

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 33871

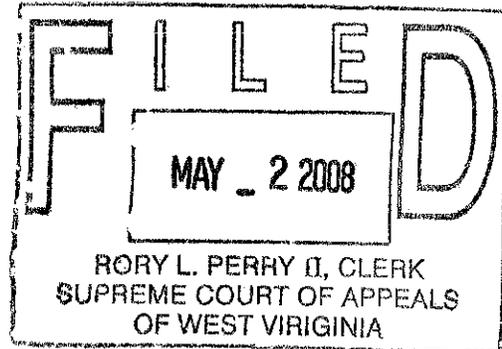
STATE OF WEST VIRGINIA EX
REL. PROSECUTING
ATTORNEY OF KANAWHA COUNTY,
WEST VIRGINIA,

Appellee,

v.

BAYER CORPORATION,

Appellant.



JOINT BRIEF OF THE KANAWHA COUNTY ASSESSOR
AND
THE KANAWHA COUNTY PUBLIC LIBRARY BOARD
AND CROSS ASSIGNMENT OF ERROR

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I.

INTRODUCTION

This joint brief is filed by the Kanawha County Assessor and the Kanawha County Public Library Board.

West Virginia Code § 11-3-27, entitled "Relief in County Commission from Erroneous Assessment," is a tax exoneration statute authorizing county commissions to correct errors in county property books "resulting 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." The County Commission makes the initial decision as to whether the error resulted from a clerical error or unintentional or inadvertent act or one of negligence or poor judgment. Because no appeal mechanism is available, review can only be sought through a writ of certiorari.

Here, the taxpayer, Bayer Corporation, sought an exoneration of personal property tax assessments before the County Commission of Kanawha County. The County Commission granted the exoneration by a vote of 2 to 1, with Commission President Kent Carper dissenting with opinion. Certiorari review of the County Commission's decision was sought by the Prosecuting Attorney of Kanawha County and by intervenors the Kanawha County Assessor and the Kanawha County Public Library Board before the Circuit Court of Kanawha County. The Circuit Court granted the writ and reversed the decision of the County Commission. This appeal was filed by Bayer Corporation. Here, the Supreme Court is presented with three questions: (1) Are the intervenors, who are governmental bodies, proper parties in a tax exoneration appeal?; (2) What is the proper standard in certiorari for reviewing a tax exoneration

decision of the county commission?; and (3) Is the taxpayer Bayer entitled to relief from alleged erroneous assessments?

II.

STATEMENT OF FACTS

The instigation of this case occurred as a result of litigation that Bayer Corporation was involved in with the West Virginia Department of Tax and Revenue over the taxability under West Virginia Constitution Art. X, § 1c (the "Freeport Amendment") of certain chemicals Bayer uses (the "chemicals case"). Nov. 6, 2003 Tr. at 20-21, 58. As a result of preparing discovery responses in the chemicals case, on or after March 21, 2003, one of Bayer's counsel, Mr. Broadwater, (Mr. Broadwater also represents Bayer this proceeding), discovered what he believed to be errors in Bayer's tax returns. Tr. at 58, 59. Bayer, believing these errors fell within West Virginia Code § 11-3-27, sent a letter to the Kanawha County Commission dated August 21, 2003 and providing in pertinent part:

Pursuant to West Virginia Code § 11-3-27, Bayer Corporation hereby applies for relief from erroneous personal property tax assessments for tax years 2001, 2002, and 2003 for its chemical plants at South Charleston and Institute. The errors in these assessments were the result of clerical errors or mistakes occasioned by an unintentional or inadvertent act as follows:

1. The amounts of inventory that Bayer reported on its personal property tax returns for the three tax years in question were taken from inventory reports generated in the normal course of business at the end of every calendar month. In order to report the value of the inventory on hand as of July 1 for tax years 2002 and 2003, Bayer inadvertently used the reports for the month ending July 31 as opposed to the report for the month ending June 30. Incorrect data was also reported in tax year 2001; however, the source of the error has not been determined.

2. Several materials were inadvertently reported as being finished goods when they should have been reported as raw materials for all three tax years. These materials were, in fact, produced at Bayer locations outside of West Virginia. Since they are materials produced by Bayer, they are treated as finished goods in Bayer's accounting systems from which the inventory reports are generated. However, all of these materials were used as raw materials at Bayer's Kanawha County facilities. Consequently, an exemption under the Freeport Amendment for these two materials was inadvertently claimed and granted.
3. For all three tax years, Bayer's accounting system included the value of some materials in inventory for the Kanawha County facilities when, in fact, the materials were in transit to or from Kanawha County. For example, propylene oxide was included on the inventory report as soon as it was loaded into river barges in Texas where it is produced for tax years 2001 and 2002. Therefore, Bayer inadvertently reported the value of these materials that were not actually located in Kanawha County for those two tax years.
4. In tax year 2003, Bayer claimed Freeport exemptions for raw materials in the amount of \$11,377,398 for the South Charleston plant and \$73,982 for the Institute plant. The claim for exemption at the South Charleston plant was denied and the entire \$11,377,398 for raw materials was included by the state in the assessment for this facility. However, the \$73,982 for raw materials was not included in the assessment for the Institute plant. While Bayer is asserting in a separation action its claim that all inventory is exempt from taxation under the Freeport Amendment, for the tax years in question, the state has consistently interpreted the law as exempting only finished goods. Therefore, we recognize that, in this instance, not including the \$73,982 for raw materials was a clerical error on the part of the state.

Rec. at 122.

Thus, Bayer raised two issues relating to claimed erroneous assessments (which would generate a substantial refund of personal property taxes). First, Bayer used inventory reports to prepare its personal property returns using an end date of July 31 as opposed to using June 30 for the tax years 2002 and 2003 (Bayer was unable to

determine the source of the 2001 tax year error) (see also Tr. at 61-62). Second, for all three tax years, Bayer's accounting system included the value of some materials in inventory for the Kanawha County facilities when they were not in Kanawha County, but in transit to or from Kanawha County. All told, Bayer requested a correction and reduction in Bayer's assessed personal property in the amount of \$14,513,992 for the years 2001, 2002, and 2003 which results in a total reduction in taxes in \$456,747.00 for the three tax years in question. Tr. at 5.

At the exoneration hearing before the Commission, it was established that Bayer is a multi-national corporation headquartered in this country in Pittsburgh, Pennsylvania, with its ultimate corporate headquarters in Germany. Tr. at 100. For the timeframes in question, Bayer had a federal tax group and state tax group. Tr. at 96. Gary Dzura, a CPA, was in charge of the state tax group which consisted of seven people. Tr. at 96-97.

Bayer owned no industrial property in Kanawha County until April 1, 2000, when Bayer acquired from Lyondell Corporation the South Charleston chemical plant and a part of the Institute chemical facility. Tr. at 99. Due to the rapid nature of the acquisition, and the disparate accounting system of the two corporations, Bayer confronted several tax related complications including its unfamiliarity with the Kanawha County tax operations. Tr. at 99-100. As admitted by Mr. Dzura, the errors due to the disparate accounting system were Bayer's fault. Tr. at 152. Also, throughout 2000, Bayer's tax department was involved in a major restructuring of Bayer's domestic operations. Tr. at 103. As to the issue of intransit materials, Mr. Dzura testified that there was a difference between the accounting records from which the tax returns were

prepared versus the accounting records at the plant sites. Tr. at 106. In essence, Bayer used corporate level reports which, because of systemic problems, failed to actually reflect the in-transit inventories of where the barges were loaded. Tr. at 106. The general lack of knowledge exhibited by Bayer was not a lack of knowledge of West Virginia's taxes laws, but was a "general lack of knowledge about what [Bayer] was acquiring and what [it] owned[.]" Tr. at 121. In essence, the Tax Group in Pittsburgh "didn't grasp exactly how they kept their records or what they were doing down in South Charleston or down in West Virginia[.]" Tr. at 118.

