

IN THE SUPREME COURT OF OHIO

MARK ALBRECHT, *et al.*,

Plaintiffs-Respondents,

v.

BRIAN TREON, M.D., *et al.*,

Defendants-Petitioners.

Case No.: 07-0507

Merit Brief On Question
Of State Law Certified By The United
States District Court For The Southern
District Of Ohio, Western Division
Case No.: 1:06CV274

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

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I. INTRODUCTION

On March 16, 2007 the Honorable Susan J. Dlott of the United States District Court for the Southern District of Ohio issued a Certification Order wherein she stated the following question for this fine Court to consider for review:

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 removed and retained by the coroner for forensic examination and testing.

(Cert. Order at 3.)

In accordance with Ohio Supreme Court Rules of Practice, Defendants-Petitioners and its various supporting amici curiae, as well as Plaintiffs-Respondents filed preliminary memoranda on April 10, 2007. Ultimately, on June 11, 2007 the Ohio Supreme Court released its Entry that declared the decision to answer the aforementioned question of state law.

As amici curiae in support of Defendants-Petitioners, the following counties' coroners and commissioners, associations, and entities submit the attached merit brief to demonstrate to this honorable Court that it should answer the certified question of law in the negative.

II. INTEREST OF AMICI CURIAE

The sixty-five (65) Ohio counties, listed in Exhibit A, have coroners and commissioners to whom Plaintiffs-Respondents issued subpoenas ordering extensive discovery in an attempt to certify a class of defendants composed of every Ohio county coroner and commissioners (except Hamilton County). 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 necessary, 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 Ohio Society of Pathologists (OSP) is a not-for-profit organization dedicated to the promotion of the field of pathology in the state of Ohio. As a means to achieve such promotion, the OSP actively engages in continuing education, quality assurance, as well as the legislative

and socioeconomic aspects of the practice of pathology. The membership of OSP is composed of physicians who hold leadership positions at the local, city, state, and national levels.

The various amici that join in this merit brief to support Defendants-Petitioners Clermont County Coroner and Commissioners share a mutual interest in the well-being of Ohio's counties and residents. 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 a claim that has no basis in Ohio's law threaten the state's foundation and the leadership that seeks to direct such funds toward efforts that improve, rather than detract from the state.

III. STATEMENT OF FACTS

A. Facts Of The Original Cause Of Action (Case No.: 1:06CV274).

This is a case filed by Mark and Diane Albrecht against the Clermont County Coroner, Dr. Brian Treon. After the death of the Plaintiffs' son, Christopher Albrecht, the Clermont County Coroner arranged for the Hamilton County Coroner's Office to perform an autopsy. (Complaint ¶ 36; Answer ¶ 30.) During the course of the autopsy, and in accordance with proper forensic practice and statutory obligation, the Hamilton County Coroner retained part of the brain for further examination to enable determination of the cause of death. (Complaint ¶ 38; Answer ¶¶ 31-32.) Upon review of the autopsy report, Mr. and Ms. Albrecht discovered that part of the

brain was removed and retained (or disposed of) after completion of the autopsy, thereby prompting the filing of the cause of action in question. (Complaint ¶ 37.)

B. The Autopsy.

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.) Based upon the above-mentioned definition extracted from Ohio’s own statute, as well as the nationally-accepted forensic medical standards, an examination of the deceased that does not include removal and retention of specimens does not constitute a proper autopsy.¹

The autopsy is a precisely performed examination and dissection that furnishes an invaluable answer to the question, “Why did life pass from a human body?”² To definitively answer the question, the medical professional performing the autopsy gathers all of the medical

¹ National Association of Medical Examiners (N.A.M.E.) states:

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

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.

