.E.2d at 230-231.

Further, this Court has applied these separation of powers principles in the context of tax appeals. For example, in *Frymier-Halloran v. Paige*, 193 W.Va. 687, 458 S.E.2d 780 (1995), this Court found that a statute that permitted a circuit court to hear an appeal from a decision of the Tax Commissioner's Office of Hearings and Appeals "anew" or "*de novo*" violated West Virginia's separation of powers. *Id.*, 193 W.Va. 687, 458 S.E.2d 780 (emphasis added). Justice Cleckley's opinion explained that once an administrative agency is created and is "assign[ed] adjudicatory decision making," courts "must defer to its decisions and cannot review factual determinations *de novo*." *Id.*, 193 W. Va. at 694, 458 S.E.2d at 787 (citing *Walter Butler Bldg. Co. v. Soto*, 142 W.Va. 616, 97 S.E.2d 275 (1957)). The *Frymier-Halloran* Court directed lower courts to be mindful that it is "established that administrative agencies are active players in the division of powers, and, while always subject to properly enacted and valid laws and to

constitutional constraints, their actions are entitled to respect from both the legislature and the courts.” *Id.*, 193 W.Va. at 694, 458 S.E.2d at 787. In short, to ensure that the separation of powers is not violated, it is “evident that courts will not override administrative agency decisions, of whatever kind, unless the decisions contradict some explicit constitutional provision or right, are the results of a flawed process, or are either fundamentally unfair or arbitrary. *Id.*

To be sure, *Frymier-Halloran* presents something of a different circumstance because the Kanawha County Commission is not a state administrative agency and this Court’s separation of powers cases have not confronted review of *ad valorem* real or personal property taxes in general or exoneration requests specifically. Those distinctions, however, should be immaterial. Indeed, this Court’s holding in *In re Tax Assessment Against American Bituminous Power Partners, L.P.*, 208 W.Va. 250, 539 S.E.2d 757 (2000) confirms that the same limitations on the Circuit Court’s scope of review are applicable here.

In *American Bituminous*, this Court considered the standard of review which may be exercised by a circuit court considering a valuation appeal pursuant to W. Va. Code § 11-3-25. The Court applied *Frymier-Halloran* and found it controlling, stating “judicial review of a decision of a board of equalization and review regarding a challenged tax-assessment valuation is limited to roughly the same scope permitted under the West Virginia Administrative Procedures Act, W. Va. Code ch. 29A. *American Bituminous Power Partners*, 208 W.Va. at 255, 539 S.E.2d at 762. Moreover, the County Commission, in which the Legislature saw fit to vest the authority to review and consider exoneration requests, is itself a creature of the Constitution of West Virginia to which the separation of powers principles discussed above apply.

Following the ratification of the Judicial Reorganization Amendment of 1974,⁸ Article IX Section 11 of the Constitution of West Virginia defines the powers of the county commissions as follows: “[s]uch commissions may exercise such other powers, and perform such other duties, *not of a judicial nature*, as may be prescribed by law.” (emphasis added). Thus, were the Legislature to attempt to assign to a County Commission a judicial function, that assignment would violate the constitutional provision now found at Article VIII, Section 1 that provides that “[t]he judicial power of the State shall be vested *solely* in a supreme court of appeals and in the circuit courts, and in such intermediate appellate courts and magistrate courts as shall be hereafter established by the legislature, and in the justices, judges and magistrates of such courts.”

When a County Commission decides a request for exoneration, it does not act judicially. *See, e.g.,* Office of the Attorney General, *Hon. Fred L. Fox; Tax Records: Clerical Error Corrected by County Court*, 35 W. Va. Op. Atty. Gen. 533, 1934 WL 30089, at *3 (W. Va. A.G. Apr. 19, 1934) (explaining that while a county court has power to correct mistakes and “[m]ere errors,” it “may not review the action of the assessor or of the tax commissioner which involved the exercise of a sound discretion, judicial in character”); *cf. Appalachian Power Co. v. Pub. Serv. Comm’n of W. Va.*, 170 W. Va. at 759; 296 S.E. 2d at 889 (“[T]he Legislature may create an administrative agency and give it quasi-judicial powers to conduct hearings and make findings of fact without violating the separation of powers doctrine.”). Indeed, Syllabus Point 2 of *State v. South Penn Oil Co.*, 42 W.Va. 80, 24 S.E. 688 (1896), states “[w]hen the question of the legality or illegality of the listing of property on the land books for taxation comes before the