Glen W. Craney, Jr., is site manager for Bayer Polymers, Polyether, Polyols Manufacturing Facilities in South Charleston and Institute. Tr. at 171. Prior to working for Bayer, Lyondell employed Mr. Craney at the same facilities and in the same capacity as for Bayer. Tr. at 172-73. According to Mr. Craney, Bayer and Lyondell lacked financial accounting and reporting systems that were compatible. Tr. at 175. Minor mistakes between the two systems may have occurred over a course of time. Tr. at 176. When Bayer acquired Lyondell's facilities, Bayer brought in a new accounting supervisor, but the accounting department suffered no downsizing. Tr. at 185-86. No support personnel were terminated from the accounting department. Tr. at 186. Mr. Craney testified he did not know as a fact why the inventory reports were confused between June and July. Tr. at 189, 190.

The upshot is that Bayer "went out and bought companies all over the place and [Bayer] was real busy and [Bayer] didn't have time to know what [Bayer was] doing[.]" Tr. at 114, and that in the "transition from the predecessor company to Bayer [there] was considerable confusion." Tr. at 191.

III.

STANDARD OF REVIEW

This case was brought as a case in certiorari. On appeal this Court applies only a limited standard of review to a circuit court's decision in issuing a certiorari since "[w]hen, after judgment on certiorari in the circuit court, a writ of error is prosecuted in this court to that judgment, a decision of the circuit court on the evidence will not be set aside unless it clearly appears to have been wrong." Syl., in part, *Snodgrass v. Board of Ed.*, 114 W. Va. 305, 171 742 (1933). See also Syl. Pt. 1, in part, *Michaelson v. Cautley*, 45 W. Va. 533, 32 S.E. 170 (1898) (holding that "the circuit court has a large discretion in awarding" certiorari, and "reviewing judgments, and . . . unless such discretion is plainly abused, [the Supreme Court of Appeals] cannot interfere there with."). Whether the circuit court employed the correct standard, though, is reviewed de novo since "[t]he determination of whether a circuit court applied the proper legal standard is a question of law we review *de novo*." Syl. Pt. 1, *Hubbard v. State Farm Indem. Co.*, 213 W. Va. 542, 544, 584 S.E.2d 176, 178 (2003)

IV.

ARGUMENT

This case presents three issues: (A) are the intervenors proper parties (B) is the appropriate standard of review for a circuit court to apply to a quasi-judicial decision of a lower tribunal in certiorari de novo and (c) did the circuit court correctly find that Bayer was not entitled to the exoneration under West Virginia Code § 11-3-27? Because the answer to all these questions is yes, the circuit court should be affirmed.

A. The Assessor and the Library Board are proper parties-intervenor or alternatively, should be considered amici curiae.

Bayer asserts that the Assessor and the Library Board lack standing in this certiorari case. Contrary to Bayer's assertion, this Court has held that "[i]n West Virginia the slippery doctrine of standing is not usually employed to avoid a frontal confrontation with an issue of legitimate public concern." *State ex rel. Alsop v. McCartney*, 159 W. Va. 829, 838, 228 S.E.2d 278, 283 (1976), *cited with approval in State ex rel. Erie Fire Ins. Co. v. Madden* 204 W. Va. 606, 610 n.4, 515 S.E.2d 351, 355 n.4 (1998). Since this case deals with tax money—the lifeblood of the body politic, *Pardee & Curtin Lumber Co. v. Rose*, 87 W. Va. 484, 490, 105 S.E. 792, 794 (1921), *cited with approval in State ex rel. Ayers v. Cline*, 176 W. Va. 123, 129, 342 S.E.2d 89, 95 (1985), and the price we pay for a civilized society, *Bluestone Paving, Inc. v. Tax Comm'r*, 214 W. Va. 684, 695, 591 S.E.2d 242, 253 (2003) (Maynard, J., concurring) (quoting *Compania General de Tabacos de Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting))—it is a taxing exercise to find a matter of more legitimate public concern.

Additionally, the Assessor shares a role, and hence an injury, that is not shared by the public at large. The Assessor is a constitutional officer of the County, imbued with the authority flowing from that document. W. Va. Const. Art. VIII, § 1. The Assessor exercises a special duty as a magistrate of the people charged within her duties to represent them as their trustee and servant. *Id.* Art. III, § 2. Consequently, the Assessor has a special—indeed, a constitutional—role separate and apart from the public at large.

Further, the Assessor also has an interest in the case as she was present at the exoneration hearing before the County Commission, both in person and by her in-house

counsel. Tr. at 6. Her role was to help the Commission understand the issues in the case. Tr. at 6. Inherent in her position here, it is evident that the majority of the Commission failed to heed her advice. Consequently, the Assessor has an interest in seeing that her role in providing understanding to the Commission is vindicated by showing she was correct before the Commission.

The Library Board too has standing. The Kanawha County Public Library is a West Virginia public corporation. The mission of the Library Board is to operate public library facilities for the benefit of the general public in Kanawha County, West Virginia, including for the benefit of students who attend Kanawha County public schools. The Library Board was created by House Bill 161, which is a Special Act of the West Virginia Legislature which was passed on March 6, 1957. Because of this, the Library Board is sometimes called "a Special Act Library."¹ Under the provisions of the 1957 Special Act, the Library Board is financially supported by the Board of Education of the County of Kanawha, the County Commission of Kanawha County, West Virginia, and the City of Charleston as a joint endeavor of the three governmental authorities. Specifically, Section 5 of the 1957 Special Act provides that at the direction of the Library Board the three supporting governmental authorities must raise an annual, regular levy of certain fixed assessments on classes of real and personal property and pay these levy revenues to the Library Board as the library funding obligation. Accordingly, although the Library Board is not a direct levying body, it is the legal initiator and recipient of the taxes which are levied on its behalf by the three supporting governmental authorities.²

¹ The Library Board is also governed, to the extent not inconsistent with House Bill 161, as a public library under the provisions of West Virginia Code §§ 10-1-1, *et seq.*

² The validity of the special act creating the Kanawha County Public Library has been specifically upheld by the West Virginia Supreme Court of Appeals. See *Kanawha County Public Library Board v.*

Like the County Assessor, the Library Board has a special, governmental role concerning tax assessments which is beyond that of the public at large and which grants standing.

Further, Bayer's assertion that the intervention was untimely is also erroneous. Under Rule 24(a), intervention as of right, a party may intervene "timely." The rule does not provide what "timely" means. However, this Court has provided that whether a petition is timely is vested in the discretion of the circuit court. Syl. Pt. 10, *Pioneer Co. v. Hutchinson*, 159 W. Va. 276, 220 S.E.2d 894 (1975), *overruled on other grounds by State ex rel. E.D.S. Fed. Corp. v. Ginsberg*, 163 W. Va. 647, 259 S.E.2d 618 (1979). While Bayer cites *Pauley v. Bailey*, 171 W. Va. 651, 653, 301 S.E.2d 608-609-10 (1983) (per curiam), Bayer makes no argument that the Circuit Court abused its discretion in granting the intervention. "[A]n appellate court should strive to uphold discretionary rulings made by trial judges and avoid in almost every case tampering with that discretion." *State v. David D. W.*, 214 W. Va. 167, 178, 588 S.E.2d 156, 167 (2003) (per curiam) (Maynard, J., concurring). Bayer overlooks what "every lawyer already knows: that two judges can decide discretionary matters differently without either judge abusing his or her discretion." *Ellis v. United States*, 313 F.3d 636,653 n.10 (1st Cir. 2002). *Accord United States v. Williams*, 81 F.3d 1434, 1437 (7th Cir. 1996) (emphasis deleted) ("It is possible for two judges, confronted with the identical record, to come to opposite conclusions and for the appellate court to affirm both. That possibility is implicit in the concept of a discretionary judgment."); *Maniscola v. Kenworthy*, 2002 Mass. App. Div. 203 ¶ 4 ("implicit in the abuse of discretion standard is the possibility