² Wagner, Scott A., *The Color Atlas of Autopsy 1* (CRC Press 2004).

facts from the decedent's history, dissection and toxicology results.³ The final answer, otherwise known as the cause and manner of death, is only as reliable as the quality of the facts gathered during the course of the autopsy. The cause and manner of death hold commensurate importance to the parties involved, whether they serve as evidence for a legal action or to ease the minds of the deceased's next of kin. Further, since performance of the forensic autopsy is the practice of medicine, the medical professional has the discretion to assume those steps that he/she deems necessary in order to reach a satisfactory conclusion.⁴

The brain is a common site of disease that is responsible for death.⁵ Therefore, all autopsies performed under a coroner's jurisdiction require the examination of the head, skull and brain.⁶ During the course of the autopsy, after the brain is removed from the skull, the medical professional has the discretion to dissect the brain either in its fresh state (without soaking it any solution to promote hardening) or in its fixed state (after it has soaked in a hardening solution.)⁷

³ *Id.*

⁴ College of American Pathologists states:

“. . . [t]issue submitted for examination must be based on the judgment of the autopsy pathologist as determined by experience and the objectives of the autopsy examination in the specific case.”

Collins, Kim A. & Grover M. Hutchins, *Autopsy Performance & Reporting* 126 (Kim Collins, Grover Hutchins ed., College of American Pathologists 2003).

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

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.

⁵ Sheaff, Michael T. & Deborah J. Hopster, *Post Mortem Technique Handbook* 282 (Springer 2005).

⁶ Wagner, Scott A., *The Color Atlas of Autopsy* 203 (CRC Press 2004).

⁷ Hutchins, Grover M., *Autopsy Performance & Reporting* 126 (Kim Collins, Grover Hutchins ed., College of American Pathologists 2003); Collins, Kim A. & James M. Powers, *Autopsy*

Fixation of the brain is accomplished by suspending the brain upside down in a large container of 10% formal saline (formalin) for at least four to six weeks.⁸ As far as process is concerned, the actual dissection of a fixed and fresh brain is identical. However, the fixation of the brain prior to dissection provides for a superior neuropathological examination.⁹ In fact, it is often stated that examination of the brain in its fresh state provides no neuropathological examination at all.¹⁰ Thus, superior practice requires retaining and fixing the brain for four to six weeks.

There are certain autopsy cases that warrant higher quality neuropathological examination that is only available after fixation of the brain. These cases include those in which there have been contusions or other injuries to the head (such as falling on a hard surface), inflammation (meningitis), stroke, or those in which there is reason to believe there are unexpected tumors or old injuries.¹¹ In autopsy cases involving an infant (two years and younger), fixation of the brain is a necessity due to its extreme fragility.¹² An infant brain presents such a challenge that even gross examination of an infant brain is difficult without first submersing it formalin.¹³ Ohio Administrative Code 3701-5-14 even mandates a coroner to

Performance & Reporting 191-194 (Kim Collins, Grover Hutchins ed., College of American Pathologists 2003).

⁸ Sheaff, Michael T. & Deborah J. Hopster, Post Mortem Technique Handbook 285 (Springer 2005).

⁹ *Id.*

¹⁰ *Id.*

¹¹ Wagner, Scott A., The Color Atlas of Autopsy 203 (CRC Press 2004).

¹² Bove, Kevin E., Autopsy Performance & Reporting 155-156 (Kim Collins, Grover Hutchins ed., College of American Pathologists 2003).

¹³ Sheaff, Michael T. & Deborah J. Hopster, Post Mortem Technique Handbook 402 (Springer 2005).

retain the brain, in addition to several other specimens, from the autopsy of a child who is two years and younger.¹⁴

Given the length of time required for proper fixation, the body is delivered to a funeral home for its final disposition before the brain is dissected and the medical professional incorporates the neuropathological findings into the finalized autopsy report.

Fixation cannot reasonably be perceived as interfering with the disposition of the deceased, and is a prudent and forensically necessary process that works to provide a more complete and accurate answer to the question, "Why did life pass from a human body?"

IV. LAW AND ARGUMENT

A. There Is No Protected Right In Forensic Specimens Removed For Purposes Of An Autopsy.

Plaintiffs-Respondents have no basis on which to build their alleged protected right in the forensic specimens that a coroner removes from the deceased for purposes of an autopsy. The supposed "right" asserted by Plaintiffs-Respondents can, at best, be described as an abstract sense that may, under other circumstances, feel right. However, such an amorphous assertion that possesses no support from Ohio's established common and statutory law, nor history or even common logic cannot be haphazardly woven into a protected right for which public servants, performing in accordance with their statutory duties, are subject to monetary punishment.

