THE STATE OF SOUTH CAROLINA
In The Court of Appeals

ORIGINAL

APPEAL FROM SUMTER COUNTY
Clifton Newman, Circuit Court Judge

Case No. 2011-CP-43-0979

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

v.

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

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This is an action seeking declaratory and injunctive relief pursuant to the South Carolina Freedom of Information Act (FOIA), S.C. Code Ann. § 30-4-10, *et seq*. On or about December 16, 2010, the Appellant Joe Perry in his capacity as an employee of "The Item" sent a letter to the Respondent Harvin Bullock, the Sumter County Coroner, making a FOIA request for records related to the autopsy of Aaron Leon Jacobs. (R. 13). By letter dated January 7, 2011, the Sumter County Attorney on behalf the Coroner responded to the FOIA request and declined to produce a copy of the autopsy report in his possession. The Coroner took the position that the records related to the autopsy of Aaron Leon Jacobs are not subject to disclosure because they constitute medical records under Section 30-4-20(c) and are otherwise exempt as investigative reports under Section 30-4-40(a)(3). (R. 14-15). The Appellants thereafter filed this action on May 23, 2011, challenging the Coroner's FOIA decision. (R. 9-12).

The parties ultimately filed cross motions for summary judgment, which were heard by Circuit Court Judge Clifton Newman on April 2, 2012. Judge Newman allowed for additional briefing by the parties, and thereafter, issued an order filed July 9, 2012. (R. 1-8). With that order, Judge Newman granted the Coroner's summary judgment motion and denied the Appellants' motion. (R. 8). He

specifically determined that the written autopsy report for Aaron Leon Jacobs is a "medical record" per Section 30-4-20(c) and, as such, was not subject to mandatory disclosure under the Freedom of Information Act. (R. 7).

The Appellants filed a timely notice of appeal, and this appeal follows.

ARGUMENTS

I. The Circuit Court correctly ruled as a matter of law that the written autopsy report for Aaron Leon Jacobs is a "medical record" per Section 30-4-20(c) and, as such, was not subject to mandatory disclosure under the Freedom of Information Act.

The Circuit Court ruled as a matter of law that the written autopsy report for Aaron Leon Jacobs as prepared by Janice C. Ross, M.D. is a "medical record" as that term is used in the definition of "public record" set forth in Section 30-4-20(c) of the Freedom of Information Act (FOIA). On appeal, the Appellants contend that written autopsy reports are not "medical records" and, as a result, are subject to the mandatory disclosure requirements of FOIA.

A. The Circuit Court concluded that the autopsy report at issue is a "medical record" based upon its *in camera* review and did not err in considering the affidavit of the pathologist who performed the autopsy and prepared the report.

Section 30-4-20(c) of the FOIA provides as follows:

> (c) "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. Records such as income tax returns, *medical records,* hospital medical staff reports, scholastic

> records, adoption records, records related to registration, and circulation of library materials which contain names or other personally identifying details regarding the users of public, private, school, college, technical college, university, and state institutional libraries and library systems, supported in whole or in part by public funds or expending public funds, or records which reveal the identity of the library patron checking out or requesting an item from the library or using other library services, except nonidentifying administrative and statistical reports of registration and circulation, 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 provisions of this act.*

S.C. Code Ann. § 30-4-20(c). (Emphasis added). Thus, Section 30-4-20(c) provides that medical records are not subject to mandatory disclosure under the FOIA. The question in this FOIA action asks whether a written autopsy report such as the autopsy report for Aaron Leon Jacobs is a "medical record" per Section 30-4-20(c).

As Judge Newman concluded, the term "medical record" is not defined by the statute and therefore must be given its plain and ordinary meaning. *See, Epstein v. Coastal Timber Co., Inc.*, 393 S.C. 276, 711 S.E.2d 912, 917 (2011) ("[w]ords in a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's application"); *Adoptive Parents v. Biological Parents*, 315 S.C. 535, 446 S.E.2d 404, 409 (1994) ("[w]here the legislature elects not to define a term in a statute, the

courts will interpret the term in accord with its usual and customary meaning").