County Court of Kanawha County, 143 W. Va. 385, 102 S.E.2d 712 (1958); *Board of Education of the County of Kanawha v. West Virginia Board of Education*, 219 W. Va. 801, 639 S.E.2d 893, 897 n.3 (2006).

that two judges might come to opposite conclusions on the same set of facts, both of which might pass muster on appellate review.”). Moreover, Bayer posits no prejudice from the intervention, and if Bayer is raising a laches argument, its failure to show prejudice disposes of this point. “For laches to apply, the circuit court must consider the circumstances surrounding the delay and any disadvantage and prejudice to the other party caused by the delay.” *Banker v. Banker*, 196 W. Va. 535, 547, 474 S.E.2d 465, 477 (1996). Finally, if it was error to allow intervention, the error was harmless because the Court could have (and can) treat the intervenors as amici curiae. See *Dize v. Amalgamated Council of Greyhound Local Unions*, 684 F. Supp. 332, 3339-40 (D.D.C.1988) (local union was prohibited from intervening because of untimeliness but was permitted to file and participate as *amicus curiae*). See also *Newport News Shipbuilding and Dry Dock Co. v. N.L.R.B.*, 594 F.2d 8, 11 n.3 (4th Cir. 1979) (intervention denied but putative intervenor permitted to file an extensive amicus brief).

B. The proper standard in certiorari is de novo as to law and fact.

West Virginia Code § 53-3-3 provides, in pertinent part:

Upon the hearing, such circuit court shall, in addition to determining such questions as might have been determined upon a certiorari as the law heretofore was, review such judgment, order or proceeding, of the county court, council, justice or other inferior tribunal upon the merits, determine all questions arising on the law and evidence, and render such judgment or make such order upon the whole matter as law and justice may require.

“*Certiorari* is an extraordinary remedy resorted to for the purpose of supplying a defect of justice in cases obviously entitled to redress and yet unprovided for by the ordinary forms of proceeding.” Syl. Pt. 1, *Poe v. Marion Mach. Works*, 25 W. Va. 517 (1884). That is, “[w]herever by a dearth in a statute there is given no statutory right of review, the writ of certiorari is available in order to obtain judicial review of the findings

of an administrative board.” *City of Huntington v. State Water Comm’n*, 135 W. Va. 568, 576, 64 S.E.2d 225, 230 (1951). “Certiorari lies only to review judicial or quasi-judicial action of an inferior board or tribunal.” Syl. Pt. 1, *Garrison v. City of Fairmont*, 150 W. Va. 498, 147 S.E.2d 397 (1966), *modified on other grounds by Lower Donnelly Ass’n v. Charleston Mun. Planning Comm’n*, 212 W. Va. 623, 575 S.E.2d 233 (2002). A quasi-judicial hearing is one characterized by “the taking of evidence, and oral testimony presupposes the administration of an oath[.]” *State ex rel. Rogers v. Board of Ed.*, 125 W. Va. 579, 590, 25 S.E.2d 537, 542 (1943), that is, “though a power is legislatively delegated to an administrative agency, constitutional requirements of a full hearing as a prerequisite to the exercise of that power will result in administrative proceedings of a quasi judicial nature.” *Appalachian Power Co. v. Public Serv. Comm’n*, 162 W. Va. 839, 849-50, 253 S.E.2d 377, 384 (1979). *See also U.S. Steel Corp. v. Stokes*, 138 W. Va. 506, 512, 76 S.E.2d 474, 477 (1953) (quoting *Black’s Law Dictionary* (4th ed.) (“quasi judicial’ is defined as follows: ‘A term applied to the action, discretion, etc., of public administrative officers, who are required to investigate facts, or ascertain the existence of facts, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature.”)). Thus, “[i]n passing upon an application for exoneration from taxes charged against the applicant, . . . a county court acts judicially[.]” Syl. Pt. 3 in part, *Humphreys v. County Court*, 90 W. Va. 315, 110 S.E. 701 (1922), so that “[n]o express remedy having been provided for review of its action in such case, the circuit court has jurisdiction to review the same by the writ of certiorari.” *Id.* Syl. Pt. 4.

Under West Virginia Code § 53-3-3, “[the] circuit court shall, *in addition to* determining such questions as might have been determined upon a certiorari as the law heretofore was, review such judgment, order or proceeding, of the county court . . . *determine all questions arising on the law and evidence, and render such judgment or make such order upon the whole matter as law and justice may require.*” (emphasis added). Thus, “[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.” Syl. Pt. 1, *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276 (1982) (emphasis added). See also 14 Am. Jur.2d *Certiorari* § 110 n. 84 (2000) (citing *State by Davis v. Hix*, 141 W. Va. 385, 90 S.E.2d 357 (1955)) (“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.”). In other words, “[t]he circuit court shall enter such judgment as the inferior court should have entered, not only in consideration of questions of law but of fact as well.” *Harrison*, 169 W. Va. at 174, 286 S.E.2d at 283. See generally Syl., *Snodgrass v. Board of Ed.*, 114 W. Va. 305, 171 S.E. 742 (1933) (“Under the provisions of Code, 53-3-3, circuit courts, upon certiorari to inferior tribunals, are authorized to review matters of both law and fact and to dispose of the case ‘as law and justice may require.’ When, after judgment on certiorari in the circuit court, a writ of error is prosecuted in this court to that judgment, a decision of the circuit court on the evidence will not be set aside unless it clearly appears to have been wrong.”). Thus, in certiorari, this Court’s role is, among other things, as a “fact finding tribunal upon the record as it was before the inferior court.” *Harrison*, 169 W. Va. at 174, 286 S.E.2d at 283 (quoting *Snodgrass*, 114 W. Va. at 306, 171 S.E. 742-43).

Bayer asserts that review under the certiorari statute and the Administrative Procedures Act are coextensive. It so argues based upon (1) prior decisions by this Court and (2) because any reading other than parallelism is constitutionally foreclosed by the separation of powers provision of the West Virginia Constitution. Both these contentions are in error.

1. Reading the certiorari statute as coextensive with the APA violates rules of statutory interpretation.

It is a cardinal rule of statutory interpretation that any question as to the meaning of a statute must begin with the statute itself. *West Virginia Human Rights Com'n v. Garretson*, 196 W. Va. 118, 123, 468 S.E.2d 733, 738 (1996) (per curiam). Where the text is plain and unambiguous, the statute's language is the ending point as well. *Bullman v. D & R Lumber Co.*, 195 W. Va. 129, 135 n.9, 464 S.E.2d 771, 777 n.9 (1995). Additionally, it is a cardinal rule of statutory construction that a "statutory interpretation that renders another statute superfluous is of course to be avoided." *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 35 (2003). Finally, where the legislature uses different language in two different statutes, "it will rather be presumed that different results were intended." *Metropolitan Securities Co. v. Warren State Bank*, 158 N.E. 81, 83 (Ohio 1927). "[W]e must presume that when the legislature uses different language, the legislature intends a different meaning of one statute from the other." *State v. Denson*, 789 A.2d 1075, 1082 (Conn. Ct. App. 2002) (internal quotation marks omitted). See also *Friss v. City of Hudson Police Dep't*, 592 N.Y.S.2d 855, 856 (App. Div. 1993) ("Accordingly, we cannot ignore the conclusion that the Legislature's use of different language to describe the two different appeals meant that something different was intended for each. To presume otherwise would result in our

impermissibly supplying words or phrases to a statute when it is not clear that such extra words were actually intended.”); *McMillan v. Joseph P. Casey Co.*, 1923 WL 3383, 6 (Ill. Ct. App.) (“The language of these provisions is different without question and renders them subject to different constructions.”); The language of the two statutes here provides:

W. Va. Code § 53-3-3 (certiorari)

Upon the hearing, such circuit court shall, in addition to determining such questions as might have been determined upon a certiorari as the law heretofore was, review such judgment, order or proceeding, of the county court, council, justice or other inferior tribunal upon the merits, determine all questions arising on the law and evidence, and render such judgment or make such order upon the whole matter as law and justice may require.

