

IN THE SUPREME COURT OF OHIO

BRIAN TREON, M.D., et al.)	
)	
Petitioner-Defendants,)	OHIO SUPREME COURT
)	CASE NO. 07-507
v.)	
)	CERTIFICATION OF QUESTION
MARK ALBRECHT., et al.)	OF STATE LAW FROM
)	FEDERAL COURT
Respondent-Plaintiffs.)	

CUYAHOGA COUNTY CORONER AND BOARD OF COMMISSIONERS OF
CUYAHOGA COUNTY'S *AMICUS CURIAE* PRELIMINARY MEMORANDUM
REQUESTING SUPREME COURT TO ANSWER QUESTION CERTIFIED FROM
FEDERAL COURT SUBMITTED ON BEHALF OF PETITIONER-DEFENDANTS

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I. INTRODUCTION

The Cuyahoga County Coroner and the Board of Commissioners of Cuyahoga County (“Cuyahoga County”), being interested parties, hereby submit this *Amicus Curiae* brief in support of answering the certified question, pursuant to Supreme Court Rule of Practice XVIII, Section 6. The certified question stems from a civil rights lawsuit alleging the violation of constitutional rights secured by the Due Process Clause of the *Fourteenth Amendment to the United States Constitution*.

On May 8, 2006, Plaintiffs filed their Complaint against Brian Treon, M.D., Coroner of Clermont County, as well as the Board of Commissioners of Clermont County. In their complaint, Plaintiffs seek declaratory, compensatory and injunctive relief under 42 U.S.C. § 1983. More importantly, although Plaintiffs have sued one relatively small County defendant, they seek to transform the case in question into a landmark case by certifying not one but two statewide classes of parties. The first class is a statewide class of plaintiffs of all beneficiaries or next-of-kin of decedents who had brains and/or hearts removed and retained by county coroners for forensic examination and testing as part of the autopsy process since 1991. The second class for which class certification is sought is a statewide class of defendants comprised of the County Commissioners and Coroners of 87 of the 88 Ohio counties.¹

¹ Hamilton County is not named in the complaint in the instant matter, as the Hamilton County Coroner’s Office was the defendant in *Hainey v. Parrott* (S.D. Ohio 2005), *unreported*, 2005 WL 2397704. Hainey was a plaintiffs’ class action case filed on behalf of the next-of-kin of approximately one thousand decedents whose brains were retained and fixed by the Hamilton County Coroner, and involved claims nearly identical to those alleged by plaintiffs in this matter. See Section IV. F., *infra*. In the *Hainey* case, Hamilton County did not request that the United States District Court certify the unanswered question of state law to this Court, as has been done in the instant matter. Following the District Court’s ruling in favor of the *Hainey* plaintiffs on cross-motions for summary judgment, Hamilton County, for reasons only known to it, settled the *Hainey* case for \$6 million, or approximately \$6 thousand per brain that was “fixed” by the

At the district court level, Cuyahoga County filed a limited notice of appearance, opposed class certification and moved the District Court to certify to this Court a question of state law. As explained below, because Plaintiffs' class action lawsuit has the potential of creating a financial disaster for Ohio counties and professional havoc for Ohio county coroners, this case deserves special attention by this Court.

II. STATEMENT OF FACTS AND CASE

A. The Autopsy Process

This case concerns the standard and long-accepted practice of county coroners in the performance of autopsies. County coroners are charged by law with the duty of performing autopsies to determine the cause of death. An autopsy performed by a coroner is a precise examination of a decedent's body undertaken to determine the decedent's cause of death. A critical reason for such an examination is to determine whether foul play is the cause of a person's death, thereby setting the stage for a criminal investigation and prosecution of a crime. The proper determination of the cause and manner of death (be it natural causes, disease or foul play) is important to the parties involved and to society at large, whether it serves as evidence for a legal action or to ease the minds of the deceased's next of kin. In order for a coroner to properly perform such a forensic examination, the decedent's organs must be surgically exposed, removed and examined.

