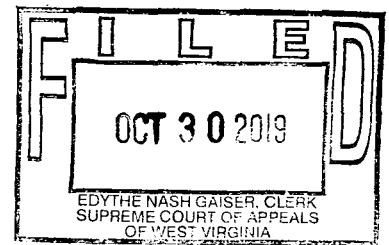


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IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
NO. 19-0679
(19-C-7)

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. Van Meter
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

PETITIONERS' APPEAL BRIEF

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WEST VIRGINIA STATUTORY LAW

<i>W.Va. Code 29B-1-3</i>	5,11,12,13
<i>W.Va. Code 59-1-11</i>	5,10,11,12,13

CASE LAW AND ADMINISTRATIVE DECISIONS FROM OTHER STATES

Alabama

<i>Ala. Op. Atty. Gen. No. 2009-076</i> (Ala.A.G.), 2009 WL 1745598	
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Arizona

<i>Ariz. Op. Atty. Gen. No. I13-012</i> (Ariz.A.G.), 2013 WL 6410549	9
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Illinois

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Louisiana

<i>First Commerce Title Co., Inc. v. Martin</i> , 887 So.2d 716, 38, 903 (La.App. 2 Cir. 11/17/04)	7
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<i>Johnson v. City of Pineville</i> , 9 So.3d 313, 2008-1234 (La.App. 3 Cir. 4/8/09)	8
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Pennsylvania

<i>Muenz v. Reserve Twp.</i> , 2014 WL 10288926 (Pa.Off.Open Rec.)	6
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<i>Lynch v. Indiana Township</i> , 2018 WL 3494824 (Pa.Off.Open Rec.)	7
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<i>Debartola v. Cambria County District Attorney's Office</i> 2017 WL 2843927 (Pa.Off.Open Rec.)	7
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ASSIGNMENTS OF ERROR

1: THE TRIAL COURT ERRED BY DISMISSING SMITH'S COMPLAINT AGAINST THE DEFENDANTS IN REGARDS 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 REGARDS 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

Petitioner/Appellant Smith (hereinafter "Smith") is a freelance legal researcher and journalist who sought to obtain copies of certain public records from the Grant County Circuit Clerk's office (App. p. 3). At the Circuit Clerk's office, Smith requested to review State v. Kimberly Hartman, Case No. 18-F-22 (App. p. 3). Smith was provided with the file by a deputy clerk and informed that he was prohibited from using a camera to take pictures of any of the file's contents because it was the Clerk's "policy" (App. p. 3-4). Smith requested to see a copy of the policy. The deputy clerk deferred to Circuit Clerk Van Meter (App. p. 4).

Clerk Van Meter informed Smith that she was "obligated" to charge Smith \$1.00 per page for copies of documents. Smith informed Clerk Van Meter that he didn't need copies of the documents and that he could take digital images of the filings with his cell phone camera. Clerk Van Meter left, ostensibly to discuss the matter with Judge James Courier. Upon her return, Clerk Van Meter informed Smith that he could take digital images, but that Smith would still have to pay \$1.00 per page for each image he made. Van Meter stated that Circuit Clerks are required to charge for any reproduction of any document held by their office. Smith exited the premises (App. p. 4).

Smith then traveled to the Hardy County Circuit Clerk's office, was given access to public records (in digital format on a public access terminal), and was allowed to take digital images of a

number of documents in full view of the Circuit Clerk's staff and without objection. Smith was not asked to pay any fee for digital images he took at the Hardy County Circuit Clerk's office (App. p. 5). Smith has been permitted to take digital images of public records without charge at Circuit Clerk's offices in Clay, Gilmer, Jackson, Kanawha, Logan, Mason, Putnam, Roane, Tucker, and Wood counties (App. p. 6).

On or about November 30, 2018, Smith sent Clerk Van Meter a FOIA request asking for a copy of several documents in four (4) cases. Smith enclosed five dollars (\$5.00) as payment to cover costs of duplication and postage (App. p. 6).