W. Va. Code 29A-5-4 (APA)

(g) The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(h) The judgment of the circuit court shall be final unless reversed, vacated or modified on appeal to the supreme court of appeals of this state in accordance with the provisions of section one, article six of this chapter.

West Virginia Code § 53-3-3 (emphasis added) provides that “[u]pon the hearing, such circuit court 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 justice may require.*" This is much broader language than the limited review afforded by the APA. It grants a court in certiorari equitable power. The statute's use of the term "as law and justice may require" is significant. See *People v. Rickert*, 446 N.E.2d 419, 420 (N.Y. 1983) ("equity" and "justice" substantially equivalent); *Bucholtz v. Computer Based Systems, Inc.*, 498 S.E.2d 231, 234 (1998) (noting the "the broad power to do full justice usually afforded to a court sitting in equity"). Therefore, affording de novo review under the certiorari statute is consistent with that statute and leaves intact the much narrower review under the APA.

2. The most recent case from this Court supports the circuit court.

Further, to the extent that this court may have issued contradictory rulings on the nature of certiorari review, it should look to the latest case it has decided as the controlling authority. *Callaway v. N. B. Downing Co.*, 172 A.2d 260, 264-265 (Del. Super. Ct. 1961) ("*Hague* and *Leavy* are absolutely inconsistent, and since *Leavy* is the more recent case, and has the implied approval of the highest court in the State, it must be taken as the final word on the matter in California.").

The most recent opinion of this court addressing the certiorari statute is *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276 (1982). In *Harrison*, this Court observed that in "1882 . . . the Legislature substantially broadened the application of the writ, and the extent of review it affords, with the enactment of the language we now find in W. Va. Code § 53-3-3 (1981 Replacement Vol.).]" *Id.* at 172, 286 S.E.2d at 282. "Although this statutory language caused some confusion in the early years after its enactment, it was generally recognized that the statute substantially expanded the scope of review of the

circuit court, giving it the power to rehear the issues on the evidence certified from the inferior tribunal." *Id.* at 172-73, 286 S.E.2d at 282 (citations omitted). The Court then proceeded to explain that "[t]he role of the circuit court on certiorari as a fact finding tribunal, with the power to enter judgment as law and justice may require, is inconsistent with the arbitrary and capricious standard of review employed by the circuit court in this case." *Id.* at 174, 286 S.E.2d at 283. This Court went on, "[t]here is language in some relatively recent opinions of this Court indicating that if an inferior tribunal's decision is arbitrary and capricious it should not be affirmed by the circuit court on certiorari. While we agree that an arbitrary and capricious decision of an inferior tribunal should not be affirmed by the circuit court on certiorari, in light of the language of W. Va. § 53-3-3 these cases cannot be read as limiting the circuit court on certiorari to an arbitrary and capricious standard of review." *Id.* at 175, 286 S.E.2d at 283.

Bayer attempts to distinguish *Harrison* on the ground that the Court then said that applying the arbitrary and capricious standard of review would be inconsistent with *North v. Board of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977) which authorized the taking of evidence. Appellant's Br. at 30-31. This argument, however, is foreclosed by the very next paragraph in *Harrison* which said:

Moreover, we recently held in *Golden v. Board of Education of the County of Harrison*, W. Va., 285 S.E.2d 665 (1981), a case involving review by the circuit court on certiorari of a county board of education administrative ruling, that "[w]hen the circuit court sits in review of the decisions of ... administrative tribunals it shall record findings of fact and conclusions of law along with the judicial orders which it issues." Syllabus Point 1, in part, *Golden v. Board of Education of the County of Harrison*, *supra*. It is obvious that the circuit court could not comply with this requirement without making its own independent review of the law and facts pertinent to the case.

Id. at 175, 286 S.E.2d at 283. The use of the word “moreover” is significant because it means “in addition to what has been said.” *Webster’s Ninth New Collegiate Dictionary* (1991). Even if Bayer’s reading of the first paragraph is correct, the second paragraph—having nothing to do with taking additional evidence—is equally at play. See *California v. United States*, 438 U.S. 645, 689 n.10 (1978) (White, J., dissenting) (citation omitted)

Bayer also asserts a pragmatic basis to reject *de novo* review, that the circuit court did not hear the witnesses testify and cannot judge their credibility. Since Code § 53-3-3 implies that a court employing it is sitting in equity, concerns of a “live” versus a “cold” record are unfounded since “[c]hancellors in equity almost always based their decisions on sworn pleadings and written depositions by witnesses without a jury’s input.” Daniel D. Blinka, *Jefferson and Juries: The Problem of Law, Reason, and Politics in the New Republic*, 47 *Am. J. Legal Hist.* 35, 83 (2005). Accord *W. Hamilton Bryson, The Merger of Common-Law and Equity Pleading in Virginia*, 41 *U. Rich. L. Rev.* 77, 80 (2006) (“Originally, the courts of equity received the testimony of witnesses only in the written form of depositions.”). See also E. Stewart Moritz, *The Lawyer Doth Protest Too Much, Methinks: Reconsidering the Contemporaneous Objection Requirement in Depositions*, 72 *U. Cin. L. Rev.* 1353, 1404 n.59 (2004). Additionally, the statute authorizes a circuit court to decide “all questions arising on the law and evidence” implies that a court need not have live testimony in deciding questions in equity. See 21 *Murdock v. City of Memphis* 87 U.S. 590, 622 (1874) (“For chancery cases, when brought here from the Circuit Courts, are brought for a trial *de novo* on all the evidence and pleadings in the case.”).

Of course, even in trial de novo, the findings of the commission are not to be ignored. "Under the old chancery practice and usually under the Codes of Procedure, suits in equity are tried de novo on appeal upon the entire record and evidence. The appellate court itself will sift the whole question and determine what the findings of the trial court should have been upon such evidence as was competent and proper. The court below and the appellate court are judges of both law and fact." *Presidio Mining Co. v. Overton*, 270 F. 388, 389 (9th Cir. 1921) (citation omitted). But, "[w]here evidence is conflicting and the trial judge has had the opportunity of seeing the witnesses, observing their demeanor, while testifying, judge of their candor and intelligence, and thus be able to determine their credibility and the weight to be given to their testimony, the finding of the trial court is persuasive and presumptively correct, but not conclusive." *Id.* Here, of course, the circuit court judge took all the probative evidence and admissions of Bayer as being true and correct.³

Further, the justification of legislative delegation and judicial deference to an agency's decisions⁴ is based upon the agency's particular competence in its field. See *Board of Governors of Univ. of North Carolina v. U.S. Dep't of Labor*, 917 F.2d 812, 816 (4th Cir. 1990) (citations omitted) (observing that "[t]he policies of legislative delegation, and agency competence militate in favor of the doctrine of administrative deference").

³Bayer contends that the circuit court did not treat as true certain statements of Bayer's witnesses reaching conclusory and unsupported opinions. Appellant's Br. at 33, 36-37. As discussed below, such statements are not probative and the circuit court justifiably did not rely on them.

⁴Assuming that county commissions are administrative agencies, an unjustifiable assumption as "a county commission is not considered to be an agency or unit of the executive branch of government." *Butler v. Tucker*, 187 W. Va. 145, 151, 416 S.E.2d 262, 268 (1992). See *infra* Part IV.A.2.