⁸ The Judicial Reorganization Amendment of 1974 renamed the county courts as county commissions and moved the provisions relating to them from Article VIII (the Judicial Article) to Article IX (the County Organization Article).

county court for correction, on the application of the party assessed, who feels himself aggrieved, the county acts, in review of the action of the commissioner of reassessment, as an administrative board; *and such action of the county court is not "judicial,"* within the meaning of section 24 of article 8 of the constitution." By the same token then, it would violate the separation of powers principles reaffirmed in *Frymier-Halloran* to allow the Circuit Court to usurp the Commission's authority by reviewing those non-judicial determinations *de novo*.

Accordingly, the Circuit Court's decision to apply a *de novo* standard of review should be reversed. By affording no deference to the factfinding of the Commission, and in substituting its contrary findings for those of the Commission, the Circuit Court usurped the authority vested in the Commission by the West Virginia Legislature in violation of W. Va. Const. art. V § 1. Because there is no basis upon which to hold that the Commission's findings were arbitrary and capricious, the decision of the Circuit Court should be reversed and the Commission's Order should be reinstated.

3. The Cases Upon Which the Circuit Court Relied Do Not Compel a Contrary Result.

In its ruling, the Circuit Court attempted to rely on an inapposite line of cases in support of its view that the Commission's factfinding must be reviewed *de novo*. That analysis does not withstand scrutiny.⁹

First, the Circuit Court cited *Board of Education v. MacQueen*, 174 W. Va. 338, 340, 325 S.E.2d 355, 357 (1984) in support of its purported authority to apply *de novo* review. Final Order at 4. This Court's decision in *MacQueen* has no application here. In *dicta*, the

⁹ The Prosecuting Attorney's current attempts to rely on a *de novo* standard of factual review are opportunistic. In his opening brief to the circuit court, the Prosecuting Attorney admitted: "The Court reviews the issues of law on a 'de novo' standard of review and *issues of fact under a "clearly erroneous" standard of review.*" Brief at 1.

MacQueen court stated: “Additionally, we note that, under the expanded role accorded certiorari by West Virginia Code § 53-3-3 (1981 Replacement Vol.), the circuit court, in effect, takes the matter *de novo*.” *MacQueen*, 174 W. Va. at 340, 325 S.E.2d at 357. There was no factfinding at issue in *MacQueen*, however. To the contrary, the case involved a petition for prohibition presenting a pure legal issue: whether a certiorari proceeding that had been filed in Kanawha County was properly venued there or in Lincoln County. *See id.*, 174 W. Va. at 340, 325 S.E.2d at 357. In short, *MacQueen* does not speak to the issue whether a Circuit Court is obligated to engage in *de novo* factfinding on certiorari review from the decision of a County Commission.

Second, the Circuit Court attempted to justify *de novo* review “because “[o]n certiorari the circuit court is required to make an independent review of both law and fact in order to render judgment as law and justice may require.” Final Order at 4 (citing Syl. Pt. 1, *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276 (1982)). The syllabus point upon which the circuit court relied sheds no light on the issues here, but merely quotes the statutory language from West Virginia Code § 53-3-3. This Court has held for over 100 years that such statutory language simply gave the circuit court *jurisdiction*—which was lacking under common law—to review the evidence as well as the law in proceedings in certiorari.

Thus, in *Morgan v. Ohio River R. Co.*, 39 W. Va. 17, 19 S.E. 588 (1894), this Court explained:

Before that statute [now §§ 53-3-2 and 53-3-3], the superior court upon certiorari could review all questions of jurisdiction and the regularity of proceeding, and decide all questions of law and fact, and render such judgment, in case of reversal, as the lower tribunal ought to have rendered; but it was at least doubtful whether the court could do what appellate courts can do on writs of error, consider evidence and reverse findings on facts by jury or court in proper cases; *but now the statute provides for embodying in the record evidence and all questions passed upon on the trial in the tribunal below, and requires the court above to pass upon all*

questions arising on law and evidence, and render such judgment as the court should have rendered, without remanding.

