

IN THE SUPREME COURT OF OHIO

MARK ALBRECHT, ET AL.,

Plaintiffs-Respondents,

v.

BRIAN TREON, M.D., ET AL.,

Defendants-Petitioners.

CASE NO.: 2007 - 0507

**Preliminary Memorandum Of Amicus Curiae Franklin County In
Support Of Petitioners**

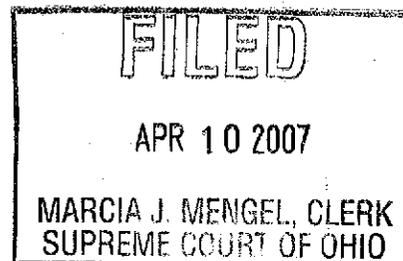
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Federal law does not establish any interests or rights in the body parts of another. If any such right or interest exists, it is a matter of state law. *Board of Regents v. Roth*, 108 U.S. 564, 577 (1972). This Court, however, has never had occasion to establish whether Ohio law recognizes any generalized right in the body parts of another. Respondents' action threatens Ohio's sovereignty, essentially seeking that the Federal Court overstep the confines of federalism and establish as law that which is properly determined only by the Ohio Legislature and this Court.

As this Court has observed before, the danger is far from merely theoretical.

Scott v. Bank One Trust Co. (1991), 62 Ohio St.3d 39, 42,

Since federal law recognizes Ohio's sovereignty by making Ohio law applicable in federal courts, the state has the power to exercise and the responsibility to protect that sovereignty. Therefore, if answering certified questions serves to further the state's interests and preserve the state's sovereignty, the appropriate branch of state government -- this court -- may constitutionally answer them.

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.

Scott, 62 Ohio St.3d at 42. It is respectfully submitted, this Court should now exercise its authority to establish the meaning of Ohio law where it has been expressly asked to do so by the Federal Court and where there is risk that by failing to do so, the Federal Court would be made to "guess" at how Ohio would decide an important

question of state law, see, *Id.* at 43, here whether or not a third party enjoys a lawfully recognized right in the body parts of another.

Moreover, in that Respondents are seeking to certify a class of defendants that will include each County Coroner and the County Commissioners for every Ohio County there are far reaching state-wide consequences at issue herein. That is, the public fisc of each County in Ohio is threatened by this action. Amicus submits that it is of critical importance, then, that the Court take advantage of this opportunity to definitively express the state of Ohio law and not allow that the fate of public monies rest on the Federal Court's best "guess."

As Judge Dlott stated, the question to be answered by this Court is 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.

Resolution of this question is determinative of the underlying proceeding. And this Court has not had occasion to examine the issue. In fact, in support of their claim Respondents' cite not to Ohio law, but instead to *Brotherton v. Cleveland*, 923 F.2d 477, (6th. Cir. 1991), for the proposition that "family members do have a property interest in the dead body of their loved one...," (Compl. ¶ 45). It is important to note, however, that the *Brotherton* Court never held that Ohio law grants a third party a property interest in the body of another in some *generalized* sense. *Id.*

The *Brotherton* Court examined a particular issue, whether Ohio law recognized an interest retained by third parties in the *corneas* of a third party decedent. In this regard, the *Brotherton* Court had statutory guidance as to whether Ohio Law recognized such an interest. R.C. Chapter 2108. The Ohio Anatomical Gift statute specifically

grants that a third party survivor is, under certain circumstances, authorized to make, or decline to make, anatomical gifts of the body parts of another – in that case, corneas. *Brotherton*, 923 F.2d at 482; R.C. § 2108.02(B). In the instant action, the Anatomical Gift Statute is of no import or use.

Likewise, while Ohio Appellate Courts have acknowledged there exists in Ohio some limited interests in the body of another in certain cases, (for example in tort actions for desecration, *Biro v. Hartman Funeral Home* (1995), 107 Ohio App 3d 508, (8th Dist.), or for mishandling, *Carney v. Knollwood Cemetery Ass'n* (1986), 33 Ohio App. 3d 31, 541 N.E.2d 430 (8th Dist.), or for purposes of preparation, morning and burial, *Everman v. Davis* (1989), 54 Ohio App. 3d 119, 561 N.E.2d 547, (2nd Dist.); R.C. § 313.14)), none of these decisions are on point with regard to the instant action. Here, Respondents do not allege mishandling of their decedent, do not allege any desecration, and do not allege they were not allowed to possess their loved one for purposes of preparation, morning and burial. Furthermore, none of these cases addresses the particular issue here, again, discernment of what are the rights of a third party in the tissues, organs, blood or other parts of the body which have been retained for forensic testing.

Finally, as noted by Judge Dlott, “it appears that the recent enactment of Ohio Revised Code § 313.123 may limit the rights of persons in the intact remains of their loved ones.” (Cert. Ord., p. 3.) Enacted by the Ohio legislature on August 17, 2006, R.C. § 313.123 provides, “**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.” R.C. § 313.123 (B)(1) (emphasis

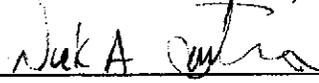
added). Survivors cannot possibly establish any property, quasi-property, or other interest in those items defined as waste. The new section provides considerable insight in to how Ohio views a survivor's interest in the body, or parts thereof, which had undergone an autopsy. Amicus urges the Court to take the opportunity to evaluate the consequences of this provision as it concerns the state of Ohio law before its enactment.

III. Conclusion

For the reasons discussed above, Franklin County, an interested party, respectfully request that the Court grant Defendants' Motion to Certify.

Respectfully Submitted,

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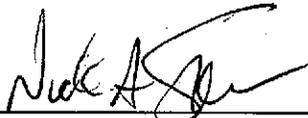
CERTIFICATE OF SERVICE

The undersigned hereby certifies that the forgoing Preliminary Memorandum in Support of Petitioners was forwarded on April 10, 2007, by regular U.S. Mail, postage prepaid, to:

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