However, such deference must “give way when the question before an agency no longer involves issues on which the agency’s expertise gives it a special competence.” *Id.* See also *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180, 196 (1997) (“Though different in degree, the deference to Congress is in one respect akin to deference owed to administrative agencies because of their expertise); *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990) (“[P]ractical agency expertise is one of the principal justifications behind *Chevron* deference”). This Court has dealt with an analogous issue in the realm of the doctrine of primary jurisdiction which provides useful guidance here. See *Lauro v. Charles*, 219 F.3d 202, 215 (2d Cir. 2000) (“law develops in large part through analogies”).

This Court defined the primary jurisdiction doctrine in syllabus point 1 of *State ex rel. Bell Atlantic-West Virginia, Inc. v. Ranson*, 201 W. Va. 402, 404, 497 S.E.2d 755, 757 (1997), “[w]here an administrative agency and the courts have concurrent jurisdiction of an issue which requires the agency’s special expertise and which extends beyond the conventional experience of judges, the doctrine of primary jurisdiction applies. In such a case, the court should refrain from exercising jurisdiction until after the agency has resolved the issue. The court’s decision whether to apply the primary jurisdiction doctrine is reviewed on appeal under an abuse of discretion standard.” Where, however, courts are equally competent with agencies to decide the questions before them, the judiciary need not defer to the agency. *Christie v. Elkins Area Med. Ctr., Inc.*, 179 W. Va. 247, 250, 366 S.E.2d 755, 758 (1988) (“the statute and regulations are straightforward, and do not hinge on the exercise of agency discretion or expertise for uniform application. Thus, there is no reason to defer to the agency on the

basis of primary jurisdiction.”); see also *Hedrick v. Grant County Pub. Serv. Dist.*, 209 W. Va. 591, 597, 550 S.E.2d 381, 387 (2001) (footnote omitted) (“We find that such a suit for damages is within the conventional experience of judges, and does not lie peculiarly within the agency’s discretion or require the exercise of agency expertise. Thus we conclude that the circuit court erred in dismissing the case with prejudice under the primary jurisdiction doctrine. We remand the case so that the lower court can consider Mr. Hedrick’s claims for damages and for the costs of the litigation.”). In the instant case, a county commission has no greater expertise, and perhaps a lesser expertise,⁵ than a county commission in determining whether a clerical error or negligence occurred. “[W]hen an issue falls outside of an agency’s area of expertise, and the courts have special competence in that area, there is little reason for the court to defer to the agency’s interpretation.” *Union Pac. R.R. Co. v. Ametek, Inc.*, 104 F.3d 558, 562 (3d Cir. 1997). “It takes no special expertise to resolve the negligence question.” *South Eastern Indiana Natural Gas Co., Inc. v. Ingram*, 617 N.E.2d 943, 950 (Ind. Ct. App. 1993); *Department of Regulation & Licensing v. State Medical Examining Bd.*, 572 N.W.2d 508, 512 (Wis. Ct. App.1997) (court owed no deference to state medical board’s interpretation of “negligence in treatment”); *Muise v. GPU, Inc.*, 753 A.2d 116, 126 (N.J. Super. Ct. App. Div. 2000). In this case, “[r]esolution of [the] claim requires exercise of judicial skills and remedies rather than administrative expertise.” *Moore v. Pacific Northwest Bell*, 662 P.2d 398, 402 (Wash. Ct. App.1983). There is no justification for applying the APA’s deferential standard here.

⁵County Commissioners are not full time government employees and deal with a multitude of tasks. See generally Chapter 7, Article 1, West Virginia Code. Article VII judges on the other hand, are full time adjudicators who are required to have graduated from law school and to have been admitted to the practice of law for five years. See W. Va. Const. Art. VIII, § 7.

3. Separation of Powers

Bayer, though, relies on *Frymier-Halloran v. Paige*, 193 W. Va. 687, 694, 458 S.E.2d 780, 787 (1995) to assert that de novo review would be inconsistent with the separation of powers doctrine set forth in Article V, § 1 of the West Virginia Constitution. However, Article V, § 1 and *Frymier-Halloran* is distinguishable on a number of grounds.

Article V, § 1 of the West Virginia Constitution provides, “[t]he legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the legislature.” In interpreting a constitutional provision, the rule of plain language controls, “[w]here a provision of a constitution is clear in its terms and of plain interpretation to any ordinary and reasonable mind, it should be applied and not construed.” Syl. pt. 3, *State ex rel. Smith v. Gore*, 150 W. Va. 71, 143 S.E.2d 791 (1965). Because “[t]he wording of this constitutional mandate is simple, plain, and easy to understand; [this Court should] apply it to mean just what it says.” *Burkhart v. Sine*, 200 W. Va. 328, 332, 489 S.E.2d 485, 489 (1997).

The West Virginia Constitution spells out that the legislative department comprises a Senate and a House of Delegates, W. Va. Const. Art. VI, § 1, that the executive department consists of a Governor, Secretary of State, Auditor, Treasurer, Commissioner of Agriculture, and Attorney General, *Id.* Art. VII, § 1, and that the judicial department is made up of a Supreme Court of Appeals, circuit courts, and any intermediate appellate courts. *Id.* Art. VIII, § 1. A county commission does not fall within any of the co-equal departments of government. Rather, a county commission is

only a political subdivision of the State. *State ex rel. State Line Sparkler of WV, Ltd. v. Teach*, 187 W. Va. 271, 277, 418 S.E.2d 585, 591 (1992). In other words, "local government itself is a legal entity distinct from the three branches of state government and is outside the separation of powers doctrine." *People v. Doyle*, 50 Cal. Rptr.2d 28, 32 (Ct. App. 1996) (citing *People v. Provines*, 34 Cal. 520, 534 (1868); 20 Atty. Gen. Op. 69, 70 (Cal. 1952)), *rev'd on other grounds*, 955 P.2d 448 (Cal. 1998). Additionally, a purposive analysis also establishes that the separation of powers rule does not apply here.

"Traditional [separation of powers] doctrine derives from concern about the tyranny that can arise when one branch of government—the executive, legislative, or judicial—assumes the powers of another." *Board of County Comm'rs v. Padilla*, 804 P.2d 1097, 1102 (N.M. Ct. App. 1990). This traditional view is consistent with West Virginia law. "[T]he West Virginia Constitution contemplates the independent operation of all three branches of government[.]" *Rice v. Underwood*, 205 W. Va. 274, 283, 517 S.E.2d 751, 760 (1998). "The legislative, executive and judicial departments of the government must be kept separate and distinct, and each in its legitimate sphere must be protected." Syl. Pt. 1, *State v. Buchanan*, 24 W. Va. 362 (1884). "The system of 'checks and balances' provided for in American state and federal constitutions and secured to each branch of government by 'Separation of Powers' clauses theoretically and practically compels courts, when called upon, to thwart any unlawful actions of one branch of government which impair the constitutional responsibilities and functions of a coequal branch." *State ex rel. Brotherton v. Blankenship*, 158 W. Va. 390, 402, 214 S.E.2d 467, 477 (1975). Both by its language and its interpretation, Article V, § 1 deals

only with co-equal and independent branches of the State government. In short, as Justice Miller ably demonstrated in *Hubby v. Carpenter*, 177 W. Va. 78, 83, 350 S.E.2d 706, 711 (1986), “[t]he concept of separation of powers is designed primarily as a check on the basic or organic form of government which is the State itself.” Article V, § 1 does not speak to a distribution of power in *subordinate* governments.⁶ And, indeed, “the general rule [is] that the separation of powers doctrine applies to state government and state officers and ordinarily does not extend to the government of municipal corporations.” *Hubby*, 177 W. Va. at 83, 350 S.E.2d at 710. See also 1 *Sutherland on Statutory Construction* § 3:31 (6th ed.) (footnote omitted) (“Historically the requirement of the separation of powers was never applied to local governmental organizations.”). See generally *Citizens for Reform v. Citizens for Open Government, Inc.*, 931 So.2d 977, 990 (Fla. Dist. Ct. App. 2006) (collecting cases). “Apparently because . . . danger is diminished for a level of government whose powers are subordinated to higher levels of government or otherwise limited, the . . . Constitution’s provision on separation of powers . . . does not apply to the distribution of power within local governments.” *Padilla*, 804 P.2d at 1102. See also *City Council v. Eppihimer*, 835 A.2d 883, 893 (Pa. Cmwlth. Ct. 2003) (citing *Ball v. Fitzpatrick*, 602 So.2d 873, 878 (Miss.1992) (Banks, J. concurring)) (one reason that separation of powers does not reach down to local government is that “the purpose of the separation of powers doctrine is to provide a