At the hearing, Judge Newman reviewed *in camera* a copy of the autopsy report at issue as well as the complete file made available to the Court by the Coroner. (R. 3). Judge Newman concluded that "the autopsy report is a medical record by the plain and ordinary meaning of the term." (R. 3). As support for that determination, he explained that "[t]he autopsy report is prepared by a medical doctor and sets forth medical information on the deceased including medical history and the medical findings of a medical doctor." (R. 3).

Judge Newman also referred in his order to the affidavit of Janice Ross, M.D., the pathologist who prepared the autopsy report at issue. Dr. Ross offers her professional opinion that the autopsy report is a medical record. *See*, Ross Affidavit, paras. 6-7. (R. 31). Dr. Ross explains that "[a]n autopsy report includes highly personal medical information and medical history of the deceased as well as information on the cause of death." *See*, Ross Affidavit, para. 6. (R. 31). The Appellants object to the court's consideration of Dr. Ross' affidavit on the premise that the meaning of "medical record" is an issue of law. However, the issue before the Court is arguably a mixed question of law and fact. As Judge Newman concluded, "regardless of whether an issue of law or fact or a mixed question, the Court must determine the plain and ordinary meaning of the term 'medical record' and determine specifically whether an autopsy report is a 'medical record.'" (R. 3).

As discussed above, based on his *in camera* review, Judge Newman determined that the written autopsy report at issue is a "medical record" per Section 30-4-20(c). He did not rely on Dr. Ross' affidavit to reach that conclusion. However, to the extent that the issue is a factual one or a mixed question, he cited Dr. Ross' opinion as supporting his assessment.

The Appellants, citing *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003), argue that Judge Newman erred in even considering the Ross affidavit because Dr. Ross is not competent to offer testimony as to an issue of law. The Coroner disagrees. Dr. Ross' opinion is probative in assessing the plain and ordinary meaning of the term "medical record" relative to an autopsy report. Her affidavit testimony explains the typical contents of an autopsy report, which Judge Newman confirmed himself with his *in camera* review of the autopsy report at issue. However, Dr. Ross never offered an opinion on the ultimate question – the meaning of "medical record" as that term is used in the FOIA. Instead, she offered her opinion that an autopsy report is a "medical record" generally applying her knowledge and experience as a physician, particularly one who performs autopsies and prepares autopsy reports.

In short, Judge Newman did not commit reversible error to the extent he even considered Dr. Ross' testimony. She did not offer her opinion on any legal issue; she did not opine whether an autopsy record is subject to disclosure under

the FOIA. That was the ultimate legal issue for the Court, and that was decided by Judge Newman alone.[1]

B. Contrary to the Appellants' position, Section 30-4-40(a)(18) may not be read as requiring the mandatory disclosure of a written autopsy report.

Instead of focusing on the meaning of "medical record" in Section 30-4-20(c), the Appellants rely entirely on Section 30-4-40(a)(18), which is part of the FOIA exemption section. Section 30-4-40(a)(18) currently reads as follows:

> A public body may but is not required to exempt from disclosure the following information:
>
> (18) Photographs, videos, and other visual images, and audio recordings of and related to the performance of an autopsy, except that the photographs, videos, images, or recordings may be viewed and used by the persons identified in Section 17-5-535 for the purposes contemplated or provided for in that section.

S.C. Code Ann. § 30-4-40(a)(18).

By way of legislative background, Section 30-4-40(a)(18) was initially enacted by the General Assembly in 2002 as part of the so-called "Dale Earnhardt

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[1] In *Poch v. Bayshore Concrete Products/South Carolina, Inc.*, 386 S.C. 13, 686 S.E.2d 689 (Ct. App. 2009), this Court concluded that the admission of an expert affidavit on legal issues was not outcome determinative and "makes no difference on appeal." 686 S.E.2d at 698. At worst, the same can be said here, even though it is clear that Judge Newman did not receive or rely on a legal opinion from Dr. Ross.

