IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

DENISE L. ANTHONY, A WIDOW, AND
ARIEL L. ANTHONY, A SINGLE WOMAN,
Plaintiffs/Appellees,

v.

DAVID M. MORGAN, DBA COCHISE COUNTY RECORD,
Defendant/Appellant.

No. 2 CA-CV 2015-0071
Filed June 16, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20144007
The Honorable Charles V. Harrington, Judge

AFFIRMED

COUNSEL

Stachel & Associates, P.C., Sierra Vista
By Robert D. Stachel
Counsel for Plaintiffs/Appellants

David M. Morgan, Bisbee
In Propria Persona

MEMORANDUM DECISION

Judge Staring authored the decision of the Court, in which Presiding Judge Howard and Judge Espinosa concurred.

S T A R I N G, Judge:

¶1 Appellant David Morgan appeals the trial court's order permanently enjoining the Pima County Medical Examiner from publicly disclosing autopsy photographs of J.A., a deceased federal law enforcement officer, late husband of appellee Denise Anthony and father of appellee Ariel Anthony and her minor sister. Morgan contends the court erred in applying A.R.S. § 11-597.02, which restricts the disclosure of certain images of human remains, retroactively to the request for the documents he made before the statute's effective date. He also challenges the constitutionality of the statute, asserting the court erred in rejecting that claim. For the reasons discussed below, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the trial court's ruling. *Hammoudeh v. Jada*, 222 Ariz. 570, ¶ 2, 218 P.3d 1027, 1028 (App. 2009). In June 2014, J.A.'s body was found near Douglas, Arizona. J.A. was a special agent with the Department of Homeland Security. The FBI[1] and Customs and Border Patrol Office of Internal Affairs investigated J.A.'s death, and the Cochise County Sheriff's Office "shadow[ed]" and provided assistance. The Pima County Medical Examiner performed an autopsy and concluded J.A. had committed suicide.

¶3 On June 26, 2014, Morgan, who operates an online news publication or "blog" known as the Cochise County Record, requested copies of the autopsy report and related documents, including photographs. After notifying Denise Anthony, the

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[1]Federal Bureau of Investigation

medical examiner released the autopsy report and all other documents except the photographs of J.A.'s body.[2] On July 24, appellees filed a complaint in Pima County Superior Court against the medical examiner and Morgan, doing business as the Cochise County Record, seeking to permanently enjoin the medical examiner from disclosing J.A.'s autopsy photographs and requesting that the court deny Morgan's request for the photographs. Appellees also filed an application for a temporary restraining order, which the trial court granted. In his answer, Morgan challenged the constitutionality of § 11-597.02 and asserted, inter alia, that appellees' privacy concerns were outweighed by the public's right to the information.

¶4 At the January 2015 bench trial, Denise Anthony testified she had not seen the autopsy photographs and did not wish to, and she considered the photographs to be private and did not want the general public or her two teenaged daughters to see them. She also testified she had seen information about J.A. that Morgan had received and posted on the internet, as well as autopsy photographs of other individuals Morgan had posted.

¶5 Eighteen-year-old Ariel Anthony testified she did not want people to see the photographs and did not want them released because she had concerns they would be posted to social media sites on the internet. Ariel explained she still struggled emotionally with her father's death, and believed publication of the photographs would cause her further harm.

¶6 Morgan presented evidence that J.A. may have attended a border corruption conference, and that the border patrol and FBI were investigating his death. Morgan claimed the Cochise County Sheriff, the FBI, or the medical examiner might be "doing a poor job," which would be "of significant concern" to the public. He presented no evidence identifying any problems with the investigation, but asserted, "[W]e don't know at this time the quality of the investigation."

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[2]For purposes of this decision, the term "photographs" includes any x-rays.

¶7 In its February 2015 under-advisement ruling, the trial court determined that § 11-597.02, which was enacted in 2014 and became effective on July 24, 2014, *see* 2014 Ariz. Sess. Laws, ch. 88, § 2, is procedural in nature, rather than substantive. The court therefore applied the statute retroactively to Morgan's June 26, 2014 public records request. The court rejected Morgan's constitutional challenge to the statute.

¶8 Applying the statute and conducting the balancing of interests it requires, the trial court found that if the photographs were released, they would "likely" be posted on the internet, where the general public, including surviving family and friends, "could easily and unwittingly" encounter them. The court found publication of the photographs would cause J.A.'s surviving spouse and daughters "profound and lasting psychological harm." It also found there was no evidence of impropriety in the investigation of J.A.'s death. The court noted that the outcome here would have been the same under the common law because the privacy interests of J.A.'s surviving family outweighed the public's interest in monitoring the medical examiner's performance. It permanently enjoined the medical examiner from releasing the autopsy photographs. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(5)(b).

Retroactive Application of A.R.S. § 11-597.02

¶9 Morgan first contends the trial court erred by applying § 11-597.02 to his request for autopsy records, because the statute was not effective when he made the request on June 26, 2014. We review de novo whether a statute may be applied retroactively. *See DeVries v. State*, 219 Ariz. 314, ¶ 9, 198 P.3d 580, 584 (App. 2008).