¹⁴ Ohio Adm. Code 3701-5-14(A)(5)(g), (B)(5)-(6) contains the following mandate to coroners performing an autopsy on an infant: "The coroner *shall* . . . perform the autopsy by conducting the following: . . . [a] microscopic examination of any of the following . . ., provided that a specimen is possible to obtain: . . . [t]he brain, including the cortex, basal ganglia, mid-pons, and medulla, each to include meninges; . . . [a] collection for testing of spinal fluid, urine, and gastric contents, five to ten milliliters of whole blood, and approximately ten grams of the liver. . . [r]etain frozen liver, brain, kidney, and lung specimens for a period of at least six months . . ."

i. Next Of Kin Do Not Have A Protected Right In Forensic Specimens That Is Based Upon A Recognition Of A Property Right In The Body Of The Deceased.

Plaintiffs-Respondents originally justified next of kin's alleged interest in forensic specimens as a property right. (Complaint ¶¶ 13, 33, 45; Opp. Mtn. to Certify R. 61 at 5.) However, such claimed property right has no basis in Ohio's case law.

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. Various Ohio state courts' decisions, reflective of the types of interests that the state holds in esteem, indicate that Ohio does not recognize the next of kin's property right in forensic specimens.

Ohio common law does not recognize a next of kin's property right in the body of the deceased, or even in portions of the human body removed during an autopsy and in accordance with the law. The two Ohio cases that squarely confront the issue held that no property right should be found in the body of a decedent. *Everman v. Davis* (1989), 54 Ohio App.3d 119, 561 N.E.2d 547; *Carney v. Knollwood Cemetery Ass'n* (1986), 33 Ohio App.3d 31, 514 N.E.2d 430; See also *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 the same and it does not become part of his estate."); *Hadsell v. Hadsell* (Cir. Ct. 1893), 3 Ohio C.D. 725, 726, 7 Ohio C.C. 196 ("A dead body is not property.").

In *Carney*, the Eighth District Court of Appeals made a point in expressing its concurrence with Restatement, Section 868 at Comment a:

One who is entitled to the disposition of the body of a deceased person has a cause of action in tort against one who intentionally, recklessly or negligently mistreats or improperly deals with the body, or prevents its proper burial or cremation. The technical basis of the cause of action is the interference with the exclusive right of control of the body, which frequently has been called by the courts a 'property' or a 'quasi-property' right. This does not, however, fit very well into the category of property, since the body ordinarily cannot be sold or transferred, has no utility and can be used only for the one purpose of interment or cremation. In practice the technical right has served as a mere peg upon which to hang damages for the mental distress inflicted upon the survivor; and in reality the cause of action has been exclusively one for the mental distress. * * * 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.

Carney, 33 Ohio App.3d at 35-36.

A more recent decision from the Ohio Sixth District Court of Appeals echoed the *Carney* holding and stated the following:

The Eighth District Court of Appeals expressly rejected "the fiction that a next of kin has a quasi-property right in a dead body." While we are not bound by the rule set forth in *Carney*, we find the law set forth therein persuasive.

Walker v. Firelands Community Hosp. (2007), 170 Ohio App.3d 785, ¶ 49.

The Second District Court of Appeals in *Everman* also expressed its view that there is no property right in the body of the deceased:

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.

Everman, 54 Ohio App.3d at 122.

The most current Restatement of the Law, Restatement 2d of Torts (1979) Section 868, is that which was originally cited by the *Carney* court (as reproduced above), in support of its

