

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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**S.C. Supreme Court**

APPEAL FROM SUMTER COUNTY  
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Appellate Case No. 2012-212669

Joe Perry and Osteen Publishing Co., Inc.....Appellants

v.

Harvin Bullock, in his capacity as  
Sumter County  
Coroner.....

Respondent

SUPPLEMENT TO RECORD ON APPEAL

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vs.

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Harvin Bullock,  
Defendant

April 2, 2012  
Sumter, S.C.

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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:

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Mr. Jay Bender,  
Attorney for Plaintiffs

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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 preposition, 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

1 so. But we have it here in case, Your Honor,  
2 disagrees.

3 MR. BENDER: I don't know what it's in it.  
4 An in camera examination is the mechanism the  
5 supreme court has endorsed in cases where there is  
6 a claim of exemption as a dispute.

7 THE COURT: Well I'll take the whole  
8 matter under advisement. And I'll take a quick  
9 look to satisfy the in camera review. I will need  
10 to try to get my arms around this issue. In  
11 addition to what you all have argued and reviewed,  
12 the submissions in greater detail. I am giving  
13 you all an opportunity to submit anything else  
14 that you want to submit to supplement your  
15 arguments. You can do it within 10 days.

16 MR. BENDER: Thank Your Honor.

17 MR. LINDEMANN: Thank Your Honor.

18 --End Of Requested Transcript of Record---

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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

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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FEB 20 2014

APPEAL FROM SUMTER COUNTY  
Court of Common Pleas

**S.C. Supreme Court**

Clifton Newman, Circuit Court Judge

Appellate Case No. 2012-212669

Joe Perry and Osteen Publishing Co., Inc.....Appellants,

v.


Harvin Bullock, in his capacity as  
Sumter County  
Coroner.....

Respondent.

CERTIFICATE OF SERVICE

I, Teresa K. Todd, Legal Assistant to Jay Bender, an employee of Baker, Ravenel & Bender, L.L.P., hereby certify that I have, on the date indicated below, served counsel below with a Supplement to Record on Appeal by mailing a copy of same via United States Mail, postage pre-paid and return address clearly indicated on said envelope, to counsel at the following address:

Andrew F. Lindemann, Esquire  
Davidson & Lindemann, P.A.  
1611 Devonshire Drive, Second Floor  
Columbia, SC 29202-8568

  
Teresa K. Todd

February 19, 2014

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**SC Court of Appeals**