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S.C. Supreme Court

1 State of South Carolina

2 County of Sumter

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5 Joe Perry and Osteen Publishing Company,
Inc., Plaintiffs

6

Transcript of Record
2011-CP-43-00979

7

vs.

8

Harvin Bullock,
Defendant

April 2, 2012
Sumter, S.C.

9

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Before the Honorable Clifton Newman, Judge.

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13 A P P E A R A N C E S:

14 Mr. Jay Bender,
Attorney for Plaintiffs

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16 Mr. Andrew F. Lindemann,
Attorney for Defendant

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1 THE COURT: Sumter County Coroner. What is
2 pending is plaintiff's motion for summary judgment, and
3 defendant's motion to dismiss the summary judgment.
4 Mr. Lindemann, Mr. Bender, who is first?

5 MR. BENDER: Jay Bender. I'm here on
6 behalf of the plaintiff's. This is an action
7 under the Freedom of Information Act. And I have
8 some material to hand up. I have provided your
9 clerk with the original memorandum. And
10 Mr. Lindemann has a copy of it. I have for you
11 and Mr. Lindemann, copies of some cases cited in
12 the memorandum. Evening Post Publishing Company
13 versus the City of the North Charleston.
14 Riverwoods, LLC v. County of Charleston. Sloan
15 versus Friends of Hunley. Section 30-4-40(a)18
16 from the Freedom of Information Act. And an order
17 from your colleague on the Richland County bench,
18 Judge Barber, in a case recently the M.X. Journal
19 Company versus the South Carolina Department of
20 Public Safety.

21 May it please the court, Your Honor, the
22 issue here is one of statutory interpretation.
23 The plaintiff's made a request of the defendant
24 for the autopsy report of Arron Jacobs, who had
25 been killed by police gunfire. The request is

1 Exhibit A to the complaint. On behalf of the
2 defendant, Jonathan Bryant, who is Sumter County
3 attorney responded, denying the request, claiming
4 that the autopsy report is a medical record. And
5 as a consequence is not in the definition of
6 public records under the South Carolina Freedom of
7 Information Act. And also asserting the exemption
8 from -- for law enforcement records under
9 30-4-40(a)3.

10 The Freedom of Information Act provides
11 that when a public body responds in writing to a
12 request, that's the final opinion of the agency on
13 that issue, as to the availability of record. So
14 there are two issues presented in the plaintiff's
15 motion. Is an autopsy report a medical record.
16 And if so, it not within the definition of public
17 records in 30-4-20. If in fact, it's a medical
18 record, which of the course the plaintiff's
19 dispute. Then the General Assembly had no reason
20 to enact 30-4-40(a)-18, which exempts from the
21 mandatory disclosure requirements of the act,
22 photographs, videos and other visual images and
23 audio recordings of and relayed to the performance
24 autopsy. Except that photographs, videos, images
25 or recordings may be viewed and used by persons

1 identified in Section 17-5-535 for the purpose
2 contemplated or provided for in that section.

3 If there is -- if an autopsy report is not
4 a medical record, there was no reason for this
5 separate exemption from mandatory disclosure in
6 the statute. But the General Assembly is presumed
7 to know what is in the law when it enacts
8 amendments to that law. And 30-4-40(a)-18 was
9 enacted after Dale Earnhardt was killed in the
10 Nascar race in Daytona. The General Assembly was
11 concerned that somebody might get killed in
12 Darlington, I think, when they didn't autopsy
13 reports of Nascar racers to be, or didn't want the
14 photographs. They have left the records, the
15 autopsy report itself, as a part of the public
16 record.

17 Now the Freedom of Information Act starts
18 with a statement by the General Assembly, that the
19 General Assembly finds its vital in a democracy
20 that public business be performed in an open and
21 public manner. And the supreme court has
22 consistently said that when a public body claims
23 an exemption from the mandatory disclosure
24 requirements of public records, it is that public
25 body that must prove the applicability of the

1 exemption and the exemption must be narrow and
2 tailored.

