

IN THE SUPREME COURT OF OHIO

MARK ALBRECHT, <i>et al.</i> ,	:	
	:	
Plaintiffs-Respondents,	:	Case No.: 07-0507
	:	
v.	:	Preliminary Memorandum On Question
	:	of State Law from the United States
BRIAN TREON, M.D., <i>et al.</i> ,	:	District Court for the Southern District of
	:	Ohio, Western Division
Defendants-Petitioners.	:	Case No.: 1:06CV274

**AMICI CURIAE PRELIMINARY MEMORANDUM OF SIXTY-FIVE (65) OHIO
COUNTIES, COUNTY COMMISSIONERS' ASSOCIATION
OF OHIO, BUCKEYE STATE SHERIFFS' ASSOCIATION, OHIO ASSOCIATION OF
CHIEFS OF POLICE, AND OHIO PROSECUTING ATTORNEYS ASSOCIATION
SUBMITTED ON BEHALF OF DEFENDANTS-PETITIONERS**

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I. INTEREST OF AMICI CURIAE

The sixty-five (65) Ohio counties, listed in Exhibit A, have coroners to whom Plaintiffs-Respondents issued subpoenas ordering extensive discovery in an attempt to certify a class of defendants composed of every Ohio county coroner (except the Hamilton County Coroner). Each of the sixty-five (65) county coroners is obligated by the Ohio Revised Code to perform autopsies for their respective communities. Further, each of the coroners recognizes that retention of autopsy specimens is a sound, age-old forensic medical practice that is essential to the performance of their statutory duties.

The County Commissioners' Association of Ohio (CCAO) works to promote the best practices and policies in the administration of county government for the benefit of Ohio residents. CCAO accomplishes this goal by providing legislative representation, technical assistance, and educational opportunities for county commissioners and their staffs.

The Buckeye State Sheriffs' Association (BSSA) works state-wide to foster the improvement of Ohio's law enforcement. In furtherance of its mission, BSSA strives to keep the state's various Sheriffs abreast of the latest advancements in law enforcement techniques, technology, legal precedent, legislative action, and training.

The Ohio Association of Chiefs of Police, Inc. (OACP) was established in 1928 with a goal to enhance the law enforcement profession by providing Ohio Police Chiefs with strong leadership, innovative programs, and exemplary services to enable them to better serve their individual communities. The private nonprofit organization provides professional, educational and informational services to all Ohio law enforcement and their communities.

The Ohio Prosecuting Attorneys Association (OPAA) is a private non-profit membership organization that works for the benefit of the eighty-eight (88) county prosecutors. The primary

goal of OPAA is to aid in the furtherance of justice. In order to accomplish this goal, the OPAA works to increase the efficiency of each county prosecutor, broaden the prosecutors' interest in government, and provide cooperation and concerted action on policies which affect the office of Prosecuting Attorney.

The various amici that join in this memorandum to support Defendants-Petitioners Clermont County Coroner and Commissioners share a mutual interest in the well-being of Ohio's counties and residents. Ohio's well-known fiscal problems would be further complicated if Plaintiffs-Respondents are able to assert claims against Ohio's eighty-seven (87) counties for damages that could approach ninety million dollars (refer to discussion below). Effective prosecution, diligent law enforcement, fiscal stability, and informed leadership lie at the core of Ohio's well-being. Each of these organizations assists the state actors who are forerunners in maintaining these fundamental arenas. Ohio county coroners, and the professional medical expertise with which they perform their statutory duties, furnish the information necessary to prosecute the guilty, exonerate the innocent, and maintain harmony within Ohio's communities. Further, litigants who to seek to fleece Ohio of substantial monetary resources on the basis of an undecided state law issue threaten the state's foundation and the leadership that seeks to direct such funds toward efforts that improve, rather than detract from the state.

II. CERTIFICATION STANDARD

Judge Dlott of the United States District Court for the Southern District of Ohio properly certified the following question of state law to this honorable Court:

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.

(Cert. Order at 3). The Ohio Supreme Court Rule of Practice XVIII sets forth the appropriate standard for certification of a state law question to the Ohio Supreme Court. Two requirements for certification exist under Rule XVIII: (1) the question of Ohio law must be determinative of the proceeding, and (2) there must be no controlling Ohio Supreme Court precedent on the issue.