conclusion that there is no property or quasi-property right in the decedent's body. While this honorable Court has not yet had reason to decide whether a property right exists in the deceased's body or the forensic specimens removed during an autopsy, this Court often refers to the Restatement (Second) of Torts to determine an issue. *Chesher v. Neyer*, 392 F. Supp.2d 939, 955 (S.D. Ohio, 2005); See also *Welling v. Weinfeld* (2007), 113 Ohio St.3d 464, 467, 473, 866 N.E.2d 1051 (Court expressly adopted Restatement of the Law 2d, Torts, Section 652E in its recognition of the tort of false-light invasion of privacy); *Gentry v. Craycraft* (2004), 101 Ohio St.3d 141, 142-143, 802 N.E.2d 1116 (Court referred to Sections 500 and 8A of the Restatement of Torts 2d. in holding that where individuals engage in recreational or sports activities, they cannot recover for any injury unless it can be shown that the other participant's actions were either 'reckless' or 'intentional'); *Gibson v. Drainage Products, Inc.* (2002), 95 Ohio St.3d 171, 178-179, 766 N.E.2d 982 (Court referenced Restatement of the Law 2d, Torts, Section 8A for the definition of 'intent' relating to a workplace intentional tort); *Perkins v. Wilkinson Sword, Inc.* (1998), 83 Ohio St.3d 507, 513-514, 700 N.E.2d 1247 (Court cites Restatement of the Law 2d, Torts, Section 402A for the doctrine of strict products liability.)

In accordance with the view of the Restatement, as well as the consensus of earlier Ohio courts' decisions, this honorable Court should conclude that there is no property right that exists in the forensic specimens that are removed during the course of the autopsy.

ii. Ohio Statutory Law Does Not Support A Next Of Kin's Alleged Protected Right In Forensic Specimens Removed During An Autopsy.

According to Ohio statutory framework, the extent of the interest that the next of kin have in the deceased who has undergone an autopsy examination is a "... prior right as to disposition of the body of such deceased person." R.C. 313.14. This interest is essentially possessory in

nature and permits the next of kin to take the body of the deceased person for the purpose of preparation, mourning and burial. *Everman*, 54 Ohio App.3d at 122.

As aptly summarized by Judge Dlott in the Certification Order, “[t]hat Ohio affords next of kin a protected right in the “body” of the decedent is beyond dispute. However, this does not automatically confer to the next of kin a protected right in “body parts” of a decedent removed and retained by the coroner for forensic examination and testing.” (Cert. Order at 2.)¹⁵

A deceased’s body, minus the forensically necessary specimens, that is returned to the next of kin after performance of a legally and medically appropriate autopsy does not violate the sole statutory direction that next of kin possess the body for purposes of burial. *Shults v. U.S.* (U.S.D. Kan. 1998), 995 F. Supp. 1270, 1275.

The fact that the specimens removed from the human body for purposes of the autopsy are separate and apart from the body which the next of kin may possess for burial is illustrated by the usage of such terms throughout Ohio’s statutes and regulations.

- R.C. 313.08

(A) “In all cases of the finding of the body or remains of a deceased person . . . , when the identity of the deceased person is unknown, or the deceased person’s relatives or other persons entitled to the custody of the body or remains . . . are unknown or not present, . . .

(B) If the body or remains of a deceased person are not identified, a coroner shall do all of the following prior to disposing of the body or remains: . . .

(3) Collect in a medically approved manner a DNA specimen from the body or remains of the deceased person;

Cross-reference to R.C. 109.573(A)(5) reveals the definition of “DNA specimen” to be as follows: “. . . human blood cells or physiological tissues or body fluids.”

¹⁵ As pointed out in the Restatement, it is not a “right” at all, but simply a basis of a tort claim for mental anguish in the event of mistreatment of the body. *Carney, supra*.

This particular statute demonstrates two key points. First, Ohio's statute mandates that the coroner *shall* collect a DNA specimen from the unidentified body before such body is disposed of. Therefore, the statute demonstrates that removal of a medically necessary and proper forensic specimen does not interfere with the next of kin's interest in possession of the deceased's body for burial. Second, the full statement of the statutory command (“[c]ollect in a medically approved manner a DNA specimen from the body or remains of the deceased person;”) contains the words “specimen” and “body” within the same sentence thereby indicating that a proper specimen is not a part of and, therefore, does not infringe upon the body of the decedent of which the next of kin have the privilege to bury.

- R.C. 313.123(B)(2)

“If . . . the coroner has reason to believe that the autopsy is contrary to the deceased person's religious beliefs, . . . the coroner shall return the specimens, . . . to the person who has the right to the disposition of the body.”

