



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

LISA A. LAWSON and)
GYMS MANAGEMENT INC.,)
)
Plaintiffs,)

v.)

C.A. No. 1183-N

VINCENT MECONI, Secretary of)
Department of Health and Social Services,)
RICHARD T. CALLERY, M.D.,)
Medical Examiner for the State of)
Delaware, JUDITH G. TOPIN, M.D.,)
Assistant Medical Examiner for the State)
of Delaware, KEITH BANKS, Chief of)
Police, Rehoboth Beach Police Department,)
KENNETH H. MCMAHON, Chairman,)
Delaware State Fire Prevention)
Commission, WILLIAM F. PRESTON, III,)
individually and as Fire Marshal, State of)
Delaware, RICHARD WARD, individually,)
and HARRY MILLER, individually,)
)
Defendants.)

MEMORANDUM OPINION AND ORDER

Submitted: May 6, 2005

Decided: May 27, 2005

John C. Phillips, Esquire, PHILLIPS GOLDMAN & SPENCE, P.A., Wilmington, Delaware, *Attorney for the Plaintiffs.*

A. Ann Wolfolk, Esquire, James J. Hanley, Esquire, Deputy Attorneys General, STATE OF DELAWARE DEPARTMENT OF JUSTICE, Wilmington, Delaware, *Attorneys for the State Defendants.*

Walter W. Speakman, Jr., Esquire, BROWN, SHIELS, BEAUREGARD &
CHASANOV, Dover, Delaware, *Attorney for Defendant Keith Banks.*

LAMB, Vice Chancellor.

I.¹

On February 15, 2005, Duane L. Lawson died in a car fire in Rehoboth Beach, Delaware. Mr. Lawson's death was investigated by both the City of Rehoboth Beach Police Department (the "Police Department") and the State Fire Marshall (the "Fire Marshall"). At approximately 4:30 p.m., Mr. Lawson's body was removed from the scene by an agent of the Office of the Chief Medical Examiner. On February 17, 2005, Assistant State Medical Examiner Judith G. Tobin, M.D. performed an autopsy on Mr. Lawson's body.² In the course of that procedure, Dr. Tobin took samples from Mr. Lawson's body in order to perform toxicology tests. On February 17, 2005, Dr. Tobin completed a pending Certificate of Death for Mr. Lawson and filed it with the Office of Vital Statistics. On March 14, 2005, the toxicology report was completed on the samples drawn from Mr. Lawson's body, and Dr. Tobin completed the autopsy report and sent the final Certificate of Death to the Office of Vital Statistics. The toxicology report, autopsy report, Certificate of Death, and the related examination record, contain information relating to the circumstances and cause of Mr. Lawson's death (the

¹ Except where otherwise stated, all facts in this opinion are taken from the Joint Pre-Hearing Statement filed on May 4, 2005.

² Neither Lisa Lawson, Mr. Lawson's widow, nor anyone else from his family consented to the autopsy. Nor did the State Attorney General's office request it. However, the Medical Examiner has the discretion to perform an autopsy, without such consent or request. *See 29 Del. C. § 4707(b)*.

“Autopsy Information”).

After conducting the autopsy, Dr. Tobin concluded that Mr. Lawson’s death was an accident. Thus, she did not believe that any further investigation was warranted. On March 17, 2005, Dr. Tobin faxed a copy of the examination record and autopsy report to the Police Department. Dr. Tobin wrote on the fax cover sheet that the transmittal was “Confidential Information.”

The Police Department has stated that no “foul play” was involved in Mr. Lawson’s death. Similarly, the Fire Marshall has preliminarily concluded that there was no foul play involved in the car fire, and that the fire was an accident. Neither of these agencies has referred the matter to the Attorney General’s office for further investigation.

The circumstances surrounding Mr. Lawson’s death have been widely reported in the Delaware press. However, the Autopsy Information has not been made public. In order to clarify the situation, and dispel certain rumors, Chief Keith Banks of the Police Department has stated that he would like to issue a press release containing information from the autopsy and examination record relating to the cause of death. In addition, the general policy of the Fire Marshall’s office is to share its reports with insurance companies, and the Fire Marshall intends to do so

with its report of Mr. Lawson's death.³

Mrs. Lawson and Gyms Management Inc.⁴ bring this suit to enjoin the Police Department and the Fire Marshall from disclosing information contained in the autopsy, Certificate of Death, toxicology report, and the examination record that Mrs. Lawson contends is protected, private information. Mrs. Lawson seeks a preliminary injunction precluding the respondents from disclosing this information.⁵ This is the court's disposition of that motion.