Law" which was precipitated by the media's efforts to obtain autopsy photographs of the deceased NASCAR driver in Florida after his death in the 2001 Daytona 500. In 2002 Act No. 350, the South Carolina General Assembly enacted Section 30-4-40(a)(18) as well as Section 17-5-535. As originally enacted, the language of Section 30-4-40(a)(18) was identical to that of Section 17-5-535. The following year, in 2003, the General Assembly adopted the current language in Section 30-4-40(a)(18) in addition to expanding the permissible uses of autopsy photographs, videos, and audio recordings in Section 17-5-535. The title to 2003 Act No. 34 is as follows:

> An Act to amend Section 17–5–535, Code of Laws of South Carolina, 1976, relating to persons authorized to view photographs or videos of and incidental to the performance of an autopsy and the penalty for violating this provision, so as to provide additional circumstances in which photographs, visual images, videos, and audio recordings of or related to an autopsy may be viewed, or disseminated and to amend Section 30–4–40, as amended, relating to matters that are exempt from disclosure under the Freedom of Information Act, *so as to revise circumstances in which photographs and videos of and related to the performance of an autopsy may be viewed, and to provide the circumstances in which certain visual images and audio recordings of an autopsy may be viewed and used.*

2003 Act No. 34. (Emphasis added). (R. 64).

The Appellants rely on the statutory rule of *expressio unius est exclusion alterius* to suggest that the General Assembly's exemption of autopsy photographs,

videos, and audio recordings in Section 30-4-40(a)(18) implies that a written autopsy report is subject to mandatory disclosure. The Appellants further argue that, if an autopsy report was not subject to disclosure as a medical record prior to the 2002 amendment, it was unnecessary to have even enacted Section 30-4-40(a)(18). The Appellants' reasoning, however, is flawed as Judge Newman correctly concluded.

In Section 30-4-40(a)(18), the General Assembly used the words "of or related to the performance of an autopsy." The General Assembly did not use the words "which are part of an autopsy report." The difference is significant because an autopsy is a procedure, and an autopsy report is a medical record that describes the findings and conclusions of the pathologist who performed the procedure.

The definition of "public record" set forth in Section 30-4-20(c) generally *includes* "photographs, tapes, ... recordings" and *does not specifically exclude medical photographs or recordings*. With the enactment of the "Dale Earnhardt Law," the General Assembly clearly intended to expand the already existing restrictions on access to autopsy information. The General Assembly did not need to exempt autopsy reports because – consistent with the *Sexton* case and Attorney General's opinions as discussed below – it was already readily understood in the jurisprudence that autopsy reports are not "public records" under FOIA. However, because photographs, videos, and recordings are arguably not "medical records"

and prior to 2002 were arguably subject to disclosure, the General Assembly enacted Section 30-4-40(a)(18) in order to close that loophole and restrict access to autopsy-related photographs, videos, and recordings.

Prior to 2002, written autopsy reports as medical records were not subject to disclosure under FOIA, and it cannot be logically argued that Section 30-4-40(a)(18) was added to FOIA to make written autopsy reports subject to disclosure. If that were the intent of the General Assembly, it would have certainly made that change in the law clear. Instead, as Judge Newman found, "Section 30-4-40(a)(18) was enacted because the General Assembly wanted to protect against the release of certain graphic audio and visual recordings and it did so by exempting those graphic audio and visual recordings from release in FOIA and by criminalizing the release of those graphic audio and visual recordings except in accordance with Section 17-5-535." (R. 6).

The photographs, videos and recordings described in Section 30-4-40(a)(18) are those that "relate to the performance of an autopsy." They are not described as being parts of an autopsy report. As indicated, an autopsy is a procedure. An autopsy report is a record that describes the findings of the forensic pathologist who performed the procedure. By analogy, open heart surgery is a procedure. The cardiac surgeon's report is a record that describes the findings and results of the surgeon who performed the procedure. The surgeon may speak into a microphone

while performing the procedure as a means of recording his observations, thoughts and intentions while performing the procedure. The surgeon may have cameras in the room and over the patient to record the specific events during the procedure. The audio and video recordings may or may not end up in the patient's file. Nevertheless, they still exist. They may be used only to assist the cardiac surgeon when he dictates and finalizes his written report and then stored separately from the written report which will be sent to patient's primary physician. Likewise, if the audio and visual recordings of the autopsy procedure do not become a part of the autopsy report, they still exist as "public records" because Section 30-4-20(c) generally includes "photographs, tapes, ... recordings"; yet they are not otherwise protected if they are not stored as part of the autopsy report which itself is not a "public record."

