

## RESTRICT RELEASE OF AUTOPSY PHOTOGRAPHS

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House Bill 4249 as enrolled  
Public Act 322 of 2003  
Sponsor: Rep. John Gleason

House Committee: Judiciary  
Senate Committee: Judiciary

### Third Analysis (12-16-04)

**BRIEF SUMMARY:** The bill would amend sections of the Public Health Code concerning vital records to specify when “autopsy photographs” can be displayed publicly and to allow injured persons, including family members, guardians, and personal representatives, to bring a civil suits against those who publicly display such photographs.

**FISCAL IMPACT:** The bill would have no fiscal impact on the state or local governmental units.

### THE APPARENT PROBLEM:

On December 12, 1996, a young woman from Genesee County died in a drunk driving accident. Devastated by the loss of her daughter, the young woman’s mother visited a number of area high schools to warn students about the dangers of drinking and driving. When she held up a copy of her daughter’s autopsy report during one school visit, a student announced that he had seen photographs of her daughter that had been taken during her autopsy. The woman learned that the autopsy photos were being displayed as part of a “morgue tour” that some county judges required of first-time offenders found guilty of underage possession, drunk driving, and other alcohol-related violations. Defenders of the practice believe that it deters offenders from returning to court, or worse yet, winding up in the morgue themselves. The deceased woman’s family was outraged by the use of their daughter’s body by the courts as a public resource without their consent or knowledge. They were even more upset when they learned that they had no legal recourse against the medical examiner for releasing the photos.

In a separate matter, after Dale Earnhardt, one of the all-time greats in auto racing history, died following an accident in February 2001, the *Orlando Sentinel* tried to obtain autopsy photos. The newspaper denied any interest in publishing the photos, stating that it merely wanted to have a head trauma expert examine the photos to evaluate various theories on exactly how Earnhardt died, arguing (in part) that knowing more about the cause of the death could help prevent future deaths. Earnhardt’s widow sued to block the release of the photos. Within months, the Florida legislature enacted the Earnhardt Family Protection Act, which exempts from public records laws any photographs and audio and video recordings of an autopsy, and prohibits members of the immediate

family entitled to copies from providing them to others without a court order. Opponents of the act have suggested that it violates the freedom of the press.

While the Earnhardt case is subject to Florida—and not Michigan—law, the dispute attracted the attention of Earnhardt fans throughout the country, raising questions about the public’s right to autopsy records. The availability of celebrity autopsy photographs on the Internet indicates that the use of such photos is not just an issue in Florida (or Michigan) and suggests that the public display of such photos is not just limited to cases where there is some clear social benefit.

Many people believe that there should be some strict limits on the display of autopsy photographs that identify the deceased person. Legislation has been introduced to restrict the conditions under which such photos may be publicly displayed.

### ***THE CONTENT OF THE BILL:***

The bill would add a new section to Part 28 of the Public Health Code (MCL 333.2855a), concerning vital records, to specify conditions under which “autopsy photographs” may be displayed publicly and to add a new cause of action, allowing specific injured persons, including family members, guardians, and personal representatives, to bring a civil suit against someone who publicly displays such photographs. The bill would define “autopsy photograph” as an image of a deceased human being obtained during the person’s autopsy in the state, including an image on videotape, motion picture or other film, or an image captured by digital means.

Prohibited Activity. The bill would specify that a person could not publicly display an autopsy photograph of a deceased person that identified the person by name, face, or other identifying physical feature unless one of the following conditions was met:

--one of the following individuals specifically provided written authorization for the public display of the autopsy photograph: a person nominated by will or other writing signed by the decedent; the decedent’s spouse, an adult child of the decedent, the decedent’s parent, the decedent’s next of kin, or an individual charged by law with the responsibility for burial or cremation of the decedent’s body. [Note: The individuals are listed in order of priority - meaning that a person with lower priority could provide authorization if every person with higher priority cannot be identified or located following a diligent and good faith effort.]

--the public display was one of the following: 1) authorized in writing by the prosecuting attorney with jurisdiction and for a purpose directly related to the investigation or prosecution of a criminal case; 2) authorized by a court of competent jurisdiction for a purpose directly related to the proceedings in a civil case; 3) required for a health department to carry out its lawful duties; or 4) necessary for the legitimate research or teaching of only medical or public health, or public safety personnel or students enrolled at a postsecondary educational institution.

