IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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NO. 23-317

PFIZER INC. and SUBSIDIARIES,

Petitioner,

v.

MATTHEW R. IRBY, STATE TAX COMMISSIONER OF WEST VIRGINIA

Respondent.

On Appeal from the Intermediate Court of Appeals of West Virginia, No. 22-ICA-285

RESPONDENT'S BRIEF

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INTRODUCTION

The Intermediate Court of Appeals' dismissal of Pfizer, Inc. and Subsidiaries' ("Pfizer") *Petition for Appeal* should be affirmed. Despite clear legal authority and explicit instructions from the Intermediate Court of Appeals, Pfizer failed to file the mandatory appeal bond or request the alternative certification of assets required in tax assessment appeals by West Virginia Code § 11-10A-19(e) (2021), *recodified as* W. Va. Code § 11-10A-19(d) *in* W. Va. Acts 2023, c.320 (Mar. 3, 2023. Pfizer incorrectly contends that the bond or alternative certification was unnecessary because it had a "net operating loss carryover" that would reduce its liability during the relevant tax years to zero. Pfizer's argument is not only untimely, but it also lacks any factual or legal basis. Its due process, takings, and estoppel arguments are equally unfounded in both fact and law. Pfizer's single assignment of error should be rejected, and dismissal below should stand.

COUNTERSTATEMENT

The facts and law for this appeal are straightforward. On December 1, 2022, Pfizer filed its notice of appeal to the Intermediate Court of Appeals from a month-earlier Office of Tax Appeals ("OTA") decision affirming the Tax Commissioner's assessment of corporate net income taxes. Proposed Supp. App. Record at 586 ("SAR 586").[1] Fifteen days later, the Intermediate Court of Appeals entered a *Scheduling Order* which, among other things, directed Pfizer to "comply with the requirements of W. Va. Code § 11-10A-19(e)." SAR 627. More specifically, it ordered Pfizer to "file with the Clerk a cash bond, surety bond or certificate from the Tax Commissioner" confirming that Pfizer's assets "are adequate to secure performance of the orders of this Court" "[w]ithin 90 days of the date the notice of appeal was file." *Id.* The order also provided Pfizer the option to "apply to this Court" if the Tax Commissioner refused the requested certification. *Id.*

[1] On September 22, 2023, the Tax Commissioner filed a *Motion to Supplement Appendix* along with a proposed *Supplemental Appendix*.

On March 1, 2023, Pfizer filed its *Petitioner's Brief in Support of Administrative Appeal* with the lower court that addressed the merits of its appeal. SAR 677. But, Pfzer did not file the appeal bond or the alternative certification required by West Virginia Code § 11-10A-19(e) or as ordered in the *Scheduling Order*.

After the 90-day window for compliance lapsed, the Tax Commissioner filed a *Motion to Dismiss*. App. Rec. 562-569 ("AR"); SAR 626-676. Thereafter, Pfizer filed a response, AR 570-577, and the Tax Commissioner filed a reply, AR 578-582. On April 27, 2023, the Intermediate Court of Appeals dismissed Pfizer's *Petition for Appeal*, AR 583, which Pfizer appealed to this Court. Pfizer filed its *Opening Brief* on August 25, 2023,[2] and its *Appendix Record* three days later.[3] The Tax Commissioner filed his *Motion to Supplement Appendix* and a *Supplemental Appendix* a month later and this *Respondent's Brief* shortly thereafter.

SUMMARY OF ARGUMENT

The issue before this Court is narrow and the core facts are simple. Pfizer was instructed by the Intermediate Court of Appeals to comply with the mandatory appeal bond or alternative certification of assets requirement set forth in West Virginia Code § 11-10A-19(e). This bond or certification was necessary to perfect Pfizer's appeal. Pfizer did not meet this statutory requirement or comply with the lower court's directives within ninety days of filing its notice of appeal. That

[2] Pfizer's *Opening Brief* improperly includes attachments that do not appear in appendix record. *See* Petr's Br. Ex. 1 (Aug. 25, 2023). This Court has previously held that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." Syl. Pt. 3, *Frymier-Halloran v. Paige*, 193 W.Va. 687, 458 S.E.2d 780 (1995). On numerous occasions, this Court has rejected appellate brief exhibits that were not properly supplemented to the appendix in accord with Rule 7(g) of the Rules of Appellate Procedure. *See e.g.*, *In re S.S.*, No. 20-0205, 2020 WL 6482749, *1 n.2 (W. Va. Nov. 4, 2020) (mem. decision); *In re R.B.*, No. 16-0880, 2017 WL 2609025, *1 n.2 (W. Va. June 16, 2017) (mem. decision); *In re S.B.*, No. 15-0408, 2015 WL 7628764, *1 n.2 (W. Va. Nov. 23, 2015) (mem. decision). It should do the same here.

[3] The *Appendix Record* filed by Pfizer on August 28, 2023, does not include the certification required under Rule 7(c)(2) of the Rules of Appellate Procedure.

failure deprived the Intermediate Court of Appeals of jurisdiction to hear the underlying merits of the appeal. Accordingly, the Intermediate Court of Appeals appropriately dismissed Pfizer's appeal.