This was the type of record that the Dale Earnhardt Law was attempting to protect. If the audio and visual recordings that are protected by the Dale Earnhardt Law were always exclusively part of the autopsy report, there would have been no reason to mention them in a unique exemption because, as a part of the autopsy report, which is a medical record, they would not be a "public record." However, because the General Assembly took the step of describing the graphic audio and visual recordings "of and related to the performance of an autopsy," it clearly meant to distinguish those specific video and audio recordings, knowing that they

may or may not actually end up as part of an autopsy report. Therein is the reason for the distinction. Recognizing the reason for the distinction then allows for recognition of the distinction itself, which is the difference between certain graphic audio and visual recordings "of and related to the performance of an autopsy" on one hand and autopsy reports on the other hand. The former, on the one hand, are protected from release under the Dale Earnhardt Law. The latter, on the other hand, are the findings and conclusions of a medical doctor who performed a procedure for the purpose of determining the cause of death and as such constitute a medical record which is not subject to mandatory disclosure under FOIA.

In sum, if the photographs, videos, and other visual images, and audio recordings of and related to the performance of an autopsy were necessarily a part of the autopsy report, it would not have needed separate mention in FOIA because an autopsy report is not a public record and, consequently, is not subject to disclosure under FOIA. However, given the possibility that photographs, videos, and other visual images, and audio recordings of and related to the performance of an autopsy would not necessarily be considered part of an autopsy report, the General Assembly described them in the terms "of and related to the performance of an autopsy" and exempted them from disclosure under FOIA.

Finally, as Judge Newman observed, the Appellants' statutory construction argument based on Section 30-4-40(a)(18) is also unconvincing because that

section is inherently inconsistent with the intent of the Dale Earnhardt Law. It is clear from 2002 Act No. 350 and 2003 Act No. 34 that the General Assembly intended with the Dale Earnhardt Law to *prohibit* access to autopsy-related photographs, videos and recordings (except to certain specified persons) and did not intend to permit any discretion to be exercised by the holder of those items. Section 17-5-535, which criminalizes any disclosure to non-authorized persons, makes that clear. Yet, inexplicably and inconsistent with Section 17-5-535, the General Assembly added the prohibition from Section 17-5-535 to Section 30-4-40, which by its express language says that the exemption is not a prohibition. Section 30-4-40 creates discretion in the public body by stating that "a public body may but is not required to exempt ...." S.C. Code Ann. § 30-4-40(a). That is clearly contrary to Section 17-5-535, which provides for no discretion and indeed criminalizes an unauthorized disclosure. In actuality, the prohibition on release of autopsy-related photographs, videos and audio recordings should have been added to the definition of "public record" as set forth in Section 30-4-20(c). In short, given the clear legislative history, the Court should not look to the "exemption" in Section 30-4-40(a)(18) as establishing whether or not an autopsy report was intended to be subject to disclosure under FOIA.

C. The Circuit Court did not err in considering the existing jurisprudence at the time of the enactment of Section 30-4-40(a)(18) in evaluating the General Assembly's intent.

As Judge Newman correctly noted, the disclosure of a written autopsy report under FOIA has not been directly addressed by our appellate courts. However, in the case of *The Society of Professional Journalists v. Sexton*, 283 S.C. 563, 324 S.E.2d 313 (1984), the Circuit Court did rule that a medical examiner's records are not subject to disclosure under FOIA as "medical records" per Section 30-4-20(c). While that issue was not directly before the Supreme Court because the Circuit Court's ruling on that point was not appealed, that aspect of the *Sexton* decision has never been questioned by the Supreme Court or other courts.

