

BEFORE THE WEST VIRGINIA INTERMEDIATE COURT OF APPEALS

No. 23-ICA-248

ICA EFiled: Nov 01 2023
04:43PM EDT
Transaction ID 71285507

**CHARLESTON GAZETTE-MAIL d/b/a
HD MEDIA, LLC,**

Petitioner, Plaintiff below,

v.

**WEST VIRGINIA UNIVERSITY
BOARD OF GOVERNORS,**

Respondent, Defendant below.

PETITIONER'S REPLY BRIEF

APPEAL FROM THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

Lonnie C. Simmons (W.Va. I.D. No. 3406)
Robert M. Bastress, III (W.Va. I.D. No. 9616)
DIPIERO SIMMONS MCGINLEY & BASTRESS, PLLC
P.O. Box 1631
Charleston, West Virginia 25326
(304) 342-0133
lonnie.simmons@dbdlawfirm.com

Counsel for Petitioner Charleston Gazette-Mail d/b/a HD Media, LLC

TABLE OF CONTENTS

I. Introduction 1

II. Discovery is not required for a litigant to prevail under the WVOGPA 2

III. Respondent’s reliance on “expert” witnesses is misplaced 5

IV. The circuit court’s expansive view of the “commercial competition”
exception effectively would repeal the WVOGPA if accepted by this Court 5

V. The circuit court’s wholesale adoption of the exemptions in the
Freedom of Information Act (FOIA) into the WVOGPA has no
basis under either these statutes or the case law 7

VI. Conclusion 7

TABLE OF AUTHORITIES

West Virginia Cases:

<i>Capriotti v. Jefferson County Planning Commission</i> , 2015 WL 869318 (No. 13-1243, 2/26/2015) (Memorandum decision)	3
<i>France v. Southern Equipment Co.</i> , 225 W.Va. 1, 689 S.E.2d 1 (2010)	5
<i>Jackson v. State Farm Mutual Automobile Insurance Co.</i> , 215 W.Va. 634, 600 S.E.2d 346 (2004)	5
<i>Peters v. County Commission of Wood County</i> , 205 W.Va. 481, 519 S.E.2d 179 (1999)	6
<i>State ex rel. Marshall County Commission v. Carter</i> , 225 W.Va. 68, 689 S.E.2d 796 (2010)	4

Other Jurisdiction Cases:

Evergrass, Inc. v. Town of Lexington, 2004 WL 231320 (Mass.Sup.Ct. 2004)	5
---	---

Miscellaneous:

W.Va.Code § 6-9A-4(b)(9)	5
W.Va.Code §6-9A-6	4
W.Va.Code §6-9A-7	3
W.Va.Code §6-9A-12	2
https://ago.wv.gov/publicresources/Documents/2017-3-10%20Open%20Meetings%20Booklet%20(Q0236711xD6D48).pdf	2

BEFORE THE WEST VIRGINIA INTERMEDIATE COURT OF APPEALS

No. 23-ICA-248

**CHARLESTON GAZETTE-MAIL d/b/a
HD MEDIA, LLC,**

Petitioner, Plaintiff below,

v.

**WEST VIRGINIA UNIVERSITY
BOARD OF GOVERNORS,**

Respondent, Defendant below.

PETITIONER’S REPLY BRIEF

APPEAL FROM THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

I. Introduction

To the Honorable Judges of the West Virginia

Intermediate Court of Appeals:

In its brief, Respondent West Virginia University Board of Governors seeks to persuade this Court that the unsupported and unprecedented final orders issued by the Circuit Court of Monongalia County effectively nullifying the clear intent and substance of the West Virginia Open Governmental Proceedings Act (WVOGPA) ought to be affirmed. It is very telling that in reviewing Respondent’s brief and its table of authorities, Respondent was unable to find **any decision** from any court in the country supporting the novel rulings issued by the circuit court.