The brain is a common site of both disease and trauma that causes death. Therefore, all autopsies performed under a coroner's jurisdiction require the examination of the head, skull and brain. As part of the autopsy process, the county coroner may find it necessary to do a more detailed examination of the decedent's brain in order to determine the cause of death. In order

Hamilton County Coroner. See, Section II. A., *infra*, concerning the necessity and process of "fixing" organs for forensic examination and testing.

to conduct such an examination, where a question as to the pathology of the brain is raised, the brain must be removed from the skull and soaked or “fixed” in a solution of formalin for a period approximately 14 days. The fixing of the brain is necessary to obtain a consistency to enable the Coroner to obtain a cross section of the brain for further testing. If the brain is not “fixed”, it is too soft and jelly-like to be properly examined and/or tested. The process of fixing the brain provides a more complete and accurate answer in the form of the cause and manner of death.

When performing an autopsy, Ohio law requires a county coroner to maintain custody of the deceased until the coroner ascertains the cause of death or determines that the body is no longer necessary to assist in the fulfillment of the coroner’s statutory duties. R.C. §313.15. Given the length of time required for proper fixation of the brain, it is standard practice for coroners to deliver the body to a funeral home for its final disposition before the brain is dissected and the medical professional incorporates the neuropathological findings in the finalized autopsy report. Since 1991, the Cuyahoga County Coroner’s Office has performed 5,517 autopsies in which brains and/or other organs were “fixed” for examination.

B. Plaintiffs’ Claims

As set forth in Plaintiffs’ Complaint, Plaintiffs are the next-of-kin and parents of Christopher Albrecht, who is deceased. After the death of Christopher Albrecht, his body was taken to the Hamilton County Coroner’s Office, who performs autopsies on behalf of Clermont County, and an autopsy was performed on his body. As a part of the autopsy, the brain was removed from the decedent’s body and “fixed” for forensic examination and testing.² The body was buried without the brain. The Plaintiffs were not notified that the brain had been removed from the decedent. Plaintiffs claim that next-of-kin have a property right in the organs and

² There are no allegations that the brain was removed for purposes other than forensic examination and testing.

tissues³ of the decedent. They also claim that county coroners throughout the State of Ohio who have retained body parts and organs for fixation, forensic examination, and subsequent medical cremation without notice to the next-of-kin have violated this right. If no such right is found to exist, Plaintiffs' lawsuit must be dismissed.

III. STATEMENT OF *AMICUS* INTEREST

Cuyahoga County, the largest County in Ohio, has a particularly significant stake in the instant matter. As noted above, the *Hainey* case settled for approximately \$6,000,000. In *Hainey*, Hamilton County Coroner's Office fixed approximately 1000 organs. Thus, the settlement amount represented a figure of approximately \$6,000 for each "fixed" organ⁴. If these settlement figures were to be applied to Cuyahoga County, the potential financial ramifications could bankrupt the County. Since 1991, the proposed starting point for inclusion in the putative Plaintiffs' class, the Cuyahoga County Coroner's Office has performed five thousand five hundred seventeen (5,517) autopsies⁵ in which brains or hearts have been retained and fixed in formalin for further examination and testing. Although Cuyahoga County specifically rejects any claim that organs taken and retained as part of an autopsy have any economic value whatsoever, utilizing the \$6,000 per fixed organ for illustrative purposes only, the potential

³ In arguments before the district court, Plaintiffs maintained that they are really only interested in those cases where brains and/or hearts have been "fixed". But Plaintiffs' argument only underscores the essence of the question presented to this Court: What is the nature of Plaintiffs' claimed interest? If they have a property interest in a decedent's brain, why do they not have a property interest in the liver or spleen? If they have a property interest in a decedent's heart, why do they not have a property interest in the blood pumped through the heart? And, if they have a property interest in the brain and heart, why do they not have a property interest in the portions of those organs taken and preserved for forensic purposes by a coroner? What is the legal principle being espoused that distinguishes between having a property interest in the brain and heart but not the other organs, blood and tissues? To determine the nature of Plaintiffs' claimed property interest, this Court must, perforce, determine the parameters of that interest.