In challenging the dismissal of its appeal, Pfizer disregards the plain language of the statute and the explicit directives from the Intermediate Court of Appeals. Instead, Pfizer makes a series of arguments in support of its single assignment of error that lack any basis in fact or law. It also attempts to excuse its neglect by characterizing itself as a "small, family-owned business" and "impoverished legal entity" with an "inability" "to post bond." Petr's Br. 7-8. These assertions, which lack factual support, do not excuse Pfizer's non-compliance. Pfizer further attempts to advance several arguments that were not timely raised below.

First, Pfizer asserts that the bond or alternative certification of assets are unnecessary because it had a net operating loss sufficient to offset tax due. This argument has been waived because it was not preserved at OTA or timely raised before the appeal bond deadline passed. In addition, this argument lacks any factual basis as the record demonstrates that the Tax Commissioner never agreed to a zeroed out assessment. *See* AR 36, 50, 118, 419, 427.

Next, Pfizer argues that it has been unconstitutionally denied access to the courts. However, Pfizer failed to avail itself of the statutory appeal procedure. Pfizer cannot recast its own failure to comply with the appeal procedure as a constitutional deficiency.

Lastly, Pfizer attempts to advance an estoppel argument. However, this argument was not raised below and has been waived. Even so, there is no basis for application of equitable estoppel in this matter. Not only can Pfizer not meet the heightened burden necessary to estop a government agency, but it also cannot meet the traditional elements as there has been no concession from the Tax Commissioner that the taxpayer had a sufficient net operating loss to offset tax liability. In

fact, the appendix record demonstrates the very opposite that the tax liability was not zeroed out and continued to be contested. *See* AR 36, 50, 118, 419, 427.

Pfizer has failed to demonstrate that the dismissal order entered by the Intermediate Court of Appeals was an abuse of discretion or was otherwise contrary to law. For these reasons, the dismissal order should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 18(a) of the Rules of Appellate Procedure, oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and the record on appeal. The sole legal question presented is controlled by the Rules of Appellate Procedure and a clear and unambiguous statute. The jurisdictional prerequisite of filing an appeal bond in tax cases has also been upheld by this Court on multiple occasions. *E.g., Solution One Mortg., LLC v. Helton*, 216 W. Va. 740, 743, 613 S.E.2d 601, 604 (2005); *RMLL Enterprises, Inc. v. Matkovich*, No. 13-1275, 2014 WL 5311444 *2, (Oct. 17, 2014) (mem. decision). For these reasons, the Tax Commissioner asserts that the decisional process would not be significantly aided by oral argument.

STANDARD OF REVIEW

This Court reviews a lower court's imposition of sanctions for failure to comply with a scheduling order for "abuse of discretion." *Sheely v. Pinion*, 200 W. Va. 472, 476, 490 S.E.2d 291, 295 (1997). "On the appeal of sanctions, the question is not whether" this Court "would have imposed a more lenient penalty," but whether the Intermediate Court of Appeals "abused its discretion in" dismissing Pfizer's appeal. *Bartles v. Hinkle*, 196 W. Va. 381, 389-90, 472 S.E.2d 827, 835-36 (1996) (citing to *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 642 (1976). Insofar at this appeal raises "jurisdictional issues," these "are questions of law" subject to "de novo" review. *State ex rel. Univ. Underwriters Ins. Co. v. Wilson*, 239 W. Va. 338,

343, 801 S.E.2d 216, 221 (2017). Pfizer bears the burden of establishing the Intermediate Court of Appeals' jurisdiction. *State ex rel. Healthport Techs., LLC v. Stucky*, 239 W. Va. 239, 242, 800 S.E.2d 506, 509 (2017).

ARGUMENT

All applicable legal authority substantiates the dismissal entered by the Intermediate Court of Appeals. Pfizer failed to file an appeal bond clearly required under state law and the lower court's order. None of the reasons Pfizer offered to the Intermediate Court of Appeals or to this Court excuse its failure. The Intermediate Court of Appeals was right to dismiss. This Court should reject Pfizer's lone assignment of error and affirm.

I. The Intermediate Court of Appeals Properly Dismissed Pfizer's *Petition for Appeal* Because Pfizer Failed to Perfect Its Appeal and Failed to Comply With the Lower Court's Explicit Directives.

The Intermediate Court of Appeals properly dismissed Pfizer's *Petition for Appeal* because it failed to perfect its appeal and failed to comply with the court's clear directives. Dismissal of an appeal is appropriate if a petitioner fails to "properly perfect the appeal" or "obey an order of" the appellate court." W. Va. R. App. P. 31(a)(1) and (2). Dismissal is also required for "lack of jurisdiction," *id.* (5), since the reviewing court's only option once jurisdiction is found wanting is to "take no further action in the case other than to dismiss it from the docket." Syl. Pt. 7, *Tanner v. Raybuck*, 246 W. Va. 361, --, 873 S.E.2d 893, 893 (2002).