II.

The standard for granting a preliminary injunction is well-settled. The party seeking a preliminary injunction bears the burden of establishing three elements: (1) a reasonable likelihood of success on the merits, (2) imminent, irreparable harm will result if an injunction is not granted, and (3) the damage to petitioner if the injunction does not issue will exceed the damage to the respondents if the injunction does issue.⁶ A preliminary injunction is an extraordinary remedy, is granted sparingly, and is only granted upon a persuasive showing that it is urgently

³ It is unclear whether the Fire Marshall's report contains information relating to the cause and circumstances of Mr. Lawson's death because, even though an interim report was available, the Fire Marshall refused to produce the report in discovery. Therefore, the court must assume that the report contains such information.

⁴ Mrs. Lawson is the only shareholder of Gyms Management. For the sake of brevity, the court refers to both petitioners simply as Mrs. Lawson.

⁵ On April 29, 2005, the court entered a Protective Order, precluding the disclosure of this information, pending the resolution of this case.

⁶ *Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 579 (Del. Ch. 1998).

necessary, that it will result in comparatively less harm to the adverse party, and that, in the end, it is unlikely to be shown to have been issued improvidently.⁷

In this case, the analysis of the likelihood of success on the merits focuses on an important threshold question. Namely, does Delaware law recognize a privacy interest in the family of a deceased person for this type of information, either by statute or common law? The court addresses this issue first.

III.

A. Statutory Right Of Privacy

1. 16 Del. C. §§ 3101-12

Mrs. Lawson cites three separate statutes as creating a right of privacy in the information contained in the disputed documents. The first is the statute titled “Vital Statistics.”⁸ This statute primarily pertains to the registration and maintenance of “vital records” by the Office of Vital Statistics of the Division of Public Health, within the Department of Health and Social Services (“DHSS”). Vital records are defined as “certificates or reports of birth, death, marriage, divorce or annulment, and data related thereto[.]”⁹ Vital records are considered confidential,¹⁰ and certificates of death and reports of death do not become public

⁷ *Id.*

⁸ 16 Del. C. §§ 3101-12.

⁹ 16 Del. C. § 3101(11).

¹⁰ *See* 16 Del. C. § 3110.

documents until forty years after the date of death.¹¹ Mrs. Lawson argues that certificates of death, autopsy reports, and toxicology reports are all vital records covered by the confidentiality provisions of this statute. Thus, the argument goes, neither they nor the information in them can be disclosed without her consent.

The court agrees that the Certificate of Death is plainly covered by this statute, and its release by DHSS is governed by section 3110 (“Disclosure of records”). However, the proposition that the statute covers the other documents, and the information contained therein, presents a very different question. This statute, pertinently, requires that death certificates be filed with DHSS and regulates public access to those certificates. It does not require the filing with DHSS of autopsy reports or toxicology reports and does not purport to regulate the disclosure of those documents or any ancillary information contained therein by persons other than DHSS. Because nothing in the statute suggests that it should be interpreted so broadly, the court cannot read this statute as creating a right of privacy in the Autopsy Information.

2. 16 Del. C. §§ 1201-32

Second, Mrs. Lawson cites the statute titled “Informed Consent And Confidentiality”¹² to claim that she has a privacy right in the Autopsy Information.

¹¹ See 16 Del. C. § 3110(f).

¹² 16 Del. C. §§ 1201-32.

16 *Del. C.* § 1232 provides that “[p]rotected health information is not public information . . . and may not be disclosed without the informed consent of the individual (or the individual’s lawful representative) who is the subject of the information except as expressly provided by statute.” In relevant part,

16 *Del. C.* § 1230(4) defines “protected health information,” as:

any information, whether oral, written, electronic, visual, pictorial, physical or any other form, that relates to an individual’s past, present or future physical or mental health status, condition, treatment, service, products purchased, or provision of care and that reveals the identity of the individual whose health care is the subject of the information

Mrs. Lawson argues that the Autopsy Information relates to her deceased husband’s past physical health condition and is, therefore, confidential.

However, 16 *Del. C.* § 1232(e) states, in pertinent part:

Deceased Individuals. — Nothing in this subchapter shall prohibit the disclosure of protected health information:

(1) In certificate of death, autopsy report, or related documents prepared under applicable laws or regulations

The plain language of 16 *Del. C.* § 1232(e) exempts what would otherwise be confidential health information from the scope of 16 *Del. C.* § 1232, when that information is contained in an autopsy report, death certificate or “related documents.” Therefore, on its face, this statute does not create a right of privacy in the Autopsy Information.