⁴ Again, these interested parties have no idea why the *Hainey* case was settled, nor how the figure of \$6,000 per "fixed" organ was reached.

⁵ Since 1991 Cuyahoga County has performed autopsies for nineteen other Ohio counties.

financial exposure for Cuyahoga County would be in the range of thirty-three million dollars (\$33,000,000.00).⁶ Moreover, Judge Dlott's certified question includes not only hearts and brains, but also tissues, organs, blood or other body parts. This language implicates all autopsies performed by the Cuyahoga County Coroner's Office, as standard forensic procedure requires retention of pieces of tissue, organs, and other body parts and fluids from all autopsies performed.⁷

IV. LAW AND ARGUMENT

A. Statement of Certified Question

The issue at the heart of the certified question has never been ruled upon by any state court in Ohio. Judge Dlott certified the question as follows:

Whether the next of kin of a decedent, upon whom an autopsy has been performed, have a protected right under Ohio law in the decedent's tissues, organs, blood or other body parts that have been removed and retained by the coroner for forensic examination and testing.

B. Important State Sovereignty Issues and Police Powers are Implicated by the Certified Question.

This Court has recognized its constitutional authority to answer certified questions "to further the state's interests and preserve the state's sovereignty." *Scott v. Bank One Trust Company, N.A.* (1991), 62 Ohio St.3d 39, 42. Answering a question certified from a federal court is particularly important to ensure correct interpretation of state law and to preserve the comity between federal and state courts. As this Court has stated:

The state's sovereignty is unquestionably implicated when federal courts construe state law...By allocating rights and duties incorrectly, the federal court

⁶ This figure represents 5,119 autopsies performed for Cuyahoga County wherein organs were "fixed" and 398 autopsies performed for other counties wherein organs were "fixed".

⁷ From the year of 1991 through September 20, 2006, the Cuyahoga County Coroner's Office performed a total of 24,313 autopsies.

both does an injustice to one or more parties, and frustrates the state's policy that would have allocated the rights and duties differently...

The danger is scarcely theoretical. **Federal courts acknowledge that they frequently err in applying state law that is unclear or unsettled...**Indeed, some federal judges consider state-law interpretation so hazardous that they compare it to prophecy. (emphasis added)

Id. at 42-43. See, also, *Town of Castle Rock, Colorado v. Gonzales* (2005), 545 U.S. 748, 777-78.

The certified question also implicates clear, well-defined police powers to protect the general health, safety, morals, or welfare of the public. As this Court held in *Benjamin v. City of Columbus* (1957), 167 Ohio St. 103, at paragraph five of the syllabus:

Although almost every exercise of the police power will necessarily either interfere with the enjoyment of liberty or the acquisition, possession and production of property, within the meaning of Section 1 of Article I of the Ohio Constitution, or involve an injury to a person within the meaning of Section 16 of Article I of that Constitution, or deprive a person of property within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States, **an exercise of the police power having such an effect will be valid if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it is not unreasonable or arbitrary.** (emphasis added.)

See, also, *State v. Thompkins* (1996), 75 Ohio St.36 558, 560.

The county coroners' duties certainly bear a real and substantial relation to the public health, safety, morals, and general welfare of the public and are not unreasonable or arbitrary under the state's police power and, as such, this Court should afford them great deference. The impact of answering the certified question in the affirmative, thereby granting next-of-kin a protected right in the decedent's tissues, organs, blood or other body parts that have been removed and retained by the coroner for forensic examination and testing, would unreasonably interfere with the county coroners' exercise of their statutorily-authorized duties.

Unlike the Sixth Circuit in *Brotherton v. Cleveland* (6th Cir. 1991), 923 F.2d 477 and Judge Beckwith in *Hainey*, Judge Susan Dlott, not wishing to prophesize as to the state of the law in Ohio, certified the question to this Court. In order “to further the state’s interests and preserve the state’s sovereignty” and protect the state’s police powers, this Court should grant certification of the question in the instant matter. See, *Scott v. Bank One Trust Company, N.A.* (1991), 62 Ohio St.3d 39, 42.