Pfizer's arguments gloss over the clear statute that mandates the filing of an appeal bond or an alternative certification of assets in tax appeals. *See* W. Va. Code § 11-10-19(e). Pfizer likewise fails to acknowledge that the Intermediate Court of Appeals' *Scheduling Order* specifically instructed it to "comply with the requirements of W. Va. Code § 11-10A-19(e)." SAR 627. Specifically, the lower court ordered Pfizer to "file with the Clerk a cash bond, surety bond or certificate from the Tax Commissioner" confirming that Pfizer's assets "are adequate to secure

performance of the orders of this Court" "[w]ithin 90 days of the date the notice of appeal was file." *Id.* The order also provided Pfizer with the option to "apply to this Court" if the Tax Commissioner refused to issue the requested certification. *Id.* Plainly stated, Pfizer failed to comply and its noncompliance deprived the Intermediate Court of Appeals of jurisdiction.

With the passage of the Appellate Reorganization Act of 2021, the Legislature redirected appeals of OTA decisions entered after June 30, 2022, from the State's circuit courts to the Intermediate Court of Appeals. W. Va. Code § 51-11-4(a)(4) (2022). But as the Intermediate Court of Appeals acknowledged in its *Scheduling Order*, many of the requirements for such appeals are still governed by West Virginia Code § 11-10A-19. That statute requires that "within ninety days" of filing an appeal from OTA, a taxpayer like Pfizer "*shall file* . . . a cash bond or a corporate surety bond" with the clerk of the court. W. Va. Code § 11-10A-19(e) (emphasis added). The "penalty of this bond shall" not be "less than the total amount of tax . . . plus additions . . ., penalties and interest" reflected in the appealed OTA order. *Id.* And the clerk must "approve[]" the bond. *Id.*

The statute provides an alternative form of security "in lieu of the bond." *Id.* But to qualify, taxpayers must apply to the Tax Commissioner and make "a sufficient showing" "that [their] assets . . . are adequate to secure performance of the orders of the court." *Id.* Then, the Tax Commissioner "may" "certify" the sufficiency of the taxpayer's assets "to the clerk" of the court. *Id.*

Filing these alternative forms of security is clearly "mandatory," *Solution One Mortg.*, 216 W. Va. at 743, 613 S.E.2d at 604, and a taxpayer's failure to comply has clear consequences. On multiple occasions, this Court has determined "that the failure to post an appeal bond as required by law is a jurisdictional bar to an appeal." *RMLL Enterprises*, 2014 WL 5311444 *2. It has refused to extend the deadline for filing this bond beyond that set in the West Virginia State Code. *Id.* at

3. And it has determined that the only way "[t]o avoid posting this appeal bond" is to obtain certification of "adequate assets" from the Tax Commissioner, *Troy Co., Inc. v. Griffith*, No. 12-0521, 2013 WL 2149856, *2 (May 17, 2013) (mem. decision), or from the court. *Frantz v. Palmer*, 211 W. Va. 188, 195, 564 S.E.2d 398, 405 (2001). If a taxpayer fails to do either, its appeal is jurisdictionally barred. *Troy Co.*, 2013 WL 2149856, *2.

Before appeals from OTA were redirected to the Intermediate Court of Appeals, many circuit courts throughout the State routinely dismissed appeals when the taxpayers failed to file the required appeal bond. SAR 630-676 (Att. B to Respondent's Motion to Dismiss, Order, *Elliott, et al. v. State Tax Comm'r*, Kanawha Cnty., No. 20-AA-90 (Oct. 1, 2021); Order, *Goldsmit Sydnor v. State Tax Comm'r*, Cabell Cnty., No. CK-6-2020-C-116 (Nov. 25, 2020); Order, *Collins v. State Tax Comm'r*, Berkeley Cnty., No. CC-02-2020-AA-1 (Sept. 25, 2020); Order, *Miles v. State Tax Comm'r*, Harrison Cnty., No. 20-P-7-3 (Sept. 25, 2020); Order, *Vandalia Mist Extracts & Vapors v. State Tax Comm'r*, Kanawha Cnty., No. 19-AA-34 (July 9, 2019); Order, *Frazee v. State Tax Comm'r*, Berkeley Cnty., No. 16-AA-4 (Apr. 7, 2017); Order, *Frazee v. State Tax Comm'r*, Berkeley Cnty. No. 16-AA-5 (Apr. 7, 2017); Order, *Drozdik v. State Tax Comm'r*, Berkeley Cnty., No. 15-AA-11 (Apr. 14, 2014)).

The Intermediate Court of Appeals correctly ordered the same outcome. Pfizer did not file the required appeal bond or the alternative certification of assets. It filed its notice of appeal on December 1, 2022. SAR 586. "[N]inety days" from that filing was Wednesday, March 1, 2023. The Intermediate Court of Appeals' docket reflects that it did not file a cash bond or corporate surety bond with the clerk. AR 584-585. It also reflects that Pfizer did not file a certification from the Tax Commissioner of the sufficiency of their assets. *Id.* etAnd nothing indicates that Pfizer ever applied for such certification. Nor did Pfizer apply to the Intermediate Court of Appeals

alleging that the Tax Commissioner refused to issue the requested certification. Pfizer simply failed to comply with the mandatory statutory requirements for perfecting its appeal. For these reasons, the Intermediate Court of Appeals appropriately dismissed Pfizer's appeal.

II. Pfizer Was Unequivocally Notified By the Lower Court of Its Obligation to Comply with West Virginia Code § 11-10A-19(e) and Its Pleas for Sympathy Must Be Rejected.