In the case at bar Plaintiffs-Respondents allege that the right to bury the body of their deceased next of kin created a property right and, therefore, a violation of due process under 42 U.S.C. § 1983 when a coroner, without notification, removed and retained their son's brain during an autopsy for purposes of forensic examination. In any due process claim, "[r]esolution of the federal issue begins * * * with a determination of what it is that state law provides." *Castle Rock v. Gonzales* (2005), 545 U.S. 748, 757, 125 S. Ct. 2796, 162 L.Ed.2d 658. This Court's answer as to whether Ohio grants next of kin a protected interest in autopsy specimens is a threshold issue, likely determinative of the present case.

This question of state law is one of first impression for the Ohio Supreme Court. Accordingly, the district court properly certified this impactful question of state law to Ohio's highest court for its ultimate determination.

III. THERE IS COMPELLING JUSTIFICATION FOR WHY THE COURT SHOULD ACCEPT CERTIFICATION OF THIS STATE LAW QUESTION

This Court previously described certification as a mechanism by which the state's highest court can "* * * further the state's interests and preserve the state's sovereignty, * * * ." *Scott v. Bank One Trust Co.* (1991), 62 Ohio St.3d 39, 42, 577 N.E.2d 1077. Certification provides a means for the state's supreme court to cease federal courts' perpetuation of rulings of state law. When a federal court decides an issue contrary to how the same issue would be decided by a state court, it diminishes the state's sovereignty, frustrates the state's policy and perpetuates

potential litigants to treat the federal decision as if it were the law of the state *Id.* at 42 – 43, 577 N.E.2d 1077.

A. The Court Has The Authority To Decide The Law That Governs This State, Thereby Defending Ohio's Sovereignty

The question of law raised by this case has the potential to lead eighty-seven (87) Ohio counties into financial hardship. On September 28, 2005 the United States District Court for the Southern District of Ohio decided a case (*Hainey v. Parrott* (Sept. 28, 2005), S.D. Ohio No. 1:02-CV-733, unreported) with identical claims brought against the Hamilton County Coroner. In the absence of (and arguably contrary to) applicable precedent, the district court granted summary judgment to plaintiffs on the basis of federal interpretation of Ohio law. *Hainey v. Parrott* (Sept. 28, 2005), S.D. Ohio No. 1:02-CV-733, 4, unreported. Prior to a decision on appeal to the Sixth Circuit Court of Appeals, Hamilton County settled for six million dollars. (See Exhibit B, *Hainey v. Parrott* Settlmt. Order) This exorbitant settlement amount accounted solely for autopsies within Hamilton County's jurisdiction. Potential liability of the remaining eighty-seven (87) counties could approach ninety million dollars in the case at bar.¹

The case at bar involves autopsies performed on behalf of eighty-seven (87) Ohio counties over the course of fifteen (15) years. Plaintiffs-Respondents argue that *Hainey v. Parrott* serves both as the support for their claim and the standard for damages sought by future

¹ The six million dollar Hamilton County settlement equated to approximately \$6,000 per claim (inclusive of attorney fees and award to lead plaintiffs), based upon the number of autopsies Hamilton County identified in which a whole organ was removed for examination. If a similar percentage were applied across Ohio, the potential liability for autopsies performed in Ohio from 1991 to present could approach ninety million dollars - based upon death and population statistics and statistics from Cuyahoga County See Ohio Department of Health, Information Warehouse, <http://dwhouse.odh.ohio.gov/datawarehousev2.htm>, Ohio Department of Development, <http://www.odod.state.oh.us/research/files/s0.htm>. Cuyahoga County alone has identified 5119 whole organs that were retained from autopsies from 1991 to present. (R.34, Balraj Aff. at ¶ 13). Accordingly, damages solely for Cuyahoga County could amount to approximately thirty million dollars.

litigants. In the absence of this Court's clarification of state law, litigants seek to pillage Ohio's treasuries strictly on the basis of federal courts' questionable determination of Ohio state law. The deterioration of scarce state resources by litigants, armed with federal-made law in what should be a state law arena, weakens Ohio's sovereignty and ability to govern its own course.

Certification of the instant question grants this Court the platform by which to confront this far-reaching question of state law and to rule accordingly based on this Court's proper determination of state law.

