THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

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

v.

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

APPELLANTS' BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Did the court below err in ruling that autopsy records were as a matter of law a "medical record" and therefore outside the definition of public records contained in the South Carolina Freedom of Information Act?
2. Did the court below err in considering the affidavit of a physician which offered opinion testimony as to a matter of law?
3. Did the court below err in concluding that a ruling by a circuit court from which no appeal was taken was a ruling of which the General Assembly was presumed to have knowledge when amending a section of the Freedom of Information Act to exempt from disclosure "Photographs, videos, and other visual images, and audio recordings of and related to the performance of an autopsy" so as to support the conclusion that autopsy records were not subject to public inspection and copying?

STATEMENT OF THE CASE

Appellant Joe Perry (Perry) is a reporter for *The Item* newspaper published in Sumter by appellant Osteen Publishing Co., Inc. Respondent, Harvin Bullock (Bullock), is Sumter County Coroner. One Aaron Leon Jacobs (Jacobs) had been shot and killed by officers of the police department of the City of Sumter in 2010. On December 16, 2010 Perry wrote to Bullock to request access to review the autopsy report and other documents related to the autopsy performed on Jacobs. On January 7, 2011 Johnathan W. Bryan, Sumter County Attorney responded on behalf of Bullock to deny Perry's request on grounds that "Autopsy reports are considered medical records and, as such, are not public records under the South Carolina Freedom of Information Act, South Carolina Code § 30-4-20 (c). Furthermore, the report in this case is exempt as an investigative report, the release of which would be premature at this time."

On May 23, 2011 appellants filed and served a summons and complaint seeking declaratory and injunctive relief. Respondent filed and served an answer, and thereafter an amended answer. Following discovery appellants moved for summary judgment and respondent moved in the alternative for summary judgment or dismissal. Following a hearing and an *in camera* review of the report on the autopsy of Jacobs the trial court granted summary judgment in favor of respondent on July 9, 2012. This appeal followed.

STANDARD OF REVIEW

The court below ruled as a matter of law that the autopsy records requested by appellants were not "public records" under the South Carolina Freedom of Information Act (FOIA), S.C. Code Ann. §30-4-20(c) (Rev. 2007), on grounds that they were "medical records" which by statute were excluded from the definition of public records subject to the disclosure and exemption provisions of the FOIA. (R. p.3) In reviewing the determination of the court below that autopsy records are medical records exempt from the FOIA, this court is to consider the question *de novo* without deference to the court below as the Supreme Court of South Carolina directed in *State ex rel. Wilson v. Town of Yemassee,* 391 S.C. 565, 707 S.E.2d 402, 405 (2011):

> The construction of a statute is a question of law, which this Court may resolve without deference to the circuit court. *Catawba Indian Tribe of S.C. v. State,* 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) ("The issue of interpretation of a statute is a question of law for the court. We are free to decide a question of law with no particular deference to the circuit court." (internal citation omitted)).

Where, as in the case now before the court, the appellate court is reviewing the grant of a motion for summary judgment in a suit for declaratory judgment, it is to apply the same standard as the trial court under Rule 56, SCRP as to the summary judgment, and where the review involves the interpretation of a statute, the interpretation is a matter of law, and may be decided without deference to the court below. *Sloan v. Greenville Hospital System,* 388 S.C. 152, 694 S.E.2d 532, 534 (2010).

ARGUMENT

I. THE COURT BELOW ERRED IN RULING THAT AUTOPSY RECORDS WERE AS A MATTER OF LAW "MEDICAL RECORDS" AND THEREFORE OUTSIDE THE DEFINITION OF PUBLIC RECORDS CONTAINED IN THE SOUTH CAROLINA FREEDOM OF INFORMATION ACT.

The General Assembly in the FOIA defined "public records" broadly to include:

> "Public record" includes all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body.

S.C. Code Ann. §30-4-20(c) (Rev. 2007).