Pfizer has made no effort to contend with the statutory text or the plainness of the lower court's directive. Instead, it makes a plea for sympathy by characterizing itself as a "small, family-owned business" and "impoverished legal entity." Petr's Br. 8. Both of these assertions are flatly contradicted by the record, AR 264 (reporting billions of dollars of Pfizer's worldwide income for purposes of SEC 10-K filings), and financial reporting, which reflect "all-time highs in several financial categories" including over $37 billion in adjusted income for 2022. Pfizer Inc., 2022 Annual Review: Financial Performance, https://tinyurl.com/ydvka8zr (last visited Oct. 3, 2023). Pfizer also makes an unsupported statement that the Tax Commissioner is on a "quest to quash the voice and rights" of Pfizer "to present the merits of its case" by moving to dismiss "based on the inability or delay of Taxpayer to post bond." Petr's Br. 7. There is nothing in the record to support that Pfizer is unable to post the appeal bond or pursue the alternative certification of assets. Further, there is no evidence that Pfizer was delayed in complying with West Virginia Code § 11-10A-19(e). As the docket sheet reflects, Pfizer did not and has not filed the required bond or certification. AR 584-585.

What the record does clearly reflect is that Pfizer was unequivocally instructed by the Intermediate Court of Appeals to comply with West Virginia Code § 11-10A-19(e). The court even detailed what those requirements were: it told Pfizer to "file with the Clerk a cash bond, surety bond" or to obtain a "certification from the Tax Commissioner" or the Intermediate Court of

Appeals regarding the sufficiency of its assets. SAR 627. And it directed Pfizer to do so "[w]ithin 90 days of the date the notice of appeal was file." *Id.* These directions could not have been clearer; yet, Pfizer still did not meet this statutory and court-ordered directive. Pfizer's pleas for sympathy do not warrant the bypass of clear legal authority.

III. Pfizer's Argument that the Bond or Alternative Certification Was Unnecessary Because it Had a Net Operating Loss Sufficient to Offset the Tax Due Was Not Timely Raised and Lacks a Factual Basis.

Pfizer's argument that the Tax Commissioner "agreed" that it "had a net operating loss sufficient to offset the tax due," Petr's Br. 1, lacks a factual basis and was untimely made. At the outset, Pfizer's net operating loss allegations were not preserved at OTA. And they were not properly developed to permit disposition on appeal. They also do not excuse Pfizer's failure to comply with West Virginia Code § 11-10A-19(e) or the lower court's *Scheduling Order*. The Intermediate Court of Appeals was right to not consider this alleged net operating loss. This Court should not either.

"One of the most familiar procedural rubrics" is that "the failure to timely raise [an] issue below" will "result[] in waiver of the matter" on "appeal." *Deras v. Prime Capitol Props.*, No. 20-0946, 2021 WL 4936971, *3 (Oct. 13, 2021) (mem. decision). This rule applies with equal force in this Court and the State's lower appellate court. *E.g., In re R.T.*, 23-ICA-115, 2023 WL 6290594, *3 (ICA Sept. 26, 2023) (mem. decision). Appellate jurisdiction also does not extend to "nonjurisdictional questions which were not considered and decided by the court from which the appeal has been taken." Syl. Pt. 7, *In re Michael Ray T.*, 206 W. Va. 434, 436, 525 S.E.2d 315, 317 (1999). This rule is "rooted in the concept of judicial economy, fairness, expediency, respect, and practical wisdom." *State v. Greene*, 196 W. Va. 500, 505, 473 S.E.2d 921, 926 (1996) (Cleckley, J., concurring). It ensures that "the facts underlying" each issue have been properly

developed "so that a disposition can be made on appeal." *Whitlow v. Bd. of Ed. of Kanawha Cnty*., 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993).

Pfizer's untimely argument attempts to skirt this well-established rule. The Tax Commissioner issued an assessment in this case, AR 273-278, and OTA affirmed the assessment in the amount of $429,643. AR 13-37. OTA's decision said nothing about whether Pfizer's assessment would be offset, reduced, or zeroed out by a loss carryover. *Id.* Pfizer did not raise this issue in time at the Intermediate Court of Appeals. It did not mention its loss carryover in either its December 1, 2022, notice of appeal to that court, SAR 586, or its *Brief in Support of Appeal of Administrative Decision*, SAR 677. Instead, it waited until after the deadline to file its appeal bond passed and the Tax Commissioner moved to dismiss to bring this issue to the Intermediate Court of Appeals' attention. By then, it was too late.