B. The Court's Acceptance Of This State Law Question Will Prevent Interference With Coroners' Practices And Procedures As Mandated By Ohio Law

Plaintiffs-Respondents seek remuneration for procedures that coroners have engaged in since the advent of the first autopsy examination. An autopsy includes, by definition, removal and retention of specimens from the human body:

“* * * the external and internal examination of the body of a deceased person, including, but not limited to, gross visual inspection and **dissection of the body and its internal organs**, photographic or narrative documentation of findings, microscopic, radiological, toxicological, chemical, or other laboratory analyses performed in the discretion of the examining individual upon tissues, organs, blood, other bodily fluids, gases, or any other specimens and the **retention for diagnostic and documentary purposes of tissues, organs, blood, other bodily fluids, gases, or any other specimens** as the examining individual considers necessary to establish and defend against challenges to the cause and manner of death of the deceased person.”

R.C. 313.123(A)(1)(emphasis added). An autopsy without removal and retention of specimens does not constitute an autopsy under Ohio's law or the nationally-accepted forensic medical standards.²

² National Association of Medical Examiners (N.A.M.E.) states:

N.A.M.E. Standard B4 Forensic Autopsy Performance

Without the latitude in their practice as forensic medical professionals to remove and retain specimens, Ohio coroners would be impeded from fulfilling their statutory duties. The Ohio Revised Code mandates that coroners issue precise rulings on the cause and manner of death. R.C. 313.15, 313.19, 313.123(A)(1). Ohio's code provisions demonstrate that a thorough autopsy and accompanying determination of cause and manner of death are of paramount importance to the state.

To tamper and restrict coroners' sound medical practice and professional discretion (as mandated by Ohio statutes) is to downgrade the precision of the autopsy and its significance in the lives of every Ohioan. The autopsy is an invaluable foundation that supports Ohio's general public health and law enforcement. Only an autopsy, performed with proper medical discretion, provides the deceased's family with answers to ease turmoil and warn of congenital threats. Further, examination of the deceased provides a means to detect disease and epidemics that have the potential to effect Ohio's residents. Lastly, an autopsy's forensic evidence initiates and perpetuates criminal investigations and prosecutions that keep Ohio residents safe in their communities.

C. Certification Of The State Law Question Prevents Additional Law Suits Fueled By Speculative Federal Court Prediction Of Ohio State Law

In the absence of the Ohio Supreme Court's ruling of the state law governing this and other similar issues, federal courts have made their own determinations. The Sixth Circuit Court of Appeals first considered whether 42 U.S.C. § 1983 claims existed (based on the anatomical

Performance of a forensic autopsy is the practice of medicine. Forensic autopsy performance includes the discretion to determine the need for additional dissection and laboratory tests.

N.A.M.E. Standard G26 Specimens for Laboratory Testing

Specimens must be routinely collected, labeled, and preserved to be available for needed laboratory tests, and so that results of any testing will be valid.

gift statute) against the Hamilton County Coroner in *Brotherton v. Cleveland* (C.A.6, 1991), 923 F.2d 477. The federal court decided that the unauthorized harvesting of corneas rose to the level of a constitutional taking, but did not create a property right in a decedent's body for all other purposes. *Brotherton v. Cleveland* (C.A.6, 1991), 923 F.2d 477, 482. *Brotherton* served as the catalyst in organ donor cases in which federal courts have found there are interests involved when organs are removed and retained solely for purposes of transplant.³

Without relevant precedent, the *Hainey v. Parrott* court elected to engage in conjecture and depended upon organ donor cases that are not similar to the forensic autopsy issues presented in the case at bar. The court expanded the *Brotherton* holding a step further and found that next of kin had a cognizable constitutional property interest in their decedents' whole body organs removed by the coroner for purposes of the autopsy. *Hainey* at 6. Prior to the *Hainey* decision in 2005, claims based on the autopsy itself were not recognized (and continue not to be recognized) by the Sixth Circuit. See *Montgomery v. Clinton* (C.A.6, 1991), 940 F.2d 661.