3 The most recent case on that issue, I have
4 handed up, it's Evening Post Publishing Company
5 versus the City of North Charleston. And in that,
6 case the supreme court discussed in some detail
7 the context in which these issues are to be
8 considered. And I am reading from that case under
9 the section that is headed, Analysis. And this is
10 in the memorandum also. Under FOIA, any person
11 has a right to inspect or copy any public record
12 of public body unless the record is exempt from
13 disclosure. Whether the record is exempt depends
14 on the particular facts of the case.

15 Underlying each case however, is the
16 principle that the exemptions in Section 30-4-40
17 are to be narrowly construed so as to fulfill the
18 purpose of FOIA to guarantee the public reasonable
19 access to certain activities of the government.
20 To further advance this purpose, the government
21 has the burden of proving that an exemption -- or
22 excuse me, or an exception applies. The exception
23 that the government asserts here is that an
24 autopsy report is a medical record. And there's
25 an affidavit from a physician filed by the

1 defendant, where the physician, a pathologist,
2 concludes that an autopsy report is a medical
3 record. Well it might be to a physician, but it's
4 not to the General Assembly. Because under the
5 doctrine that the inclusion of one principle
6 excludes others. And for that proposition, I have
7 cited Riverwoods, LLC.

8 The fact that the General Assembly has put
9 a separate exemption in or exception in for
10 photographs and videos of autopsy reports,
11 indicates that autopsy reports are otherwise
12 available under the FOIA. In Riverwoods, the
13 supreme court discussed a principle, a canon if
14 you would, of statutory construction. And I am
15 readings from Riverwoods, LLC, the County of
16 Charleston. The canon of construction, *expressio*
17 *unius est exclusio alterius* or *inclusio unius est*
18 *exclusio alterius*, holds that to express or
19 include one thing, implies the exclusion of
20 another or of the alternative.

21 As we explained in *Hodges v. Rainey*, the
22 enumeration of exclusions from the operation of a
23 statute indicates that the statute should apply to
24 all cases not specifically excluded. Exceptions
25 strengthen the force of the general law and

1 enumeration weakens it as to things not expressed.
2 Well what was exempted from the mandatory
3 disclosure requirements of 30-4-30, photographs,
4 videos and other visual images and audio
5 recordings of and related to the performance of an
6 autopsy.

7 So if this weakens with respect to the
8 exception and strengthens with respect to the
9 general law, then an autopsy report is not a
10 medical record. And the only portions of an
11 autopsy report that are exempt from mandatory
12 disclosure are the photographs and the videos and
13 the recordings. That being so, the claim of an
14 exemption by the coroner is in violation of the
15 act. Why is that important? Because the relief
16 sought by the plaintiff, plaintiff's, is a
17 declaratory judgment, determined that the law has
18 been violated by the failure to provide access and
19 copies of this report. And if that threshold is
20 met, then the court is empowered to issue an
21 injunction to prohibit the defendant from
22 continuing to refuse access to this report. And
23 then award attorney's fees and costs.

24 There is a second claim by the defendant
25 that this record is exempt under 30-4-40

1 Subsection (a)3, I think, that relates to law
2 enforcement. And what the defendant says in that
3 regard; is that, this is under investigation.
4 Well there is no under investigation exception to
5 mandatory disclosure. There is a set of
6 exemptions for mandatory disclosure for law
7 enforcement agencies, if the release of the
8 information would harm the agency. And that's
9 another part of this City of North Charleston
10 case, that is crucial. Because the City of North
11 Charleston, refused to release a 911 tape on
12 grounds that it was a record of law enforcement
13 and public safety agency not otherwise available
14 by law, and cited the Subsection: the premature
15 release of information to be used in prospective
16 law enforcement action. Citing 30-4-40(a)3(b).
17 30-4-40(a)3 is what was cited by the defendant as
18 the basis for denying access to the record.

19 The supreme court in rejecting the City of
20 North Charleston's claim under 30-4-40(a)3 said
21 all of the elements of this exemption are present
22 except harm to the agency. And the defendant has
23 made no effort to show that Sumter County
24 Coroner's Office is harmed by the release of this
25 autopsy report. Without that showing, then the

1 withholding of that autopsy report is violation of
2 the law.