C. Important County Coroner’s Statutory Duties are Implicated by the Certified Question.

The duties of the county coroners are inextricably linked with the important state interests of crime prevention, law enforcement, and protection of the public health. Ohio Revised Code § 313.12 defines the broad circumstances under which a county coroner is provided with notice of a suspicious death, including when a person dies by “criminal or other violent means, by casualty, by suicide, or in any suspicious or unusual manner, any person, including a child under two years of age, dies suddenly when in apparent good health, or when any mentally retarded person or developmentally disabled person dies regardless of the circumstances.” Ohio Revised Code § § 313.121 and define the circumstances under which a county coroner is required to perform an autopsy. Ohio Revised Code § 313.131 states that the county coroner, “**shall** perform an autopsy if, in the opinion of the coroner...an autopsy is necessary,” unless an autopsy is contrary to the decedent’s religious beliefs. (Emphasis added). Pursuant to R.C. § 313.121(B), the coroner “**shall** perform an autopsy” on any child under the age of two years who dies suddenly and in apparent good health, in accordance with public health council rules. (Emphasis added).

Ohio Revised Code § 313.15 requires that the county coroner retains the body of a decedent for as long as necessary and states:

All dead bodies in the custody of the coroner shall be held until such time as the coroner, after consultation with the prosecuting attorney, or with the police department of a municipal corporation, if the death occurred in a municipal corporation, or with the sheriff, has decided that it is no longer necessary to hold such body to enable him to decide on a diagnosis giving a reasonable and true cause of death, or to decide that such body is no longer necessary to assist any of such officials in his duties. (emphasis added)

Significantly, after the *Hainey* decision, discussed further at Section IV. F., *infra*, the Ohio Legislature enacted R.C. § 313.123. This newly-enacted provision of the Revised Code specifically states that “retained tissues, organs, blood, other bodily fluids, gases, or other specimens from an autopsy are **medical waste and shall be disposed of** in accordance with applicable federal and state laws, . . .” R.C. §313.123 (emphasis added). Undoubtedly, the Ohio Legislature has determined that the tissues, organs, blood, fluids, and other specimens taken and retained as part of an autopsy are to be treated as medical waste.

D. This Case Presents a Dispositive Issue which Depends on This Court’s Interpretation of State Law.

Section 1983 provides a remedy when federal rights have been violated by governmental officials. *Monroe v. Pape* (1961), 365 U.S. 167. There are two requirements to establish a claim under 42 U.S.C. § 1983: (1) the conduct in controversy must be committed by a person acting under color of state law, and (2) the conduct must deprive the plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States. *Parratt v. Taylor* (1981), 451 U.S. 527, 535.

When a Section 1983 claim, such as the one brought by Plaintiffs in the instant matter, rests on an alleged deprivation of a property interest, negligent or intentional, the constitutional right invoked is not a substantive right, but rather the procedural due process right to notice and hearing. *Board of Regents v. Roth* (1972), 408 U.S. 564, 576-77. The United States Supreme

Court and Ohio federal courts have repeatedly held that property rights are defined by state law for purposes of Section 1983 claims. As the United States Supreme Court stated:

Property interests, of course, are not created by the Constitution. **Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings** that secure certain benefits and that support claims of entitlement to those benefits. (emphasis added)

Id. at 577. See, also, *Leary v. Daeschner* (6th Cir. 2000), 228 F.3d 728, 741; *McClain v. NorthWest Community Corrections Center Judicial Corrections Board* (6th Cir. 2006), 440 F.3d 320; and *TriHealth, Inc. v. Board of Commissioners, Hamilton County, Ohio* (6th Cir. 2005), 430 F.3d 783, each holding that state law defines whether a property right exists.

To date, this Court has not addressed the issue of whether a next-of-kin has a protected right in a decedent's tissues, organs, blood or other body parts, which are removed and retained for forensic examination purposes. Rather than continuing to allow federal courts to prophesize as to how this Court would define state law on this issue, the time is ripe for this Court to answer the certified question.

