

IN THE SUPREME COURT OF
THE STATE OF FLORIDA

ANNIE B. SMITH,

Petitioner,

vs.

DEPARTMENT OF HEALTH AND
REHABILITATIVE SERVICES,

Respondent.

FILED
SID J. WHITE

CASE NO.: 70,440

JUL 16 1987

CLERK, SUPREME COURT
By *MW*
Deputy Clerk

PROCEEDING ON QUESTION OF GREAT PUBLIC IMPORTANCE
CERTIFIED BY THE SECOND DISTRICT COURT OF APPEAL

ANSWER BRIEF OF RESPONDENT

CHARLEEN C. RAMUS
Attorney for Respondent
Department of Health and
Rehabilitative Services
4000 West Buffalo Avenue
Suite 520
Tampa, Florida 33614
Telephone: (813) 272-2540

July 13, 1987

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii - iii
SUMMARY OF THE ARGUMENT	1
ARGUMENT	2
I. THE LOWER COURT CORRECTLY INTERPRETED FLORIDA STATUTE 57.081 IN DENYING PETITIONER'S MOTION TO COMPEL PREPARATION OF TRANSCRIPT WITHOUT PREPAYMENT OF COSTS	2
A. The Courts Need Only Give Effect To The Plain Meaning Of The Terms Of The Statute	2
B. Voluminous Case Law Supports The Denial Of A Free Transcript To An Indigent Appellant In A Noncriminal Administrative Appeal	4
II. THE LOWER COURT CORRECTLY INTERPRETED FLORIDA STATUTE 120.57 (1)(b) AND FLORIDA ADMINISTRATIVE CODE RULE 10-2.71 IN HOLDING THAT PREPARATION OF TRANSCRIPTS IN ADMINISTRATIVE APPEALS IS NOT AN AGENCY CLERK'S DUTY NOR FUNCTION	7
III. THE COURTS HAVE CONSISTENTLY HELD THAT THERE IS NO VIOLATION OF ARTICLE I, SECTION 21 AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION, IN DENYING AN INDIGENT A TRANSCRIPT WITHOUT COST	9
CONCLUSION	10
CERTIFICATE OF SERVICE	11

TABLE OF CITATIONS

	<u>Page</u>
<u>Cases:</u>	
<u>Bower v. Connecticut General Life Insurance Company,</u> 347 So.2d 439 (Fla. 3rd DCA 1977)	1,4,5,6,7
<u>Curran v. Florida Probation and Parole Commission,</u> 498 So.2d 629 (Fla. 1st DCA 1986)	6
<u>Fields v. Zinman,</u> 394 So.2d 1133 (Fla. 4th DCA 1981)	3
<u>Harrell v. Department of Health and Rehabilitative Services,</u> 361 So.2d 715 (Fla. 4th DCA 1978)	1,4,5,6,7,9, 10
<u>Harris v. Department of Corrections,</u> 486 So.2d 27 (Fla. 1st DCA 1986); Case No.: 69,793 (Fla. 1987)	1,4,5,6
<u>Hillman v. Federal National Mortgage Association,</u> 375 So.2d 336 (Fla. 4th DCA 1979)	5,7
<u>Kelly v. Department of Health and Rehabilitative Services,</u> 502 So.2d 42 (Fla. 1st DCA 1987); Case No.: 70,052 (Fla. 1987)	6
<u>Kirkpatrick v. Parker,</u> 187 So. 620 (1939)	10
<u>Kluger v. White,</u> 281 So.2d 1 (Fla. 1973)	10
<u>Lee v. City of Winter Haven,</u> 386 So.2d 268 (Fla. 2nd DCA 1980)	5,7
<u>Ortwein v. Schwab,</u> 410 U.S. 656, 93 S.Ct. 1172, 35 L.Ed.2d 572 (1973). Reh. denied 411 U.S. 922, 93 S.Ct. 1551, 36 L.Ed.2d 315 (1973)	1,9
<u>Roberts v. Unemployment Appeals Commission,</u> _____ So.2d _____ Nos: 87-106, 87-107, 87-302, 87-635, 87-779 (Fla. 3rd DCA May 26, 1987)	6
<u>Smith v. Department of Health and Rehabilitative Services,</u> 504 So.2d 801 (Fla. 2nd DCA 1987)	1,2,4,6,7,8,9, 10