3 The defendant has also asserted in his
4 motion that this case is moot, because the
5 newspaper has obtained from sled a necropsy report
6 on the autopsy of Arron Jacobs. Now the report
7 misspelled his name, but we believe it's probably
8 the same person. And that's why I handed up,
9 Sloan v. Friends of the Hunley. That case was
10 mooted when Sloan received from the defendant, the
11 records that he sought. The plaintiff's here have
12 not received the records they are seeking from the
13 defendant. And the defendant can't control where
14 the plaintiff's seek public records. Because the
15 law says in 30-4-30 that any citizen can ask for
16 these records from any public body. And it's not
17 unusual to ask for them from more than one source.

18 You may have recalled the controversy
19 involving the governor not long ago, where there
20 was a Freedom of Information Act requested of the
21 governor's office for e-mails about a committee
22 that's been established to determine how to
23 implement the health care reform law that congress
24 has passed. And the governor's office had no
25 e-mails about that subject. An identical request

1 was made to another agency, the Department of
2 Health and Human Services. And low and behold,
3 those e-mails appeared. They had been deleted in
4 the governor's office. They were available in
5 another agency. I think the public is entitled to
6 see if the report that sled has is the same report
7 that the defendant has. And it's not the
8 defendant's prerogative to tell these plaintiff's
9 you have to go somewhere else to get it. And if
10 you get somewhere else, you can't see what I have.
11 That's not the way it works in the democracy.

12 So the plaintiff's have the right to seek
13 these records where the plaintiff's choose to seek
14 them. And the defendant has the obligation if he
15 is claiming an exception, to come forward to show
16 that it is applicable in this case, and that it's
17 narrowly construed. Thank you.

18 THE COURT: Yes, sir.

19 MR. LINDEMANN: May it Please the Court,
20 Your Honor, Andrew Lindemann, on behalf of the
21 Sumter County Coroner. Your Honor, just so the
22 court is aware, there are cross motions for
23 summary judgment that are before you. As you have
24 gathered from Mr. Bender's arguments thus far,
25 this issue involves an interpretation of the

1 Freedom of Information Act. There are a number of
2 different issues that we have raised. The initial
3 issue is the last one that Mr. Bender talked about
4 and that is, No. 1, whether or not this court even
5 has subject matter jurisdiction to hear this case.
6 And the issue being whether or not there is a
7 still a judicable claim.

8 We have relied on the Sloan versus the
9 Friends of the Hunley case to make a mootness
10 argument. As the supreme court made it clear in
11 the Hunley case, and that was a case that was
12 dealing with specifically how mootness is applied
13 in a Freedom of Information Act case. In the
14 Hunley case what had occurred was, a Freedom of
15 Information request was made as Mr. Bender
16 indicated. Initially no response was made. There
17 was a suit that was filed ultimately. The Friends
18 of the Hunley, Inc., which was recognized as a
19 public body, did produce whatever records they
20 had. The court ultimately found then that the
21 claim was moot.

22 THE COURT: How many claims did Mr. Sloan
23 have pending at the time?

24 MR. LINDEMANN: Probably about a half
25 dozen or so. I know as an attorney in Greenville,

1 I know he keeps very busy. And obviously standing
2 in mootness are often issues in Mr. Sloan's cases.
3 But in this particular one, the supreme court
4 found that it's FOIA claim was moot.

5 Now the difference between that claim and
6 this claim is that, for the reasons that I'll get
7 into in a moment, the coroner has not produced the
8 autopsy report at issue in response to the FOIA
9 request. However, we've learned that No. 1,
10 through an article that subsequently was in the
11 Item after this suit was brought, and has been
12 confirmed by answers to request for admissions
13 that are attached to the memo I handed up. The
14 Item did receive a copy of the autopsy report that
15 they are trying to seek. Ultimately the rationale
16 is the exact same.

17 In Sloan, the supreme court focused on the
18 fact that there is no longer an issue of
19 controversy. And that courts are not called upon
20 to decide academic issues. And essentially that's
21 what we are left with here in this particular
22 case. Because the exact document the plaintiff
23 wants, the plaintiff has conceded that they have
24 received. They received it from sled. It's an
25 issue of whether or not sled should have

1 appropriately turned it over, but obviously I
2 don't represent sled in this matter. It doesn't
3 make at difference as to this litigation. The
4 plaintiff's have received the autopsy report.
5 Whether that was handled correctly or not, is
6 immaterial.