E. All Ohio Case Law on Similar Issues has Held there is no Property Interest in a Dead Body.

There is no statutory authority in Ohio creating a protected right for next-of-kin in a decedent's remains, nor has this Court ever found such a protected right to exist. In fact, while protecting tort remedies, four Ohio state courts have addressed the issue of a property right in a dead body and found that no such right exists. See *Carney v. Knollwood Cemetery Ass'n* (8th Dist. 1986), 33 Ohio App.3d 31; *Everman v. Davis* (2nd Dist. 1989), 54 Ohio App.3d 119; *Hadsell v. Hadsell* (Cir. Ct. 1893), 3 Ohio C.D. 725, 726, 7 Ohio C.C. 196 ("A dead body is not property."); *Hayhurst v. Hayhurst* (Ohio Com. Pleas 1926), 4 Ohio Law Abs. 375 ("There can be

no property in a dead body and therefore a man cannot, by will, dispose of same and it does not become part of his estate.”)

In *Carney*, next-of-kin brought claims for mental anguish and mishandling of a corpse after a cemetery disinterred a decedent’s remains. The Eighth District Court of Appeals explained that any rights the next-of-kin have in a decedent’s remains are protected by tort remedies, not property law.

“Quasi property” seems to be, however, simply another convenient “hook” upon which liability is hung, - merely a phrase covering up and concealing the real basis for damages, which is mental anguish. The plaintiff, in these actions, does not seek to vindicate any “quasi property” right. He sues simply because of the mental suffering and anguish that he has undergone from the realization that disrespect and indignities have been heaped upon the body of one who was close to him in life. (emphasis added.)

Carney, 33 Ohio App.3d at 36. The Court of Appeals ruled that the next-of-kin were adequately protected through tort remedies and stated:

Instead, this court **rejects the theory that a surviving custodian has quasi-property rights in the body of the deceased**, and acknowledges the cause of action for mishandling of a dead body as a sub-species of the tort of infliction of serious emotional distress. *Id.* (emphasis added)

In *Everman*, a husband claimed that his Fourth Amendment rights were violated by an autopsy performed on his late wife. The Second District Court of Appeals upheld the trial court’s dismissal for failure to state a claim. The court ruled:

The argument that a dead body is an “effect” within the meaning of “houses, papers and effects” stretches the imagination and the language of the [Fourth] amendment...**Nothing in this language suggests that, despite the respect due to the dead, the body of the former person is the “effect” of anyone else.** The word “effects” in legal and common usage includes real or personal property and as used in the Constitution does not necessarily include the right of immediate possession of the dead body of a human being. (emphasis added.)

Everman, 54 Ohio App.3d at 122. Also, significantly, the Court examined the language of R.C. § 313 *et seq.* and stated, “The compelling interest of the state in determining the true cause of death...overrides the interest of relatives to immediate possession for burial.” *Id.*

Neither *Carney* nor *Everman* addressed the specific question at issue in the instant matter. In *Carney*, the Court specifically rejected the notion of next-of-kin having a quasi-property right in a decedent’s remains. The *Everman* case, which based its decision partially on the undeniable importance of the county coroner’s duties under R.C. § 313 *et seq.*, likewise refused to find a constitutionally-protected right in the remains of a decedent.

These cases, while protective of tort remedies, do not hold that a next-of-kin has a property interest or protected right in a decedent’s tissues, organs, blood or other body parts that have been removed and retained by the coroner for forensic examination and testing. The *Carney* case did not involve a claim of a constitutionally-protected right, nor did it involve the county coroner’s statutory duty to perform autopsies. The *Everman* case, while involving R.C. § 313 *et seq.*, involved a challenge to the very performance of an autopsy, rather than the retention of specimens for testing. Therefore, while the Ohio state courts that have addressed similar issues have found no such protected right to exist, the state of the law on this important issue is far from settled. It is necessary, therefore, for this Court to answer the question certified to it by the District Court in order to clarify Ohio law.

