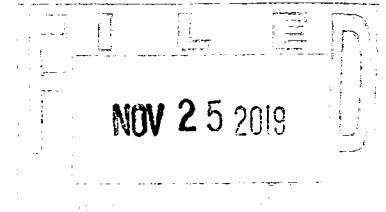


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IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
NO. 19-0679
(19-C-7)



FROM THE CIRCUIT COURT OF GRANT COUNTY,
WEST VIRGINIA
TWENTY-FIRST JUDICIAL CIRCUIT
CASE NO. 19-C-7

Jay Lawrence Smith,
Plaintiff Below, Petitioner

vs

Angela B. VanMeter
in her capacity as the Circuit Clerk of Grant County,
The Grant County Circuit Clerk's Office, and
The Grant County Commission,
Defendants Below, Respondents

RESPONDENTS' SUMMARY RESPONSE
TO
PETITIONER'S APPEAL BRIEF

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SUMMARY RESPONSE

ASSIGNMENTS OF ERROR

1. THE TRIAL COURT ERRED BY DISMISSING SMITH'S COMPLAINT AGAINST THE DEFENDANTS IN REGARD TO SMITH'S REQUEST TO BE ALLOWED TO TAKE DIGITAL IMAGES OF PUBLIC DOCUMENTS WITHOUT BEING CHARGED ONE DOLLAR (\$1.00) PER IMAGE.
2. THE TRIAL COURT ERRED BY DISMISSING SMITH'S COMPLAINT AGAINST THE DEFENDANTS IN REGARD TO SMITH'S REQUEST THAT HE BE PROVIDED COPIES OF PUBLIC DOCUMENTS PURSUANT TO A FOIA REQUEST BASED ON LAW WHICH IS NOT APPLICABLE TO THIS MATTER.

STATEMENT OF THE CASE

Simply stated, the Appellant, who identifies himself as a free lance legal researcher, and journalist, walked into the Circuit Clerk's office in Grant County, and demanded that he be allowed, without charge, to photograph the contents of 4 criminal files under her control. When she prohibited him from taking pictures without paying \$1.00 for each, he got mad, and left.

He shortly thereafter filed an unclear FOIA request and sent \$5.00 suggesting it was more than enough to cover the cost of the requested documents, without allowing the Clerk any input in determining the cost of the requested documents. When the Clerk returned the \$5.00, and requested clarity for his request, he refused to clarify his request, and filed suit against the Clerk, like he has done with multiple other Circuit Clerks, in this State.

The Petitioner's statement of the case is accurate to a large extent, but doesn't quite have the necessary detail for the Court. Mr. Smith did appear at the Circuit Clerk's office, and did request to see 4 criminal files that dealt with criminal charges against the former Circuit Clerk of Hardy County, and other Co-Defendants. He was provided with 1 of the files by a Deputy Clerk. He then informed the Deputy that he intended to take pictures of the contents of the file. The Deputy Clerk

informed him that it was against the Clerk's policy, and referred him to the Clerk. The Circuit Clerk, who is in her first term of office, had never had any person demand to make copies of the contents of criminal files by photographing them, without charge. She informed Mr. Smith that he would have to pay \$1.00 for each photographic copy that went out of her office. Mr. Smith, became upset, irrate, refused to pay, and left her office.

Mr. Smith, shortly thereafter, made a FOIA Request, and enclosed \$5.00 to cover the cost of copying what the Clerk later determined to be 66 documents from 4 criminal files. The FOIA request wasn't clear as to whether Mr. Smith was requesting access to the files, again, or copies. The request also misnamed 3 of the 4 Defendants. The Circuit Clerk wrote Mr. Smith, returned the \$5.00 sent with the request, advising that it was insufficient, and requested clarity from Mr. Smith regarding his FOIA request to determine just what it was that he wanted. Mr. Smith, over the telephone, and through correspondence, continued to argue with the Circuit Clerk that the \$1.00 per copy required by WV Code §59-1-11(b)(2) was not the law, and that the only charge that she could make had to be under WV Code §29B-1-3, the reasonable cost based on the actual cost. He sent \$5.00 again. Mr. Smith recorded some of his arguments and discussions with the Clerk, and posted the recordings on YouTube and social media to the dismay and humiliation of the Clerk.