Clerk Van Meter declined to provide the copies and stated that she was "*obligated to charge copy fees according to W.V. Code 59-1-11*" of one dollar (\$1.00) per page. Smith responded by noting that, on or about June 7, 2015, H.B. 2636 became law and revised the FOIA law at W.V. Code 29B to require that the fees charged for photocopying records be "reasonable" and based on the "actual cost" of duplication. Smith persisted with additional, similar requests, which were all denied for similar reasons (App. p 7-8).

Smith then filed suit in the Grant County Circuit Court against the Defendants (App. p. 10). The Defendants answered and filed motions to dismiss (App. p. 28, 30, 38). After a brief hearing held on June 18, 2019, the Court below granted the Defendants' Motions to Dismiss by Order dated July 1, 2019 (App. p. 42). Smith appeals from that Order.

The issue of whether or not a Circuit Clerk can charge a person for taking photographs of documents in the Circuit Clerk's office appears to be an issue of first impression in this Court. Several other states have decided that people should be allowed to take photos of official documents without being charged a fee for doing so.

SUMMARY OF ARGUMENT

The statutes relevant to Petitioner Smith's Assignments of Error state in pertinent part (emphasis added):

"The clerk of a circuit court shall charge and collect for services rendered by the clerk the following fees... 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..." W.Va. Code 59-1-11.

"The public body may establish fees reasonably calculated to reimburse it for its actual cost in making reproductions of records." W.Va. Code 29B-1-3.

Petitioner Smith argues that the above statutes do not require Circuit Clerks to charge people for taking photographs of documents in the Circuit Clerk's office. Petitioner Smith also argues that the applicable statutes explicitly or implicitly require the Circuit Clerk to only charge fees reasonably calculated to reimburse it for its actual cost in making reproductions of records. In other words, the applicable statutes presume that a Circuit Clerk is not to treat the making of copies or images of documents in the Circuit Clerk's office as a means of revenue generation.

As such, Smith argues that it is impermissible for a Circuit Clerk to charge any fee for images made by the individual using their own cell phone camera or similar apparatus. Such images do not require the Circuit Clerk to "make" anything or to "render" any services, and certainly do not result in any cost to the Circuit Clerk.

While this issue appears to be an issue of first impression with this Court, several other states have decided that people should be allowed to take photos of official documents without being charged a fee for doing so.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner Smith does not believe that Oral Argument is necessary in this matter. Petitioner Smith believes this case is appropriate for Memorandum Decision.

ARGUMENT

DISCUSSION OF HOW THE PRIMARY ISSUE IS HANDLED IN OTHER STATES

Because the primary issue in this case appears to be an issue of first impression with this Court, Petitioner Smith asks the Court to consider the way other states have handled the issue before advancing to the argument on Petitioner's Assignments of Error. The way those other states have handle the issue may be applicable to both of Petitioner's Assignments of Error.

Pennsylvania

The Pennsylvania Office of Open Records administers the Pennsylvania Right-to-Know Law ("RTKL") which went into effect in 2008-2009. In *Muenz v. Reserve Twp.*, 2014 WL 10288926 (Pa.Off.Open Rec.), the Pennsylvania Office of Open Records addressed the issue of an individual who requests to take photos of official documents and issued an Amended Final Determination on August 14, 2015¹. In that Amended Final Determination, the Pennsylvania Office of Open Records held that (emphasis added):

Allowing an agency which lacks separate statutory authority to set a fee schedule prohibiting the photographing of documents would be contrary to the purpose of the RTKL, which is "to maximize access to government records." See *Gingrich v. Pa. Game Comm'n*, No. 1254 C.D. 2011, 2012 Pa. Commw. Unpub. LEXIS 38 at *16 (Pa. Commw. Ct. 2012). To hold otherwise would not only permit agencies to allow the public to inspect public records, but would also, **following the reasoning to its logical conclusion, permit agencies to prohibit the public from taking written notes about public records or recording an audio dictation describing**

¹ Determination also found at" <https://www.openrecords.pa.gov/Documents/FinalDet/18005.pdf>

public records. Such an interpretation of the RTKL would lead to an absurd and unreasonable result, and cannot be said to have been the intention of the General Assembly. See *1 Pa.C.S. § 1922*. Therefore, under Section 701(a) of the RTKL, the Township must make responsive records available to the Requester for his inspection and duplication by photography.