The Appellants criticize Judge Newman's citation to *Sexton* and inexplicably suggest that he treated the unappealed ruling as the "law of the case." In no instance did Judge Newman treat *Sexton* as binding precedent or the "law of the case." Instead, he correctly states that "[t]he disclosure of an autopsy report under FOIA has not been directly addressed by our appellate courts." (R. 3). Moreover, he observed that the Circuit Court's ruling as described in *Sexton*, while not binding or precedential, is the only available court ruling on the issue. None of that is incorrect or in error. Judge Newman, nonetheless, did not treat the *Sexton* decision as binding precedent and instead conducted his own analysis of the issue and concluded that a written autopsy report is a "medical record" per Section 30-4-

20(c). He simply reached the same conclusion -- that an autopsy report is a "medical record" under FOIA.

It should also be noted that same conclusion is well supported by several South Carolina Attorney General's Opinions addressing the scope of FOIA. For instance, in 1981, Attorney General Daniel R. McLeod opined as follows:

> The details of an autopsy report are of such an intimate, personal nature concerning vivid medical allusions to parts of the human body, their description and indications of prior history. *A report of this nature constitutes a medical record which is not available for public consumption.*
>
> I advise, therefore, that, in my opinion, the report is not subject to public disclosure.

1981 S.C. Op. Atty. Gen. No. 81-87, 1981 WL 96613. (Emphasis added). In 1983, Attorney General T. Travis Medlock agreed that "the detailed autopsy report would not be subject to disclosure." 1983 S.C. Op. Atty. Gen. No. 83-83, 1983 WL 142752. More recently, in February 2011, the Attorney General's Office confirmed that "this Office has consistently opined that autopsy records, including photographs, are confidential under State law. These opinions rest on the premise that public access to autopsy records invades the privacy of those persons having a property interest in the dead body itself and that it would be detrimental to the public interest to permit such access." 2011 WL 782314.

In short, the existing authority in 2002 when the Dale Earnhardt Law was enacted, while not binding or precedential, provided that an autopsy report is not subject to disclosure under FOIA because it is a "medical record." The description of the Circuit Court's unappealed ruling in *Sexton* and the Attorney General's Opinions on point show that there was at least an understanding in the jurisprudence to that effect prior to the enactment of the Dale Earnhardt Law. Consequently, Judge Newman did not err in providing this historical background in his order and in interpreting the Dale Earnhardt Law with some consideration given to the jurisprudence existing in 2002.

In sum, the Coroner submits that Judge Newman correctly analyzed the issue at the heart of this FOIA action. He correctly ruled as a matter of law that the written autopsy report for Aaron Leon Jacobs is a "medical record" per Section 30-4-20(c) and, as such, was not subject to mandatory disclosure under FOIA. As a result, the summary judgment entered for the Coroner should be affirmed.

II. The Health Insurance Portability and Accountability Act bars the disclosure of the autopsy report without compliance with the authorization and consent provisions of that Act, and as a result, the Appellants' interpretation of the Freedom of Information Act as requiring the mandatory disclosure of written autopsy reports, if accepted as the law in South Carolina, would impermissibly conflict with the federal law.

In the lower court, the Coroner also cautioned that the Appellants' interpretation of FOIA to allow for the mandatory disclosure of written autopsy reports would be in conflict with the Health Insurance Portability and Accountability Act (HIPAA).[2] The Coroner pointed out that, to the extent the South Carolina Freedom of Information Act or any other state law requires a coroner to disclose autopsy records without compliance with the authorization and consent provisions of HIPAA, those state laws are subject to federal preemption in accordance with Code of Federal Regulations § 160.203. In contrast, the Coroner's position that an autopsy report is a "medical record" and thus not subject to mandatory disclosure under FOIA does not give rise to any conflict between FOIA and HIPAA or any privacy laws.