Rather than cooperate with the Circuit Clerk, with regard to her request for clarity, which is required under FOIA, Mr. Smith filed suit, Pro Se, against the Circuit Clerk of Grant County and the Grant County Commission, after filing a questionable Financial Affidavit that allowed him to not pay the filing and service fees in the Circuit Court, or the filing fee in the Supreme Court.¹

¹ On March 19, 2019, Mr. Smith signed, before a Notary, a Financial Affidavit to obtain a waiver of the filing and service fees required for his law suit. He filed it with the Circuit Clerk on March 25, 2019. Therein he swore that his yearly expenses for rent, food, utilities, cell phone, and miscellaneous were \$14,160.00, \$5,160.00 greater than his stated annual net income of \$9,000.00.

SUMMARY OF ARGUMENT

There is no law, known to the Clerk, or counsel, that requires her to allow Mr. Smith, or anyone, to photograph the records under her control, free of charge. She was trained to charge for copies of documents leaving her office.

WV Code §59-1-11, titled Fees to be Charged by the Clerk of the Circuit Court, provides: (a) The Clerk of a Circuit Court shall charge and collect for services rendered by the Clerk the following fees which shall be paid in advance by the parties for whom services are to be rendered. Subsection (b)(2) says for a transcript, **copy**, or paper, made by the Clerk for use in any other Court, or otherwise, **to go out of the office, for each page \$1.00**. The history of the statute shows that the Legislature, since 1872, has statutorily designated the fees to be charged by the Circuit Clerk, for the last 156 years.

The other statute involved, in this Appeal, deals with FOIA, WV Code §29B-1-3. It provides “the public body may establish fees reasonably calculated to reimburse it for its actual costs in making reproductions of records.

The two statutes are in conflict. The Legislature in one instance requires the Circuit Clerk to charge \$1.00 for every copy leaving their office. Mr. Smith was wanting to take digital images, and the resulting copies of the criminal files from her office, free of charge. Her interpretation of the law, under §59-1-11(b)(2), required her to charge Mr. Smith \$1.00 for any copy of a document leaving her office. Mr. Smith argues that he is permitted to take pictures of the documents in the Circuit Clerk’s office, free of charge.

Mr. Smith, the Petitioner, argues that the FOIA statute overrules all other existing laws with regard to fees. It is conceded that the two areas of law are in conflict.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondents do not believe that oral argument is necessary in this matter. The Respondents believe that this case is appropriate for a memorandum decision.

1. THE TRIAL COURT ERRED BY DISMISSING SMITH'S COMPLAINT AGAINST THE DEFENDANTS IN REGARD TO SMITH'S REQUEST TO BE ALLOWED TO TAKE DIGITAL IMAGES OF PUBLIC DOCUMENTS WITHOUT BEING CHARGED ONE DOLLAR (\$1.00) PER IMAGE.

There is no WV Statute, or Supreme Court decision that required the Circuit Clerk to allow Mr. Smith, or anyone, to take pictures of documents in the Circuit Clerk's office, free of charge.

WV Code §59-1-11(b)(2) states in pertinent part (emphasis added) the following fees shall be charged and collected for a transcript, copy, or paper made by the Clerk for use in any other Court, or otherwise **to go out of the office, for each page \$1.00.**

When Mr. Smith appeared, and wanted to take pictures of the contents of the files in the Circuit Clerk's office, no one can argue that the images he would have taken would not have been copies of the documents, and if Mr. Smith left with the copies, no one can argue that the copies hadn't gone out of the Circuit Clerk's office. Mr. Smith did not, in any way, comply with §59-1-11(b)(2). His argument is that he didn't have to because it is not the applicable law.

In none of the Circuit Clerk's training was she instructed that individuals are permitted, free of charge, to make copies of the documents under her control by photographing them.

The Circuit Clerk, from her training, believed that she was required, by law, to charge \$1.00 for any copy leaving her office, whether it was one she made, or one made by his camera. The Circuit Clerk of Grant County did what she believed she was required to do to comply with her training, and WV Code §59-1-11(b)(2), when she told Mr. Smith his copies would be \$1.00 per

copy. Mr. Smith made no attempt to comply. He refused to pay.

2. THE TRIAL COURT ERRED BY DISMISSING SMITH'S COMPLAINT AGAINST THE DEFENDANTS IN REGARD TO SMITH'S REQUEST THAT HE BE PROVIDED COPIES OF PUBLIC DOCUMENTS PURSUANT TO A FOIA REQUEST BASED ON LAW WHICH IS NOT APPLICABLE TO THIS MATTER.