Id., 39 W. Va. at 21-22, 19 S.E. at 590 (emphasis added and internal citation omitted); *see also Anderson, supra* (recognizing that if “in every case where a judgment or order of an inferior tribunal is reversed the circuit court must retain and try the case *de novo*, would be productive of great inconvenience”). Indeed, as detailed above, the clearly erroneous standard of review applicable to factfinding has been confirmed repeatedly by this Court.

The Circuit Court also cited 14 Am. Jur. 2d *Certiorari* § 110 n.84 (2000), which provides that (i) “[i]n some jurisdictions, however, a final judgment may be rendered by the reviewing court in a proper case, even though it has been held that such judgment must be one that the lower tribunal should have entered,” and (ii) cites *State ex rel. Davis v. Hix*, 141 W.Va. 385, 90 S.E.2d 357 (1955) for the proposition that in “West Virginia, circuit courts, on certiorari, review matters of law and fact and make such disposition of a case as law and justice may require.” *Id.*, 141 W.Va. at 391, 90 S.E.2d at 361. Nothing in those provisions speak to the standard governing review of the original tribunal’s factfinding.¹⁰ Indeed, the Am. Jur. treatise makes clear that, as Bayer has shown here, the general rule upon certiorari review is that “[t]he reviewing court has no power to enter a judgment on the merits of the controversy to substitute its own judgment for that of the tribunal or body being reviewed.” 14 Am. Jur. 2d *Certiorari* § 110 (footnotes omitted).

Finally, the Circuit Court erroneously relied on a limited exception in *Harrison v. Ginsberg*, as a license for wholesale *de novo* review of the facts. *Harrison*, however, is not

¹⁰ *Hix* presented the question whether the circuit court should address an issue raised by the facts on the record that the parties did not raise. In that case, then, the certiorari statute was interpreted as meaning that the circuit court should address *all issues fairly raised in the record* even if not raised by the parties, not that the circuit court can freely substitute its own opinion for that of the lower tribunal. Those principles are not implicated here.

remotely comparable to this case. There, an individual seeking welfare appealed to this Court after a circuit court affirmed on certiorari an administrative decision denying benefits. This Court reversed the circuit court which had applied an arbitrary and capricious standard to the administrative decision. In doing so, the *Harrison* court reasoned that although “an arbitrary and capricious decision of an inferior tribunal should not be affirmed by the circuit court on certiorari,” its precedents could not “be read as limiting the circuit court on certiorari to an arbitrary and capricious standard of review.” *Id.*, 169 W. Va. at 175, 286 S.E.2d at 283 (quoted in Order at 4 n.3). Necessary to the Supreme Court’s statement was its determination that such a limitation would be inconsistent with this Court’s prior holdings that “*in proper circumstances*, the circuit court on certiorari is authorized to take evidence independent of that contained in the record of the lower tribunal.” *Id.* 169 W. Va. at 175, 286 S.E.2d at 283 (emphasis added). Indeed, in *North, supra*, this Court held that a circuit court is authorized during certiorari proceedings “to take evidence, independent of that contained in the record of the lower tribunal, **to determine if such violations [of petitioner’s substantial rights] have occurred.**” Syl. pt. 4, 160 W. Va. 248, 233 S.E.2d 411 (emphasis added); accord *Adkins v. Gatson*, 218 W. Va. 332, 336, 624 S.E.2d 769, 773 (2005).

As the above-quoted language from *North* makes clear, those “proper circumstances” are limited. Thus, in *North* this Court considered a situation where “substantial rights are alleged to have been violated by the inferior tribunal,” and therefore “the circuit court is authorized to take evidence independent of that contained in the record of the lower tribunal to determine if such violations have occurred.” *See North*, 160 W. Va. at 258-60, 233 S.E.2d at 418. In those circumstances, *de novo* review of facts makes sense because the Circuit Court has adduced new evidence and therefore its determination of facts based on that new evidence

necessarily must be *de novo*. In *North*, a university student had asserted that he was not afforded procedural due process in connection with his dismissal from the school. This Court reversed the circuit court because it was unclear whether the student had been afforded substantial due process protections to which he was entitled. *Id.*, 160 W. Va. at 257, 233 S.E.2d at 417 (“It is not possible from the meager record before this Court to determine if all of these [due process] rights were afforded North. It does appear that he was not permitted to have his retained counsel present and a question exists on whether there was any proof of the charges independent of North’s explanation”). In remanding, this Court advised the circuit court that its certiorari review should ensure that the due process requirements were satisfied, *i.e.*, that it would have to engage in factfinding to make clear what due process protections in fact were provided during proceedings before the university board. *Id.*; *see Harrison*, 169 W. Va. at 176, 286 S.E.2d at 284 (holding *de novo* fact-finding was necessary because “neither the hearing officer nor the circuit court made findings of fact upon which [the Supreme Court] c[ould] base a decision,” and remanding for the circuit court to make findings of fact).