	<u>Page</u>
<u>State v. Egan</u> , 287 So.2d 1 (Fla. 1973)	3
<u>Viaros v. Division of Retirement</u> , _____ So.2d _____ No.: 87-447 (Fla. 3rd DCA June 2nd, (1987))	6
 <u>STATUTES</u>	
Section 57.081, Fla. Stat. (Supp. 1986)	1,2,3,4,5,6, 7,10,11
Section 120.57 (1)(b) 7 (Supp. 1986)	1,2,7,8,9,11
Section 120.57 (1)(b) 6 (1978)	1,5,7,8,9,11
 <u>REGULATIONS</u>	
Fla. Admin. Code Rule 10-2.71	2,3,7,8
Fla. Admin. Code Rule 10-2.065	8
 <u>MISCELLANEOUS</u>	
Art. I, Section 21, Fla. Const.	9
Art. I, Section 9, Fla. Const.	9
BLACK'S LAW DICTIONARY 229 (5th Ed. 1979)	3

SUMMARY

Petitioner was properly denied a free transcript of her administrative proceedings. Florida Statute 57.081 allows an indigent to receive the services of the courts, sheriffs and clerks without charge, with respect to such proceedings. However, the legislature did not intend that transcription be a "service" of the Agency Clerk of the Department of Health and Rehabilitative Services and therefore, an indigent has no right to a transcript without payment of cost. The plain meaning of "clerk" and "services of the clerk" is clearly apparent on the face of 57.081 and as such, the Court need not use any extrinsic aid to statutory construction. The Smith court correctly cited Bower, Harrell and Harris as authority for its holding in denying Petitioner's Motion To Compel Preparation Of Transcript Without Prepayment Of Cost. The holdings of Bower, Harrell and Harris continue to be viable and recent case law even cites these decisions as authoritative.

Florida Statute 120.57 (1)(b) reads that the Agency shall preserve the testimony in administrative proceedings and make a transcript of the proceedings available at no more than actual cost. The Clerk is not designated as the transcriber and the Agency can delegate this job to any position within its structure. The Court was correct in stating that the statute and accompanying rule should not be read in such a broad sense so as to include transcription as an agency clerk's duties.

Additionally, there is no violation of the equal protection and due process provisions of the Florida Constitution as well as no violation of the access to courts provision, in denying an indigent a transcript without cost. The Harrell court spoke very clearly on these issues and correctly cited Ortwein, a United States Supreme Court case.

ARGUMENT

I. THE LOWER COURT CORRECTLY INTERPRETED FLORIDA STATUTE 57.081 IN DENYING PETITIONER'S MOTION TO COMPEL PREPARATION OF TRANSCRIPT WITHOUT PREPAYMENT OF COSTS.

Florida Statute 57.081 (Supp. 1986) states in relevant part,

Any indigent person who is a party or intervenor in any judicial or administrative agency proceeding or who initiates such proceeding shall receive the services of the courts, sheriffs, and clerks, with respect to such proceedings, without charge.

This appeal revolves around whether the above-mentioned "services of the clerk" includes the duty on the part of the Agency Clerk of the Department of Health and Rehabilitative Services to prepare a transcript from a formal "OPAH" hearing and include it as part of the record on appeal without payment of costs. The Second District Court of Appeal was correct in holding that it does not. Both the rules of statutory construction and voluminous case law support such a holding.

A. THE COURTS NEED ONLY GIVE EFFECT TO THE PLAIN MEANING OF THE TERMS OF THE STATUTE.

In speaking to the Agency's Formal Proceedings, Florida Statute 120.57 (1)(b) 7, states,

The agency shall accurately and completely preserve all testimony in the proceeding, and, on the request of any party, shall make a full or partial transcript available at no more than actual cost.

The Second District Court of Appeal in Smith, considered the above-mentioned statute in conjunction with Florida Administrative Code Rule 10-2.71 in deciding whether there is a requirement that the Agency Clerk prepare a free

transcript for indigent appellants. Florida Administrative Code Rule 10-2.71 provides that there is an initial fee for the transcript to be prepared by the agency. The Court stated that it was not inclined to interpret the statute and rule in such a broad sense so as to include transcription as an agency clerk's function. Thus, if transcription is not clearly a clerk's function in administrative appeals, there could be no requirement to provide a transcript without cost in the case of an indigent appellant. The Second District Court of Appeal was absolutely correct in declining to interpret the statute and rule in a broad sense.

Courts are to defer to the plain meaning of a statute:

Where the legislative intent as evidenced by a statute is plain and unambiguous, then there is no necessity for any construction or interpretation of the statute, and the courts need only give effect to the plain meaning of its terms.

