

IN THE SUPREME COURT OF OHIO

MARK ALBRECHT, et al., : Case No. 07-0507
Plaintiffs-Respondents, : Preliminary Memorandum on
- vs - : Question of State Law Certified by
BRIAN TREON, M.D., et al., : the United States District Court, for
Defendants-Petitioners. : the Southern District of Ohio,
Western Division
Case No. 1:06CV274

DEFENDANTS' MEMORANDUM ADDRESSING
CERTIFIED QUESTION OF LAW

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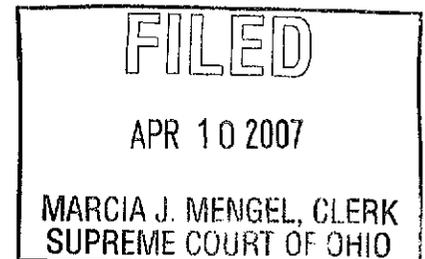


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CERTIFIED QUESTION

The following question has been certified to this Court by the Hon. Susan J. Dlott,
United States District Court, Southern District of Ohio, Western Division:

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.

STANDARD OF REVIEW

Where there is no controlling precedent from this Court to answer the question certified from the federal district court, Defendants respectfully request the Court to accept the question proposed by the federal district court and answer it in the negative, thus disposing of *Albrecht v. Treon* as a matter of Ohio law. SCt R XVIII.

STATEMENT OF THE CASE

The Court's holding that next of kin have no protected interest in autopsy specimens will be determinative of this proceeding upon grounds that are consistent with past and current Ohio law. To do otherwise is to permit Plaintiffs and all other parties whom they can join in their class action to obtain money damages from eighty-seven Ohio counties for their "loss" of tissues, organs, blood or other body parts which may have been damaged, destroyed and/or disposed of by county coroners during the course of the tens of thousands of lawfully conducted autopsies since 1991.

As set forth in the Certification Order of the Federal District Court: "This lawsuit is a

putative class action against all county coroners and/or medical examiners in the State of Ohio that have removed, retained, and disposed of body parts without prior notice to next of kin, and the County Commissions and Commissioners of those counties. Eighty-seven counties (all Ohio counties except Hamilton) are implicated in this suit. Plaintiffs Mark and Diane Albrecht brought this lawsuit against the coroner of Clermont County, Ohio, as well as the Board of County Commissioners, after discovering from their son's autopsy report that the coroner's office, or others on its behalf, had removed their son's brain for forensic examination and retained it after the autopsy. The coroner's office did not notify the Albrechts that their son's brain had been retained. The Albrechts buried their son without his brain and without any notice from the coroner of that fact. They alleged that they have suffered legal damages as a result."

ARGUMENT

Eighty-seven Ohio counties and their Coroners are under attack by Plaintiffs' attempt to enlarge a principal of law – a principle unsupported in Ohio and in dispute in the Sixth Circuit – beyond its limited facts.

Scott v. Bank One (1991), 62 Ohio St.3d 39, is instructive if not dispositive of the question whether the Court should accept this opportunity to confirm Ohio law:

The state's sovereignty is unquestionably implicated when federal courts construe state law. If the federal court errs, it applies law other than Ohio law, in derogation of the state's right to prescribe a 'rule of decision.' 'By allocating rights and duties incorrectly, the federal court 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 frustration of the state's policy may have a more lasting effect, because other potential litigants are likely to behave as if the federal decision were the law of the

state. In that way, the federal court has, at least temporarily, *made* state law of which the state would have disapproved, had its courts had the first opportunity to pass on the question.”

Id. at 42 [emphasis in the original], quoting McCree, Foreword, 1976 Annual Survey of Michigan Law (1977), 23 Wayne L.Rev. 255, 257, fn. 10.