Here, however, there has been no claim by appellee that it was denied its opportunity to present relevant evidence before the Commission. Further, the circuit court did not “take evidence, independent of that contained in the records of the lower tribunal,” and a sufficient record was developed before the Commission to allow the Circuit Court (and this Court) to exercise review without need for further factfinding. As such, in this case, the Circuit Court sat as an appellate court reviewing the factfinding of the Commission. As such, this Court’s well-established precedents require that the Circuit Court review the lower tribunal’s factfinding for clear error. *See, e.g., Morgan* 39 W. Va. 17, 21, 19 S.E. 588, 589-590 (1894)

(explaining that certiorari “is an appellate writ”); *Corliss*, 214 W. Va. at 539-540, 591 S.E.2d at 97-98 (reviewing factfinder for clear error on certiorari).

C. The Circuit Court Erred by Substituting Its Judgment for That of the Commission and Overturning the Commission’s Finding That Bayer’s Overpayment of Taxes Was the Result of Inadvertent Errors That Should Be Corrected.

On the merits, the issue presented in this case is straightforward: Whether the record evidence supported the Commission’s determination that Bayer’s overpayment of taxes was attributable to “clerical error[s] or [] mistake[s] occasioned by [] unintentional or inadvertent act[s].” W. Va. Code § 11-3-27. After taking substantial evidence on these points, the Commission found that the errors in question “resulted from a clerical error or a mistake occasioned by an unintentional or inadvertent act as distinguished from a mistake growing out of negligence or the exercise of poor judgment.” Order at 1; *accord* Hearing Tr. 199-201 (setting forth the Commission’s findings). The Circuit Court, however, rejected the Commission’s factfinding. Final Order at 13-15. The Circuit Court’s ruling should be reversed, and the ruling of the Commission should be reinstated..

1. The Circuit Court Erred in Substituting Its Review of the Cold Record for the Commission’s Factfinding.

As set forth above, the Circuit Court was obligated to review the Commission’s factual findings under a deferential standard of review. In applying *de novo* review, however, the Circuit Court cast aside the Commission’s findings and selectively resolved the facts against Bayer to support its findings of “negligence”. Reversal is required because the Circuit Court acted improperly when it substituted its factfinding for that of the County Commission.

At the hearing, Bayer submitted substantial evidence that the errors that led to its tax overpayment were unintentional and inadvertent. *See, e.g.*, Hearing Tr. at 121, 153, 193-194 (presenting evidence that the errors were inadvertent mistakes spurred by combining accounting

systems and practices post-merger). For example, there was compelling evidence before the Commission that Bayer's use of the wrong monthly inventory reports was a mistake occasioned by an unintentional or inadvertent act. The Commission credited evidence showing that this mistake occurred as a result of the complexity of the transaction through which Bayer acquired a part of Lyondell Chemical Company's assets, the differences between the accounting systems and practices of the two companies, and a change in accounting supervisors in Kanawha County. *Id.* at 121.

Further, on the critical issue of whether Bayer exercised reasonable diligence to satisfy the duty of ordinary care such that a finding of negligence would be inappropriate, the testimony of Bayer's witness was un rebutted:

Q Did you use ordinary care in the discharge of your responsibilities?

A I would say during that transition period that we, as an organization, tried to use *extraordinary care*.

Q And would you say that you used care, exercised care, that was equal to or better than that there would be exercised in the chemical industry by people in similar positions? I know that's a hard question.

A That's a hard question. I think we're better than the average chemical company.

Q And when it came time to respond to some of these requests, like, give me the July inventory reports, did you make any observations as to whether the people who were responsible for responding to those requests did so in a means by which they exercised ordinary care?

A Yes.