Plus, the record is not clear enough to permit consideration of this issue even if it was properly raised. Pfizer says that the Tax Commissioner agreed that it had a net operating loss sufficient to offset tax due. Petr's Br. 1. But the record shows nothing of the sort. Rather, it contains no indication that Pfizer "timely filed a claim for refund or credit with the Tax Commissioner" based on this loss carryover. W. Va. Code § 11-10-14(c). Nor does the record show that the Tax Commissioner agreed to its amount or availability of this loss carryover. Pfizer did list the loss carryover as an issue in its prehearing report at OTA. AR 427. But in his responsive report, the Tax Commissioner asserted that the "amounts" and availability of any "net operating loss" "have not been calculated" yet and must be determined after Pfizer's taxable income for these years was "resolved." AR 419. When the parties reported to OTA that they had "resolved several issues" regarding the assessment, the loss carryover never came up. AR 50. And the "amount left in controversy" by that resolution was not zeroed out. *Id.* Rather, at the hearing, the Tax

Commissioner continued to assert that the remainder of Pfizer's $429,643 assessment was correct. AR 118. And OTA ruled in the Tax Commissioner's favor without mentioning the possibility of any loss carryover to reduce that assessment. AR 36. Even Pfizer's brief to this Court concedes that "other issues that were contested were settled" and the "proposed tax assessments were reduced to $166,846.00 for 2015, $245,651.00 for 2016, and $17,146.00 for 2017." Petr's Br. 1; *See also* Petr's Br. 4-5. Simply put, nothing in the record shows that the alleged carryover loss operates the way Pfizer claims or would reduce the $429,643 assessment to zero as Pfizer argues.

Yet, even if its loss carryover position is accurate, Pfizer gives no explanation for neglecting to advise the Intermediate Court of Appeals of this rationale on or before March 1, 2023, when the *Scheduling Order* directed it to file the appeal bond. Nor does Pfizer explain why it failed to timely use this loss carryover to request certification of its assets from either the Tax Commissioner or the Intermediate Court of Appeals. A party cannot disregard a court's directives because it believes they are incorrect. *Cf. E. Assoc. Coal Corp. v. Doe*, 159 W. Va. 200, 206, 220 S.E.2d 672, 677 (1975) (finding that even improvidently granted injunctions must be obeyed until dissolved). And a party cannot wait to challenge the basis of a court's orders until it is already in default. "[T]he law aids those who are diligent, not those who sleep upon their rights." *Perrine v. E.I. du Pont de Nemours & Co.*, 225 W. Va. 482, 601, 694 S.E.2d 815, 934 (2010) (cleaned up). Pfizer's failure to timely "obey an order" regarding the perfection of an appeal was an appropriate ground for dismissal. W. Va. R. App. P. 31(a)(1)-(2).

Pfizer's alleged net operating loss does not excuse its failure to file the appeal bond required by West Virginia Code § 11-10A-19(e) and the Intermediate Court of Appeals' *Scheduling Order*. This issue was not timely raised and not adequately developed in the record.

Pfizer's allegations before this Court also contradict what little does exist on the record related to its alleged loss carryover. Its allegations on this loss carryover do not justify reversal.

IV. Pfizer's Reliance on Legal Authority that Pre-Dates the Current Appeal Bond Statute Is Unsupportive of Its Arguments.

Pfizer also says the appeal bond statute unconstitutionally denies it access to the court under *Frantz v. Palmer*, 211 W. Va. 188, 574 S.E.2d 398 (2001), and it shouldn't be enforced. Petr's Br. 7. That's not true.

Admittedly, *Frantz* held that a 1986 version of a similar bond requirement in West Virginia Code § 11-10-10(d) (1986), "violates the open courts provision" of the Constitution. Syl. pt. 4, *Frantz*, 211 W. Va. at 190, 574 S.E.2d at 400. That was because (at the time) the statute placed "ultimate discretionary authority" to require a bond on the Tax Commissioner, *id.*, and gave the taxpayer no recourse to the judiciary if the Tax Commissioner delayed or refused to waive the bond, *id.* at 194, 564 S.E.2d at 404. But *Frantz* also found that the "ninety-day period" for the appeal bond "remains enforceable," *id.* at 195, 564 S.E.2d at 405, and reaffirmed that "compliance with [the] statutory-imposed deadline[]" is "jurisdictional in nature," *id.* at 194, 564 S.E.2d at 404. All that *Frantz* did was let taxpayers "apply to circuit court for a review of any adverse determination concerning bond waiver "pending legislative attention to the" open courts "defect" it identified. *Id*. at 195, 574 S.E.2d at 405.

That constitutional defect is no longer an issue because (as Pfizer admits, Petr's Br. 7 n.2), only a couple months later, the Legislature passed W. Va. Acts 2002, c.303 (Mar. 3, 2002), which added language in both West Virginia Code § 11-10-10(d) and West Virginia Code § 11-10A-19(e) mirroring the judicial review process *Frantz* required. Afterward, both statutes let taxpayers "apply to the" courts "for the certification" of assets "if the tax commissioner refuses" to do so. W. Va. Code §§ 11-10-10(d) (2002), 11-10A-19(e) (2021). The 2023 version of the appeal bond

statute allows for the same application for judicial review to the Intermediate Court of Appeals. W. Va. Code § 11-10A-19(d) (2023). Of course, Pfizer didn't take advantage of this alternative certification of assets. It never sought certification of its assets from the Tax Commissioner, and it never applied to the Intermediate Court of Appeals for review of the Tax Commissioner's refusal.

Regardless, there is nothing constitutionally suspect about the appeal bond statute. With the defect *Frantz* identified cured, its "ninety-day period" for filing the bond "remains enforceable." *Frantz*, 211 W. Va. at 195, 564 S.E.2d at 405. And taxpayers—like Pfizer—who miss this deadline and fail to "pursu[e] [] possible statutory alternatives" for certification, must have their appeals dismissed. *Solution One Mortg.*, 216 W. Va. at 743, 613 S.E.2d at 604. "[F]ailure to post an appeal bond as required by law is a jurisdictional bar to [the] appeal." *RMLL Enterprises*, 2014 WL 5311444 *2. *Frantz* does not dictate a different result in this case.