Petitioner Charleston Gazette-Mail d/b/a HD Media, LLC respectfully submits the summary judgment orders challenged in this appeal have to be reversed to be consistent with well established

West Virginia case law as well as the Legislature’s clearly stated intent that “it is, therefore, in the best interests of the people of this state for the proceedings of public agencies be conducted openly, with only a few clearly defined exceptions.” Fundamentally, the circuit court based its rulings on an overly expansive interpretation of the WVOGPA’s limited exceptions to a public meeting rather than applying them in the narrow fashion mandated by the Legislature and as demonstrated by decisions from the West Virginia Supreme Court.

II. Discovery is not required for a litigant to prevail under the WVOGPA

Throughout its brief, Respondent criticizes Petitioner’s deliberate decision not to conduct any discovery in this case. Respondent magnifies this criticism by lauding its own efforts to conduct some discovery and to obtain expert witnesses, one of whom actually is employed by West Virginia University while the other used to be a member of Respondent.

As the West Virginia Attorney General explains in **THE WEST VIRGINIA OPEN GOVERNMENTAL MEETINGS ACT**, the WVOGPA is intended to be enforced by anyone: “Any citizen may bring a legal action in the circuit court of the county where the public agency regularly meets to enforce the provisions of the Act.”¹ Every citizen has the legal right to challenge whether or not under the WVOGPA a governing body abided by its statutory obligation to provide proper notice of a public meeting and to conduct the meeting open to any interested person. Neither the guidelines provided by the Attorney General nor any provision in the WVOGPA requires a litigant to engage in written and deposition discovery in order to prevail in an enforcement action.

¹This online guide created by the West Virginia Attorney General pursuant to W.Va.Code § 6 - 9 A - 1 2 , [https://ago.wv.gov/publicresources/Documents/2017-3-10%20Open%20Meetings%20Booklet%20\(Q0236711xD6D48\).pdf](https://ago.wv.gov/publicresources/Documents/2017-3-10%20Open%20Meetings%20Booklet%20(Q0236711xD6D48).pdf).

For example, WVOGPA’s mandatory notice requirement, which the circuit court **agreed** had been violated by Respondent in connection with the notice filed for the June 19, 2020 meeting, speaks for itself and does not otherwise require any discovery, other than an examination of the notice. All Petitioner had to do on this issue was to ask the circuit court to review that particular notice. The circuit court, after citing and discussing *Capriotti v. Jefferson County Planning Commission*, 2015 WL 869318 (No. 13-1243, 2/26/2015)(Memorandum decision), specifically held, “Defendant violated the WVOGPA by publishing an inadequate Meeting Agenda prior to the June 19, 2020, meeting. Specifically, the Court finds that the Potential Executive Session items were generic descriptions insufficient to provide enough information to adequately place the public and the media on notice of the particular items that it intended to discuss.”² (JA 623). Despite this specific finding, the circuit court nevertheless chose not to enforce this mandatory statutory provision by concluding, without citing any statute or case law, that this violation was “technical” and therefore would not be enforced under the WVOGPA.

Simply dismissing out of hand this violation of the WVOGPA is inconsistent with the significance the Legislature has placed on the laudable goals sought to be achieved under this law. A violation of the WVOGPA can trigger criminal penalties against anyone responsible. W.Va.Code §6-9A-7. No matter how it is analyzed, a violation is a violation, regardless of whether the violation is labeled as being “technical.”

²In its brief, Respondent challenges this ruling by the circuit court and seeks to distinguish the *Capriotti* decision. (**BRIEF OF RESPONDENT** at 26-28). The holding in *Capriotti* is on point and the circuit court was correct in finding the agenda notice for the June 19, 2020 meeting violated the WVOGPA.

Petitioner could have deposed all members of Respondent to get their recollections of everything that was said during the many executive sessions at issue. In these depositions, these members would have been required to provide their complete recollections of the matters discussed in executive session because the Legislature did not provide any evidentiary privilege in the WVOGPA. In Syllabus Point 4 of *State ex rel. Marshall County Commission v. Carter*, 225 W.Va. 68, 689 S.E.2d 796 (2010), the West Virginia Supreme Court held:

The provision of the Open Governmental Proceedings Act, W. Va.Code §§ 6-9A-1 to 6-9A-12, that recognizes a specific and limited right of governing bodies to meet in an executive session which is closed to the public is not intended to prevent the legitimate discovery in a civil action of matters discussed in an executive session which are not otherwise privileged.

