

IN THE SUPREME COURT OF OHIO

MARK ALBRECHT, etc., et al.,

CASE NO. 07-0507

Plaintiffs-Respondents,

vs.

BRIAN TREON, M.D., et al.

Defendants-Petitioners.

Preliminary Memorandum on  
Question of State Law Certified by the  
United States District Court, Southern  
District of Ohio, Western Division  
Case No. 1:06-CV-00274

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**PLAINTIFFS' MEMORANDUM ADDRESSING CERTIFIED QUESTION OF LAW**

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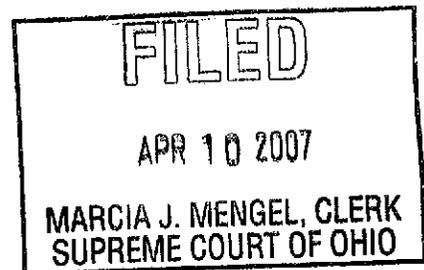
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**PLAINTIFFS' MEMORANDUM ADDRESSING CERTIFIED QUESTION OF LAW**

**INTRODUCTION**

On March 12, 2007 the Honorable Susan J. Dlott, United States District Court Judge for the Southern District of Ohio, Western Division, issued an order in Case Number 1:06-CV-274 (*Albrecht v. Treon*) which granted a motion to certify a question to this Court. Judge Dlott followed her March 12, 2007 order with a Certification Order dated March 16, 2007. The question certified is

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 specimens removed and retained by the coroner for forensic examination and testing. (Emphasis added.)

Because this particular question is not one that may be determinative of the proceeding as required by S.Ct.Prac.R. XVIII(1), this Court should decline to answer the question.

**FACTS**

In *Albrecht v. Treon*, Case Number 1:06-CV-274, Plaintiffs Mark and Diane Albrecht filed suit against the Clermont County Coroner and the Clermont County Commissioners after they learned that their son's brain had been removed for autopsy and had been retained by the coroner. The coroner provided no notice to the Albrechts that their son's brain had been retained when the body was released to them for burial. As a result, the Albrechts buried their son without his brain and without any notice of that fact.

Plaintiffs filed their action as a putative class action, and sought certification of both a plaintiff and a defendant class. Plaintiffs do not contest the coroners' right to conduct forensic examinations or their right to take samples of blood or tissue in connection with such examinations. The practice to which Plaintiffs object is the retention and eventual disposal of entire organs, such as brains, hearts, livers, etc. It is Plaintiffs' position that they, as next of kin,

were entitled to notice that such organs were retained. Such notice would have enabled the Albrechts to make an informed decision with regard to whether they wished to have the retained organ released to them once it was no longer needed for forensic purposes so that they might have buried it with their son.

Plaintiffs' complaint is based on the Sixth Circuit's ruling in *Brotherton v. Cleveland* (6th Cir., 1991), 923 F.2d 477. In *Brotherton*, the Sixth Circuit concluded at 923 F.2d 482 that

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.

Because the decision in *Brotherton* is binding on the District Court for the Southern District of Ohio, Western Division, *Brotherton* is determinative of the proceeding and certification to this court is improper pursuant to S.Ct.Prac.R. XVIII and is a waste of judicial resources.

### LAW AND ARGUMENT

A federal court may certify a state law question to a state supreme court only if there is a state law procedure for such certification. 17A Wright, Miller & Cooper Fed. Prac. & Proc. 3d § 4248. Such certification may only be made, therefore, in accordance with the state procedure. This Court adopted such a certification procedure in 1988, S.Ct.Prac.R. XVI, and found it constitutional in *Scott v. Bank One Trust Co., N.A.* (1991), 62 Ohio St.3d 39. The current version is found in S.Ct.Prac.R. XVIII.

To avoid the waste of judicial resources, S.Ct.Prac.R. XVIII(1) requires that the question of Ohio law be "determinative of the proceeding." (S.Ct.Prac.R. XVI provided for certification when "there are questions of law of this state which may be determinative of the cause\* \* \* .") The original version of the rule provided that "[t]he Supreme Court may, at its discretion, answer

questions of law certified to it \* \* \* ,” and in Section 9 provided that this court could “decline[] to answer any or all of the questions of law certified to it \* \* \* . This Court did dismiss certification in *Fid. & Guar. Ins. Underwriters, Inc. v. Strayhorn Limousine Serv.* (1993), 66 Ohio St.3d 1493. The current version still vests this Court with the discretion to answer the certified question (“[t]he Supreme Court may answer questions of law certified to it \* \* \* ”), and in Section 6 provides that this Court will “issue an entry identifying the question or questions it will answer and declining to answer the remaining question or questions.” This Court declined to answer the question certified in *Corwin v. Ford Motor Co.* (1994), 69 Ohio St.3d 1448 (“this court declines to answer the certified question pursuant to S.Ct.Prac.R. XVIII(6), and this cause is dismissed”).

Thus under this Court’s certification procedure, not only must a federal court certify a question that may be determinative of the proceeding, but this Court must also agree to answer the question. *Genaro v. Cent. Transport, Inc.* (1999), 84 Ohio St.3d 293, 294 (“the district court has certified to us, and we have agreed to answer, a specific question of state law \* \* \*”). Because the District Court Judge is bound by the Sixth Circuit’s precedent in *Brotherton*, any answer this Court might give would not be determinative of the proceeding. Accordingly, this Court should decline to answer the question certified by Judge Dlott.