Fields v. Zinman, 394 So.2d 1133 (Fla. 4th DCA 1981) citing, State v. Egan, 287 So.2d 1, 4 (Fla. 1973).

The primary definition of a clerk is one who is an officer of court who files pleadings, motions, judgments, etc..., issues process, and keeps records of court proceedings. BLACKS LAW DICTIONARY 229 (5th Ed. 1979). In looking at the plain meaning of Florida Statute 57.081, "clerk" means an officer of court and not of an administrative agency.

The plain meaning of "services of the clerk" is obvious. Clerk, in the legal sense of the word, is a court's clerk who is responsible for documenting court dates, filing papers, and keeping court records. Transcribing hearings to be included in appellate records is clearly not a service of a clerk. Thus, the plain meaning of "clerk", and "services of the

clerk" is clearly apparent on the face of Florida Statute 57.081, and courts need not use any extrinsic aid to statutory construction when the plain meaning of a statute is obvious, as it is here. The legislature's intent was to limit the function of the clerk to the ministerial nature as it has been traditionally and commonly known.

B. VOLUMINOUS CASE LAW SUPPORTS THE DENIAL
OF A FREE TRANSCRIPT TO AN INDIGENT APPELLANT
IN A NONCRIMINAL ADMINISTRATIVE APPEAL

The Second District Court of Appeal in Smith cites Bower, Harrell, and Harris in support of its holding that Florida Statute 57.081 does not authorize or require provision of a free transcript to an indigent appellant in a noncriminal administrative appeal. Bower v. Connecticut General Life Insurance Company, 347 So.2d 439 (Fla. 3rd DCA 1977), Harrell v. State of Florida, Department of HRS, 361 So.2d 715 (Fla. 4th DCA 1978), Harris v. Department of Corrections, 486 So.2d 27 (Fla. 1st DCA 1986).

On interlocutory appeal, the Bower court affirmed the lower court's order denying plaintiff's request for Dade County to absorb his court reporter's charges in a civil action. The Court held that Florida Statute 57.081 does not require that cost of transcribing and preparing records on appeal be given to indigents without charge and also, that transcribing trial court proceedings is not a function or a service of the Court or Clerk. Though the Bower decision came before the 1980 statutory amendment to Florida Statute 57.081, the Smith court correctly stated that the Bower court's rationale is nonetheless appropriate, as holding that clerk's fees and not the court reporter's fees are waived for indigents. Therefore, it is insignificant whether the Bower court proposed that the pre-1980 statute applied to appeals insofar as Bower continues to be cited for its holding that clerk's fees and not court reporter's fees are

waived. The law was undoubtedly confusing on this subject, especially in light of Hillman v. Federal National Mortgage Association, 375 So.2d 336 (Fla. 4th DCA 1979) and Lee v. City of Winter Haven, 386 So.2d 268 (Fla. 2nd DCA 1980), which held that Florida Statute 57.081 applies only to proceedings in trial courts. However, any confusion that existed on the subject of whether 57.081 applied to appeals was certainly cleared up through the legislature's 1980 amendment to the statute. Respondent suggests that the 1980 amendment served to clarify the discrepancies in the case law concerning the statute's application to appeals, but not to impose the requirement that the clerk function as a court reporter.

The Harrell court cites the Bower decision as authority on Florida Statute 57.081. Petitioner cites Harrell as significant in ascertaining the legislative intent behind legislative action. Petitioner states that as Harrell was the only law on the subject of 57.081 as applied to administrative agencies, the legislature must have wanted to change it by specifically adding administrative agencies to the statute by amendment. Again, any confusion that existed about whether the statute applied to administrative agencies was certainly cleared up through the 1980 amendment to the statute, but again, not to impose the requirement that the clerk function as a court reporter. Additionally, the Harrell court considered Florida Statute 120.57 (1)(b) 6 of the Florida Administrative Procedure Act which required the agency to preserve all testimony at an administrative proceeding and, on the request of any party, to make a transcript available at no more than actual cost. The Court stated that the Act carved out no statutory exception for judicial review at the behest of an indigent.

In Harris, the First District Court of Appeal held that indigent

appellants in noncriminal cases are not entitled to free transcripts. The Court recognized that though the state of the law on this subject has been confusing, the rationale of Harrell was extant.