However, the purpose of an enforcement action filed under the WVOGPA is not simply to learn, after the fact, what was discussed by the governing body when it illegally went into executive session, but rather is to require the governing body to follow the law by holding open meetings and only to use executive sessions to discuss those few issues where a narrow exception applies. Ideally, an enforcement action under the WVOGPA should be resolved quickly due to the interest members of the public have in requiring their public officials to participate in hearings open to anyone interested in observing the decision-making process.

Prolonged litigation over the failure of a governing body to abide by the WVOGPA defeats the purposes of this law and frustrates the Legislature's clear intent to have these enforcement actions move expeditiously. That is why a citizen has only 120 days after a governing body has violated the WVOGPA to file an enforcement action. W.Va.Code §6-9A-6. However, as demonstrated by this case, Petitioner's efforts to avoid complicating the record with lots of discovery requests,

depositions, and expert witnesses nevertheless has resulted in these parties still litigating over illegal hearings that occurred in 2020.

Ultimately, Petitioner's decision to rely on the undisputed facts and not to conduct any discovery is a red herring designed to divert the Court's attention from Respondent's blatant violations of the WVOGPA and the circuit court's unfathomable rulings.

III. Respondent's reliance on "expert" witnesses is misplaced

Although Petitioner addressed Respondent's improper reliance on expert witnesses in its initial brief, Petitioner feels compelled to mention it again as a result of some comments in Respondent's brief. Despite the specific holding by the circuit court that "expert witness affidavits, expressing opinions on whether the Defendant violated the WVOGPA, are inadmissible and will not be considered by the Court," (JA 618), Respondent nevertheless relies upon various expert opinions in its brief. (**BRIEF OF RESPONDENT** at 14-15). The circuit court's ruling that these expert witness opinions were inadmissible is consistent with multiple decisions from the West Virginia Supreme Court. Syllabus Point 10, *France v. Southern Equipment Co.*, 225 W.Va. 1, 689 S.E.2d 1 (2010); *Jackson v. State Farm Mutual Automobile Insurance Co.*, 215 W.Va. 634, 600 S.E.2d 346 (2004); *Evergrass, Inc. v. Town of Lexington*, 2004 WL 231320, n.11 (Mass.Sup.Ct. 2004).

Therefore, as the Court analyzes the various holdings rendered by the circuit court, the expert opinions offered by Respondent should not be considered.

IV. The circuit court's expansive view of the "commercial competition" exception effectively would repeal the WVOGPA if accepted by this Court

The circuit court accepted Respondent's assertion that the "commercial competition" exception under the WVOGPA, W.Va.Code §6-9A-4(b)(9), is so broad that it justified barring the public from observing Respondent discuss University budgets, tuition and fees, athletics, emergency

leave policy, social injustice on campus, COVID-19 response, deliberative matters relating to capital projects, and the business college.³ In light of this wide variety of topics, it would be a challenge trying to identify a topic, under the circuit court’s analysis, that would not be subject to this amorphous exception.

In its initial brief, Petitioner cited cases demonstrating how this very limited exception should be interpreted and applied. Respondent simply disagrees with this analysis. Rather than repeat these same arguments, Petitioner will rely on the jurisprudence provided in its initial brief.

However, it should be evident from the broad manner in which the circuit court applied this commercial competition exception that governing bodies would be able to cite this exception to bar the public from observing deliberations over virtually any topic. While Respondent criticizes Petitioner’s arguments that this exception must be narrowly construed, that is, in fact, the proper standard. When the West Virginia Supreme Court addressed the argument about whether discussions of matters covered by the attorney-client privilege can be the basis for an exception from the public meeting requirement under the WVOGPA, which has no such express exception, the West Virginia Supreme Court nevertheless held that “such exemption must be **narrowly drawn so as to not abrogate the spirit and purpose of the Act.**” (Emphasis added). *Peters v. County Commission of Wood County*, 205 W.Va. 481, 489, 519 S.E.2d 179, 187 (1999).⁴ These same

³Despite Respondent’s overarching concern about commercial competition, it had no problem obtaining the services of two out-of-state experts, who had been employed by “competing” colleges and sharing the facts regarding Respondent’s executive sessions challenged herein.