This narrow exception to the treatment of forensic specimens as medical waste explicitly states for the coroner to provide the specimens to the individual who had an interest in possessing the body for its final disposition. A command to provide something that is already a part of the body, in which the next of kin have an interest, would be nonsensical. Thus, this language substantiates that, once extracted from the body for medicolegal¹⁶ purposes, a forensic specimen is no longer a part of the deceased's body, in which the next of kin have an interest for purposes of burial.

Ohio Revised Code 313.123 further substantiates that next of kin have no right or interest in the portions of the deceased's body removed by a coroner for forensic testing. Ohio Revised Code Section 313.123(B)(1) states the following:

¹⁶The definition of “medicolegal” is “pertaining to medicine and law or to forensic medicine.”

[R]etained 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.

As a general rule, Ohio's statute labels autopsy specimens as "medical waste." The only narrow exception to the generalized treatment of forensic specimens as medical waste is religious objection, provided for in R.C. 313.123(B)(2), discussed above.

Similarly, Ohio Revised Code 3734.01(R)(3) classifies human tissues, organs, body parts, and body fluids that are likely to be contaminated with infectious agents that are removed during an autopsy as "pathological wastes."

Such clear and succinct treatment by Ohio's statutes of forensic specimens leaves no question that the state does not regard the next of kin as having any right in forensic specimens.

iii. The History Of The Autopsy Examination Has Never Recognized Any Semblance Of A Right In Forensic Specimens.

Plaintiffs-Respondents seek remuneration for procedures that coroners have engaged in since the advent of the first autopsy examination. On any given level of knowledge or familiarity, whether it is the average layperson's perception of an autopsy by its portrayal on a television show, a dictionary description¹⁷, the definition of an autopsy under Ohio law, or nationally accepted forensic standards, it is well-known that an autopsy involves removing portions of the human body so that such portions can be tested and conclusions formed about the cause of death. Therefore, there is adequate notice to the next of kin that the deceased's body is not technically whole after the completion of an autopsy. Nevertheless, the body is given to the proper individual for its most appropriate burial.

¹⁷ Dictionary states the following for the definition of "autopsy": "inspection and dissection of a body after death as for determination of the cause of death . . ." Reference to the definition of "dissection," demonstrates the following: "cutting so as to separate into pieces."

Despite the awareness of an autopsy and its inherent procedures that have been established for decades, there have never been causes of action on the part of next of kin to be monetarily compensated for scientific specimens rightfully removed from the deceased's body until present day. Such newly emerged litigation raises the question of whether there is a truly protected right at issue.

B. Even If The Next Of Kin Have Any Right To Forensic Specimens, The Coroner Has A Superior Police Power Right.

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. A thorough autopsy examination that provides commensurate results is only achieved by removal, retention, and subsequent testing of forensic specimens.

Not only are the coroner's actions in relation to forensic specimens assumed out of medical and legal necessity, but such coroner's duties and rights to specimens transcend any alleged rights of the next of kin. As this honorable court has stated:

We recognize that . . . almost every exercise of the police power will necessarily interfere with the enjoyment of liberty or the acquisition or possession of property, or involve an injury to a person . . . [n]evertheless, laws passed by virtue of the police power will be upheld if they bear a **real and substantial relation to the object sought to be obtained, namely, the health, safety, morals or general welfare of the public, and are not arbitrary, discriminatory, capricious or unreasonable.**

State v. Thompkins (1996), 75 Ohio St.3d 558, 560, 664 N.E.2d 926 (emphasis added.)

The Sixth Circuit Court of Appeals echoes the finding that the coroner has a superior interest over that of the next of kin in the deceased's body for purposes of the autopsy. See

Montgomery v. Clinton (C.A.6, 1991), 940 F.2d 661. (“ . . ., [E]ven if such an autopsy is inconsistent with plaintiff’s religious practices, the District Court did not err in analyzing the state’s superior interest.”)

Ohio’s statutory provisions are also reflective of the fact that the coroner’s performance of duties, consistent with the police power, takes priority over any rights of the next of kin.