There can be no better example of a case than *Albrecht v. Treon* where “potential litigants are likely to behave as if the federal decision were the law of the state.” *Id.* Here, Plaintiffs’ claim arises under a federal court’s speculation on Ohio law announced in 1991 by a panel of the Sixth Circuit Court of Appeals. *Brotherton v. Cleveland* (1991) 173 F.3d 552. In *Brotherton*, the federal court found a constitutionally protected right in corneas taken for donation without consent of next of kin in violation of the Uniform Anatomical Gift Statute. “We hold the aggregate of rights granted by the state of Ohio to Deborah Brotherton rises to the level of a ‘legitimate claim of entitlement’ in Steven Brotherton’s body, including his corneas, protected by the due process clause of the fourteenth amendment.” Yet before reaching this conclusion – a conclusion unsupported by Ohio law in 1991 – the *Brotherton* court stated unabashedly that “State supreme court decisions are the controlling authority for such determinations. However, the Ohio Supreme Court has not ruled upon the precise issue before this Court” *Id.* at 480 (internal citation omitted).

A temporary pronouncement of Ohio law, indeed. Several months later another panel of the Sixth Circuit simply disavowed *Brotherton*, holding:

There is no merit in the procedural due process claim founded on the state statutory requirement that the medical examiner make a diligent effort to notify the next of kin as to the decision to perform an autopsy. **Whatever the nature of the right created by the statute there is an insufficient liberty or property**

interest under this statute to create a valid procedural due process claim. Although the notice requirement in the state statute does not appear to be discretionary, it does not purport to establish a right to control the dead body. We would distinguish this case from *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991). In *Brotherton* the plaintiff had an “aggregate of rights granted by the state of Ohio” to control disposition of the body, including the corneas, and thus had a right to refuse removal of corneas for purposes of a cornea transplant. *Id.* at 482.

Montgomery v. County of Clinton (6th Cir., August 9, 1991), 1991 U.S. App. LEXIS 19070, unreported, attached hereto, [emphasis supplied]. In *Montgomery*, the plaintiffs asserted a claim against a coroner who performed an autopsy on their son without their consent but otherwise within the scope of his statutory duties. The *Montgomery* court found no property interest or other protected right in the decedent’s body, let alone in the specimens remaining after the autopsy. The decision of the *Montgomery* court, although interpreting Michigan law, correctly reflected Ohio law in the same area at that time and to date.

To be sure, this matter concerns the right to dispose of autopsy specimens, while *Brotherton* considered to the right to make or deny an anatomical gift. Yet, even under the Ohio statute that existed 1991, a coroner’s need to perform a forensic examination on a part that had been “donated” prior to death, was paramount to the donee’s wish. No matter how much deference the Court wishes to accord the *Brotherton* decision, it is inapposite to the case at bar.

The highest court of a state tells a federal court whether a protected right exists under state law before a federal due process claim can stand.

To establish a procedural due process claim, a plaintiff must show that she had a property interest of which she was deprived without due process of law. A federal court must determine whether the state has given the plaintiff a protected interest. *Castle Rock v. Gonzales*

(2005), 545 U.S. 748. The federal court looks initially to state law to determine whether such interest exists. *Bd. of Regents v. Roth* (1972), 408 U.S. 564, 577. Protected interests in property are normally “not created by the Constitution. Rather, they are created and their dimensions are defined” by an independent source such as state statutes or rules entitling the citizen to certain benefits. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). It is for this reason that this Court has been asked to determine whether the protected property right asserted by Plaintiffs exists as a matter of Ohio law.

While there is no controlling precedent from this Court regarding a next of kin’s protected right in autopsy specimens, nothing in Ohio decisional or statutory law would lead this Court to find such right.

Ohio law has historically provided significant protection to the rights of next of kin in the respectful disposition of the bodies of their family members. Ohio law has, at the same time, permitted a county coroner¹ to perform his professional duties without interference and even over the objection of family members. Ohio’s coroners perform their duties clothed in the police power of the state. “The object of the police power is the public health, safety and general welfare. To be valid, its exercise must bear a substantial relationship to that object and must not be unreasonable or arbitrary.” *Hudson v. Albrecht, Inc.* (1984), 9 Ohio St. 3d 69, 458 N.E.2d 852.