⁶And neither does the federal constitution since the United States Supreme Court “has held that the concept of separation of powers embodied in the United States Constitution is not mandatory in state governments.” *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957). Accord *Whalen v. United States*, 445 U.S. 684, 689 (1980). See also *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989) (describing this as “settled law”). See also *Falls v. Town of Dyer*, 875 F.2d 146, 147 (7th Cir. 1989) (federal constitution does not require separation of power at local level of government).

system of checks and balances for the three branches of government, and such a system is not needed at the local level because local government is kept in check by the various departments of state government.”). In other words, the encroaching power of a co-equal branch of government of state wide power and authority is not comparable to a local government of limited authority and territory and subject to a higher governmental system. In this light, it is evident that Bayer’s reliance on *Frymier-Halloran v. Paige* is in error.

In *Paige*, this Court held that it was constitutionally impermissible for a circuit court to exercise de novo review over the Tax Commissioner’s findings of fact or to take new evidence on appeal. 193 W. Va. at 693-94, 458 S.E.2d at 786-87. However, the basis for that decision was that allowing a court to interfere with an administrative agency or officer of the State. Compare *Western Maryland Ry. Co. v. Goodwin*, 167 W. Va. 804, 821, 282 S.E.2d 240, 250 (1981) (observing that Tax Department is a state agency); *Hamill v. Koontz*, 134 W. Va. 439, 442, 59 S.E.2d 879, 881 (1950) (recognizing that “the tax commissioner is an executive officer of the State.”). Executive agencies are created to assist the executive in exercising his or her authority. See *Nixon v. Sampson*, 389 F. Supp. 107, 138 (D.D.C. 1975) (footnotes omitted) (“in order to formulate, effectuate, and discharge the powers and duties of the Office of the President, numerous executive departments and agencies have been created”), *rev’d on other grounds sub nom., Reporters Committee for Freedom of Press v. Sampson*, 591 F.2d 944 (D.C. Cir. 1978). However, a county commission, dealing with county money, is not assisting the executive in exercising state executive authority. Or, more generally, as this Court has pointed out, “a county commission is not considered to be

an agency or unit of the executive branch of government.” *Butler v. Tucker*, 187 W. Va. 145, 151, 416 S.E.2d 262, 268 (1992). *Paige* is simply not pertinent here. Indeed, if anything, the underlying principle of separation of powers is advanced by de novo review because a superior department of government is checking the powers of a subordinate subdivision of the state. Compare *Padilla*, 804 P.2d at 1102, *Eppihimer*, 835 A.2d at 893, *Ball*, 602 So.2d at 878 (Banks, J. concurring).

In this case, consistent with West Virginia Code § 53-3-3 and the case law interpreting it, the circuit court conducted a de novo review of the law and the facts and entered “such judgment [and] ma[d]e such order upon the whole matter as law and justice . . . required.” Since the Commission is not a part of the executive branch of the state government, no violation of Article V, § 1 could have occurred. *Cf. State ex rel. The Plain Dealer Publishing Co. v. Cleveland*, 661 N.E.2d 187, 192 (Ohio 1996) (“Since the mayor of Cleveland is not part of the executive branch of state government, the General Assembly’s enactment of R.C. 149.43 does not violate the separation of powers doctrine.”); *Citizens for Reform v. Citizens for Open Government, Inc.*, 931 So.2d 977, 989 (Fla. Dist. Ct. App. 2006) (similar). In short, “there is generally no violation of a state’s constitutional separation of powers doctrine by an action applied to local government officials.” *State ex rel. The Plain Dealer Publishing Co. v. Cleveland*, 661 N.E.2d 187, 192 (Ohio 1996). Application of de novo review is not unconstitutional.

C. Bayer was negligent and is not entitled to relief.

West Virginia Code § 11-3-27 provides in pertinent part:

Any taxpayer, or the prosecuting attorney or tax commissioner, upon behalf of the state, county and districts, claiming to be aggrieved by any entry in the property books of the county, including entries with respect to classification and taxability of property, resulting 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, may, within one year from the time the property books are delivered to the sheriff or within one year from the time such clerical error or mistake is discovered or reasonably could have been discovered, apply for relief to the county commission of the county in which such books are made out

Admittedly, "in a world of silk purses and pigs' ears, the Act is not a silk purse of the art of statutory drafting." *Lindh v. Murphy*, 521 U.S. 320, 336 (1997). Since the statute takes money away from the county, it has the same effect as a tax exemption—and like tax exemption statutes should be strictly construed. See 3A *Sutherland on Statutory Construction* § 66:9 ("Tax refund statutes must be construed strictly in favor of imposing the tax and against allowing the refund, and the burden is on the person requesting the refund to bring himself within the refund statute."). Accord, *In re Ford Mtr. Credit Co.*, 69 P.3d 612, 615 (Jan 2003); *Lacey Nursing Center, Inc. v. Department of Revenue*, 905 P.2d 338, 343 (Wash. 1995) (En banc); *Department of Revenue v. Bank of America*, 752 So.2d 637, 641 (Fla. Dist. Ct. App. 2000). See also *Agar School Dist. No. 58-1 v. McGee*, 561 N.W.2d 318, 324 (S.D. 1997) ("A refund of taxes is an extraordinary remedy available only under narrowly defined circumstances."). Cf. *Land Title Bank & Trust Co. v. Marshall*, 34 A.2d 71, 72 (Pa.1943) (tax abatement statutes are strictly construed against the taxpayer).

Code § 11-3-27 makes an important legal distinction between inadvertent/unintentional acts and negligent acts. In reality, the statute really sets forth *three* categories in the realm of inadvertent or unintentional. In approaching the statute as setting forth three situations, all the parts of the statute can be read together to give each effect. First, if an act is intended or advertent, then the statute simply does not

apply. Second, if an act is unintentional or inadvertent, it will provide relief as long as it was not negligent, that is falling below a reasonable standard of care. And, third, if an act is negligent, i.e., falling below a reasonable standard of care—advertent or intentional, or inadvertent or unintentional—no relief is available. See, e.g., *Markovits v Commissioner*, 1952 WL 9750 (Tax Ct.), 1952 PH TC Memo 52,245, 11 T.C.M. (CCH) 823, T.C.M. (P-H) P 52,245 (emphasis added) (“The taxpayer has the burden of proving that the overcharges were inadvertent and unintentional *and* that they were not made through an unreasonable lack of care.”); *Phillips Petroleum Co. v. Curtis*, 85 F. Supp. 399, 401 (D. Okl. 1949) (“It does not follow that an unintentional or inadvertent act is not a negligent act.”).

Clerical errors are easy to understand and are straight forward. In the tax context clerical errors include such things as errors in mathematical computations, incorrect use of IRS tables, inconsistent entries on the same form, omission of information required to substantiate an entry, and an entry relating to a deduction or credit in an amount exceeding statutory limits. 35 Am. Jur.2d *Federal Tax Enforcement* § 160 (citing 26 U.S.C. 6213(g)(2)). Additionally, “a clerical error must be unintended.” *Id.* “Where an error is of a deliberate nature such that the party making it at the time actually intended the result that occurred, it cannot be said to be clerical.” *National CSS, Inc. v. City of Stamford*, 489 A.2d 1034, 1040 (Conn. 1985). Bayer is not entitled to any relief under with the clerical error or mistake portions of the statute.