See also: *Lynch v. Indiana Township*, 2018 WL 3494824 (Pa.Off.Open Rec.); *Debartola v. Cambria County District Attorney's Office*, 2017 WL 2843927 (Pa.Off.Open Rec.).

Florida

The Office of the Attorney General of Florida has prepared **FLORIDA'S GOVERNMENT-IN-THE-SUNSHINE MANUAL AND PUBLIC RECORDS LAW MANUAL**². The Manual summarizes Florida's laws applicable to issues similar to the ones in this case at pages 178-179 (emphasis added):

10. Requester makes his/her own copies

Section 119.07(3)(a), F.S., provides a "right of access to public records for the purpose of making photographs of the record while such record is in the possession, custody, and control of the custodian of public records." This subsection "**applies to the making of photographs** in the conventional sense by use of a camera device to capture images of public records...". Section 119.07(3)(b), F.S. The photographing is to be done in the room where the public records are kept... In such cases **the custodian may not charge the copy charges** authorized in s.119.07(4)(a), F.S....

Louisiana

In *First Commerce Title Co., Inc. v. Martin*, 887 So.2d 716, 38, 903 (La.App. 2 Cir. 11/17/04), the Court considered a case in which a "Title company brought action against clerk of court seeking declaratory judgment ordering clerk to permit the use of a portable scanner in the

² The manual can be found at:
[http://myfloridalegal.com/webfiles.nsf/WF/MNOS-B9QQ79/\\$file/SunshineManual.pdf](http://myfloridalegal.com/webfiles.nsf/WF/MNOS-B9QQ79/$file/SunshineManual.pdf)

clerk's offices.” The Trial Court ruled in favor of the Clerk of Court. The Court of Appeals reversed and concluded that (emphasis added):

... the clerk of court of Bienville Parish is hereby ordered to permit the use of a **hand-held scanner** in the clerk of court's office to **copy public records** during normal business hours **at no charge**.

See also: *Johnson v. City of Pineville*, 9 So.3d 313, 2008-1234 (La.App. 3 Cir. 4/8/09), referencing *First Commerce, supra*.

Illinois

In *People ex rel. Gibson v. Peller* (1962), 34 Ill.App.2d 372, 181 N.E.2d 376, the Illinois Appellate Court - First District, Second Division considered a case in which the Plaintiffs “*brought a professional photographer with them to enable them to photographically reproduce the records*” of the Board of Education. The Court held that (emphasis added):

Defendants say that relators have the right to look, examine and inspect with the naked eye the public records and copy by hand these public records, but that they **have no right to photograph the records. This argument cannot be sustained by logic or common knowledge. Modern photography is accurate, harmless, noiseless and time saving. It does nothing more than capture that which is seen with the naked eye.** Neither defendants nor the public can be harmed by the reproduction of the records exactly as they exist. The fact that more modern methods of copying are devised should not lessen the basic right given under the common law.

Alabama

The Alabama Attorney General issued an extensive opinion on the issue which can be found at: *Ala. Op. Atty. Gen. No. 2009-076* (Ala.A.G.), 2009 WL 1745598, and which states in pertinent part (emphasis added):

If possible, **a public agency should provide free copies of public records.** However, **if budgetary constraints** prevent this, then **a public agency may**

charge a nominal fee, if necessary, to cover its costs of providing copies of public records... 184 Op. Ala. Att'y Gen 27 (August 25, 1981)...

... the fee charged should be limited to the actual cost of providing information to the public, so long as those costs are reasonable. An excessive fee should not be charged as the public's right to a copy of public records should not be restricted. 240 Op. Ala. Att'y Gen. 16 (July 17, 1995), 240 Op. Ala. Att'y Gen. 17 (July 20, 1995)...

The regular copy fee may not be assessed if individuals use personal cameras or other electronic devices to make a copy of a public record.