¶10 "By state statute, '[n]o statute is retroactive unless expressly declared therein.'" *Id.*, *quoting* A.R.S. § 1-244 (alteration in *DeVries*). Section 11-597.02 does not contain a legislative statement of retroactive intent. But a statute that is "procedural only, and do[es] not alter or affect earlier established substantive rights may be applied retroactively." *Aranda v. Indus. Comm'n*, 198 Ariz. 467, ¶ 11, 11 P.3d 1006, 1009 (2000).

¶11 The distinction "between substance and procedure 'has proven elusive.'" *See Seisinger v. Siebel*, 220 Ariz. 85, ¶ 29, 203 P.3d 483, 490 (2009), *quoting In re Shane B.*, 198 Ariz. 85, ¶ 9, 7 P.3d 94, 97 (2000). *See also Graf v. Whitaker*, 192 Ariz. 403, ¶ 10, 966 P.2d 1007, 1010 (App. 1998). Generally, however, "[s]ubstantive law 'creates, defines and regulates rights' while . . . procedural law establishes only 'the method of enforcing such rights or obtaining redress.'" *Aranda*, 198 Ariz. 467, ¶ 12, 11 P.3d at 1009, *quoting Hall v. A.N.R. Freight Sys., Inc.*, 149 Ariz. 130, 138, 717 P.2d 434, 442 (1986).

¶12 We conclude Morgan's June 26 request qualifies as a relevant event triggering the need for retroactivity analysis. As of June 26, his right to access the photographs in question was subject to Arizona public records law, including A.R.S. § 39-121's requirement that "[p]ublic records . . . shall be open to inspection by any person at all times during office hours."[3] "Upon request, a custodian of records [was required] to 'promptly' furnish copies of requested records. . . ." *McKee v. Peoria Unified Sch. Dist.*, 236 Ariz. 254, ¶ 15, 338 P.3d 994, 998 (App. 2014), *quoting* A.R.S. § 39-121.01(D)(1). In addition, a party *opposing* disclosure ordinarily has the burden to overcome a presumption of access by demonstrating that disclosure "would violate rights of privacy or confidentiality, or would be 'detrimental to the best interests of the state.'" *Cox Ariz. Publ'ns, Inc. v. Collins*, 175 Ariz. 11, 14, 852 P.2d 1194, 1198 (1993), *quoting Mathews v. Pyle*, 75 Ariz. 76, 81, 251 P.2d 893, 896 (1952).

¶13 Section 11-597.02(A), however, prohibits a county medical examiner from publicly disclosing "photographs, digital images, x-rays and video recordings of human remains" created during the medical examiner's "death investigation" unless a superior court judge first conducts an in camera review and "balanc[es] the interests under [Arizona's] public records laws" to determine whether disclosure is appropriate. Thus, § 11-597.02 imposes a per se rule requiring an in camera inspection for a specific type of public record, the depiction of human remains.

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[3] "[A]utopsy photographs are public records." *Schoeneweis v. Hamner*, 223 Ariz. 169, ¶ 11, 221 P.3d 48, 52 (App. 2009).

¶14 Until § 11-597.02 was enacted, there was no statutory distinction between autopsy photographs and other public records, for which there is a "legal presumption favoring disclosure."[4] *Cox*, 175 Ariz. at 14, 852 P.2d at 1198. Although § 11-597.02(B) permits certain family members, medical professionals, and government agencies to examine and obtain images of human remains created by a medical examiner upon request, members of the general public must file a petition in superior court requesting an in camera review of the images, which may not be disclosed without a court order issued after the court has conducted in camera review and balanced the competing interests. § 11-597.02(A)–(B).

¶15 Thus, § 11-597.02 represents a significant, substantive departure from the treatment accorded to other classes of public records under Arizona law. These changes are not merely procedural. They regulate and restrict the right of access for a defined subset of records, creating new burdens for a party seeking these records. *See Seisinger*, 220 Ariz. 85, ¶ 30, 203 P.3d at 491 ("[T]he legislature is empowered to set burdens of proof as a matter of substantive law."). Additionally, they have the potential to create substantial delay in the access to records that had been presumptively subject to disclosure. *City of Phoenix v. Johnson*, 220 Ariz. 189, ¶ 18, 204 P.3d 447, 451 (App. 2009) (rule could not be enforced when it imposed "a potentially substantial period of time" between the exercise of a substantive right to immediate payment, because it lessened, eliminated, and diminished the substantive right). We therefore conclude § 11-597.02 is substantive, and did not apply retroactively to Morgan's records request.