The *Hainey* court created new law, yet conceded in reaching such conclusion that the court only considered Ohio appellate decisions which merely stood for the proposition that there is a spousal right to a "decent burial." *Hainey* at 5. Even though *Hainey* classified the actions of the defendants in the *Brotherton* case as "state-sanctioned grave robbing," it nevertheless, and without any legal support, created a new property right in whole organs properly removed for forensic purposes under the police power during the autopsy. The *Hainey* court stretched the

³ While federal courts in various jurisdictions have struggled with the legal rights to organs removed for potential transplant based on anatomical gift statutes as in *Brotherton*, the courts have not extended claims or rights to organs which are retained for forensic examination. Clearly, there are totally different interests involved when the coroner has the right and duty to perform autopsies and examine organs. The courts have recognized this fact. See *Schults v. U.S., Dept. of Air Force* (S.D. Kan. 1998); *Montgomery v. Clinton* (C.A.6, 1991), 940 F.2d 661; 995 F. Supp. 1270; *Fuller v. Marx* (C.A.8, 1984), 724 F.2d 717.

property right across coroners' state-mandated investigatory forensic practice despite its acknowledgement that coroners have "virtually unfettered discretion" in deciding how to perform an autopsy and what organs are necessary to retain. *Hainey* at 5. While the federal court also acknowledged that it was important that "the coroner's decision to retain the deceased's brain was determined to be forensically or scientifically necessary to determine the cause of death," it somehow failed to follow the only Sixth Circuit case (decided after *Brotherton*) which specifically rejected a claim that there was a property interest in a dead body and ruled that a coroner has the right to remove organs as a necessary part of an autopsy. *Hainey* at 5; *Montgomery v. Clinton* (C.A.6, 1991), 940 F.2d 661.

In *Albrecht v. Treon* the litigants have, once again, gone before a federal court and requested that it apply inapplicable, federal misinterpretations of Ohio law. *Albrecht* stands to expand *Brotherton* even further in that Plaintiffs-Respondents assert a 42 U.S.C. § 1983 claim on behalf of next of kin for every specimen removed during the course of an autopsy. (Compl. at ¶ 1).

Certification of this state law question is the opportunity for the Ohio Supreme Court to address this issue, discontinue further federal court "prophecy"⁴ and to make a final determination of state law that reflects Ohio's standards and policies.

Undoubtedly, the case at bar possesses every one of the "powerful considerations" that are intended to fuel certification to a state's highest court. The United States Supreme Court stated the following in its discussion of the importance of certification of an undecided state law question:

⁴ "Indeed, some federal judges consider state-law interpretation so hazardous that they compare it to 'prophecy.'" *Scott v. Bank One Trust Co.*, 62 Ohio St.3d at 42-43, 577 N.E.2d 1077.

First, principles of federalism and comity favor giving a State's high court the opportunity to answer important questions of state law, particularly when those questions implicate uniquely local matters such as law enforcement and might well require the weighing of policy considerations for their correct resolution. Second, by certifying a potentially dispositive state-law issue, the Court would adhere to its wise policy of avoiding the unnecessary adjudication of difficult questions of constitutional law. Third, certification would promote both judicial economy and fairness to the parties. After all, the [State] Supreme Court is the ultimate authority on the meaning of [State] law, and if in later litigation it should disagree with this Court's provisional state-law holding, our efforts will have been wasted * * * .

Castle Rock v. Gonzales, 545 U.S. at 777-778, 125 S. Ct. 2796, 162 L.Ed.2d 658.

Amici, on behalf of Defendants-Petitioners, urge this honorable Court to embrace certification of this state law question as an opportunity to decide the law that will ultimately impact Ohio's quality of forensic medicine, law enforcement, public health, and fiscal well-being.

IV. LAW AND ARGUMENT

A. The Certified Question Presently Before This Court Is A Question Of State Law

Whether next of kin can succeed in bringing a 42 U.S.C. § 1983 action against Ohio coroners for specimens removed from the deceased during an autopsy implicates, first and foremost, a state law inquiry. *Memphis Light v. Craft* (1978), 436 U.S. 1, 9, 98 S.Ct. 1554, 56 L.Ed.2d 30. Property interests protected by the due process clause "are created and their dimensions defined by existing rules or understandings that stem from * * * state law." *Bd. of Regents v. Roth* (1972), 408 U.S. 564, 577, 92 S.Ct. 2701 (emphasis added). Specifically, state supreme court decisions are the controlling authority for the determination of whether state law dictates a property interest worthy of due process protection. *Clutter v. Johns-Manville Sales Corp.* (C.A.6, 1981), 646 F.2d 1151, 1153. Consequently, the Ohio Supreme Court is the ultimate authority on whether a protected interest exists in specimens removed during an

autopsy. Only after Ohio's highest court makes such determination, can the federal court proceed with what due process is necessary, if any, in the case at bar.