7 Our contention is the Sloan case governs
8 the judicial ability issue, and this claim should
9 be moot. In the event the court disagrees with
10 that and wants to address the merits, we believe
11 the action that has taken by the Sumter County
12 Coroner is absolutely correct. I very much
13 disagree with Mr. Bender as to the application of
14 the Freedom of Information Act. He made the
15 suggestion to this court, which I submit is
16 absolutely erroneous; that whether or not an
17 autopsy report qualifies as a public record is an
18 exemption under FOIA.

19 Our first and principal argument in this
20 case, Your Honor, is that an autopsy report is a
21 medical record. And as a medical record, it does
22 not qualify as a public record as that term is
23 defined in the court claims. I mean in the
24 Freedom of Information Act.

25 The term public record, it said, it goes

1 on and includes a number of things. And then it
2 goes and says records; such as, income tax
3 returns, medical records, hospital medical staff
4 reports, scholastic records, adoption records, it
5 keeps going. And ultimately it says, are not
6 considered to be made open to the public under the
7 provisions of this act. So our first argument is
8 not an exemption. Our first argument is that the
9 autopsy report that they're trying to obtain, is
10 not even a public record based upon the
11 definition. That is not our burden of proof. The
12 burden of proof on that particular issue, Your
13 Honor, falls on the plaintiff.

14 The plaintiff has presented no evidence
15 whatsoever to suggest that autopsy report is a
16 medical -- is not a medical record. And let me
17 just back up. The right to inspect and copy
18 public records is established by Section 30-4-30.
19 And it says, quote, any person has a right to
20 inspect or copy any public record of a public
21 body. So it falls upon the plaintiff's to first
22 prove that what they are seeking is a public
23 record. And we contend based on that definition,
24 that it is a not.

25 We have submitted the affidavit of the

1 pathologist who actually performed the autopsy,
2 Dr. Janice Ross, the pathologist out of Newberry.
3 And she gives the professional opinion and she
4 does believe that an autopsy report is, or she
5 takes the position that an autopsy report in her
6 professional opinion, is a medical record. If you
7 apply the plain and ordinary meaning of the terms
8 medical record, it's not defined in the act.
9 Clearly an autopsy report which includes medical
10 histories, medical findings, as prepared by a
11 pathologist, it is a medical record, Your Honor.
12 And the plaintiff's have not submitted any case
13 law that suggests otherwise.

14 Now what we have addressed in our memo, is
15 a case from 1984. It is a case of society of
16 professional journalists versus Sexton. It's a
17 case that went before the South Carolina Supreme
18 Court. In the particular case, in fact Dr. Sexton
19 the named defendant, was a medical examiner. And
20 he was sued under FOIA in order to obtain an
21 autopsy report among other records. And in that
22 particular case, the lower court ruled that the
23 medical examiner's records including the autopsy
24 report, were not subject to disclosure under FOIA
25 as medical records, for the exact reason that we

1 are arguing.

2 Now admittedly so, that ruling from the
3 lower court in the Sexton case, was not appealed.
4 Now the supreme court does mention that ruling and
5 does indicate that it not appealed. And as the
6 supreme court is apt to do as Your Honor is
7 probably well aware and has seen before, even when
8 an issue is not before them and they think the law
9 in the case may be wrong, they usually comment on
10 that by footnote. In this particular case in
11 1984, they didn't do so. But the only case that
12 we have that actually even somewhat addresses this
13 particular issue is the Sexton case, Your Honor.

14 In addition to that, Your Honor, and
15 something I have not mentioned in my memo that I
16 do want to hand up to, Your Honor, and I have got
17 copies for Mr. Bender; are two attorney general
18 opinions. And granted attorney general opinions
19 aren't binding on this court, but they are
20 persuasive. The first one is from Daniel McLeod,
21 the Attorney General, back in 1981. And he is
22 specifically addressing the coroner of Georgetown
23 County in that opinion. An the issue is whether
24 or not autopsy is considered a medical record.
25 And if I can read from the third paragraph of that

1 letter. I believe it is very persuasive.