Arizona

The Attorney General of Arizona has also addressed the issue in *Ariz. Op. Atty. Gen. No. 113-012* (Ariz.A.G.), 2013 WL 6410549 (emphasis added):

A public body may charge copying fees under Arizona's public records law only if the public body itself makes the copies using public resources and furnishes them to the requesting party. In the event that a member of the public seeks to inspect public records and make copies using his or her own personal device, Arizona's public records law does not allow a public body to charge a fee.

It is clear that other states have found that individuals have a right to photograph public records and that those states prohibit individuals from being charged “copying” fees for making photographs of public records. Additionally, other states often hold that an charges for the clerk making actual paper copies must be limited to an amount sufficient to cover the actual costs of making those copies.

Of particular note is that - all the way back in 1962, the Illinois Court in *People ex rel. Gibson v. Peller, supra*, found that “*Modern photography is accurate, harmless, noiseless and time saving.*”. Now that we’re in 2019 - nearly 60 years later - “modern” photography is even more accurate, harmless, noiseless, and time saving than it was in the ‘60s.

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

W.Va. Code 59-1-11 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..."

Additionally, the beginning of *W.Va. Code 59-1-11* reads (emphasis added): "The clerk of a circuit court shall charge and collect for services rendered by the clerk the following fees...". In relation to copies of public documents in the Circuit Clerk's office, it is clear that the purpose of the fees/charges contemplated by *W.Va. Code 59-1-11* is to compensate the Clerk for services rendered and for the cost of materials used up by the copying process. The fees/charges are not intended to be a means of revenue generation.

While *W.Va. Code 59-1-11* does clearly require Circuit Clerks to charge \$1.00 per copy for every copy **made by the clerk**, that statute does not in any way address the issue of private citizens taking digital images of public documents at the Circuit Clerk's office.

Preparing a transcript/paper, or making copies of documents requires the Clerk to do something. Such activities also use up materials such as ink/toner, paper, staples, etc... When a private citizen such as Smith uses their own cell phone camera or other camera to make digital images of public documents, no materials or supplies are used up and the digital images are not required to be "*made by the clerk*". The Clerk doesn't have to make, do anything, or even render a service after the Clerk has located the file and handed it to the private citizen.

As such, there is no reasonable basis in the statute for a Circuit Clerk to charge a private citizen one dollar (\$1.00) per page for digital images of those pages made by the private citizen with

the private citizen's own camera. Earlier in this brief, Petitioner provided the Court with authority from other states which supports Petitioner's position in this matter.

Wherefore, Petitioner/Appellant Smith asserts that the Grant County Circuit Court erred in dismissing Smith's Complaint filed against the Defendants and moves this Court to reverse the decision of the Circuit Court and remand the case for discovery and trial.

2: THE TRIAL COURT ERRED BY DISMISSING SMITH'S COMPLAINT AGAINST THE DEFENDANTS IN REGARDS 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

In relation to FOIA requests, *W.Va. Code 29B-1-3* states in pertinent part: "*The public body may establish fees reasonably calculated to reimburse it for its actual cost in making reproductions of records.*"

The Circuit Clerk's position in the matter was/is that *W.Va. Code 59-1-11* is applicable to FOIA requests and, therefore, the Clerk is required by law to charge Smith - or any other person - one dollar (\$1.00) per page of copies made by the Clerk.

However, there is nothing in either code section explicitly stating or even implying that *W.Va. Code 59-1-11* is in any way applicable to the FOIA statute codified at *W.Va. Code 29B-1-3*. Additionally, *W.Va. Code 29B-1-3* is applicable to "*any public record of a public body in this state*" specifically in relation to FOIA requests made to those public bodies. Therefore, FOIA requests made under *W.Va. Code 29B-1-3* are outside the scope of the "normal" request for copies from a Circuit Clerks office which are governed by *W.Va. Code 59-1-11*.