⁴As to the attorney-client privilege issue, Respondent argues that it followed the procedure outlined by the West Virginia Supreme Court in both of the *Peters*’ decisions. Petitioner explained this argument in some detail in its initial brief and will not rehash those arguments again. However, it is clear Respondent failed to comply with the procedure required by these decisions and, therefore, the circuit court erred in applying the attorney-client privilege under these facts.

concerns about not abrogating the spirit and purpose of the WVOGPA apply with respect to the commercial competition exception.

V. The circuit court's wholesale adoption of the exemptions in the Freedom of Information Act (FOIA) into the WVOGPA has no basis under either these statutes or the case law

Neither Respondent nor the circuit court cited any provision where the Legislature incorporated into the WVOGPA every exemption contained in the FOIA nor has any case been cited for this proposition. Quite clearly there is no legal basis for this conclusion, yet the circuit court and Respondent seek to persuade this Court to affirm this part of the orders as well. Throughout Respondent's arguments and brief, it fails to recognize that one of the main goals of the WVOGPA is to permit the public to observe the decision-making process. By providing the full context leading up to the final decisions made, the public has a better understanding about how the decisions were reached.

The complete lack of any legal authority supporting this novel ruling by the circuit court alone is enough to require the reversal of the circuit court. If the Legislature had wanted to incorporate all of the FOIA exemptions into the WVOGPA, it could have done so very easily. However, the Legislature never passed any statutes to that effect and it is error for a circuit court to act as a superlegislature by amending and redrafting the WVOGPA as requested by Respondent.⁵

VI. Conclusion

For the foregoing reasons, Petitioner HD Media, LLC d/b/a Charleston Gazette-Mail respectfully moves this Court to grant Rule 20 oral argument and after hearing these arguments, to

⁵As noted by Petitioner in its initial brief, in the event this Court reverses some or all of the rulings made by the circuit court, the proper procedure is for the Court to remand this case to the circuit court so that a record can be made on the attorneys' fees incurred by Petitioner in this litigation. Thus, the parties are in agreement on this procedural issue.

issue a Judge or Justice written decision reversing the final orders issued by the trial court, explaining in new Syllabus Points that the trial court erred in expansively reading the narrow exceptions to the WVOGPA, and remanding this case to the trial court to address an award of attorneys' fees and costs to Petitioner. Furthermore, Petitioner seeks such other relief as this Court deems appropriate.

**HD MEDIA, LLC d/b/a CHARLESTON
GAZETTE-MAIL**, Petitioner, Plaintiff below,

–By Counsel–

/s/ Lonnie C. Simmons

Lonnie C. Simmons (W.Va. Bar # 3406)

Robert M. Bastress III (W.Va. Bar # 9616)

DiPIERO SIMMONS McGINLEY & BASTRESS, PLLC

P.O. Box 1631

Charleston, West Virginia 25326

(304) 342-0133

lonnie.simmons@dbdlawfirm.com

rob.bastress@dbdlawfirm.com

BEFORE THE WEST VIRGINIA INTERMEDIATE COURT OF APPEALS

No. 23-ICA-248

**CHARLESTON GAZETTE-MAIL d/b/a
HD MEDIA, LLC,**

Petitioner, Plaintiff below,

v.

**WEST VIRGINIA UNIVERSITY
BOARD OF GOVERNORS,**

Respondent, Defendant below.

PETITIONER'S APPEAL BRIEF

APPEAL FROM THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

CERTIFICATE OF SERVICE

I, Lonnie C. Simmons, counsel for Plaintiff hereby certify that on November 1, 2023, a copy of **PETITIONER'S REPLY BRIEF** was served electronically on all counsel of record using File and Serve Xpress.

/s/ Lonnie C. Simmons
Lonnie C. Simmons (W.Va. Bar # 3406)