The Ohio Supreme Court has demonstrated that it subscribes to the principle that a state's highest court is the ultimate authority on the existence of a state protected interest when dealing in the context of a 42 U.S.C. § 1983 claim. The Ohio Supreme Court recently accepted two cases for certification of state law property rights questions posed by the Sixth Circuit Court of Appeals. *McNamara v. Rittman* (2005), 107 Ohio St.3d 243, 244, 838 N.E.2d 640; *McNamara v. Rittman* (C.A.6, 2007), 473 F.3d 633; *Hensley v. Columbus* (Feb. 20, 2004), C.A.6 Ohio No. 02-3778, unreported.

Similar to *McNamara* and *Hensley*, Plaintiffs-Respondents assert claims under 42 U.S.C. § 1983 and allege a taking of property and violation of due process rights. Also similar to *McNamara* and *Hensley*, this case has no controlling state law precedent. Given the similarity of claims and absence of relevant precedent, Defendants-Petitioners urge this honorable Court to find that this issue solely poses a question of *state* law and to accept certification of the state law question.

B. There Is No Applicable State Law Precedent For This Critical Question

Plaintiffs-Respondents will likely attempt to persuade the Court that the question posed has already been decided – an argument that was clearly rejected by Judge Dlott. A review of the case law shows that every court that has considered an issue related to the question raised here has specifically stated that there is no guidance from Ohio's highest court on this topic. Prior to engaging in its own survey of state appellate court decisions, the Sixth Circuit Court of Appeals in *Brotherton v. Cleveland* first looked to what law was established by the state's highest court and expressly stated “* * * the Ohio Supreme Court has not ruled upon the precise

issue before this Court; thus, we must look to “other indicia of state law.” *Brotherton*, 923 F.2d at 480. *Hainey* cited no other Ohio authority.

Further, Judge Dlott is absolutely correct in stressing: “As to * * * whether there is controlling Ohio Supreme Court precedent on the issue-the answer is plainly that there is not. The Ohio Supreme Court has never addressed the issue of whether next of kin have a protected right under Ohio law in the decedent’s body parts removed and retained for forensic examination.” (Cert. Order. at 10).

Not only has the property right question not been decided by this Court, but there is no good authority for the property right Plaintiffs-Respondents seek to establish. The very case (*Brotherton v. Cleveland*) that Plaintiffs-Respondents rely upon is completely distinguishable and has been rejected by the Sixth Circuit which subsequently held that there is no claim against a coroner based on an autopsy. *Montgomery v. Clinton* (C.A.6, 1991), 940 F.2d 661.

The *Brotherton* decision revolved around completely separate statutory provisions concerning anatomical gifts. R.C. 2108.60, 2108.02. The case at bar deals with Ohio Revised Code §§ 313.01 *et seq.* that pertain to the coroner’s authority, practices, and procedures. This difference is significant given that R.C. §§ 2108.60 and 2108.02 are included within the Sixth Circuit Court of Appeals’ primary justification for finding that the spouse of the deceased had a “legitimate claim of entitlement” in her husband’s corneas. *Brotherton*, 923 F.2d at 482. Specifically, the Court stated that “Ohio Rev. Code § 2108.02(B), as part of the Uniform Anatomical Gift Act governing gifts of organs and tissues for research or transplants, expressly grants a right to Deborah Brotherton to control the disposal of Steven Brotherton’s body.” *Id.* at 482. Ohio Revised Code § 2108.02(B) provides as follows: “Any of the following persons,* * * , may make an anatomical gift of all or any part of the body of a decedent for any purpose

specified in section 2108.03 of the Revised Code: * * * .” R.C. 2108.02(B). In connection with R.C. 2108.02(B), the Sixth Circuit Court of Appeals also utilized the text contained within R.C. 2108.60 to bolster its finding that the spouse had a substantive interest in the corneas extracted from her deceased husband’s body:

“A county coroner who performs an autopsy pursuant to section 313.13 of the Revised Code may remove one or both corneas of the decedent, * * *, if all of the following apply:

* * *

(1) **The coroner, at the time he removes or authorizes the removal of the corneas, has no knowledge of an objection to the removal by any of the following: * * * .”**

R.C. 2108.60(B) (emphasis added). In the statutes at issue in *Brotherton v. Cleveland* the Ohio General Assembly made emphatic statements about which individuals possess the authority to make and/or object to an anatomical gift. Given the explicit consent hierarchy surrounding anatomical gifts, the individuals mentioned in the anatomical gift statutes could be found to have some semblance of an interest.