At no time in 1991 – or since that time – have Ohio statutes supported a protected right in autopsy specimens.

On August 17, 2006, Revised Code section 313.123 became effective. In that statute,

¹For purposes of this Motion, Defendants request the Court to take notice of the use of the word “coroner” to mean both the elected official as well as his deputies appointed pursuant to Revised Code section 313.05(A)(“[t]he coroner may appoint, in writing, deputy coroners, who shall be licensed physicians in good standing in their profession”).

the Ohio legislature limited the result of *Brotherton*. R.C. 313.123(B)(1) provides, in relevant part, that:

Except as otherwise provided in division (B)(2) of this section, **retained tissues, organs, blood, other bodily fluids, gases, or any other specimens from an autopsy are medical waste** and shall be disposed of in accordance with applicable federal and state laws, including any protocol rules adopted under section 313.122 [313.12.2] of the Revised Code.

[Emphasis supplied.]

Thus, by means of this statute, in 2006 the Ohio legislature clearly defined autopsy specimens to be medical waste subject to disposal without reference to next of kin. This statute, in itself, provides a sound basis for this Court to answer the certified question in the negative.

At the time *Brotherton* was decided, in 1991, the Ohio legislature provided the following with respect to coroners, their powers and their duties:

A person holding the office of coroner was required to be a physician licensed by the State of Ohio and in good standing. R.C. §313.02². In cases where persons died of “criminal or other violent means, by casualty, by suicide or in any suspicious or unusual manner, or when any person, including a child under two years of age, dies suddenly when in apparent good health,” the coroner was to be notified. R.C. §313.12 Upon receiving notice of such death, the coroner was required to notify next of kin. The next of kin had “prior right as to the disposition of the body of the deceased person.” R.C. §313.14.

The coroner was required by statute to perform an autopsy if, in the opinion of the

²The statutes cited in the following paragraphs are those in effect in 1991 and 1992. Nothing in these archival statutes support a claim for a protected interest in autopsy specimens and as current R.C. 313.123 demonstrates, the Ohio legislature does not protect these specimens.

coroner himself, it was necessary to do so. R.C. §313.131. However, upon obtaining evidence that an autopsy was “contrary to the deceased person’s religious beliefs,” the coroner was to delay to autopsy for forty-eight hours to give the objecting person time to file suit to enjoin the autopsy. This provision did not apply to cases involving “aggravated murder, suspected aggravated murder, murder, suspected murder, manslaughter offenses or suspected manslaughter offenses.” Nor did the provision prohibit the coroner from drawing blood or other fluids to perform drug or alcohol screens. R.C. §313.131. Further, except in the circumstances described above, the coroner had no obligation to obtain consent from family or friends of the deceased to perform an autopsy. R.C. §2108.52.

No person was permitted to disturb the body of any person dying under circumstances described in R.C. §313.12 without an order from the coroner. Indeed, such improper disturbance carried a criminal penalty. R.C. 313.11. The death of any child under two years of age who was in apparent good health was to be reported to the coroner who was mandated by statute to perform an autopsy. “The coroner or deputy coroner may perform research procedures and tests when performing the autopsy.” R.C. §313.121. With respect to R.C. §313.121, the Ohio Administrative Code set forth a specific protocol which demanded that the coroner remove and examine certain specimens from the child’s body. O.A.C. 3701-5.14.