Id. at 193-194 (emphasis added). In response to this testimony, the Tax Commissioner did not call any of his own witnesses or otherwise submit documentary evidence to the contrary. As

such, Bayer set forth substantial evidence at the hearing to establish that it was not negligent and that the Commission agreed. That evidence, standing alone, was sufficient to create a factual dispute to be resolved by the factfinder as to the nature of Bayer's actions.

Here, the West Virginia Legislature has designated the Commission to hear evidence and make findings of fact on the question whether a taxpayer's errors may be corrected through the tax exoneration process. *See* W. Va. Code § 11-3-27(a). The Commission properly considered the significant testimony and documentary evidence and concluded that it showed that Bayer's errors were inadvertent – and not negligent – and therefore were properly the subject of exoneration under West Virginia law. Hearing Tr. at 199-200 (finding the errors were “occasioned by an unintentional or inadvertent act as distinguished from a mistake growing out of negligence”).

Even Bayer's opponent, the State Tax Commissioner, acknowledged on the record that Bayer presented sufficient evidence to support the Commission's ruling that Bayer's errors were properly the subject of tax exoneration because they were not negligent: “I agree with Commissioner Hardy to the extent that there is *enough evidence*, I think, [that] *you could have ruled either way*.” *Id.* at 203-204 (emphasis added). Indeed, on behalf of the Commission majority, Commissioner Hardy explained that Bayer made a “very, very strong record on why [it] made that inadvertent act or mistake.” *Id.* at 201. In fact, Commissioner Hardy further recognized, based on the testimony presented and on his own experience working with accountants, that inadvertent acts or mistakes such as the ones that led to Bayer's overpayment can be made without any negligence whatsoever. *Id.* at 202.

In light of this record, the Circuit Court erred by rejecting the Commission's factfinding and instead substituting its own view of the evidence. Rather than crediting the

Commission's assessment of witness testimony presented by Bayer, the Circuit Court simply chose to rely upon its own review of the cold record to conclude that Bayer was negligent. *See* Final Order at 13-14 (quoting testimony from Bayer's witness and stating that it showed Bayer's errors "cannot be considered clerical" or "mistakes occasioned by an unintentional or inadvertent act as distinguished from a mistake growing out of negligence").¹¹ In short, the Circuit Court improperly usurped the Commission's factfinding role.

As this Court repeatedly has explained: "The questions of negligence and contributory negligence are for the [factfinder] when the evidence is conflicting or when the facts, though undisputed, are such that reasonable men may draw different conclusions from them." Syl. pt. 10, *Louk v. Isuzu Motors, Inc.*, 198 W. Va. 250, 479 S.E.2d 911 (1996) (quoting Syl. pt. 3, *Davis v. Sargent*, 138 W. Va. 861, 78 S.E.2d 217 (1953)). Put another way, where the evidence is conflicting, "[q]uestions of negligence [and] due care . . . present *issues of fact* for jury determination." Syl. pt. 4, *Harmon v. Elkay Min. Co.*, 201 W. Va. 747, 500 S.E.2d 860 (1997) (per curiam) (internal quotation marks and citations omitted); *id.*, 201 W. Va. at 753, 500 S.E.2d at 866 ("questions [of negligence] ordinarily should be submitted to a jury"); *accord* Bayer's Petition for Appeal at 35 (collecting additional cases). Here, reversal is warranted

¹¹ In denying Bayer's motion for reconsideration, the Circuit Court sought to support its ruling by asserting that "the Commission made no findings of fact at all supporting its conclusion that the errors Bayer claimed 'were the result of clerical error or mistake occasioned by an unintentional or inadvertent act.'" Reconsideration Order at 7. That is incorrect. Although the Commission's eventual written order did not memorialize each factual finding made by the Commission, that is immaterial under West Virginia law. In fact, oral "orders which have not been reduced to writing still have the full force and effect of written orders." *State v. Larry M.*, 215 W. Va. 358, 365, 599 S.E.2d 781, 788 (2004) ("An oral order has the same force, effect, and validity in the law as a written order") (emphasis added; citation omitted); *accord* W. Va. Code § 29A-5-3 ("Every final order or decision rendered by any agency in a contested case shall be in writing *or stated in the record* and shall be accompanied by findings of fact and conclusions of law") (emphasis added). Here, the Commission set forth its findings orally on the record. Indeed, following the hearing at which the Commission made its oral findings, Commissioner Hardy expressly stated that his findings were all set forth in that transcript: "I stated my reasons for ruling, they are on the record [of November 6] and I'll stand by them. They were taken down by this court reporter and you will rise or fall on appeal with [them]." November 20 Hearing Tr. at 16.