Judge Newman did not reach the HIPAA issue because he determined as a matter of law that the written autopsy report for Aaron Leon Jacobs is a "medical record" per Section 30-4-20(c) of FOIA and thus is not subject to mandatory

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[2] Importantly, the Court only needs to address this HIPAA issue if this Court agrees with the Appellants that the autopsy report is not a "medical record" under Section 30-4-20(c).

disclosure by the Coroner. However, for purposes of appellate review, the Coroner again submits that the Appellants' interpretation of FOIA as requiring the mandatory disclosure of an autopsy report without the authorization and consent of the deceased's personal representative or next of kin must be examined for its inherent conflicts with HIPAA.

In the lower court, the Appellants generally argued that the autopsy report is not subject to HIPAA and that there is insufficient evidence to suggest that the pathologist who prepared the autopsy report is a "covered entity" under HIPAA. HIPAA regulations define "protected health information" to include "individually identifiable health information" which is held or transmitted by a "covered entity." 45 C.F.R. § 160.103. "Individually identifiable health information" is in turn defined to include information that "[r]elates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present or future payment for the provision of health care to an individual." *Id.* Thus, the autopsy report qualifies as "protected health information." Moreover, to the extent that the Appellants may argue that HIPAA only applies to electronic records, that argument was rejected by the Fourth Circuit, which recognized that:

> The definition of "individually identifiable health information" -- a subset of "health information" -- contains no language limiting its reach to electronic media. Thus, the plain language of HIPAA indicates that

> HHS could reasonably determine that the regulation of individually identifiable health information should include non-electronic forms of that information.

South Carolina Medical Association v. Thompson, 327 F.3d 346, 353 (4th Cir. 2003). The Fourth Circuit further explained:

> Regulating non-electronic as well as electronic forms of health information effectuates HIPAA's intent to promote the efficient and effective portability of health information and the protection of confidentiality. If coverage were limited to electronic data, there would be perverse incentives for entities covered by the rule to avoid the computerization and portability of any medical records. Such a development would utterly frustrate the purposes of HIPAA.

327 F.2d at 354. Thus, HIPAA applies to the autopsy report even if not in an electronic form.

Finally, the Coroner submits that Dr. Janice Ross – who is a practicing pathologist – clearly qualifies as a "covered entity" under HIPAA. However, if the Court were to agree with the argument made by the Appellants below and conclude that there is insufficient evidence to determine whether Dr. Ross is a "covered entity," that at most would preclude summary judgment. In order to prove their entitlement to the autopsy report without compliance with the authorization and consent provisions of HIPAA, the Appellants have the burden of establishing that HIPAA does not apply. The Appellants have accordingly not sustained *their* burden of showing that HIPAA does not preclude the relief that they are seeking

under FOIA.

In sum, to the extent that this Court finds the Appellants' interpretation of Section 30-4-20(c) persuasive, the Court is nonetheless urged to consider the resulting conflict between FOIA and HIPAA. The mandatory disclosure of autopsy reports without compliance with the authorization and consent requirements of HIPAA – which is the position urged by the Appellants – creates a conflict between the state and federal laws. That conflict is resolved by federal preemption. Therefore, this Court is urged to construe FOIA as Judge Newman did – to avoid the conflict with HIPAA. In short, this analysis provides further support for the Judge Newman's conclusion that a written autopsy report is a "medical record" and is not subject to mandatory disclosure under FOIA.

CONCLUSION

Based on the foregoing discussion and analysis, the Respondent Harvin Bullock, as Sumter County Coroner, respectfully requests that this Court affirm the order of Judge Clifton Newman granting summary judgment to the Respondent and ruling that written autopsy report at issue is not subject to mandatory disclosure under FOIA.

Respectfully submitted,

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February 19, 2013

CERTIFICATE OF COUNSEL

The undersigned counsel for the Respondent Harvin Bullock, as Sumter County Coroner, certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Respondent Harvin Bullock, as Sumter County Coroner, certifies that the Brief of Respondent complies with the Supreme Court's Order of August 13, 2007, regarding personal identifiers and sensitive information.

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Respondents, does hereby certify that service of the **Brief of Respondent** was made upon all counsel of record by placing a copy in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 19th day of February 2013:

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