The coroner’s right to perform an autopsy was paramount to the ability of the decedent or next of kin to make a gift of an organ. “If he takes charge of and decides to perform, or performs an autopsy on a dead body ... the coroner may waive his paramount right to any donated part of the dead body.” R.C. §313.13. To be sure, Ohio’s Uniform Anatomical Gift statute provided that the coroner had the right, when performing an autopsy, to remove and

donate a pituitary gland “and give it to the national pituitary agency to use for research and in manufacturing a hormone” Only an objection grounded on the tenets of a well-recognized religion could prevent a coroner from making such donation. R.C. §2108.53.

The coroner had the right to hold any dead body “until such time as the coroner ... has decided that it is no longer necessary to hold such body to enable him to decide on a diagnosis giving reasonable and true cause of death” R.C. §313.15. Ultimately, it was the coroner’s duty to deliver a verdict announcing the cause of death, manner and mode of death. R.C. §313.19.

The coroner’s rights and duties were spelled out by the Ohio legislature at the time of the *Brotherton* decision. The only exception to a coroner’s right to perform an autopsy in the manner he saw fit as a medical professional was in a case where a decedent had, prior to death, made it known that an autopsy violated his religious beliefs, and even that exception could be overridden where criminal misconduct was suspected. To be sure, the Uniform Anatomical Gift Statute specified that the coroner’s right to a body part for forensic examination was paramount to that of the donee. Ultimately, pursuant to Revised Code Chapter 313, while next of kin had a prior right to disposition of a body, such right did not arise until *after* the coroner had performed his duties, duties which, as a matter of forensic practice, require the removal, destruction and/or retention of specimens from the body. Nevertheless, in light of this statutory framework, Plaintiffs seeks to vindicate an alleged protected property right in autopsy specimens.

At no time in 1991 – or since that time – have Ohio appellate decisions supported a protected right in autopsy specimens.

There are no Ohio appellate decisions on point with the case at bar. In March 2007, however, the Sixth District Court of Appeals found that parents have no protected right in the tissue of a fetus of less than 20 weeks gestation. The Appellate Court summarized the facts as follows:

Hayth alleges that she had a miscarriage at appellee, Firelands Community Hospital (“Firelands”), some time between the years 1988 through 1996. She was told by her physician that the “fetus” of 20 weeks or less gestation would be cremated. It is uncontroverted that during that period, it was hospital policy to dispose of all tissue by means of a tissue grinder or incineration. The tissue included the tissue of fetuses at or less than 20 weeks gestation n4 that were the result of a miscarriage or were stillborn.

Id. at P6, footnotes omitted.

The Sixth District upheld the trial court’s dismissal of all of plaintiff’s claims, including violation of Ohio statutes and regulations governing unlawful possession of a dead body and those regulations governing the humane disposal of a fetus; the common law tort of mishandling a body or corpse (appellant also added “fetus” in this claim”); fraud by omission (raised against Firelands only); negligent infliction of emotional distress; intentional infliction of emotional distress; and a claim for punitive damages. *Walker v. Firelands Community Hospital*, 2007 Ohio 871 at P10. In *Firelands*, the court held that where the fetal tissue could not, as a matter of law, be considered a “person,” the means and method of disposal of the tissue was at the hospital’s discretion. While *Firelands* does not involve a coroner, it does involve questions Ohio law regarding the decision of a medical professional regarding post-mortem disposal of tissue. To be sure, there are no appellate court decisions on point with the

case at bar, but holdings in other cases indicate an unwillingness by several appellate districts to find a protected property right in even a fully-developed human corpse.

In Ohio, “[t]he law is not primarily concerned with the extent of physical injury to the bodily remains but with whether there were any improper actions and whether such actions caused emotional or physical suffering to the living kin.” *Biro v. Hartman Funeral Home*, 107 Ohio App.3d 508, 512 (8th Dist.1995)(basis for recovery in damages not found in a property right in a dead body, but in personal right of family to bury the body;); *Everman v. Davis*, 54 Ohio App.3d 119, 122 (2nd Dist.1989)(no Fourth Amendment claim for body as “effect”); *Carney v. Knollwood Cemetary Ass’n*, 33 Ohio App.3d 31, 37 (8th Dist.1986)(case law moving away from “quasi-property fiction;” relief available under tort law); *Hadsell v. Hadsell*, 3 Ohio Cir. Dec. 725, 726 (1893)(“A dead body is not property”).