2 It says, quote, the details of an autopsy
3 report are of such an intimate, personal nature
4 concerning vivid, medical allusions to parts of
5 the human body, their descriptions and indications
6 of prior history. A report of this nature
7 constitutes a medical record, which is not
8 available for public consumption. The second
9 attorney general's opinions were two years later.
10 This time it's from Attorney General Travis
11 Medlock. It addresses a number of other issues,
12 but it also quotes back and relies on the 1981
13 opinion that I just indicated. And this is in the
14 last paragraph before the conclusion paragraph in
15 that letter.

16 It says, for example, in a prior opinion,
17 this office concluded that while the results of an
18 autopsy report may be disclosed, i.e., and cause
19 of death, the detailed autopsy report would not be
20 subject to disclosure due to public policy
21 considerations of privacy. And that's the --
22 that's pre-HIPAA. That's the based upon where
23 privacy existed, 20, I mean, 30 years ago.
24 Certainly as, Your Honor, is well aware based on
25 the strengthening of federal law on privacy, and

1 the strengthening of state law on privacy,
2 certainly that same rationale will apply. And
3 that's the concerns that the coroner has, Your
4 Honor.

5 The coroner does not have a problem with
6 turning over an autopsy report, when it's done so
7 with the consent of the family; specifically, the
8 personal representative of the estate. And the
9 coroner doesn't have a problem with turning over
10 an autopsy report if it's done by court order or
11 by subpoena. But for anybody just send in a FOIA
12 request and get an autopsy report, which typically
13 contains personal medical information, granted
14 it's of the deceased. But it's still personal
15 medical information that could also impact the
16 deceased family as well. The rationale and the
17 attorney general's opinions I submit, is still
18 absolutely good law today. An autopsy is a
19 medical record. I would also point out this is
20 also argued in our brief, Your Honor; that after
21 the death of Dale Earnhardt at Daytona that
22 Mr. Bender touched upon, there was a -- some
23 changes in the South Carolina law.

24 The South Carolina General Assembly,
25 adopted a statute 17-5-535, which is noted by some

1 as the Dale Earnhardt law, which prohibited the
2 discovery through FOIA or any other means of not
3 an autopsy report, but autopsy photographs,
4 videos, digital depictions. And what Mr. Bender
5 has relied on, is the fact that has also been
6 included now as an exemption as part of the
7 tort -- of the Freedom of Information Act.

8 Where there is a disconnect however, Your
9 Honor, is you have look at exactly what was added
10 to the Freedom of Information Act. They didn't
11 change the definition of public record. Still
12 medical records themselves are still not public
13 records. What the court did was, they obviously,
14 not the court, what the General Assembly did
15 obviously, is they distinguished between an
16 autopsy report, and the photographs and the videos
17 that are taken during the course of the autopsy
18 itself. Clearly autopsy reports are medical
19 records. And certainly the Attorney General's
20 opinions support that. The -- under the Circuit
21 Court's decision in Sexton supports that.

22 But videos and photographs are not part of
23 the report. And they are something separate. So
24 obviously the General Assembly in light of the
25 Dale Earnhardt controversy down in Florida,

1 adopted a separate section, and then also adopted
2 a separate exemption to the Freedom of Information
3 Act.

4 In addition to that, Your Honor, I would
5 make one additional point to try to show the court
6 that an autopsy report is indeed a medical record.
7 And, Your Honor, if you find that an autopsy
8 report is a medical record, that's the principal
9 issue here. And that's the dispositive issue, I
10 would submit. In the South Carolina General
11 Assembly there's also in sections, and they're
12 cited in my brief. 44-63-60. And 44-63-84. Very
13 much have limited access of death certificates.
14 Not anybody can just get a death certificate. You
15 can make a FOIA request, and you can't get a death
16 certificate.

17 The only people who can get a death
18 certificate are members of the family, the
19 family's legal representatives or and this is
20 quoted from 44-63-84, others who demonstrate a
21 direct and tangible interest when information is
22 needed for the determination of a personal or
23 property right. And clearly, the Item and it's
24 reporter, Joe Perry wouldn't qualify under that.