Judge Dlott noted at page 4 of her Order Granting the Motion to Certify that Plaintiffs’ right to recourse for their alleged injury “depends on whether they possess a right to their son’s body parts that is afforded procedural due process protection.” That is exactly the question which the Sixth Circuit decided in *Brotherton*. In *Brotherton*, the Sixth Circuit looked at the bundle of rights which Ohio grants to the next of kin of a decedent and determined as a matter of federal law that the aggregate of rights granted by the state of Ohio rose to the level of a

"legitimate claim of entitlement." The issue of whether the interest recognized by the state of Ohio is *protected*, which is exactly the question that the District Court Judge has asked this Court to answer, is a question of federal law, and it is a question which the Sixth Circuit has answered in the affirmative. Not only is *Brotherton* directly on point, *Brotherton* announced the law of this Circuit on the issue. See *Whaley v. County of Tuscola ex rel. Tuscola County Bd. of Comm'rs* (6th Cir., 1995), 58 F.3d 1111, 1114 ("[b]ecause *Brotherton* is the law of this Circuit, our decision in the present case turns on a comparison of Ohio and Michigan law"). The Sixth Circuit expressly determined that "whether the Supreme Court of Ohio would categorize the interest in the dead body granted to the spouse as property, quasi-property or not property" was not necessary to the determination of the proceeding in *Brotherton*. Based on *Brotherton*, the same is true in *Albrecht v. Treon*. Thus, this Court's answer to the certified question would not be determinative of the federal proceeding.

The District Court Judge relied on two factors in granting the motion to certify a question to this court. Neither warrant certification since neither would be determinative of the proceeding. First, the District Court Judge improperly focused on the fact that the organs were removed for autopsies. Again, it is important to recognize that Plaintiffs do not contest the right of the coroners to conduct their examinations. The issue is the disposition of the organs *after* the forensic examinations are completed. The next of kin's interest in the *ultimate* disposition of the remains of their decedents is the same under *Brotherton* regardless of the coroners' right to use the organs for testing. Once an interest protected by the due process clause of the fourteenth amendment is implicated, the effects of particular state actions on that interest are questions of federal law not state law. Therefore, this Court's opinion of the impact of autopsy procedures on Plaintiffs' protected federal interests would not be determinative of the federal proceeding. The

federal court would still be required to determine, as a federal question, whether the autopsy procedures offend Plaintiffs' due process rights under the United States Constitution. *Christophel v. Kukulinsky* (6th Cir., 1995), 61 F.3d 479, 486 ("The type of process due is a question of federal law"). Any opinion by this Court would not be determinative of the federal proceeding but would be only advisory.

Second the District Court Judge focused on the 2006 enactment of R.C. 313.123, particularly subsection B. At page 9 of her Order Granting the Motion to Certify the Judge wrote that "this court simply may not ignore the recent enactment of Ohio Rev. Code 313.1123 and the potentially limiting effect it may have on the rights of persons to the intact remains of their loved ones." This is just plain wrong. Pursuant to R.C. 1.48 "[a] statute is presumed to be prospective in its operation unless expressly made retrospective." R.C. 313.123 was not expressly made retrospective. Assuming arguendo that R.C. 313.123 limited the rights of the next of kin, it did so only on and after August 17, 2006. Thus, prior to August 17, 2006 the law in the Sixth Circuit related to *Albrecht v. Treon* was governed by *Brotherton*.

Also wrong is the District Court Judge's observation at page 8 of her Order Granting the Motion to Certify that "if the Ohio legislature recognized a protected right in a decedent's tissues and organs removed and retained by the coroner for forensic examination, the statute [R.C. 313.123(B)(2)] would not confine return of the specimens to a religious decedent's next of kin." (See also page 3 of the Certification Order.) R.C. 313.123 is a newly enacted statute effective in August of 2006. The statute was adopted long after the Sixth Circuit's decision in *Brotherton* and also after the more recent decision in *Hainey v. Parrott* (S.D. Ohio, 2005), 2005 WL 2397704 and can be presumed to be a response to those decisions. *Howard v. Seidler* (1996), 116 Ohio App.3d 800, 811 ("As a matter of statutory construction, courts presume that the legislature is

aware of the current case law when it drafts its statutes”). Contrary to Judge Dlott’s speculation, traditional canons of statutory construction dictate that that R.C. 313.123 modified existing Ohio law, if in fact it did, in response to of *Brotherton* and *Hainey*. Certainly the enactment of the statute can have no effect on the state of the law in Ohio prior to August 17, 2006.

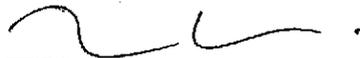
While the Ohio General Assembly may, or may not, have chosen to limit the rights of the next of kin in organs removed for autopsy in light of *Brotherton* and *Hainey*, the enactment of R.C. 313.123 has neither retroactive application nor does the enactment of R.C. 313.123 change the Ohio law prior to August 17, 2006. The only impact R.C. 313.123 could possibly have would be on organs removed after August 17, 2006. But the District Court Judge made no such temporal limitation in certifying her question. Nor did the District Court Judge confine her question to the impact of the enactment of R.C. 313.123 on prospective class members whose claims arose from conduct occurring on or after the effective date of R.C. 313.123.

The Albrechts seek certification of a class going back to 1991, when *Brotherton* was decided. Between 1991 and August 17, 2006 the law in the Sixth Circuit was clear, as announced in *Brotherton*. The question certified is overbroad and would not determine the proceeding as to those claims arising from conduct prior to August 17, 2006, obviously the vast majority of the claims. Accordingly, this Court should decline to answer the question certified by Judge Dlott in her March 12, 2007 order.

**CONCLUSION**

For the reasons set forth herein, this Court should exercise its discretion to decline to answer the question certified in *Albrecht v. Treon* because this Court's answer would not determine the proceeding.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

This is to certify that a copy of Plaintiffs' Memorandum Addressing Certified Question of Law was sent to the following by email and by first class U.S. mail on April 10, 2007, addressed as follows:

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