Accordingly, in Ohio, there was no support in 1991, and no support has developed over the past sixteen years in the state’s decisional law, for the “protected property right” in autopsy specimens asserted by Plaintiffs in the case at bar. Further, it is beyond dispute that Ohio law recognizes – both in its statutes and judicial decisions – that the next of kin have a right of action where they believe that there has been mishandling or abuse of the corpse of their decedent. See also, *Dunker v. Babbitt Funeral Home*, 1996 Ohio App. LEXIS 1692 (8th Dist., Apr. 25, 1996); Ohio Revised Code section 1713.34 (criminal penalty for mishandling corpse), section 2927.01 (criminal penalty for abuse of a corpse).

In the case at bar, Plaintiffs do not assert that they did not receive the body of their decedent for burial. Nor do Plaintiffs assert that Defendants mishandled or in any way abused the corpse. They allege, instead, that the exigencies of a properly conducted forensic

examination performed by a person lawfully authorized to do so resulted in their not receiving the *entire* body for burial. This, Plaintiffs argue, violates their due process rights.

A properly conducted autopsy is a legitimate and important exercise of the police power of the state, and is entitled to protection by this Court.

The above-cited cases provide significant legal protection for doctors, hospitals and funeral homes who perform their duties properly. Where the actor in question is a county coroner, striving to properly exercise the police power of the state, the protection must be as great or greater.

“The office of coroner is a very ancient one, and is said to be of equal antiquity with that of the sheriff, the two having been ordained together to keep the peace, and the historical development of the office may be traced back practically to the Norman Conquest of England. In this state, however, the coroner can only exercise such powers and jurisdiction as are provided by statute. His duties are largely ministerial in character, but certain of them are, nevertheless, in a limited sense quasi judicial.” *State ex rel. Harrison v. Perry* (1925), 113 Ohio St. 641. Because a coroner can “only exercise such powers and jurisdiction as are provided by statute, to protect a county coroner’s ability to exercise such powers and jurisdiction in no way permits state-sanctioned disrespect for the sensibilities and wishes of families and friends.

The autopsy procedure, even when properly performed, is by its nature destructive of the remains of a body. Frequently a body brought to a morgue for autopsy has already been subject to significant damage, damage from which has arisen the need for forensic examination to determine the cause and manner of death. A coroner must be completely free to use his best professional judgment with regard to examination, testing and study of a body to arrive at his

verdict. To date, Ohio's coroners have been permitted this freedom. It is significant that Plaintiffs seek to invoke federal law to engage eighty-seven of Ohio's county coroners in litigation over conduct in which the coroners have engaged for literally hundreds of years without interference by any court in the state of Ohio.

Retention of tissues, whole organs, blood, fluids and other specimens is a widely recognized – and in Ohio, mandated – forensic medical practice.³ Such retention permits Ohio's coroners to accurately report cause and manner of death. The work of Ohio's coroners has a direct impact on both law enforcement and public health concerns.

The law regarding a body found to have died under circumstances which mandate an autopsy is settled: the coroner's right to the remains is paramount until the completion of his forensic examination. Indeed, the coroner's right to perform an autopsy where homicide is suspected overcomes the stated religious objections of the deceased. This case is, therefore, an attempt to create a cause of action – not over the right to ultimate disposition of the body itself or even to make or deny an anatomical gift – but over the right to parts of the body which may, during the course of an autopsy, be damaged or retained and destroyed by a coroner acting within the scope of his duties.