25 So in theory what you have here, Your

1 Honor, if you rule in the plaintiff's favor and
2 find that an autopsy report is discoverable under
3 FOIA, what you will have is such a discrepancy in
4 the law, that in effect, a death certificate could
5 not be obtained under FOIA. Yet an autopsy report
6 which contains not only what a death certificate
7 does, but much more, personal health information,
8 the findings of the pathologist, the conclusions
9 of the pathologist, all of that information
10 including personal medical information of the
11 deceased and potentially it's family or her
12 family, as well, that that is discoverable by
13 anyone by simply filing or submitting a FOIA
14 request, while the South Carolina General Assembly
15 is so restricted, the information on a death
16 certificate is to a very few.

17 That discrepancy, that inconsistency, just
18 is illogical and defies logic. And not does this
19 court have to interrupt the definition of public
20 record consistently with what is in Freedom of
21 Information Act. But I would submit, Your Honor,
22 has to interpret it so that it is consistent, and
23 doesn't create an absurd result when you are
24 looking at other related statutes that deal with
25 privacy issues, and the discovery or production of

1 information regarding decedents, including death
2 certificates.

3 One other issue I wish to point out to the
4 court, and we have raised this in response to, in
5 our answer to the complaint. Mr. Bender has not
6 addressed in his motion for summary judgment. But
7 as, Your Honor, is aware, you know, we have HIPAA.
8 The federal laws regarding medical records and
9 privacy. From based upon my research, it seems to
10 be a very open ended question as to how HIPAA
11 applies specifically in this instance. I was able
12 to find any specific case on point. However,
13 while the coroner himself is not medical doctor
14 and is not per se, a covered entity, the coroner
15 contracts with a pathologist. And it is the
16 pathologist who is a medical doctor, who is a
17 covered entity under HIPAA, who then prepares the
18 report. We contend it is a medical record. And
19 provides that report back to the coroner as they
20 are required to by law.

21 The coroner does not have the right under
22 HIPAA we submit, to simply disclose that private
23 medical record to anyone who asks for it,
24 without the authority of the family, without the
25 authority of the personal representative. And the

1 reason why this is important, is because we
2 contend that if the court were to agree with the
3 plaintiff, what you have essentially agreed to, is
4 inconsistent with federal privacy laws. And as a
5 result of that inconsistency, any type of South
6 Carolina law that would be inconsistent with
7 HIPAA, we would submit to the court, is
8 preemptive.

9 In fact, we cited in our answer. And I
10 will be happy to hand up it. This is from a
11 federal regulation that says a standard
12 requirement or implementation specification
13 adopted under this subchapter that is contrary to
14 a provision of state law, preempts the provision
15 of the state law. And we've raised that
16 preemption. I have another regulation it talks
17 about also; appropriate uses for medical records.
18 And they talk about medical records in that
19 particular section that actually go to a coroner.

20 So we're not taking the position that the
21 coroner is per se, a covered entity. It's an open
22 ended question. HIPAA also provides that what is
23 defined as business associates of covered entities
24 are also covered by HIPAA. In that I believe that
25 the coroner would probably qualify at least as a

1 business associate. Because they contract with a
2 pathologist to provide the information, the
3 confidential medical record. And as a result, we
4 contend that if Your Honor agrees with the
5 plaintiff's, and finds that an autopsy report
6 should be produced simply because a FOIA request
7 has been made, without first going to the family
8 and making sure they have consent. Or at least
9 without first going to a court and getting a court
10 order to provide that information; that that is
11 inconsistent with HIPAA and therefore we would be
12 preempted.

13 We're not suggesting the court has to get
14 to that HIPAA issue, because this case is very
15 easy to resolve, I would submit. It's easy to
16 resolve because an autopsy report is a medical
17 record. I don't think there is any question about
18 it, the plaintiff's do have the burden of proof on
19 that issue; have not presented anything to this
20 court to suggest that an autopsy report is not a
21 medical record. And if, Your Honor, finds it's
22 a medical record, you don't have to deal with all
23 these other issues. And quite clearly, it is not
24 discoverable under FOIA. It's not that it's
25 exempt. It's not a medical record, and therefore

1 the plaintiff hasn't proven that they're entitled
2 to receive it.