That same section also addressed "medical records" by providing:

> Records such as...medical records...and other records which by law are required to be closed to the public are not considered to be made open to the public under the provision of this act....

Id.

No definition was provided for "medical records." Appellants believe that the General Assembly did not intend to include autopsy records within the definition of medical records when adopting the section quoted above. Had it been the intention of the General Assembly to include autopsy records within the scope of medical records, it would not then have been necessary for the inclusion of specific exemptions from the mandatory disclosure requirements of the FOIA for "Photographs, videos, and other visual images, and audio recordings of and related to the performance of an autopsy..." when the FOIA was amended in 2002 to include this specific exemption. S.C. Code Ann. §30-4-40(a)(18) (Rev. 2007). If autopsy records were medical records, they were exempt from disclosure to the public prior to the amendment that added subsection (18) in 2002,

Act No. 350, 2002 S.C. Acts 3809 (hereinafter Act No. 350), thus making the amendment unnecessary. The Supreme Court of South Carolina has long recognized the rule of statutory interpretation that the adoption of an amendment which materially changes a statute raises a presumption that a departure from the original law was intended, and this presumption is strongest where, as here, the amendment was an isolated and independent amendment rather than a general revision of the law. *North River Ins. Co. v. Gibson,* 244 S.C. 393, 137 S.E.2d 264 (1964). Act No. 350 materially diminished the public's right of access to the autopsy records specified in the amendment, and the amendment of the FOIA by Act No. 350 creates the strong presumption that autopsy records including photographs and videos were previously available for public inspection and copying under the FOIA.

The statutory definition of "public record" contained in the FOIA and cited above subjects to mandatory public inspection and copying all photographs and recordings, whether video or audio in the possession of a public body. By exempting from the mandatory disclosure requirements of the FOIA only those portions of records relating to autopsies specified in Act No. 350, the General Assembly necessarily retained other records relating to autopsies within its definition of public records subject to public inspection and copying as the application of the judicial canon *expressio unius est exclusio alterius* or *inclusio unius est exclusio alterius* instructs:

> "The canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius est exclusio alterius*' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'" *Hodges v. Rainey,* 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000). As we explained in *Hodges v. Rainey*: "The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded. Exceptions

> strengthen the force of the general law and enumeration weakens it as to things not expressed.'" *Id.* at 87 (quoting Norman J. Singer, *Sutherland Statutory Construction* §47.23 at 227 (5th ed. 1992)).

Riverwoods LLC v. County of Charleston, 349 S.C. 378, 563 S.E.2d 651, 655 (2002).

When the General Assembly excluded only portions of autopsy records from the mandatory disclosure requirements of the FOIA with the adoption of Act No. 350, application of the traditional doctrine of statutory construction explained above dictates that only those portions of autopsy records contained in the amendment are exempt from disclosure and all others are to be made available for public inspection and copying. And, in an instance where the records sought relate to an examination of a citizen killed by police gunfire, access to those records is essential to the operation of our democracy and consistent with the finding of the General Assembly that "it is vital that public business be performed in an open and public manner...." S.C. Code Ann. §30-4-15 (Rev.2007).

Application of the clear rules of statutory interpretation demonstrate forcefully that autopsy records other than those specifically exempt from public inspection and copying by the provisions of Act No. 350 are not considered by the General Assembly to be medical records outside the reach of the FOIA. The court below erred in concluding that the requested records were medical records just as respondent erred in asserting an "under investigation" exemption for the records (R. p.14) when an assertion of this imaginary exemption had been expressly rejected by the Supreme Court of South Carolina in *Evening Post Publishing Co. v. City of North Charleston,* 363 S.C. 452, 611 S.E.2d 496, 33 Media L. Rep. 1532 (2005).

II. THE COURT BELOW ERRED IN CONSIDERING THE AFFIDAVIT OF A PHYSICIAN WHICH OFFERED OPINION TESTIMONY AS TO A MATTER OF LAW.