F. The *Brotherton* Case is Distinguishable from the Present Case and the *Hainey* Case Misinterprets Ohio Law.

Prior to the instant matter, two federal courts have interpreted Ohio law on the same or similar issues without seeking guidance from this Court. The decisions of the United States Court of Appeals for the Sixth Circuit in *Brotherton v. Cleveland* (6th Cir. 1991), 923 F.2d 477, and the United States District Court for the Southern District of Ohio in *Hainey v. Parrott* (S.D.

Ohio 2005), 2005 WL 2397704 (Beckwith, J.), have created uncertainty as to the law of the state on this important issue. The state's sovereignty was "unquestionably implicated" in both of these cases, when the federal courts interpreted an unsettled area of state law.

In *Brotherton*, Deborah Brotherton, a widow, brought a Section 1983 claim against the Hamilton County Coroner alleging violation of procedural due process rights based upon the removal and donation of her late husband's corneas to individuals for transplant without her knowledge or consent. 923 F.2d at 479. Mrs. Brotherton explicitly refused to consent to the harvesting of decedent's corneas. The Sixth Circuit recognized that Deborah Brotherton had an aggregate of rights based largely on the language of R.C. §2108.02(B), part of Ohio's codification of the Uniform Anatomical Gift Act. 923 F.2d at 482. As the Sixth Circuit acknowledged in *Brotherton*, however:

State supreme court decisions are the controlling authority for such determinations. *Clutter v. Johns-Manville Sales Corp.*, 646 F.2d 1151, 1153 (6th Cir. 1981). **However, the Ohio Supreme Court has not ruled on the precise issue before this Court; thus, we must look to "other indicia of state law..."** *Kveragas v. Scottish Inns, Inc.*, 733 F.2d 409, 412 (6th Cir. 1984). (emphasis added)

923 F.2d at 480.

While the Sixth Circuit found that a widow had an aggregate of rights in her husband's corneas, the *Brotherton* decision is clearly distinguishable from the present case. First, the *Brotherton* decision rested, in substantial part, on R.C. §2108.02(B), which allows the next-of-kin to donate, but not possess, a decedent's remains, including corneas. Such a ruling is not applicable to this case as there is no Ohio statutory authority that would even hint at creating a

property interest in tissue, organs, blood and other body parts that are required to be removed, tested, examined and retained as part of a forensic autopsy.⁸

Indeed, the Sixth Circuit itself limited the *Brotherton* holding. In *Montgomery v. County of Clinton, Michigan* (6th Cir. 1991), 940 F.2d 661, 1991 WL 153071, the Sixth Circuit specifically held that the *Brotherton* “aggregate of rights” did not exist when the claim was based on the autopsy performed by the coroner. *Montgomery*, 1991 WL 153071 at *2. In *Montgomery*, Plaintiffs claimed that the autopsy was performed without their notice and that they would have objected because of their religious beliefs. *Id.* at *1. The Sixth Circuit found the state’s interest, including the coroner’s obligation to do an autopsy to determine the cause of death, to be a “superior interest” to any claim that plaintiffs may have. *Id.* at *2. Further, the Sixth Circuit held that the unauthorized removal of corneas was a completely different interest than what is involved when a coroner does an autopsy, required and sanctioned by statute.

In 2005, the United States District Court for the Southern District of Ohio, Judge Sandra Beckwith, decided a case with allegations basically identical to those in the instant matter. *Hainey*, 2005 WL 2397704.⁹ Rather than requesting certification of a question of state law and despite the ruling in *Montgomery*, the *Hainey* Court turned to the *Brotherton* decision as “the primary case on point.” 2005 WL 2397704 at *4. Despite this characterization, the court went on to acknowledge significant factual differences between the two cases, stating:

The question is whether *Brotherton* is distinguishable from the facts of this case in any meaningful way. An important but not necessarily dispositive point of

⁸ The *Brotherton* Court was expressly concerned about the potential medical use of and market for said corneas for transplant purposes or medical research. *Id.* at 481. Clearly, there is no medical use of or market for the types of tissues, organs, blood or other body parts at issue herein.