because the Circuit Court substituted its own views for those of the factfinder authorized by statute to assess whether errors relating to the overpayment of tax are properly the subject of exoneration. *See, e.g., Louk*, 198 W. Va. at 265, 479 S.E. 2d at 927 (reversing grant of directed verdict for defendants although certain facts were “undisputed” because factfinders “reasonably might reach differing conclusions” about their significance); *Workman v. Wynne*, 142 W. Va. 135, 147-48, 94 S.E.2d 665, 672-73 (1956) (recognizing that it is the factfinder’s “peculiar and exclusive province” “to weigh the evidence and to resolve questions of fact when the testimony of witnesses regarding them is conflicting,” and the conclusions reached on such facts will not be disturbed on appeal).

2. The Circuit Court’s Assertion upon Reconsideration That It Took All Bayer’s Evidence as “Absolutely True” Is Contrary to the Record.

Following the Circuit Court’s decision, Bayer filed a motion for reconsideration submitting that the court erred by employing *de novo* review, and asserting that it improperly had substituted its own factfinding for that of the Commission. *See generally* Reconsideration Order at 7-11. In denying Bayer’s Motion in an order originally drafted by counsel for the Prosecuting Attorney, the Circuit Court attempted to downplay the importance of its *de novo* factfinding. The Circuit Court claimed that “no where . . . in the Court’s original order [did it] question[] the veracity of *any* of [Bayer’s] witnesses,” but instead the “Court’s order specifically quoted the testimony of Bayer’s witnesses and statements of Bayer’s counsel—*all of which the Court to be absolutely true.*” *Id.* at 8 (second emphasis added). That claim cannot be squared with the record in this case.

On the negligence issue, Bayer presented uncontested evidence that it exercised “extraordinary care” and acted in a manner “better than the average chemical company.” Hearing Tr. at 199-201 (documenting Commission’s conclusion that Bayer was not negligent

and that it compiled a “very, very strong record” on the point); *see generally McGraw v. Norfolk & Western Ry. Co.*, 201 W.Va. 675, 680, 500 S.E.2d 300, 205 (1997) (defining negligence as “the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done”) (internal quotation marks and citations omitted). Despite the evidence adduced at the hearing and the Commission’s acceptance of that testimony as credible, the Circuit Court simply asserted that the evidence presented to the Commission demonstrated that Bayer was negligent. In direct contradiction of the above-quoted testimony, the Court claimed that “[t]he uncontroverted facts establish Bayer fell below a reasonable standard of care” as “[a] reasonable company would strive to ensure corporate cohesion and communication,”. Reconsideration Order at 10; *id.* at 11 (finding that “[a] reasonably prudent company would not rely on a computer without adequate safeguards”).¹²

3. Bayer Is Entitled to Relief Even Under a *De Novo* Standard of Review.

Even under a *de novo* standard of review, Bayer is entitled to relief because it demonstrated that (1) submissions based on “July” inventory reports inadvertently drew the data from July 31, not June 30; (2) a inadvertent mistake in accounting systems caused certain materials to be reported as non-taxable “finished goods” rather than taxable “raw materials,” and (3) the disparate accounting systems caused a computer error through which materials were mistakenly reported as being in West Virginia thus subjecting them to taxation. *See, e.g.*, Hearing Tr. 193-194 (explaining that Bayer went to extraordinary lengths to reconcile the

¹² Any claim that negligence was established based on “uncontroverted facts” is belied by the Tax Commissioner’s concession that the evidence presented a factual question upon which the Commission could rule in Bayer’s favor.

competing accounting systems, but that even diligent reconciliation takes a significant amount of time).

The Circuit Court relied on factually inapposite case law to support its conclusions that Bayer's conduct constituted negligence.

First, in holding that the use of the July 31 inventory data was negligent not inadvertent, *see* Final Order at 15, the court below primarily relied upon *R.A. Siegel Co. v. Bowen*, 539 S.E.2d 873, 878 (Ga. Ct. App. 2000) for the proposition that "corporations do not insulate themselves from liability when there is a lack of internal communication and confusion. 'It is no excuse that the left hand did not know what the right hand was doing.'" Final Order at 12. Bayer has not contended that its left hand did not know what the right hand was doing, nor attempted to excuse its conduct on that basis. Rather, the evidence in the record shows that the mistake occurred as a result of the complexity of the transaction through which Bayer acquired a part of Lyondell Chemical Company's assets, the differences between the accounting systems and practices of the two companies, and a change in accounting supervisors in Kanawha County. Hearing Tr. 121.