As such, when a FOIA request is made to a Circuit Clerk, the Clerk is merely a "public body" and is required to comply with the terms of *W.Va. Code 29B-1-3*. The relevant portion of that Code

section states (emphasis added): “*The public body may establish fees **reasonably calculated to reimburse it for its actual cost in making reproductions of records.***”

That provision of *W.Va. Code 29B-1-3* is consistent with the authority from other states that Petitioner Smith referred to earlier in this brief. Which, stated another way, is that making copies of public records was not and is not intended to be a means of revenue generation for government offices which control and maintain those public records. It is often necessary for individual citizens to obtain copies of public records for a variety of reasons. The cost of obtaining those necessary public records should be no more than the actual cost of making those copies.

As such, Petitioner Smith’s position in this matter has been and is that one dollar (\$1.00) per copy is not reasonably calculated to reimburse the Clerk for its actual cost in making copies of public documents.

Certainly, the issue of the actual cost of making copies could be debated if it were based on evidence presented by the parties. One dollar (\$1.00) per copy does seem to be a common fee for paper copies at Courthouses (likely because of *W.Va. Code 59-1-11*, at least in relation to general requests for copies at Circuit Clerk’s offices).

On the other hand, Appellant Smith’s Counsel generally charges \$0.10 per copy to his clients and finds that \$0.10 per copy is sufficient to cover the costs related to those copies. Smith’s counsel is aware of other attorneys that have historically charged a similar amount to their clients for copies. A library in Petitioner’s Counsel’s city charges \$0.25 per copy - which is still 75% less than the Clerk attempted to charge Smith. Presumably the library considers that sufficient to cover the costs related to those copies.

It is undoubtedly possible that the Circuit Clerk's copier requires a special toner that is exorbitantly expensive. Or that the Circuit Clerk leases its copier and the lease costs are very high.

But we don't know any of that - because discovery was not conducted and there was no evidence or testimony below to establish what the Clerk's actual cost of making copies of public records is. As such, the Circuit Court's dismissal of Smith's complaint against the Defendants was and is premature and should be reversed for discovery to proceed.

Additionally, similar to *W.Va. Code 59-1-11*, *W.Va. Code 29B-1-3* also refers to the public body "making" copies. So we're back to the issue of what constitutes "making". Making copies of documents requires the Clerk to do something. Such activities also use up materials such as ink/toner, paper, staples, etc... When a private citizen such as Petitioner Smith uses their own cell phone camera or other camera to make digital images of public documents, no materials or supplies are used up and the digital images are not required to be "*made by the clerk*". The Clerk doesn't have to make, do anything, or even render a service after the Clerk has located the file and handed it to the private citizen.

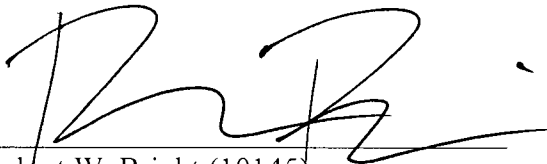
As such, there is no reasonable basis in the statute for a Circuit Clerk to charge a private citizen one dollar (\$1.00) per page for digital images of those pages made by the private citizen with the private citizen's own camera.

Wherefore, Petitioner/Appellant Smith asserts that the Grant County Circuit Court erred in dismissing Smith's Complaint filed against the Defendants as premature and moves this Court to reverse the decision of the Circuit Court and remand the case for discovery and trial.

CONCLUSION

Wherefore, for all of the above reasons, Petitioner Jay Lawrence Smith moves the Court to reverse the decision of the Trial Court and remand this matter to proceed towards discovery and Trial.

**Jay Lawrence Smith
By Counsel,**



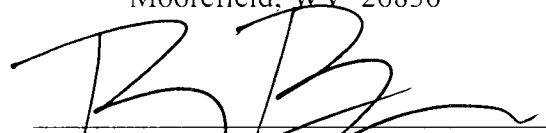
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CERTIFICATE OF SERVICE

I, Robert W. Bright, hereby certify that I served a true copy of the foregoing **PETITIONERS' APPEAL BRIEF** and related **PETITIONERS' APPENDIX** upon the following persons by U.S. Mail on the 29th day of October, 2019:

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