V. Pfizer Has Not Been Unconstitutionally Deprived of Access to the Courts Nor Does the Requirement of Posting an Appeal Bond Equate to an Unconstitutional Taking.

Pfizer's argument that its failure to file a mandatory appeal bond or alternative certification of assets results in a violation of its constitutional rights and access to the courts is inconsistent with prevailing legal authority. Pfizer is seeking the protections of West Virginia's courts while ignoring clear obligations imposed by statute. There is no question that Pfizer has constitutional due process rights to seek judicial review of an OTA decision; however, Pfizer failed to follow the statutory requirement to perfect its appeal and neglected to comply with the lower court's order. Pfizer's failure to avail itself to the statutory appeal procedure does not constitute a denial of access to the courts. It is further notable that Pfizer did not raise due process or court access concerns at the Intermediate Court of Appeals until after the deadline to file the appeal bond or alternative certification of assets had passed and the Tax Commissioner filed a motion to dismiss. "[T]he law

aids those who are diligent, not those who sleep upon their rights." *Perrine*, 225 W. Va. at 601, 694 S.E.2d at 934.

To be certain, there is nothing unfair about the dismissal of an appeal in which a petitioner fails to comply with West Virginia Code § 11-10A-19(e). The "prompt and certain" payment of taxes is "an imperious need" of government. *G.M. Leasing Corp. v. United States*, 439 U.S. 338, 350 (1977) (cleaned up). Requiring taxpayers to file an appeal bond serves that need by ensuring recovery of the disputed tax assessment if a taxpayer is unsuccessful in its appeals. Elsewhere, state law routinely sets conditions and deadlines for pursuing various tax appeals. *E.g.*, W. Va. Code § 11-3-25a (2022) (requiring property taxes be paid as condition for protesting assessment); W. Va. Code 11-3-25 (b) (2005), *repealed by* W. Va. Acts 2021, c. 261 (July 1, 2022) (requiring filing of the certified record with circuit court as condition for perfecting an appeal of a property tax assessment). Even outside of the tax appeal context, state law lets West Virginia's appellate courts "set forth such other matters as deemed beneficial or necessary" in its scheduling orders, W. Va. R. App. P. 5(d), including "order[ing] the payment of an appeal bond before an appeal . . . may commence." W. Va. Code § 51-11-7(d). The Intermediate Court of Appeals was allowed to "dismiss the appeal" "[i]f a party fails to comply with" such orders. W. Va. R. App. P. 5(e); *see also* W. Va. Code § 58-5-14(a).

And the courts of this state have not hesitated to impose such sanctions where parties miss a deadline or fail to perfect an appeal. *E.g.*, *Purple Turtle, LLC v. Gooden*, 223 W. Va. 755, 760, 679 S.E.2d 587, 592 (2009) (affirming circuit court's dismissal for failure to file certified record in property tax appeal); Syl. pt. 3, *Rawl Sales & Processing Co. v. Cnty. Comm'n of Mingo Cnty.*, 191 W. Va. 127, 128, 443 S.E.2d 595, 596 (1994) (same); *see also In re S.L.*, 243 W. Va. 559, 566, 848 S.E.2d 634, 641 (2020) (declining to consider untimely appeal of final disposition order

in abuse and neglect proceeding). After all, a party cannot cry foul when it "merely fails or declines to take advantage of" a "constitutionally sufficient" procedure. *In re Stephen Tyler R.*, 213 W. Va. 725, 733, 584 S.E.2d 581, 589 (2003).

Pfizer further makes a cursory allegation without citation to legal authority that the dismissal deprived it of its property without a meaningful opportunity to contest the "taking" of its property. Petr's Br. 8. Pfizer's apparent assertion that compliance with the appeal bond constitutes an unconstitutional taking falls flat. Under the Takings Clause of the Fifth Amendment, the government may not take "property…for public use, without just compensation." U.S. Const. amend. V. The Takings Clause is applied to the states through the Fourteenth Amendment. *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). However, as it pertains to the Takings Clause and taxation, this Court has observed that "Courts universally have concluded that the takings clauses of various state and federal constitutions do not apply in the context of taxing statutes…" *In re Estate of Elizabeth M. Lewis*, 614 S.E.2d 695, 705, 217 W.Va. 48, 58 (2005). As West Virginia Code § 11-10A-19(e) is part of West Virginia's tax code and serves as a mechanism to ensure the payment of taxes, it is not violative of the Takings Clause.

Simply put, Pfizer's own neglect deprived the Intermediate Court of Appeals of jurisdiction. Pfizer's attempt to recast its failure to comply with West Virginia Code § 11-10A-19 as a constitutional deficiency must be rejected.

VI. Pfizer's Equitable Estoppel Argument Has Been Waived; Even So, There is No Basis for the Application of Equitable Estoppel in This Matter.