Mr. Smith's position with regard to his FOIA request, is clearly untenable. When he made his FOIA request to the Circuit Clerk for the documents he desired, he had no authority to send \$5.00 to cover the cost, and expect the Clerk to accept it. Under the FOIA statute, the Clerk determines the cost, not Mr. Smith. He did not permit the Circuit Clerk to determine her actual cost for the requested documents. He didn't allow the Circuit Clerk any input in determining what the reasonable fee for the requested documents should be, as required, under the FOIA statute.

The Circuit Court of Grant County is still a paper circuit. E-filing is not required. It may be that Mr. Smith believed that there was some kind of a computer button that the Circuit Clerk may have been able to push, and automatically load what he requested onto a disc. That was not, and is not, the case.

The Circuit Clerk did not deny Petitioner Smith's FOIA request. When Mr. Smith was asked by the Circuit Clerk for clarity in his request, his response was to file suit, Pro Se, in the lower Court, against the Circuit Clerk and the Grant County Commission as he has done, on multiple occasions against other Circuit Clerks, in this State.

Mr. Smith can't argue that he complied with the FOIA statute, or that the Clerk did something wrong. He did not respond to the Circuit Clerk's request for clarity. He did not permit the Clerk any input in determining the cost of the requested items. When the Clerk didn't do as he demanded, he filed suit.

At the time of the submission of this Summary Response, 3 things are certain:

1. There is no law, or Supreme Court decision, requiring Circuit Clerks to allow anyone to take pictures of the documents under their care, free of charge.

2. WV Code §59-1-11(b)(2) tells our Circuit Clerks what fees they are to charge for copies leaving their office. Mr. Smith refused to pay the \$1.00 per copy, by the Circuit Clerk, and left.

3. The FOIA statute, particularly WV Code §29B-1-3, provides for how the cost of a FOIA request is to be determined. Mr. Smith did not allow the Circuit Clerk to determine the actual cost. He did not respond to her request for clarification. He refused to comply with the FOIA statute either.

At the time of the hearing for the Motion to Dismiss, Mr. Smith's Complaint, the Circuit Court learned from the pleadings, the arguments, and Mr. Smith's representations that: Mr. Smith didn't provide authority for being permitted to take pictures of the documents, in the Circuit Clerk's office free of charge; Mr. Smith admitted he didn't comply with the Clerk's proposed charge under WV Code §59-1-11(b)(2); Mr. Smith did not comply with the FOIA statute by not responding to the Clerk's request for clarity, and not allowing the Circuit Clerk's input in to determining her actual costs under the FOIA statute, before filing suit. The Circuit Court was absolutely correct in dismissing Mr. Smith's action.

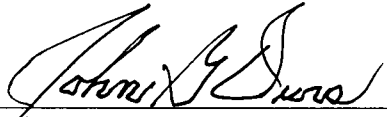
CONCLUSION

The Circuit Court did not err in dismissing Petitioner's action. The dismissal came, first, as a result of the Petitioner not providing unto the Circuit Court authority that he was entitled to photograph the documents in the Circuit Clerk's office without cost. Second, he refused to pay the \$1.00 copy fee for the documents under §59-1-11(b)(2). Third, under his FOIA request, he did not

comply with the Clerk's clarity request, or allow her to determine the cost. He instead filed suit. The Circuit Court was correct. Dismissal was appropriate.

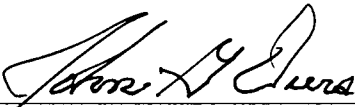
Respondents urge the West Virginia Supreme Court to uphold the decision of the Circuit Court of Grant County in dismissing the Petitioner's action.

STATE OF WEST VIRGINIA

By: 
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Petersburg, WV 26847
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CERTIFICATE OF SERVICE

I, John G. Ours, Prosecuting Attorney for Grant County, do hereby certify that I have served a copy of the foregoing *SUMMARY RESPONSE*, by mailing true copies thereof to Robert W. Bright, counsel for Petitioner, to his mailing address of 278 S. 5th Ave., Middleport, OH 45760; on this the 22nd day of November, 2019.


John G. Ours
Prosecuting Attorney