In Curran vs. Florida Probation and Parole Commission, 498 So.2d 629 (Fla. 1st DCA 1986), the Court, in Per Curiam, affirmed the lower court's denial of appellant's Petition for Writ of Mandamus and as in Harris, certifie the following as being a question of great public importance:

Does 57.081 Florida Statute authorize or require that indigent appellants in noncriminal appeals be provided with transcripts at no cost to them?

In Kelly et al v. Department of HRS, 502 So.2d 42 (Fla. 1st DCA 1987), the Court denied appellants' Motions To Compel Preparation Of Transcripts Without Prepayment Of Costs on the authority of Harris and Curran.

A recent Third District Court of Appeal case, Roberts v. Unemployment Appeals Commission, ____ So.2d ____ Nos. 87-106, 87-107, 87-302, 87-635, 87-779 (Fla. 3rd DCA May 26, 1987), on appellants' Motions To Compel Preparation Of Transcripts At No Cost, denied the Motions and certified a similar question to this Court concerning the provision of a transcript to a claimant in an unemployment compensation case. The Court denied appellants' motions citing Smith as authority that there is no statute or rule provision which obliges the commission to prepare the transcripts in question. The Court also cited Curran, Harrell, and Bower in holding that indigent appellants in noncriminal cases are not entitled to a free transcript under Florida Statute 57.081.

In Viaros v. Division of Retirement, ____ So.2d ____ No. 87-447 (Fla. 3rd DCA June 2, 1987), the Court denied appellant's Motion To Compel Preparation Of Transcript At No Cost on the basis of Roberts.

It is obvious from the current state of the law that Bower and Harrell both continue to be viable in that transcribing of trial court proceedings is not a function or a service of the court or clerk. It is also apparent that any confusion that Bower, Harrell, Hillman, and Lee may have presented on the status of whether or not Florida Statute 57.081 applied to appellate proceedings, is cured by the 1980 amendment to the statute which clearly states that the statute applies to both appellate and administrative appeal proceedings. The 1980 amendment was in no way intended to include the requirement that an agency clerk prepare a transcript for appeal.

II. THE LOWER COURT CORRECTLY INTERPRETED
FLORIDA STATUTE 120.57 (1)(b) AND FLORIDA
ADMINISTRATIVE CODE RULE 10-2.71 IN
HOLDING THAT PREPARATION OF TRANSCRIPTS
IN ADMINISTRATIVE APPEALS IS NOT AN
AGENCY CLERK'S DUTY NOR FUNCTION

Florida Statute 120.57 (1)(b) 7 (Supp. 1986) of the Administrative Procedure Act states in relevant part,

The agency shall accurately and completely preserve all testimony in the proceedings, and, on the request of any party, it shall make a full or partial transcript available at no more than actual cost.

The Smith court looked to Florida Statute 120.57 (1)(b) in determining whether an agency clerk is required to prepare a transcript. The Court correctly stated that it found nothing in the statute which requires the clerk to prepare the transcript but rather, that the statute requires the Agency to preserve testimony and make it available at no more than actual cost. The Court also looked to Florida Administrative Code Rule 10-2.71 which provides for an initial fee for the transcript to be prepared. The Court correctly declined to interpret both the above-mentioned statute and rule in conjunction with the alleged actual practices of the Agency Clerk in such a broad sense so as to

make transcription a clerk's function. It must be emphasized that Florida Statute 120.57 (1)(b) 7 reads that it is the Agency's obligation to record the proceedings and the Agency's duty to provide a transcript at no more than cost, when requested by a party. The clerk is omitted from the statute and so transcription is not explicitly the Agency Clerk's function. Petitioner argues that the Administrative Procedure Act includes the Agency Clerk in the definition of "Agency" and therefore, that it is the Clerk's obligation to prepare the transcript and provide it to indigents without cost. However, once again, the plain meaning of the statute is clear and it is obvious that the Agency Clerk has no duty to transcribe proceedings. It is the Agency's responsibility to transcribe, upon request, and this responsibility can be delegated to any position within the agency and not necessarily to the Clerk. Even if an actual practice, the Clerk transcribes, the Court was correct in considering only the plain meaning of the terms of the statute.

Florida Administrative Code 10-2.065 is entitled "Transcript of the Proceedings". Subsection (2) states in relevant part,

On request of any party, the Department will make available a transcript of the recording at actual cost, or at the option of the requesting party a reproduction of the recording at actual cost.

Again, the rule obliges the Department and not the Clerk, to make a transcript available at cost. It is obvious from both the statute and rule that transcription by the Agency or Department is likened to transcription by a court reporter as a court reporter requires a fee for the transcription.