Nor can one dispute that a body that has been subject to autopsy leaves the morgue in a condition considerably different from that in which it arrived. To be sure, during the course of the autopsy on Plaintiffs' son, the body was subject to extensive dissection and concomitant damage. According to the autopsy report, the Coroner dissected and examined the spine:

³See, e.g., R.C. §313.121(B)(autopsy mandated where apparently healthy child under two dies); O.A.C. 3701-5-14 (certain fluids and tissues to be removed from child's body and retained by coroner).

vertebrae, ligaments and disks. In addition, he opened the thoracic cavity, removing and weighing the right and left lungs, heart, liver, right and left kidneys, and spleen. The Coroner also removed and retained the brain, blood, tissue samples, and various fluids (pericardial sac, gall bladder, pulmonary parenchyma, stomach, urinary bladder) for forensic examination. The body was, in fact, returned to Plaintiffs physically damaged and without its brain and blood as well as other fluids and certain tissues.

In the case at bar, Plaintiffs claim only to seek vindication of their right to “notice” of whether body parts will be retained by the coroner. In the law, however, “notice” is followed inevitably by “an opportunity to be heard.” To be heard in these circumstances is to permit the next of kin to second-guess the professional decisions of the coroner: to question why a certain fluid was retained, to argue over the size of an organ sample, to debate the necessity of a particular, destructive test. Indeed, this right, should it be found, may require courts to determine whether next of kin have been unconstitutionally deprived of not just a decedent’s heart or brain, but of tissues, blood, other bodily fluids or even gases, remaining after the completion of an autopsy. Ohio coroners are physicians licensed to practice medicine by this State. Such professional licensure carries with it the right to make medical judgments – no matter how distasteful to a particular individual or family-- judgments upon which public is entitled to rely.

A coroner’s verdict has evidentiary value in court. The reliability of the coroner’s finding regarding cause and manner of death can be said, without exaggeration, to be a matter of life and death. In criminal cases, the retention of body parts protects the due process rights of the accused who wish to have their own experts perform forensic examination of retained body

parts. Such reliability will undoubtedly be called into question when a non-medical person has the right to question the retention and/or destruction of autopsy specimens and interfere with a coroner's ability to perform tests and research procedures. The cross-examination of a coroner under these circumstances can only be imagined.

Further, a coroner's forensic examination has public health implications. A coroner is expected to discover an report on contagious disease. Further, except where an objection arises on religious grounds, a coroner is permitted by statute to remove a pituitary gland "and give it to the national pituitary agency to use for research and in manufacturing a hormone" R.C. §2108.53(A).

Public health and law enforcement are quintessential elements of the police power of the state. These functions are exercised by Ohio coroners on a daily basis. For this Court to find a protected right in autopsy specimens thus permitting the *Albrecht* Plaintiffs to burden a coroner's lawful exercise of his duty would amount to a significant and unwarranted change in Ohio law.

CONCLUSION

At the time *Brotherton v. Cleveland* was decided in 1991, even the Sixth Circuit Court of Appeals did not hesitate to state that there was no controlling precedent from this Court which would determine the existence, or otherwise, of a protected right in autopsy specimens. Recently, the Ohio legislature has determined that autopsy specimens are medical waste and must be disposed of accordingly. This Court's definitive determination that next of kin have no protected right in body parts removed and destroyed pursuant to a statutorily mandated autopsy will dispose of the case at bar. Defendants urge this Court to accept the question certified to it

by the federal district court and hold that no protected right exists in autopsy specimens that result from a properly conducted forensic examination by a county coroner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum has been served upon John H. Metz, Esq., counsel of record for Plaintiffs-Respondents, at his office, 441 Vine Street, 44th Floor, Cincinnati, Ohio 45202-3016, and upon Patrick J. Perotti, Esq., counsel for Plaintiffs-Respondents, at his office, Dworken & Bernstein, 60 South Park Place, Painesville, Ohio 44077, by ordinary U.S. mail, postage prepaid, this 9th day of April, 2007.

Elizabeth Mason
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