3 THE COURT: How is a medical record
4 defined in the law?

5 MR. LINDEMANN: It's not defined in law,
6 Your Honor. FOIA does not actually define that.

7 THE COURT: It hasn't been defined by any
8 courts in the nation?

9 MR. LINDEMANN: Well, Your Honor---

10 THE COURT: In regards to medical records?

11 MR. LINDEMANN: ---our FOIA is a little
12 different. I couldn't find one that specifically
13 had exactly these provisions. The states, as I
14 have seen it, are all over the place with
15 autopsies. Some states specifically rule. They
16 specifically hold by statute that they are
17 discoverable. Some hold that parts of them are.
18 And then some absolutely don't allow it. They
19 don't allow it specially.

20 THE COURT: All in relation to FOIA, or
21 just in the general definition of what is a
22 medical record?

23 MR. LINDEMANN: Based on FOIA. A lot of
24 FOIA, a lot of acts that I've seen around the
25 country, specifically address autopsy, autopsies

1 by name.

2 THE COURT: Some say that it is, and some
3 say that it isn't?

4 MR. LINDEMANN: That's right. And some
5 say that limited parts of them are. But in South
6 Carolina as our attorney generals interpret it, as
7 the Circuit Court in Sexton interpreted it. And
8 there hasn't been any changes to the statute in
9 light of those opinions that have come down back
10 in the 1980's. And those opinions are still cited
11 as recently as I think 2002, by the attorney
12 general. So those opinions that I am relying on
13 while they're 30 years old, they are still
14 considered good opinions by the attorney general.

15 As I have indicated, plaintiff's haven't
16 shown that an autopsy is not a medical record.
17 And I would submit to the court, common sense and
18 logic dictates that a report that's prepared by a
19 pathologist that talks about medical history and
20 medical findings and medical conclusions, is a
21 medical record.

22 THE COURT: If it's done by a doctor, it's
23 a medical record.

24 MR. LINDEMANN: That's correct. Thank
25 you.

1 THE COURT: Mr. Bender.

2 MR. BENDER: Your Honor, obviously then
3 that's medical practice people are dying to get in
4 to see. Because it's not medical record. It is
5 not made for the purpose of diagnosing or curing
6 disease. It is made for the purpose of
7 determining death. And in this case, death at the
8 hand of the state.

9 Now I have asked Mr. Lindemann, and he has
10 assured me that he has brought the coroner's file,
11 which we would submit to the court for an in
12 camera review. Obviously, I hope I made my point
13 better to you than I made to Mr. Lindemann. He
14 said I've offered nothing to show that this is not
15 a medical record. Well there is no reason from
16 the exemption in 30-4-40(a)18 unless an autopsy
17 report is a medical record. The exemption relates
18 to records that are public records. And these are
19 exemptions from mandatory disclosure for public
20 records.

21 So 30-4-40(a)18 exists only because an
22 autopsy report is a medical record, and
23 photographs, videos and other visual images and
24 audio recordings related to the performance of an
25 autopsy, are exempt from disclosure. So the

1 remaining records related to an autopsy are
2 subject to mandatory disclosure. I think that's
3 clear.

4 Now I didn't argue HIPAA, because No. 1,
5 Mr. Bryant didn't raise HIPAA in letter. And as I
6 pointed out in initial argument, the FOI says that
7 the letter written in response to a written
8 request is the final opinion of the agency. Now
9 as time goes on and they think of other things,
10 sure, they come up with it; but they're stick with
11 what they wrote in the initial letter.

12 Now I believe that the coroner's office is
13 not covered by HIPAA. And the coroner could find
14 that out by going to the Health and Human Services
15 website, which talks about covered entities. And
16 I assure you that the coroner and the medical
17 examiner, the pathologist, did not provide medical
18 care to Arron Jacobs. Now you've heard all those
19 stories about dumb questions that lawyer's ask
20 when they have somebody on the stand. There is
21 one that you probably recall, is the lawyer who
22 has the pathologist on the stand, who is talking
23 about an autopsy and he says, was the patient dead
24 at the time. Yes.

25 This is not medical care. This is looking

1 to determine the cause of death of somebody who is
2 already dead. And in South Carolina there is no
3 right of privacy in a privacy in a dead person.
4 The dead person has no right of privacy. So these
5 are public records. They are subject to
6 exemptions with respect to video and photographs.
7 The rest of them are to be made public. And for
8 that reason, the coroner has violated the law.