Respondent submitted the affidavit of Janice Ross, M.D. (Ross) to establish that an autopsy report is a medical record. The affidavit stated that Ross had performed the autopsy on the deceased, that "An autopsy report includes highly personal medical information and medical history of the deceased as well as information on the cause of death," and that the report was a medical record. (R. p.31, ¶¶ 6 and 7) Appellants objected to the introduction of the affidavit on grounds that expert testimony is admissible only to assist the court in the understanding of factual issues, and that an expert is not competent to offer an opinion on an issue of law. *Dawkins v. Fields,* 354 S.C. 58, 580 S.E. 433 (2003). Since the determination of what the General Assembly meant by "medical records" in the definition of public records in the FOIA is a question of law, Ross lacked competency to offer expert opinion testimony on the matter and her affidavit was inadmissible under Rule 56, SCRCP which requires affidavits submitted in connection with a motion for summary judgment be made by witnesses competent to testify as to the matters stated. Ross was not competent to offer testimony on a matter of law, and the reliance by the court below on the testimony was in error. (R. p.3)

Ross' position that the autopsy records are medical records because they contain medical information is similar to an argument made by the South Carolina Department of Health and Environmental Control that a death certificate was exempt from the disclosure requirements of the FOIA on grounds that it was a medical record. The Supreme Court of South Carolina rejected this argument, saying:

> DHEC first contends that death certificates are in the nature of medical records and are therefore exempt from

> disclosure pursuant to Code § 30-4-20(c). We disagree. It is true that death certificates contain a medical certification of the cause of death. However, they are not medical records in the normal sense but are statements of conclusion by persons required by law to make such findings after the death of a citizen of the state.

Society of Professional Journalists v. Sexton, 283 S.C. 563, 324 S.E.2d 313, 314 (1984).

Autopsy records contain statements of medical conclusions by persons who have examined the bodies of persons after death, and like death certificates, these records cannot be considered "medical records in the normal sense" in that they are not prepared in connection with a course of treatment of an injury or an illness. The root of "medical" is *mederi*, "to heal." *Webster's II, New College Dictionary* (1995). Obviously no healing occurs with respect to the subject of an autopsy; therefore, while autopsy records may contain "medical conclusions," those conclusions are stated not to heal, but to identify and confirm information relating to the cause of death. Within the context of an autopsy then, a report on the autopsy and its conclusions are not medical records exempt from the definition of public records.

III. THE COURT BELOW ERRED IN CONCLUDING THAT A RULING BY A CIRCUIT COURT FROM WHICH NO APPEAL WAS TAKEN WAS A RULING OF WHICH THE GENERAL ASSEMBLY WAS PRESUMED TO HAVE KNOWLEDGE WHEN AMENDING A SECTION OF THE FREEDOM OF INFORMATION ACT TO EXEMPT FROM DISCLOSURE "PHOTOGRAPHS, VIDEOS, AND OTHER VISUAL IMAGES, AND AUDIO RECORDINGS OF AND RELATED TO THE PERFORMANCE OF AN AUTOPSY" SO AS TO SUPPORT THE CONCLUSION THAT AUTOPSY REPORTS WERE NOT SUBJECT TO PUBLIC INSPECTION AND COPYING.

The court below relied upon a ruling by a circuit court from which no appeal was taken to conclude that the General Assembly knew that this ruling was "the law" when it

enacted Act No. 350 to exempt from disclosure certain specific records relating to autopsies. (R. p.5) This reliance was couched in terms of the doctrine of the "law of the case," and misapplied both that doctrine and the presumption that the General Assembly knows the law when it acts.