¶16 Because we agree with Morgan that the statute did not apply to his request for the autopsy photographs, we need not

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[4]In *Schoeneweis*, which was a special action from a probate court's refusal to seal death records, we concluded the court's "failure to conduct an *in camera* review to balance the competing interests of privacy and access amount[ed] to an abuse of discretion." 223 Ariz. 169, ¶ 22, 221 P.3d at 54. *Schoeneweis*, however, did not impose a per se rule requiring in camera inspection. *Id.*

address his claim that the trial court erred in finding the statute constitutional. *See Armenta v. City of Casa Grande*, 205 Ariz. 367, ¶ 7, 71 P.3d 359, 362 (App. 2003) (no need to address constitutional challenge to inapplicable statute); *Smith v. Ariz. Bd. of Regents*, 195 Ariz. 214, ¶ 24, 986 P.2d 247, 252 (App. 1999) ("Because . . . the statute does not apply, we need not address . . . constitutional arguments.").

Balancing of Interests

¶17 "We are obliged to affirm the trial court's ruling if the result was legally correct for any reason." *State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984). Whether or not the trial court incorrectly applied § 11-597.02 retroactively, it nevertheless balanced the parties' interests thoroughly and in accordance with the law applicable before the effective date of the statute, and correctly granted appellees' request for a permanent injunction.

¶18 Public records may be lawfully withheld when "the interests of privacy, confidentiality, or the best interest of the state in carrying out its legitimate activities outweigh the general policy of open access." *Carlson v. Pima County*, 141 Ariz. 487, 491, 687 P.2d 1242, 1246 (1984). Ordinarily, a party opposing disclosure has the burden to overcome the presumption of access by demonstrating that disclosure "would violate rights of privacy or confidentiality, or would be 'detrimental to the best interests of the state.'" *Cox*, 175 Ariz. at 14, 852 P.2d at 1198, *quoting Mathews*, 75 Ariz. at 81, 251 P.2d at 896. Our supreme court has "'asked trial courts to make *in camera* inspections of the relevant documents and balance the rights of the parties'" when asked to determine whether to bar disclosure of public records. *Id.* at 15, 852 P.2d at 1199, *quoting Mitchell v. Superior Court*, 142 Ariz. 332, 334, 690 P.2d 51, 53 (1984). Notably, in *Schoeneweis*, we concluded the trial court had abused its discretion by failing to conduct an in camera inspection before releasing death records, including autopsy reports. 223 Ariz. 169, ¶ 22, 221 P.3d at 54.[5]

[5]In *Schoeneweis*, concerning the need for in camera review, we also wrote: "In this case, *in camera* review will surely lead to the

¶19 We review de novo a trial court's decision to grant or deny access to public records. *Id.* ¶ 6. In doing so, we defer to the court's factual findings unless clearly erroneous. *Scottsdale Unified Sch. Dist. No. 48 of Maricopa Cty. v. KPNX Broad. Co.*, 191 Ariz. 297, ¶ 20, 955 P.2d 534, 539 (1998). The trial court balanced the parties' competing interests thoroughly and in a manner consistent with the evidence presented at trial. The appellees' testimony supports the court's finding that they did not want the public to have access to the autopsy photographs and their release would significantly intrude upon the family's privacy and mental health. *Cf. Marsh v. County of San Diego*, 680 F.3d 1148, 1154 (9th Cir. 2012) ("[T]he common law right to non-interference with a family's remembrance of a decedent is so ingrained in our traditions that it is constitutionally protected" under the Due Process Clause of the Fourteenth Amendment.).[6] The testimony also supports the court's finding that if released to Morgan, the photographs would "likely find their way onto the internet" and that the surviving family might inadvertently encounter them. Furthermore, the record supports the court's finding that exposure to the photographs would cause significant emotional harm to the surviving family.

¶20 As the trial court acknowledged, it is important for the public to have the means to be able to evaluate the government's investigation of J.A.'s death. But the medical examiner's release of the written autopsy report and all documents other than the autopsy photographs provided the means to allow such an evaluation. *See A.H. Belo Corp. v. Mesa Police Dep't*, 202 Ariz. 184, ¶ 6, 42 P.3d

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determination that many of the records are not appropriately subject to public inspection. For example, it is difficult to conceive of circumstances that would justify the public disclosure of autopsy photographs here." 223 Ariz. 169, ¶ 23, 221 P.3d at 54.

[6]Additionally, Arizona's constitution contains an express "right to privacy" that broadly protects against being "disturbed in [one's] private affairs . . . without authority of law." Ariz. Const. art. II, § 8. The Arizona Attorney General has recognized this provision as a "potential ground for denying public access to autopsy reports." 1988 Op. Att'y Gen. I88-130, at 5.

615, 617 (App. 2002) (alternate sources of information decrease public interest in access to particular record). Morgan presented no facts supporting his assertion that the circumstances surrounding J.A.'s death were suspicious or suggesting any impropriety with respect to the investigation. Nor has he argued that the photographs would add anything of substance to the information already disclosed. Morgan's speculative concerns coupled with his admission that "we just don't know" about the quality of investigation are insufficient to tip the balance of competing interests in disclosure of the autopsy photographs. On the record before us, the court therefore did not err in balancing the relevant interests and granting appellees injunctive relief.

Disposition

¶21 For the reasons stated, we conclude the trial court did not err in permanently enjoining the medical examiner from disclosing the autopsy photographs of J.A. Accordingly, we affirm the court's order.