Bayer contends that it is entitled to relief under the statute due to the fact that Bayer’s computer system did not properly interface with Lyondell’s legacy computer.

system. It also asserts that the accounting and tax systems did not match up. These arguments are unpersuasive and clearly to not involve any clerical error.

First, a clerical error is one that can be resolved by reference only to the document wherein the error has occurred. A “[c]lerical error has been defined as [g]enerally, a mistake in writing or copying It may include error apparent on face of instrument, record, indictment or information.” Clerical error contemplates transcription errors and the like within a document itself.” *Ammons v. County of Wake*, 490 S.E.2d 569, 571 (N.C. Ct. App. 1997) (quoting *Black’s Law Dictionary* 252 (6th ed.1990)). “To qualify as a clerical error, the mistake must ordinarily be apparent on the face of the instrument[.]” *Ammons*, 490 S.E.2d at 571. Here, there is no dispute that the inventory errors were not apparent on the face of the tax returns.

COMMISSIONER HARDY: And let me see if I understand. Your group in Pittsburgh, which is trying to get this material together, didn’t grasp exactly how they kept their records or what they were doing down in South Charleston or down in West Virginia. I guess the plants in South Charleston officially?

THE WITNESS: Yes, sir.

COMMISSIONER HARDY: So they fill out the return and then [Mr. Broadwater] goes to South Charleston two years later, get the South Charleston material, and finds that it doesn’t match the information put on in Pittsburgh. That’s the way I understand your testimony.

THE WITNESS: And it’s substantially accurate, right.

Tr. at 118.

Since the errors were not apparent on the face of the returns, the error is not clerical.

Further, a clerical error cannot be intended; that is, the maker cannot intend the result. *National CSS, Inc. v. City of Stamford*, 489 A.2d 1034, 1040 (Conn. 1985). At issue in *National CSS*, was a statute providing “a remedy for ‘any clerical omission or

mistake in the assessment of taxes” *Id.* The taxpayer in that case listed leased computer equipment on its tax return and paid the taxes. *Id.* At the time it paid the taxes, it operated under the mistaken belief that it actually owed the taxes. *Id.* Thus, held the court, “[b]ecause the plaintiff’s action in listing the property and paying the taxes, although mistaken, was deliberate and intentional, it is not clerical, but can only be characterized as an error of substance.” *Id.* Here, Bayer intended to report the inventory as it did so the error cannot be clerical. Even more to the point, Bayer’s product is like the computers in *National CSS*, Bayer believed its product to taxable and it was not. Further, as the Michigan Court of Appeals has observed, a clerical error is not one that results from ignorance of a computer system’s program. *City of Detroit v. Michigan Consolidated Gas Co.*, 2005 WL 2812794, *2 (Mich. Ct. App.). There was no clerical error. This leaves Bayer to argue that it was not negligent. They cannot prevail on this prong either.

Whether Bayer was not negligent requires some expert testimony. *Cf. Battenfield of America Holding Co. v. Baird, Kurtz & Dobson*, 60 F. Supp.2d 1189, 1212 (D. Kan. 1999) (expert testimony required when claim of negligent due diligence raised).

Bayer cites testimony from Mr. Craney that Bayer attempted to use reasonable care:

Q Mr. Craney, did you observe how your folks were working during the periods your talking about here?

A Yes

Q You’re the supervisor?

A Yes

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 ordinary 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.

Tr. at 193-94.

However, this is mere conclusory testimony "that does not provide the underlying facts to support the conclusion." *1001 McKinney Ltd. v. Credit Suisse First Boston Mortg. Capital*, 192 S.W.3d 20, 27 (Tex. App. 2005). See *La Bris v. Western Nat. Ins. Co.*, 133 W. Va. 731, 736-737, 59 S.E.2d 236, 239 (1950). See also *United States v. Perez-Ruiz*, 353 F.3d 1, 19 (1st Cir. 2003) ("If the [plaintiff] expects its witnesses' conclusions to be taken as strongly probative, the least that it can do is to elicit a sufficient factual foundation to support those conclusions."); *Orgain v. City of Salisbury*, 521 F. Supp.2d 465, 487 (D. Md.2007) (basis for opinion must be included for testimony to be probative). Conclusory testimony is without probative value. *Dallas Ry. & Terminal Co. v. Gossett*, 294 S.W.2d 377, 380-81 (Tex. 1956) ("It is well settled that the naked and unsupported opinion or conclusion of a witness does not constitute evidence of probative force and will not support a jury finding even when admitted without objection."); *Schlicher v. Smith*, 1995 WL 221492, 1 (10th Cir. 1995) ("Conclusory allegations unsupported by underlying facts cannot sustain a cause of action.");

Williams v. Callaghan, 938 F. Supp. 46, 50 (D.D.C. 1996) (quoting *Marks v. United States Dep't of Justice*, 578 F.2d 261, 263 (9th Cir.1978)) (“[c]onclusory allegations unsupported by factual data will not create a triable issue of fact.”); *Pedcor Investments-1995-XXIII, L.P. v. Portage Tp. Assessor*, 2007 WL 1364425, 5 (Ind. Tax Ct.); *Jackvony v. Monafó*, 1980 WL 336400, 3 (R.I. Super. Ct.) (“Sullivan’s testimony is conclusory and therefore not probative[.]”). Additionally, any legal conclusions drawn from the facts are not entitled to any deference. See, e.g., *Muehler v. Mena*, 544 U.S. 93, 98 n.1 (2005). This non-probative conclusory testimony must be measured against Bayer’s other testimony and statements.

Bayer admitted at the hearing that many of its problems were due to a “general lack of knowledge about what [Bayer] was acquiring and what [it] owned[.]” Tr. at 121. Indeed, as confirmed by Bayer’s own lawyer at the hearing before the Commission, the real reason for the mistakes was that Bayer “went out and bought companies all over the place and [Bayer] was real busy and [Bayer] didn’t have time to know what they were doing.” Tr. at 114. These statements constitute judicial admissions. *In re Cesar L.*, ___ W. Va. ___, ___, 654 S.E.2d 373, 386 (2007) (quoting *Keller v. United States*, 58 F.3d 1194, 1198 n. 8 (7th Cir.1995)) (“Judicial admissions are formal concessions . . . or stipulations by a party or its counsel. . . that are binding upon the party making them. They may not be controverted at trial or on appeal.”).

Bayer attempts to make a virtue out of a necessity by arguing that it is a big company and that being big puts big pressures on it so it cannot be seen to be negligent. However, “[t]he inquiry into a taxpayer’s negligence is highly individualized, and turns on all of the surrounding circumstances including the taxpayer’s education,

intellect, and sophistication.” *Merino v. Commissioner of Internal Revenue*, 196 F.3d 147, 154 (3d Cir. 1999) (quoting *David v. Commissioner*, 43 F.3d 788, 789 (2d Cir.1995)). In assessing whether Bayer was negligent, this Court may consider Bayer’s sophistication because courts “have long held sophisticated taxpayers to a higher standard than unsophisticated ones.” Carlton M. Smith, *Documentation Needed to Avoid Penalties Specified by Transfer Pricing Temp. Regs.*, 80 J. Tax’n 305 n.7 (1994).⁷ Moreover, “[t]he more voluminous the records, the more intricate the system, the greater is the required degree of care.” *Phillips Petroleum Co. v. Curtis*, 85 F. Supp. 399, 401 (D. Okl. 1949) (emphasis added).