Pfizer asserts that the doctrine of equitable estoppel counterbalances its failure to file an appeal bond. Petr's Br. 8-9. At the outset, this argument is not properly before the Court. Specifically, Pfizer's allegations regarding equitable estoppel were not mentioned at the Intermediate Court of Appeals at all. Pfizer's response to the Tax Commissioner's Motion to

Dismiss included no argument regarding equitable estoppel. AR 570-577. Its attempt to interject estoppel arguments into this appeal runs afoul of the same principles that bar its untimely loss carryover arguments, *see* Section III, *supra*: "this Court will not decide nonjurisdictional questions which were not considered and decided by the court from which the appeal has been taken." Syl. pt. 7, *In re Michael Ray T.*, 206 W. Va. at 436, 525 S.E.2d at 317. Pfizer's equitable estoppel is not properly before this Court and must be rejected at the outset.

But even if Pfizer had preserved this argument, it has no merit. The "general rule" this Court has applied in a number of cases is "that estoppel may not be invoked against a government unit when functioning in its governmental capacity." *Samsell v. State Line Dev. Co.*, 154 W. Va. 48, 59, 174 S.E.2d 318, 325 (1970) (quoting *Cunningham v. Cnty. Ct. of Wood Cnty.*, 148 W. Va. 303, 309-10, 134 S.E.2d 725, 729 (1964); *e.g.*, *Freeman v. Polling*, 175 W. Va. 814, 819, 338 S.E.2d 415 (1985) (same). This rule may soften "when [the State is] acting in a propriety capacity." *Samsell*, 154 W. Va. at 59, 174 S.E.2d at 326. But "taxes are the lifeblood of government." *Bull v. United States*, 295 U.S. 247, 259 (1935). Their "collection is a governmental, as opposed to a proprietary, function." *W. M. R.R. v. Goodwin*, 167 W. Va. 804, 820, 282 S.E.2d 240, 250 (1981). And in its governmental capacity, "[i]t is clear" that the State "is not subject to the law of equitable estoppel." *Martin v. Pugh*, 175 W. Va. 495, 503, 334 S.E.2d 633, 641 (1985).

Federal courts apply a similar rule. They typically refuse to "equitably estop[]" the government "from asserting its legal rights because of the actions on an agent." *Miller v. United States*, 949 F.2d 708, 712 (4th Cir. 1991). And while the Supreme Court of the United States has declined to create a "flat" bar to estoppel claims, *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 60 (1984), and has "left open" the possibility that "some type of 'affirmative misconduct' might give rise to estoppel against the Government," *Office of Pers. Mgmt. v.*

Richmond, 496 U.S. 414, 421 (1990), it has "reversed every finding of estoppel [by federal circuits] that [it has] reviewed," *id.* at 422. As the Fourth Circuit put it, "[i]f equitable estoppel ever applies to prevent the government from enforcing its duly enacted laws, it would only [be] in extremely rare circumstances." *Volvo Trucks of N. Am., Inc., v. United States*, 367 F.3d 204, 211-12 (4th Cir. 2004).

To be sure, *Hudkins v. State Consol. Pub. Ret. Bd.*, 220 W. Va. 275, 647 S.E.2d 711 (2007) (per curiam), was one of those extremely rare cases. There, Ms. Hudkins retired early from state employment "based on assurances" given by the Consolidated Retirement Board that she "could freeze her sick leave" and use it "as additional service credit when she filed for retirement." *Id.* at 276, 647 S.E.2d at 712. Two years later, the Board flip-flopped and told her that she couldn't use her sick leave in this way, *id.* at 277, 647 S.E.2d at 713, resulting in a decrease in her monthly retirement income, *id.* at 281, 647 S.E.2d at 717. On appeal, this Court found that there were "exceptions" to the "general rule prohibiting" the use of estoppel against the State. *Id.* at 280, 647 S.E.2d at 716. Some courts, according to *Hudkins*, required proof of "affirmative misconduct or wrongful conduct" before estopping the government, while others balanced several public interest related factors. *Id.* Ultimately, this Court found "that the elements of equitable estoppel" were "met," *id.*, because Ms. Hudkins' injury "outweigh[ed] the public interest" and applying estoppel would not "defeat" "public policy" or "impair or interfere with" "the exercise of government functions," *id.* at 282, 647 S.E.2d at 718.

But *Hudkins* doesn't open the door to estopping the Tax Commissioner here. All signs indicate that the opinion should only apply in proprietary capacity (and not government capacity) cases because there "[t]he rule" against estopping the State "is different" and provides "ample text and case authority" for its application. *Samsell*, 154 W. Va. at 65-66, 174 S.E.2d at 329 (Haymond,

J., dissenting). Admittedly, *Hudkins* does not address the government versus proprietary capacity analysis directly, but it still fits neatly in the proprietary side of this Court's precedent. For one thing, *Hudkins* only estopped the Retirement Board after confirming that doing so would "not impair or interfere with" "the exercise of government functions." *Hudkins*, 220 W. Va. at 282, 647 S.E.2d at 718. It also looked to *Samsell* for "exceptions" to the "general rule prohibiting" estoppel, *Hudkins*, 220 W. Va. at 280, 647 S.E.2d at 716, and the only exception *Samsell* recognized was the proprietary capacity exception. *Samsell*, 154 W. Va. at 59-60, 174 S.E.2d at 326.