3. 29 Del. C. §§ 4701-13

Third, Mrs. Lawson cites the statute titled “Medical Examiners”¹³ to claim that she has a privacy right in the Autopsy Information. Aptly named, this statute describes the powers and responsibilities of the Chief Medical Examiner and his or her Assistants and Deputies (collectively, “Medical Examiners”). Mrs. Lawson interprets this statute as allowing Medical Examiners to share an autopsy report with only two classes of people. The first is the next of kin, upon written request pursuant to 29 Del. C. § 4707(e). The second is the Attorney General. Pursuant to 29 Del. C. § 4710(b), the Medical Examiners “shall deliver to the Attorney General copies of all records relating to every death in which, in the judgment of the investigating Medical Examiner, further investigation may be deemed advisable.” In addition, pursuant to 29 Del. C. § 4710(c), “[t]he Attorney General may obtain from the office of the Chief Medical Examiner copies of all records or other information which the Attorney General may deem necessary.” From these explicit grants of authority, Mrs. Lawson argues that the Medical Examiner has the authority to provide autopsy reports or information derived therefrom only to the Attorney General and the family of the decedent.

While this is a possible reading of this law, it is not compelled by either the

¹³ 29 Del. C. §§ 4701-13.

language or the structure of the statute. For example, subsection 4710(d) expressly provides that records of the Chief Medical Examiner's Office shall be received "as competent evidence in any court in this State of the matters and facts therein contained." Indeed it is routine for autopsy reports and related information to be admitted into evidence in both criminal and civil matters. This fact weighs against any reading of the other subparts of the statute to limit the Medical Examiners' ability to share information with other officials in the course of their duties.

Reading this statute to strictly limit the ability of the Medical Examiners to share information with other officials would doubtless interfere with the normal functioning of Medical Examiners by preventing them from sharing potentially important information with police in the course of an investigation, except through the intermediation of the Attorney General. This is not how the Chief Medical Examiner's Office works. Dr. Tobin testified that she typically begins her investigation by speaking to the police officers investigating the case.¹⁴ Dr. Tobin also testified that she regularly takes blood samples and gives them to the police so that the police can perform DNA and blood typing.¹⁵ While Dr. Tobin stated that she considers the autopsy reports to be confidential and that she sent Mr. Lawson's autopsy report to the Police Department marked as "confidential," she plainly does

¹⁴ Tobin Dep. at 9-10.

¹⁵ *Id.* at 21-22.

not consider it a violation of that confidentiality to have given the report to the Police Department.¹⁶

Mr. Lawson died under unusual and suspicious circumstances, and the Police Department properly began an investigation that required them, in the performance of their duties, to have access to information about the cause of Mr. Lawson's death. The interpretation of the statute that Mrs. Lawson asks the court to adopt would effectively end communication between the medical office and the police, unless the Attorney General intervened. Such an interpretation of the statute would provide great protections for the privacy of certain information contained in autopsy reports and related documents, but would do so only at great cost to efficient communication between and among responsible public officials. Because the court concludes that the relevant provisions of the Medical Examiners statute neither require nor support such an interpretation, the court holds that the statute does not create any privacy right in the Autopsy Information.¹⁷

B. Common Law Right Of Privacy

Mrs. Lawson argues that, even if there is no statutory right of privacy in the

¹⁶ *Id.* at 52.

¹⁷ In her brief, Mrs. Lawson argued that the Autopsy Information is exempt from the disclosure requirements of the Delaware Freedom of Information Act ("FOIA"). All parties to this suit agree that the Autopsy Information is exempt under the Delaware FOIA. As this issue is not in dispute, the court expressly makes no findings or rulings on this issue.

Autopsy Information, there is a common law right of privacy that would be violated by releasing this information. The Delaware Supreme Court has recognized a common law right of privacy.¹⁸ Furthermore, in *Barker v. Huang*, our Supreme Court delineated the four varieties of the tort of invasion of privacy as the following: (1) intrusion on plaintiff's physical solitude, (2) publication of private matters violating the ordinary senses, (3) putting plaintiff in a false position in the public eye, and (4) appropriation of some element of plaintiff's personality for commercial use.¹⁹ Two of these are particularly relevant to this case. Relating to the first, intrusion, the Supreme Court stated: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."²⁰ Relating to the second, publication of private matters, the Supreme Court stated that: "One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public."²¹

¹⁸ See *Barberi v. News-Journal Co.*, 189 A.2d 773, 774 (Del. 1963).