Petitioner claims the Smith court applied an improper legal standard to the analysis of Florida Statute 120.57 (1)(b) and Florida Administrative Code 10-2.71 in the Court stating that there was no compelling

reason to allow more complete state (or county) subsidizing of civil cases in indigents' administrative appeals than in appeals from trial courts.

Respondent suggests that the Smith court was not applying its own legal standard in its interpretation of the statute and rule, but rather, that the Court was merely commenting on the obvious lack of intent on the part of the legislature to effect the statutory requirement that an indigent appellant in a noncriminal administrative appeal be given a transcript at no cost.

III. THE COURTS HAVE CONSISTENTLY HELD THAT THERE IS NO VIOLATION OF ARTICLE I, SECTION 21 AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION, IN DENYING AN INDIGENT A TRANSCRIPT WITHOUT COST.

In Harrell, the Court held, in part, that the statutory provision that the cost of preparing a transcript of agency proceedings must be borne by the petitioner seeking judicial review did not violate the due process or equal protection rights of the indigent petitioners and did not violate the section of the Florida Constitution guaranteeing all persons access to state courts for redress of any injury. The Harrell court correctly cited Ortwein v. Schwab, 410 U.S. 656, 93 S.Ct. 1172, 35 L.Ed.2d 572 (1973), Reh. denied 411 U.S. 922, 93 S.Ct. 1551, 36 L.Ed.2d 315 (1973), in disposing of the due process and equal protection arguments.

In Ortwein, a statute requiring the prepayment of filing fees as a precondition of judicial review of administrative action reducing welfare payments was not unconstitutional as applied to indigents. The Harrell court stated that upon the analysis of Ortwein, it was inconceivable why a similar statute (Florida Statute 120.57 (1)(b)) requiring prepayment of transcript costs to the administrative agency would be unconstitutional. The purpose of of a transcription fee, to offset the expenses incurred by the agency

preparing the transcript, was a rational basis justifying the statute for equal protection purposes.

As for the argument about "Access to Courts", the Harrell court cites Kirkpatrick v. Parker, 187 So. 620 (1939), for the proposition that this constitutional provision was never intended to independently create new causes of action. It is the legislature that decides what substantive benefits an indigent receives and in fact, the legislature has not provided a statute requiring that indigents be given transcripts for appeals without charge, as heretofore argued by Respondent. For reasons stated earlier in this brief, the Harrell court correctly stated that if the legislature decides that indigent petitioners ought to be provided at state expense a transcript of agency proceedings, it may so provide by appropriate legislation.

The Harrell court also cited Kluger v. White, 281 So.2d 1 (Fla. 1973), for its holding that the "Access to Courts" provision has been interpreted by the Florida Supreme Court to apply only in those instances where right of access to the courts for redress of a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights in the Florida Constitution, or where such a right has become a part of the common law of this state pursuant to Florida Statute 2.01.

In Smith, Florida Statute 57.081 (Supp. 1986) became effective (in 1980) after the Declaration of Rights was adopted in the Florida Constitution. Additionally, any right the Petitioner asserts that she has to be given a transcript free of charge, has never been pursuant to common law.

CONCLUSION

For the reasons stated above, the Second District Court of Appeal was absolutely correct in denying Petitioner's Motion To Compel Preparation

Of Transcript Without Prepayment Of Costs. The 1980 Amendment to 57.081, which included in the statute both appeals and administrative agencies, merely broadened the scope of the statute's application and did so in light of the confusing state of the case law prior to the amendment. The legislature did not intend to require that a service of the Agency Clerk is transcription of administrative proceedings.

Additionally, Petitioner is not denied equal protection or due process under the Florida Constitution and she is not denied access to the courts. It is the legislature that defines indigents' substantive rights and the legislature, through 57.081 and 120.57, has not afforded an indigent the right of a free transcript on appeal.

This Court should answer the certified question in the negative and should affirm the lower court's denial of Petitioner's Motion.

Respectfully submitted,



CHARLEEN C. RAMUS
Attorney
Department of Health and
Rehabilitative Services
4000 West Buffalo Avenue - 520
Tampa, Florida 33614
Telephone: (813) 272-2540

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has

been delivered by United States Mail to Francis A. Solorzano, Esquire,
Florida Rural Legal Services, Inc., 305 North Jackson Street, Post Office Box
1499, Bartow, Florida 33830 on this 13th day of July, 1987.


CHARLEEN C. RAMUS