9 MR. LINDEMANN: Just one point real quick,
10 Your Honor.

11 THE COURT: Yes, sir.

12 MR. LINDEMANN: I just blanked out. It
13 will come back, just a second. Oh, the point on
14 subsection 18 that he is relying on. That
15 specifically talks about photographs and video
16 tapes, as I indicated, No. 1. So It doesn't talk
17 about records. And in fact, if the General
18 Assembly had intended when they adopted the Dale
19 Earnhardt law in subsection 18 at the same time,
20 intended that to not include records, they
21 certainly would have said so, because it would
22 have interpreted up until that time as a public
23 record, not including the report itself.

24 There is nothing addressed specifically
25 about the report. There is no suggestion of any

1 change of the law. What they are suggesting is,
2 is that there is a change as far as, or trying to
3 make certain that they don't have the same
4 controversy they had in Florida, that video tapes
5 and photographs of the performance. And if you
6 focus on the language in there, it says of the
7 performance of the autopsy. It's not focusing on
8 the anything that's part of the autopsy report.
9 So the performance of the autopsy that that is
10 the -- what was adopted as an exemption. And I
11 think that is a very key difference.

12 As I indicated, there is absolutely no
13 evidence that's been presented of the -- that this
14 is not a medical record. The fact that it's a
15 diseased person doesn't make it not a medical
16 record. And the point that I was trying hard to
17 remember is this, Your Honor, that it rely on
18 some HIPPA. Mr. Bender says that we can't rely on
19 HIPPA, because it wasn't specifically mentioned in
20 the county attorney's letter in response to the
21 FOIA request.

22 Well here's the problem with that logic.
23 We're not arguing that South Carolina law violates
24 HIPAA and should be preempted. We're -- we take
25 the position and we believe the law is clear in

1 South Carolina, that an autopsy report is a
2 medical record. And as a medical record, it's not
3 a public record that can be obtained through FOIA.
4 It's only if this court disagrees with that, that
5 the position that the plaintiff is taking; that
6 it is not medical record, and should be able to be
7 produced. And that is a position that is
8 inconsistent with HIPAA.

9 So this court doesn't even have to reach
10 the HIPAA issue if you find that an autopsy report
11 is a medical record. So to suggest that it was
12 waived somehow by not being mentioned in the
13 response to the FOIA request, is absolutely wrong,
14 because it is not inconsistent with the position
15 that the coroner took from the very beginning; and
16 that is, that it's a medical record. Thank you.

17 THE COURT: You mentioned you have the
18 coroner's report available. Is there -- what
19 would be the benefit of me looking at that in
20 camera?

21 MR. BENDER: To take a look to see.
22 Because one thing the law does require, if
23 portions of the record are exempt from disclosure,
24 they are to be segregated from those portions of
25 the law that are to be disclosed. And of course,

1 I haven't seen the coroner's file, so I don't have
2 any idea what's in there. And what was requested
3 was the coroner's file. So if there is material
4 in there that is to be disclosed, the court can
5 make that judgment.

6 THE COURT: Are you seeking the entire
7 file or just the autopsy?

8 MR. BENDER: I don't know what's in his
9 file. I don't know what....

10 MR. LINDEMANN: He sought the autopsy. I
11 will be happy for the court to see the autopsy.
12 Again, he keeps using the words exempt. We are
13 not arguing exemption. So if it's a medical
14 record then he can't have it. If it isn't a
15 medical record, and, Your Honor, you know, rejects
16 our other positions, you know, it's not something
17 to be taken out piecemeal.

18 THE COURT: Well I've seen many, many
19 autopsy reports.

20 MR. LINDEMANN: I'd be happy to show you
21 this one.

22 THE COURT: So I mean the question is, do
23 I need to review the coroner's file for a
24 particular reason to decide this issue?

25 MR. LINDEMANN: I personally don't think

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C-E-R-T-I-F-I-C-A-T-E

I, Margaret T. Sullivan, Court Reporter, for the Third Judicial Circuit of the State of South Carolina, do hereby Certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the Common Pleas Court, Nonjury, on April 2, 2012, in Sumter County, Sumter, South Carolina.

I do further certify that I am neither kin, counsel, nor interest to any party hereto.

2/6/14
DATE

Margaret T. Sullivan
COURT REPORTER
My Commission expires: 9/7/21