In stark contrast, the pertinent statutory provisions that are the focus of the case at bar are devoid of any language indicating a similar interest held by the next of kin in those portions of the human body removed for purposes of an autopsy. Those portions of R.C. §§ 313.01 *et seq.* that address the removal and retention of specimens do not create an interest in such specimens that even remotely approaches the interest of the next of kin in anatomical gifts.

Rather than dictate a prioritization of those next of kin who have the “interest” or authority to receive and/or control the autopsy specimens, the Ohio Revised Code treats those specimens removed and retained at the discretion of the professional as “medical waste,” in which no one has an interest or statutory right to control the final disposition. The pertinent provision states as follows:

“Except as otherwise provided in division (B)(2) of this section⁵, 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 of the Revised Code.”

R.C. 313.123(B)(1) (emphasis added).

Even more significantly, the Sixth Circuit itself limited the *Brotherton* holding. In *Montgomery*,⁶ the Sixth Circuit specifically held that a *Brotherton* property right did not exist when the claim was based on the autopsy performed by the coroner. *Montgomery*, 940 F.2d at 2. Plaintiffs claimed that the autopsy was done 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 (and 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.

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. In this case, the state left the decision as to autopsy to the discretion of the medical examiner, allowing the autopsy with or without the permission of the next of kin.

⁵ The only exception to the general rule that specimens removed during an autopsy constitute medical waste to be disposed of in accordance with the law is when “ * * * the coroner has reason to believe that the autopsy is contrary to the deceased person’s religious beliefs, * * * .” R.C. 313.123(B)(2)

⁶ Importantly, the federal court in *Hainey* never even addressed *Montgomery* prior to granting summary judgment to plaintiffs.

Id. at 2 (emphasis added).

The Sixth Circuit's *Montgomery* ruling further substantiates that *Brotherton v. Cleveland* is not proper precedent for the case at bar. As aptly phrased by Judge Dlott in the certification order, the case at bar and the question before this Court do not involve the remains of a decedent in general, but specifically those body parts of a decedent that are removed and retained by a coroner for the purpose of forensic examination and testing. This unique question has not been considered by the Ohio Supreme Court nor any other Ohio state court.

C. **Federal Court Decisions Interpreting Ohio Law Are In Conflict With Ohio Policy, Recently Highlighted By The Ohio General Assembly's Enactment Of R.C. 313.123**

Even if this Court could stretch *Brotherton v. Cleveland* as a proper precedent that establishes a protected interest, the recent enactment of Ohio Revised Code § 313.123 demands renewed examination of Ohio's interest. Ohio Revised Code § 313.123, effective August 17, 2006, came into existence after both the *Brotherton v. Cleveland* case, decided on January 18, 1991 and the *Hainey v. Parrott* decision on September 28, 2005.

The newly enacted portion of the code expressly defines “* * * retained tissues, organs, blood, other bodily fluids, gases, or any other specimens from an autopsy * * *” as “medical waste” and mandates their disposal. R.C. 313.123 (B)(1). Even if *Brotherton* and *Hainey* established a protected interest in the entire human body, R.C. 313.123 draws a bright line to cease the expansion of that interest to encompass those specimens extracted for forensic examination during an autopsy.

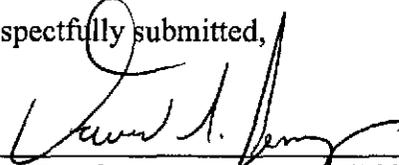
Further, R.C. 313.123 was enacted as the General Assembly's reply to the *Brotherton* and *Hainey* decisions. By way of R.C. 313.123, Ohio's lawmakers succinctly stated what established forensic practice, statutory and case law has maintained for decades. There is a bright line

boundary between a coroner's treatment of those body parts extracted for purposes of anatomical donation and those removed and retained for purposes of forensic examination. Such differentiation stands in marked contrast to Plaintiffs-Respondents' alleged federal case precedent. This Court, through the forum of certification, has the opportunity to address such conflict and ensure that interpretation of the newly enacted statute is reflective of Ohio's policy.

V. CONCLUSION

Wherefore, the Amici Curiae of Petitioners, Clermont County Coroner and Commissioners, represent that the certified question presented for this Court's review is not only one of first impression, but is a question of utmost importance to the state of Ohio. Accordingly, for the foregoing reasons, the Amici Curiae respectfully request the Court to accept certification of this state law question.