Besides that, *Hudkins* "expressly limited [its application] to the specific facts of [the] case," *id.*, and that limitation has played-out well in practice. This Court has only cited to *Hudkins* in employee benefit cases involving the Retirement Board. *E.g., Ringel-Williams v. W. Va. Consol. Pub. Ret. Bd.*, 237 W. Va. 702, 708, 790 S.E.2d 806, 812 (2016); *W. Va. Consol. Pub. Ret. Bd. v. Jones*, 233 W. Va. 681, 683, 760 S.E.2d 495, 497 (2014). In both, this Court found it "neither legally sound nor prudent to expand" *Hudkins* beyond its limited scope, *Ringel-Williams*, 237 W. Va. at 708, 790 S.E.2d at 812 (quoting *Jones*, 233 W. Va. at 687, 760 S.E.2d at 501), and found estoppel inapplicable, *id.* Pfizer offers no reason to change course now. This case doesn't involve the Retirement Board, it isn't a claim for employee benefits, and Pfizer isn't an unsophisticated person—like Ms. Hudkins—who had no choice but to act "upon the assurances given her" by the State. *Hudkins*, 220 W. Va. at 277, 647 S.E.2d at 713; *cf. Helton v. Reed*, 219 W. Va. 557, 561 n.6 638 S.E.2d 160, 165 n.6 (2006) (recognizing (in theory) that equity principles may apply where "an unsophisticated taxpayer" was "given erroneous information by a tax official"). And applying estoppel here would assuredly "impair or interfere with" the "government [tax collection] functions" and "public interests" the appeal bond statute was designed to serve. *Hudkins*, 220 W. Va. at 282, 647 S.E.2d at 718.

What's more, Pfizer hasn't even met the traditional elements for applying equitable estoppel to private parties. To bring a basic claim for equitable estoppel, "there must exist a false representation or a concealment of material facts; it must have been made with knowledge, actual or constructive, of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real fact; it must have been relied on or acted on it to his prejudice." Syl. Pt. 3, *Folio v. City of Clarksburg*, 221 W. Va. 397, 398, 655 S.E.2d 143, 144 (2007). Additionally, the party who relies on the false representation must have done so "reasonably" and "through no fault of [its] own." *Hatfield v. Health Mgmt. Assocs. of W. Va*., 223 W. Va. 259, 266, 672 S.E.2d 395, 402 (2008) (cleaned up).

There is no basis for equitable estoppel even under these traditional elements. Pfizer makes the conclusory statement that it is inequitable for the "Tax Commissioner to concede that the Petitioner had sufficient Net Operating Loss to offset any tax liability and then dismiss its appeal for failing to file an appeal bond to cover any outstanding tax obligation." Petr's Br. 9. However, Pfizer fails to cite to any such concession in the record. In fact, there is absolutely no evidence to support this allegation. In actuality, the record demonstrates the very opposite. Specifically, the Tax Commissioner asserted at the administrative level that the "amounts" and availability of any "net operating loss" "have not been calculated" yet and must be determined *after* Pfizer's taxable income for the years at issue were "resolved." AR 419. Further, at the administrative hearing, the Tax Commissioner continued to assert that Pfizer's $429,643 assessment, which was after various modifications to the original assessment, was correct. AR 118 (Tr. at 2, ln.11-19). These facts contradict Pfizer's unsupported claim that the Tax Commissioner somehow conceded that Pfizer had a net operating loss sufficient to offset its tax liability. So, Pfizer cannot show that there was a false representation or a concealment of material facts.

Pfizer also cannot claim that its failure to file the bond was in any way reasonable. The Intermediate Court of Appeals' *Scheduling Order* unequivocally directed it "to comply with the requirements of W. Va. Code § 11-10A-19(e)" and to "file with the Clerk a cash bond, surety bond, or certification from the Tax Commissioner that [its] assets are adequate." SAR 627. That directive couldn't have been clearer. Even if Pfizer thought the bond unnecessary, it was still unreasonable to ignore the Intermediate Court of Appeals' directives. With such a clear directive out there, Pfizer certainly did not miss the bond or certification filing deadline "through no fault of [its] own," *Hatfield*, 223 W. Va. at 266, 672 S.E.2d at 402, so it cannot rely on traditional elements of estoppel to reverse the Intermediate Court of Appeals' dismissal order.

Pfizer offers no reason for this Court to deviate from the general rule barring the application of equitable estoppel against the State. It hasn't even met the less rigorous elements of estoppel in private party cases. Its arguments in favor of estoppel should be rejected.

CONCLUSION

For the foregoing reasons, the Tax Commissioner requests that Pfizer's assignment of error be rejected and the lower appellate court's dismissal of Pfizer's Petition for Appeal be affirmed.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

NO. 23-317

PFIZER INC. and SUBSIDIARIES,

Petitioner,

v.

MATTHEW R. IRBY, STATE TAX
COMMISSIONER OF WEST VIRGINIA

Respondent.

On Appeal from the Intermediate Court of Appeals of West Virginia, No. 22-ICA-285

CERTIFICATE OF SERVICE

I, Cassandra L. Means-Moore, do hereby certify that on this 10th day of October, 2023, the foregoing Respondent's Brief was electronically filed with the Clerk of the Court using the File & Serve Xpress system, which constitutes service on the following:

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