¹⁹ 610 A.2d 1341, 1349 (Del. 1992).

²⁰ *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 652B (1977)).

²¹ *Barker*, 610 A.2d at 1350 (quoting RESTATEMENT (SECOND) OF TORTS § 652B).

However, Delaware case law is silent as to whether the family of a decedent can enforce this right on the decedent's behalf. The parties have spilled a good deal of ink over *Swickard v. Wayne County Medical Examiner*,²² a Michigan Supreme Court case, in arguing whether or not the common law right of privacy dies with the decedent. In *Swickard*, the Michigan Supreme Court examined the applicability of the Michigan FOIA to a request for information concerning a deceased person.²³ *Swickard* involved the death of a judge and a FOIA request for the release of an autopsy report and toxicology tests prepared by the medical examiner.²⁴ Emphasizing the facts that (1) no right to privacy existed that could be asserted against the plaintiff, and (2) the requested information related to a public official, the Michigan Supreme Court held that the information was not of a personal nature, that no invasion of privacy was threatened, and therefore the privacy exemption did not apply and the FOIA request should be granted.²⁵ Specifically, the Michigan Supreme Court stated: "Constitutional rights of privacy are personal. A deceased person loses the right of privacy, and the right cannot be asserted by the next of kin."²⁶

²² 475 N.W.2d 304 (Mich. 1991).

²³ *Id.* at 306-07.

²⁴ *Id.*

²⁵ *Id.* at 312-15.

²⁶ *Id.* at 312.

However, Mrs. Lawson questions the continued viability of this holding in *Swickard*, and its applicability to this case. In *Baker v. City of Westland*, the Court of Appeals of Michigan distinguished *Swickard* to instances involving public figures.²⁷ *Baker* involved a request under the Michigan FOIA to provide the names, addresses, and accident dates of all injured, potentially injured, or deceased accident victims who were involved in car accidents during a specified six-month period and who were not at fault for the accident.²⁸ The Michigan Court of Appeals held that information regarding a death of a private individual in an auto accident, as opposed to the very public suicide of a state judge, is personal information.²⁹ It further held that there was no public interest in such a disclosure.³⁰

While these cases seem to be in conflict, the overwhelming weight of authority holds that a claim for invasion of privacy cannot be brought by a decedent's family. For instance, the Restatement (Second) of Torts § 652I states that: "Except for the appropriation of one's name or likeness, an action for invasion of privacy can be maintained only by a living individual whose privacy is

²⁷ 627 N.W.2d 27, 32 (Mich. App. 2001).

²⁸ *Id.* at 28.

²⁹ *Id.* at 32.

³⁰ *Id.* at 33.

invaded.”³¹ Indeed, as far as the court has been able to determine, there are only three states that have recognized a common law relational right of privacy.³²

In *Reid*, the most recent of those three decisions, the plaintiffs, relatives of deceased persons, filed an action against the defendants, a county and its employees, alleging that the defendants’ appropriation and displaying of photographs of corpses of plaintiffs’ deceased relatives to others constituted a common law invasion of privacy.³³ The Washington Supreme Court held that the immediate relatives of a decedent have a privacy interest in the autopsy records of their dead relatives, grounded in maintaining the dignity of the deceased.³⁴

In doing so, the Washington Supreme Court failed to distinguish, or even mention, the Restatement and the plethora of cases cited therein. Instead, it relied upon several federal cases interpreting the federal FOIA. For instance, in *Katz v.*

³¹ See also *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956, 957 (6th Cir. 1980) (“[T]he exclusive right to publicity survives a celebrity’s death. We hold that the right is not inheritable. After death the opportunity for gain shifts to the public domain, where it is equally open to all.”); *Moore v. Charles B. Pierce Film Enter., Inc.*, 589 S.W.2d 489, 491 (Tex. App. 1979) (“[I]nvasion of privacy cannot be maintained by a relative of the person concerned, unless that relative is himself brought into unjustifiable publicity.”); *Hendrickson v. Cal. Newspapers*, 48 Cal. App. 3d 59, 62 (Cal. Ct. App. 1975) (“[T]he right of privacy is purely a personal one; it cannot be asserted by anyone other than the person whose privacy has been invaded, that is, plaintiff must plead and prove that *his* privacy has been invaded. Further, the right does not survive but dies with the person.”) (emphasis in original).