Furthermore, the circumstances in *R.A. Siegel* are not remotely analogous to those here. There, after the insurance company defendant destroyed the wreckage of a car subject to litigation, the appeals court affirmed imposition of a sanction for bad faith spoliation of evidence.

The decision was based on the facts that:

- the trial court had issued an order that the evidence be preserved four months before the destruction occurred;
- the insurance company was experienced in litigation;
- the insurance company knew it had an affirmative duty to preserve the evidence

- the insurance company should have had procedures in place to prevent the evidence from being destroyed; and
- the employee who authorized the destruction made no effort to find out why the car was being held.

Because of those circumstances, the Court of Appeals held that “[i]t is no excuse that the left hand did not know what the right hand was doing.” 539 S.E.2d at 878. Moreover, in the next sentence—which the Circuit Court failed to quote—the Georgia court explained the crux of its holding: “[The insurance company] was palpably remiss in failing to make reasonable arrangements to preserve the evidence, *especially after the trial court issued an order to do so.*” *Id.* (emphasis added). Accordingly, *R.A. Siegel* simply does not support the Court’s conclusion that Bayer was negligent here.

Second, to support its conclusion that Bayer was negligent for mistakenly including materials in transit on its tax returns, the Court erroneously relied upon *Alabama Power Co. v. Emigh*, 429 So. 2d 952, 955 (Ala. 1983) for the proposition that Bayer’s conduct amounted to “bureaucratic bungling in which the left corporate hand did not know what the right corporate hand was doing.” Final Order at 15-16. At issue there was whether the corporation’s actions in garnishing wages to repay a debt that had already been paid constituted *malice*. *Id.* The Alabama Supreme Court held that “a display of ineptitude or negligence in the handling of collections *cannot, under these facts, be viewed as malicious.*” *Id.* Thus, *Emigh* stands for no more than the proposition that the specific corporate behavior therein did not rise to the level of malice. The Court’s characterization of the company’s behavior as a “display of ineptitude or negligence” is mere dicta tied to the peculiar facts of that case. *Emigh* has no application here.

Even under a *de novo* review of the evidence adduced at the hearing before the Commission, Bayer was entitled to exoneration under Section 11-3-27.

V. CONCLUSION

For these reasons, the ruling of the County Commission should have been affirmed. First, the Prosecuting Attorney lacked standing to pursue this appeal of the County Commission's ruling. Second, the Circuit Court erred when it substituted its factfinding for that of the County Commission. Finally, the Court's determination that Bayer's errors constituted negligence are contrary to the record because Bayer's overpayment of taxes was due to inadvertent errors arising from a complex corporate acquisition and restructuring.

VI. PRAYER FOR RELIEF

WHEREFORE, Bayer Corporation PRAYS this Honorable Court to Grant the Writ of Appeal;

REVERSE the decision below or, in the alternative, DISMISS the petition for a writ of certiorari for want of proper parties,

ORDER that the scope of review in the circuit court in a proceeding in certiorari is limited deciding whether the decision of the inferior tribunal was clearly wrong in view of the reliable, probative and substantial evidence on the whole record, arbitrary or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion,

ORDER that that Bayer's actions were not negligent based on the record below, and

AFFIRM the decision of the Kanawha County Commission, and for such other relief as this Honorable Court deems appropriate.

Respectfully submitted,



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Dated: April 2, 2008

NO. 33871

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PROSECUTING ATTORNEY OF
KANAWHA COUNTY, WEST VIRGINIA,

Appellee

v.

BAYER CORPORATION

Appellant

CERTIFICATE OF SERVICE

I, Steven R. Broadwater, counsel for the Bayer Corporation, the Appellant herein, certify that service of the "*Brief of Appellant Bayer Corporation*" was made upon the parties listed below by mailing a true and exact copy thereof to:

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in a properly stamped and addressed envelope, postage prepaid, and deposited in the United States mail this the 2d day of April, 2008.


Steven R. Broadwater
(WVSB No. 462)