- R.C. 313.131(C)(1) – a court will allow performance of an autopsy over the next of kin’s religious objection if the court determines that the delay may prejudice the accuracy of the autopsy, or if law enforcement officials are investigating the deceased person’s death as a homicide;
- R.C. 313.15 – the coroner is able to hold the body (therefore, interfere with the next of kin’s possession for burial) until the coroner has had the opportunity to consult with the prosecuting attorney, police department, or the sheriff to ensure that the body is no longer necessary to assist any of the officials in the performance of their duties;
- R.C. 313.18 –the coroner may order the disinterment of any dead body (therefore, interfering with the next of kin’s possessory interest of the body) for the purpose of examination and autopsy.

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 power and, as such, this Court should recognize coroners’ superior right to the forensic specimens that are essential to the satisfaction of their statutory duties.

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. **Plaintiffs-Respondents Chiefly Rely On *Brotherton v. Cleveland* And *Hainey v. Parrott*, Which Are Inapplicable To The Question Of Law Presently Before This Court.**

Both *Brotherton v. Cleveland* (C.A.6, 1991), 923 F.2d 477 and *Hainey v. Parrott* (Sept. 28, 2005), S.D. Ohio No. 1:02-CV-733 are decisions issued by federal courts that attempted to hypothesize where the Ohio Supreme Court would stand on this particular issue and others related to it. Consequently, neither of these cases' holdings or analyses provide assistance to this honorable Court. Rather, the Ohio Supreme Court now has the opportunity to answer this pivotal question of state law and provide a definitive precedent for the state of Ohio.

i. **The *Brotherton* Holding And Its Effect.**

The Sixth Circuit Court of Appeals first considered whether 42 U.S.C. § 1983 claims existed (based on the anatomical gift statute) against the Hamilton County Coroner in *Brotherton v. Cleveland*. 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 any other purpose. *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.¹⁸

¹⁸ *Newman v. Sathyavaglswaran* (C.A.9, 2002), 287 F.3d 786, 796-797 (given California's adoption of the UAGA, found that parents had property interests in the *corneas* of their deceased children removed without the attempt to notify the parents and request consent); *Martin v. Kim* (N.D. Ind. 2005), No. 2:03 CV 536, 5 (parents of deceased planned to donate deceased kidneys, however, coroner interfered with harvesting because the removal would interfere with the coroner's autopsy as well as the investigation of the death; court found that the parents had a property right in the kidneys intended for transplant); *Colavito v. New York Organ Donor Network* (N.Y. 2006), 860 N.E.2d 713 (held that a specified donee of an incompatible kidney has no common-law right to the organ and that his cause of action for conversion must fail)

ii. The Sixth Circuit Has Expressly Limited The *Brotherton* Holding.

Brotherton v. Cleveland is completely distinguishable from the issue presented by the state law question. In fact, the Sixth Circuit itself limited the *Brotherton* holding and subsequently held that there is no claim against a coroner based on taking forensic specimens in an autopsy. *Montgomery*, 940 F.2d 661. The Sixth Circuit solidified such differentiation between those issues presented in *Brotherton* and those of the present case when the court denied Plaintiffs-Respondents' Emergency Petition for Writ of Mandamus, Prohibition and/or Procendo on May 2, 2007. (R. 91, Order.) Specifically, the Sixth Circuit stated the following in its Order: "Here, the plaintiffs invoke a holding in a decision issued in another case on a distinguishable set of facts. Since *Brotherton* was decided, changes in Ohio law suggest another reading may be possible." *Id.* at 3.

In *Montgomery*,¹⁹ 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 performs 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

¹⁹ Importantly, the federal court in *Hainey* never even addressed *Montgomery* prior to granting summary judgment to plaintiffs.

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.

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.

iii. **Brotherton Involved Ohio Revised Code Chapter 2108 Which Is Distinct From Ohio Revised Code Chapter 313.**

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.

R.C. 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.

To further explain the difference between the anatomical gift statute (cornea issue) and the duties of a coroner pursuant to autopsy (forensic specimen issue), a federal court's discussion of immunity in *Wallin v. Cincinnati Eye Bank*, 733 F. Supp. 1152 (S.D. Ohio, 1990) is helpful. *Wallin*, still good law, did not involve the removal of a cornea against the wishes of next of kin, but rather a false positive HIV test on the corneas, communicated to the funeral home, which cremated the body against the family's wishes. The Court held that the coroner was entitled to complete immunity for all his conduct and actions which involved his duties pursuant to autopsy statutes (Ohio Revised Code 313.01 *et. seq.*). The Court held that an autopsy is a governmental function and entitles both the coroner and the political subdivision to immunity. In the Court's reasoning (consistent with *Brotherton*), there is a difference between unauthorized harvesting of corneas, and claims made against a coroner when he acts within his duties that are enumerated in the autopsy statutes.