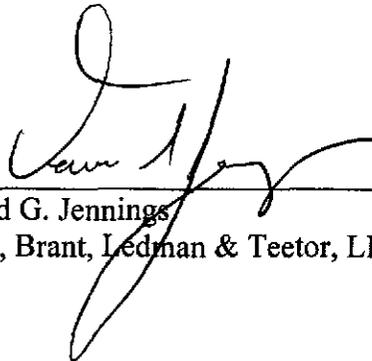
Respectfully submitted,



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Association of Ohio, Buckeye State Sheriffs'
Association, Ohio Association of Chiefs of
Police, and Ohio Prosecuting Attorneys
Association*

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2007, a copy of the foregoing was served upon the parties by regular U.S. mail, postage prepaid.

A handwritten signature in black ink, appearing to read "David G. Jennings", is written over a horizontal line. The signature is stylized and cursive.

David G. Jennings
Isaac, Brant, Ledman & Teetor, LLP

EXHIBIT A

Adams County
Allen County
Ashland County
Ashtabula County
Athens County
Belmont County
Brown County
Butler County
Carroll County
Clark County
Clinton County
Columbiana County
Coshocton County
Crawford County
Darke County
Defiance County
Delaware County
Erie County
Fairfield County
Fayette County
Fulton County
Gallia County
Geauga County
Guernsey County
Hardin County
Harrison County
Henry County
Highland County
Holmes County
Huron County
Jefferson County
Knox County
Lake County
Licking County

Logan County
Lorain County
Madison County
Mahoning County
Marion County
Medina County
Meigs County
Miami County
Monroe County
Morrow County
Muskingum County
Ottawa County
Paulding County
Perry County
Pickaway County
Portage County
Preble County
Putnam County
Richland County
Ross County
Sandusky County
Scioto County
Seneca County
Stark County
Summit County
Trumbull County
Union County
Warren County
Washington County
Williams County
Wyandot County

EXHIBIT B

FILED
JAMES BONINI
CLERK

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

06 OCT 23 PM 4:04

U.S. DISTRICT COURT
SOUTHERN DIST OHIO
WEST DIV CINCINNATI

KATHY HAINEY, *et al.*,

: Case No. 1:02CV00733

. Plaintiffs

:(Hon. Sandra S. Beckwith)

v.

: ORDER

CARL L. PARROTT, *et al.*

:

Defendants

:

:

:

:

:

The Parties hereto having reached a tentative settlement agreement in this litigation on June 9, 2006 providing, in part, for the amount of \$6,000,000 to be paid by defendants prior to the issuance of notice to the class for the purpose of establishing a Qualified Settlement Fund (the Fund) to be utilized consistent with the agreement, the Court now finds that it is appropriate to ORDER that such \$6,000,000 shall be paid to the Fund on or before November 1, 2006 for the benefit of the class. The Court further APPOINTS, with the approval of the Parties, as Special Master, under Federal Rule of Civil Procedure 53, Marlene Penny Manes, Esq., Nathaniel Ropes Building, Suite 400, Cincinnati, Ohio 45202.

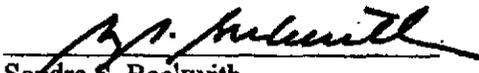
The duties and powers of the Special Master, until further order of the Court, shall be as

follows:

- 1) With regard to the Fund of \$6,000,000 to be paid by defendants, the Special Master shall receive these proceeds in the name of the Hainey Class Action Qualified Settlement Fund for the benefit of this litigation. Interest and other income generated by the Fund shall inure to the benefit of the Fund and the Class. The Special Master shall propose to the Court by no later than November 1, 2006 a program for the initial investment of the Fund. All investments of monies in the Fund shall be approved by the Court. The investment program proposed by the Special Master may be for such period and in such amounts as the Special Master determines to be in the best interests of the class.
- 2) No withdrawals may be made from the Fund without an Order from this Court.
- 3) The Special Master shall continue to serve until further Order of this Court.
- 4) The Special Master shall be compensated in an amount deemed appropriate by this Court for all services performed from August 1, 2006.
- 5) In the event that the settlement is rejected by this Court or rejected upon appeal from an order of this Court, all monies remaining in the Fund, including such interest and income as may be generated by the Fund, shall, following the payment of the expenses of the administration of the Fund and costs associated with the services of the Special Master, be returned to Hamilton County, Ohio.

SO ORDERED

Dated: 10/23/06


Sandra S. Beckwith
United States District Judge