First, Bayer cannot rely on the “computer did it defense.” A reasonably prudent company would not simply rely on a computer (or computers) without adequate safeguards to ensure accuracy. “It is not acceptable . . . that a new defense be established in this jurisdiction that excuses conduct because the computer did it. Computers are tools which are programmed by humans, and humans retain the responsibility for supervising the work product of computers.” *Walker v. Housing Auth.*, 1998 WL 1119776, 5 Okl. Trib. Rptr. 458 (1998). See also *Thompson v. San Antonio Retail Mer. Ass’n*, 682 F.2d 509, 513 (5th Cir. 1982) (defendant failed to exercise reasonable care in programming its computer, *inter alia*, where defendant lacked “an adequate auditing procedure to foster accuracy.”); *State v. White*, 660 So.2d 664, 667

⁷In *Berardi v. Meadowbrook Mall Co.*, 212 W. Va. 377, 383, 572 S.E.2d 900, 906 (2002) (per curiam), the Supreme Court of Appeals applied this concept of greater diligence, although not in the tax context. See *id.* at 383, 572 S.E.2d at 906 (citations omitted) (“Mr. Berardi is a sophisticated businessman who has operated a number of commercial enterprises. As of 1997, the Berardis had substantial assets and a considerable net worth. While economic duress may reach large business entities as well as the ‘proverbial little old lady in tennis shoes,’ when the parties are sophisticated business entities, releases should be voided only in “extreme and extraordinary cases.””).

(Fla.1995) (failure of the police to maintain up-to-date and accurate computer records is negligence).

Finally, and most tellingly, Bayer admitted that it "went out and bought companies all over the place and [it] was real busy and [it] didn't have time to know what [it was] doing." Tr. at 114. A reasonably prudent company would strive to ensure corporate cohesion and communication, if, for no other reason, than self-preservation. "Any other rule would permit fragmentation by a corporate principal that would make business with it impossibly impracticable." *Continental Cas. Co. v. United States*, 337 F.2d 602, 603 (1st Cir. 1964) (citations omitted) Thus, "[a]n example of negligence . . . may be found in a large organization where the 'right hand' does not know what the 'left hand' is doing." 30 *Williston on Contracts* § 77:1 (4th ed.). And, of course, being so busy to not be able to do what is reasonable is, definitionally, negligence. *Shelley v. C.I.R.*, 1994 WL 461840, *16 (U.S. Tax Ct.) ("Petitioner explained only that he was too busy to keep records. Petitioners have not demonstrated that they were not negligent with regard to the underpayments."); *Throop v. C.I.R.* 1993 WL 546625, *2 (U.S. Tax Ct.) ("Petitioner's generalizations about being preoccupied and too busy to file income tax returns do not establish that she was not negligent."). See also *In re Teamsters Local 100 (Hopple Plastics)*, Case 9-CB-10652, 2002 WL 31357924 (N.L.R.B.G.C.) (being "too busy" to file a grievance is "negligent"); *Secretary of Labor v. Bob & Tom Coal Co.*, 16 F.M.S.H.R.C. 1974, 1986 ("That the section foreman felt he did not have time to conduct the examinations is no excuse. If, in fact, he was too busy to examine the area, Bob & Tom was required to make sure another certified person did. Compliance is the operator's duty, and here the operator failed in that regard. The company was

negligent.”). Having a lot to do in a short period of time is no excuse. *Leroy Jewelry Co., Inc. v. Commissioner of Internal Revenue*, 36 T.C. 443, 444 (1961)

VI. CROSS ASSIGNMENT OF ERROR

The Circuit Court concluded that the standard of review by the circuit court for an exoneration is by a preponderance of the evidence. This is erroneous. The standard of proof is clear and convincing evidence.

Standards of proof “instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.” *Addington v. Texas*, 441 U.S. 418, 423 (1979) (quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)).

“The public revenues are the life blood of the body corporate . . . [.]” *State ex rel. Ayers v. Cline*, 176 W. Va. 123, 129, 342 S.E.2d 89, 95 (1985) (quoting *Pardee & Curtin Lumber Co. v. Rose*, 87 W. Va. 484, 490, 105 S.E. 792, 794 (1921)), and are “the price we pay for civilized society.” *Bluestone Paving, Inc. v. Tax Comm’r*, 214 W. Va. 684, 695, 591 S.E.2d 242, 253 (2003) (Maynard, J., concurring) (quoting *Compania General Tabacos de Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting)). Property taxes fund public safety programs such as Sheriff’s Departments, Regional Jail fees and ambulance authorities; they fund public health programs, such as County Health Departments; they fund public convenience programs such as public buses; and they fund perhaps the greatest responsibility government has to the present and to posterity—the education of our children. “The *ad valorem tax* is the most fundamental tax imposed upon the citizens of this State to fund local government, including schools.” *State ex rel. County Comm’n v. Cooke*, 197 W. Va. 391, 399, 475

S.E.2d 483, 491 (1996). Indeed, the Supreme Court has pointed out the importance that it and the Constitution of West Virginia place upon the financial and fiscal integrity of the tax system, *id.* at 396, 475 S.E.2d at 488, as well as the constitutionally preferred position that public education holds in this State. *E.g.*, Syl. pt. 1, *State ex rel. Board of Ed. v. Rockefeller*, 167 W. Va. 72, 281 S.E.2d 131 (1981). See also *Contractors Ass'n of West Virginia v. West Virginia Dep't of Pub. Safety*, 189 W. Va. 685, 702, 434 S.E.2d 357, 374 (1993) (Brotherton, J., dissenting) ("Roads and education— education and roads—are two budgetary mainstays essential to providing a productive future for our present and future citizens."); *Neal v. City of Huntington*, 151 W. Va. 1051, 1056, 158 S.E.2d 223, 226 (1967) ("The imposition of taxes is a legislative function. Courts are not permitted to concern themselves with the need for or wisdom of taxes properly imposed, but are obligated to recognize that proper taxes are essential to the maintenance of government.").

Indeed, here the money that Bayer seeks to recover has already been budgeted and spent. A high standard of proof is essential if the budget process is to maintain the integrity necessary to the effective functioning of government. See *G.M. McCrossin, Inc. v. West Virginia Bd. of Reg.*, 177 W. Va. 539, 543, 355 S.E.2d 32, 36 (1987) ("The integrity of the budget process could be as threatened by the expenditure of budgeted funds as by a claim which requires a future allocation.").

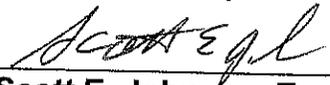
Against this backdrop must be measured the requisite standard of proof understanding that the purposes of standards of proof are to allocate the risk of an erroneous decision considering the relative importance society attaches to the right in question. *Addington*, 441 U.S. at 442. Any reduction in taxes available as a result of

relief under West Virginia Code § 11-3-27 (especially as here where the taxpayer's relief is based upon its own errors—whether culpable or not) and the corresponding threat to the financial and fiscal integrity of the public fisc, indisputably calls for a high standard of proof to be imposed. Indeed, only recently, in Syllabus Point 3 of *Schmel v. Helton*, No. 33379 (W. Va. Feb. 27, 2008), this Court held that a corporate officer seeking to avoid personal liability for the corporation's unpaid and unremitted sales tax must prove by clear and convincing that imposition of personal liability would be unfair and an arbitrary and capricious or unreasonable act.

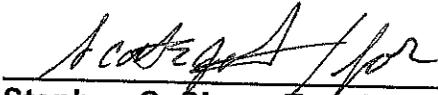
VI. CONCLUSION

For the above reasons, the decision of the Circuit Court of Kanawha County should be affirmed.

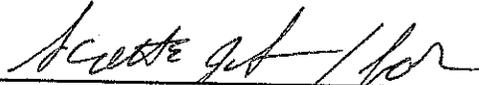
Respectfully submitted,
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 33871

STATE OF WEST VIRGINIA EX
REL. PROSECUTING
ATTORNEY OF KANAWHA COUNTY,
WEST VIRGINIA,

Appellee,

v.

BAYER CORPORATION,

Appellant.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served upon the following parties by First Class United States Mail, postage prepaid by me, on the 2nd day of May, 2008, and addressed as follows:

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