It is true that a circuit court ruled in the case of *Society of Professional Journalists v. Sexton, supra,* that "Medical Examiner's records [were] exempt from disclosure as medical records under §30-4-20(c) and as investigative reports under Code §30-4-40(a)(3)." As the Supreme Court of South Carolina noted, no appeal was taken from that ruling. *Id.* 324 S.E.2d at 314. From this passing reference by the Supreme Court, (R. p.3) the court below concluded that the ruling was the law of the case and that because it had not been challenged, the General Assembly must be charged with knowledge of the circuit court ruling in connection with the adoption of Act No. 350. (R. p.5)

First, with respect to the law of the case doctrine, a decree from which no appeal is taken becomes the "law of the case" in subsequent proceedings involving the same parties and the same subject matter. *Long v. Carolina Baking Co.,* 193 S.C. 225, 8 S.E.2d 326 (1939). This doctrine applies only against those who were parties to the case when the prior decision was rendered and who had their day in court. 5 Am.Jur.2d *Appellate Review* §610 (1995). It goes without saying that a ruling by a circuit court from which no appeal has been taken and with regard to which no appellate court has ruled, does not establish precedent or bind strangers to the decision. Further, the doctrine of the law of the case does not apply to a statement by a court which does not constitute a binding adjudication. 21 C.J.S. *Courts* §195 (1940) cited in *Weil v. Weil,* 299 S.C. 84, 382 S.E.2d 471 (Ct. App. 1989). Clearly the passing reference by the Supreme Court to

the trial court ruling regarding the records of the Medical Examiner did not constitute a binding adjudication so it may be assumed that with respect to the world, there is no law of the case that a Medical Examiner's records are medical records under the FOIA. Consideration by the court below of a ruling from which no appeal was taken was mistaken and legal error.

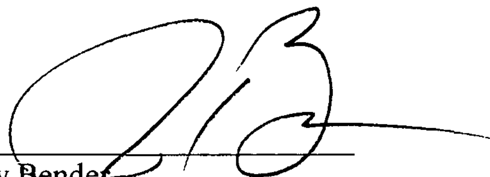
With respect to the notion that the General Assembly should be charged with knowledge of a ruling by a circuit court, from which no appeal was taken, made more than 20 years prior to the adoption of Act No. 350, the court below expanded beyond recognition the presumption that the General Assembly is aware of the Supreme Court's interpretation of its statutes. *Wigfall v. Tideland Utilities, Inc.,* 354 S.C. 100, 580 S.E.2d 100 (2003); *State v. 192 Coin-operated Video Game machines,* 338 S.C. 176, 525 S.E.2d 872 (2000). No South Carolina appellate court case suggests that the General Assembly should be presumed to be aware of circuit court decisions when enacting legislation, and certainly no case adopts that presumption with respect to a ruling from which no appeal was taken.

CONCLUSION

The court below erred in ruling that the records requested by appellants were not public records under the FOIA on grounds that they were medical records which are excluded from the statutory definition of the public records which are subject to both the disclosure and non-disclosure provisions of the FOIA. By adoption of Act No. 350 which exempted certain autopsy records from disclosure, the General Assembly affirmed that the remaining autopsy records were subject to the mandatory disclosure requirements of the FOIA. Grant of summary judgment to respondent was in error. This court should

conduct its own *in camera* review of the records requested by appellants, reverse the ruling of the court below and remand the case for reconsideration of appellants' motion for summary judgment in light of the determination that autopsy records are not medical records for purposes of exclusion from the FOIA.

Respectfully submitted.



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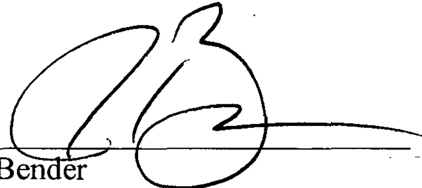
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

January 28, 2013



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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 Appellants' Final Brief and 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:

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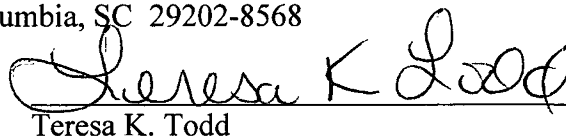

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January 29, 2013