³² See *Reid v. Pierce County*, 961 P.2d 333, 342 (Wash. 1998); *Cox Broad. Co. v. Cohn*, 200 S.E.2d 127, 131 (Ga. 1973); *Smith v. Doss*, 37 So. 2d 118 (Ala. 1948). Three other states, Oklahoma, Virginia, and Utah have created relational right of privacy by statute.

³³ *Reid*, 961 P.2d at 335.

³⁴ *Id.* at 342.

Nat. Archives & Records Admin., the United States District Court for the District of Columbia held that the family of President Kennedy had a privacy interest in the x-rays and photographs taken during President Kennedy's autopsy, such that the documents need not be released under the Federal FOIA.³⁵ Likewise, in *New York Times Co. v. NASA*, that same District Court held that tape-recorded voice communications of the deceased astronauts in the Challenger shuttle crash were exempt from the federal FOIA because the families of the deceased astronauts had a privacy interest.³⁶

Reid also relied upon *Douglas v. Stokes*,³⁷ a Kentucky Supreme Court case from early last century. In that case, twin boys born connected at the sternum died shortly after birth, and the parents hired a photographer to make 12 pictures of the twins. The photographer made an extra picture and obtained a copyright of that picture from the United States Copyright office.³⁸ The Kentucky Supreme Court upheld a jury verdict against the photographer for invasion of privacy, among other things.

These cases are readily distinguishable from the instant case. First, the federal FOIA cases do not involve a common law right; they involve an

³⁵ 862 F. Supp. 476, 485-86 (D.D.C. 1994), *aff'd*, 314 U.S. App. D.C. 387, 68 F.3d 1438 (1995).

³⁶ 782 F. Supp. 628 (D.D.C. 1991).

³⁷ 149 S.W. 849 (Ky. 1912).

³⁸ *Id.* at 849.

interpretation of an exception under the federal FOIA. An agency must disclose agency records under the federal FOIA unless they may be withheld pursuant to one of the nine enumerated exemptions listed in the statute.³⁹ 5 U.S.C.S.

§ 552(b)(6) exempts from mandatory disclosure personnel and medical files, and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. The courts in *Katz* and *New York Times v. NASA* were interpreting this exemption to the statute. Thus, their holdings are not dispositive as to whether the common law right of privacy survives death, especially since, as discussed *supra*, the overwhelming weight of authority applying that common law right holds that it does not.

Second, the federal FOIA cases involved a party attempting to force the government to disclose documents or materials. In this case, Mrs. Lawson is attempting to *prevent* the Fire Marshall and Police Department from releasing information. This distinction is crucial. Freedom of information acts, such as that adopted by the Delaware General Assembly, 29 *Del. C.* § 10001 *et seq.*, are based upon strong public policies favoring citizens' access to public records "in order that the society remain free and democratic."⁴⁰ Thus, courts are directed to construe such laws "to further the accountability of government to the citizens of

³⁹ See 5 U.S.C.S. § 552 (2005); *United States Dept. of Justice v. Julian*, 486 U.S. 1, 8 (1988).

⁴⁰ 29 *Del. C.* § 10001.

this State.”⁴¹ That policy is obviously not implicated by this suit, the object of which is to prevent a public official from publicizing information about Mr. Lawson’s cause of death, as reported in the official records.

Third, *Katz*, *Douglas*, and *Reid* itself all involved the release of photographs. At common law, there have been greater protections for appropriations of someone’s likeness.⁴² This distinction is expressly recognized by the Delaware FOIA. 29 *Del. C.* 10002(g)(15) specifically exempts photographs, audio recordings, and video recordings of a post-mortem examination in the possession of the Chief Medical Examiner from disclosure. Thus, not only does the Delaware FOIA draw a distinction between these documents and the autopsy report and related information, but the negative implication of this distinction is that the autopsy report and related information not covered by the statutory exemption should be given less privacy protection.

For all of the above reasons, the court cannot adopt the reasoning articulated in *Reid*, and go against the overwhelming weight of authorities. Thus, the court holds that the majority rule – that the common law right of privacy does not survive the death of its holder – is the law of Delaware.

⁴¹ *Id.*

⁴² *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 652I (“*Except for the appropriation of one’s name or likeness*, an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded.”) (emphasis added).

IV.

Since the court finds that Mrs. Lawson does not have a statutory or common law right to protect the confidentiality of the Autopsy Information, the court must conclude that Mrs. Lawson has not shown a reasonable likelihood of success on the merits. Therefore, her motion for a preliminary injunction is DENIED.