⁹ While the certified question in the instant matter refers to a “protected right,” the *Hainey* courts used the term “property interest.” See *Hainey*, 2005 WL 2397704 at *6 (“...Plaintiffs do have a cognizable property interest in their decedent’s body parts...”)

distinction is that **in the present case, the coroner's decision to retain the deceased's brain was determined to be forensically or scientifically necessary to determine the cause of death.** As noted above, this decision appears to be completely within the purview of the coroner. **In contrast, *Brotherton* involved what amounted to state-sanctioned grave robbing...It appears that the coroner's policy of not notifying the next-of-kin that he had retained the brains of their decedents was motivated by nothing more than a desire to avoid inflicting additional unnecessary pain on Plaintiffs.** In any event, these differences in facts **likely** do not take this case outside the broad holding in *Brotherton* that there is a substantial and protectable constitutional interest in the dead body of a relative or loved one. (emphasis added)

Id. at *5. The *Hainey* Court completely disregarded the numerous distinguishing factors of the *Brotherton* case and ignored the *Montgomery* case. Despite acknowledging the difference between retaining a brain to determine the cause of death and taking corneas for organ donation, the *Hainey* Court inexplicably equated the two for purposes of recognizing a property interest.¹⁰

Rather than continue to allow Ohio law in this important area to remain unsettled and open to confusion by federal courts, this Court should accept the question certified to it by the District Court. Doing so will provide clarity not only to Ohio and federal courts, but also to County Coroners in performing their statutorily authorized duty to determine cause of death.

G. No Other Jurisdictions' Case Law Answers the Certified Question.

No other state or federal court across the country has dealt with this precise issue, except for the United States District Court in *Hainey*. A survey of cases from across the country shows that, while there are cases dealing with various issues concerning property rights in decedent's body, no case other than *Hainey* has found a protected interest in a decedent's tissues, organs, blood or other body parts that have been removed and retained by the coroner for forensic examination and testing. *See, e.g., Fuller v. Marx*, 724 F. 2d 717 (8th Cir. 1984) (stating the

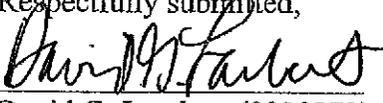
¹⁰ As discussed in Section IV. C. *supra*, R.C. § 313.123 was enacted after the *Hainey* decision and states that tissues, organs, blood, fluids, and other specimens taken and retained as part of an autopsy are to be treated as medical waste.

court knows “of no Arkansas cases which extend this quasi-property right to all of the body’s organs . . .”); *Shults v. U.S.*, 995 F. Supp. 1270 (D. Kan. 1998) (finding that organs taken and removed as part of an autopsy “has no compensable value” for purposes of an alleged conversion claim); *Colavito v. New York Organ Donor Network, Inc.* (2nd Cir. 2006), 438 F.3d 214 (involving an organ donee’s protected interest in receiving a functioning organ); *Newman v. Sathyavagiswaran* (9th Cir. 2002), 287 F.3d 786 (involving California’s codification of the Uniform Anatomical Gift Act).

V. CONCLUSION

The instant matter involves a question of Ohio law that is determinative of the proceeding and for which there is no controlling precedent in the decisions of this Court. At issue is not only the ability of county coroners to effectively execute their critically important police powers and statutory duties of performing forensic autopsies and determining cause of death, but also the financial stability of 87 of the 88 Ohio counties. As such, Interested Party Cuyahoga County respectfully requests this Honorable Court accept the question certified to it by the United States District Court.


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CERTIFICATE OF SERVICE

A copy of the foregoing has been sent via regular U.S. mail this 9th day of April, 2007,

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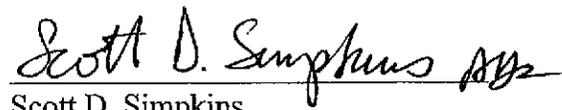
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