Remedy. The bill would allow a deceased person’s parent, surviving spouse, or child who was injured as a result of a violation of these provisions to bring an action to recover \$1,000 or actual damages, whichever was greater, plus costs and reasonable attorney fees.

Exceptions. The provisions of the bill would not apply to an Internet service provider or computer network service provider who, in good faith and without knowledge of the content of the photograph, provides the medium for public display of the photograph. Further, the provisions of the bill would not prohibit a constitutionally protected speech or activity.

## **ARGUMENTS:**

### ***For:***

The public display of autopsy photographs that identify the deceased person should be permitted only under very restricted conditions. For someone trying to cope with the death of a family member or close friend, it can be very upsetting to discover that the deceased’s image is being shown to others without the family’s consent and without a compelling reason. While some people appeal to greater social goods—such as deterring people from driving drunk or determining how a death occurred to prevent future deaths—to support their judgment that the public has a right to access such photos, this right must be balanced with rights to privacy and confidentiality.

Autopsy photos that obscure a person’s identity could still be shown and would arguably be just as effective for achieving the benefits that the public display of autopsy photos are alleged to have. (Many people doubt that the use of autopsy photographs for “shock value” or to “scare people straight” has significant long-term effects.) And the bill would still allow the use of an autopsy photograph that identifies a deceased person if there was a compelling reason to do so. For instance, if a prosecuting attorney needed to publicly display a photo that identified the deceased for the investigation or prosecution of a criminal case or if public health personnel needed to show a picture for teaching or research purposes, the bill would allow them to do so, whether or not family members consented. Publicly displaying an autopsy photo that identifies the deceased person without relatives’ consent and without any strong public interest in the display is offensive, disrespectful, and abusive. The new cause of action proposed by the bill would help injured family members get some relief when autopsy photographs of their loved ones are used improperly or carelessly.

### ***Response:***

It is unclear whether the bill would address either the case of the mother who learned that her daughter’s autopsy photos had been shown in a morgue tour or the Earnhardt case (or a case like it). In the former case, the student who had seen the photos recognized them as photos of her daughter by the time and place of the accident—not by name or any visual characteristics of the deceased. And in the latter case, if a newspaper or other media organization had no intention of publishing a celebrity’s autopsy photos, it is unclear if providing the pictures to the organization would count as “publicly displaying” the photos. Whether or not it would, in cases where autopsy photos are part of the autopsy record, the photos could still be obtained through a “freedom of information”

request. It is also not clear how the bill would address the subsequent use of photos within the news organization: would an individual who received such photos on behalf of a newspaper run afoul of the bill's prohibition when showing them to colleagues for work-related purposes, even if the individual believed that the photos were obtained with the consent of a family member? A related question is whether showing an autopsy photograph during a court-ordered morgue tour would count as a "public display" of the photograph. Would a judge who orders such tours interpret this prohibition as a limitation on her ability to sentence? If not, would a medical examiner follow the judge's orders or follow the statute in deciding whether or not he was allowed to show autopsy photos?

In a separate matter, some people believe the provision of the bill allowing people to bring civil suits for violations of the act is overly broad. It seems unnecessary to allow multiple lawsuits in multiple courts for injured family members. Perhaps only one family member should be allowed to bring suit against someone who violated the bill's provisions and other members should be allowed to join the suit.

***Reply:***

While the bill may not address every real and imaginable case involving the improper display of autopsy photos, it will address many cases and it will also attract attention to the problem: out of respect for both the deceased and her or his loved ones, autopsy photographs that identify an individual should not be treated carelessly.

Individual accident victims are each allowed to bring suit for injuries they sustain in a single accident. While an injury involved when an autopsy release is not necessarily the same sort of injury as that received in a car accident, perhaps it is best left to the courts to decide when it is appropriate for family members to join an existing suit.

***Against:***

Insofar as the bill was interpreted to limit press access to autopsy photographs, some people question whether such an endorsement of prior restraint of free speech would be constitutional. Also, the bill would restrict access to public records and documents with no compelling reason. While most autopsy photographs have little if any news value, access to such documents could help journalists investigate and disprove (or substantiate) alleged plots, conspiracies and other theories that arise when newsworthy assassinations and other murders occur. Using autopsy photographs to shock and scare people may be a tasteless impropriety, but the news value of photographs should be left up to newspapers, not the government.

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