D. Of The Few Jurisdictions That Have Confronted A Remotely Similar Question, None Have Concluded That Next Of Kin Have A Protected Right In Forensic Specimens Removed For Purposes Of An Autopsy.

Clearly, there are totally different interests involved when the coroner has the right and duty to perform autopsies and examine organs verses those cases where organs are improperly removed for transplant. The courts have recognized this fact. Those few cases that deal with scenarios more factually comparable to the case at bar do not conclude that next of kin have any semblance of rights in the forensic specimens that a coroner removes while performing an autopsy on the deceased's body.

i. Arkansas.

In *Fuller v. Marx* (C.A.8, 1984), 724 F.2d 717 (applying Arkansas state law), the wife of a decedent sued the coroner alleging that the bodily organs were disposed of in violation of her constitutional rights. 724 F.2d at 718-719. The body was returned to the family for burial while the organs that had been removed for examination were separately disposed of. The policy of the coroner was to incinerate the organs or provide the organs to medical students. The Court rejected this claim and recognized that there was a right to take possession and bury the body. There was no quasi-property right to all of the organs when an autopsy is done. The Court reasoned that the body was received in an acceptable condition for burial, and that this was the only right or interest at issue. Further, there was a special Arkansas statute that provided that next of kin could take possession of organs removed if next of kin made a written request. *Id.* at 719. Finally, Plaintiff also claimed a violation of her First Amendment religious rights. The Court also rejected this claim and held:

We do not agree, however, that she was hindered in the free exercise of this belief. Arkansas law, as discussed above, requires physicians to safely dispose of bodily organs after autopsies. Ark.Stat.Ann §82-434. This law is a

reasonable way to protect public health. Religious beliefs such as Mrs. Fuller's are accommodated by the provision which allows anyone claiming a body to also claim the body's organs if a written request is made. No religious test is required as a condition for retrieval of the organs. We consider the statute to be a reasonable limit on first amendment rights, and find no violation of or interference with Mrs. Fuller's right to freely exercise her religious beliefs.

Id. at 719-720.

ii. Mississippi.

In *Shults v. U.S.* (U.S.D. Kan. 1998), 995 F. Supp. 1270 (apply Mississippi state law), the parents of the decedent, upon whom an autopsy was performed, filed suit claiming a property interest in the multiple organs (including the whole brain and heart) that were removed during the autopsy (later incinerated) and not included with the body for burial. 995 F. Supp. at 1271-1272. The Court concluded that there was no cause of action and no property right. The only right was to possess the body for burial, not a property right in the organs removed for examination. In the absence of any property right, the only potential claim would be a tort claim for mishandling a corpse or interfering with burial - - neither claim being warranted against a coroner merely doing his statutory duty to perform autopsies. *Id.* at 1275-1276. Mississippi's statute also offered next of kin possession of tissues, but only upon written notice actually received by the coroner prior to disposing of the medical waste. *Id.* at 1274.

iii. Colorado.

In *Culpepper v. Pearl Street Bldg., Inc.* (1994), 877 P.2d 877, the Supreme Court of Colorado held that there was no property right or cause of action where the decedent's body was mistakenly partially cremated. The mistake was caught during the cremation process, and the body was removed with the flesh gone and returned to the coroner. The parents ultimately decided to complete the cremation process. In a thorough discussion of tort verses property

theories, the court decided that there is no property interest in the dead body that is compensable based on conversion or any other theory.

iv. Kansas.

In *Burgess v. Perdue* (1986), 239 Kan. 473, 721 P.2d 239, the Supreme Court of Kansas dealt with a fact pattern wherein a physician, after the burial of the deceased, contacted the mother of the deceased to inform her that her son's brain was still in a jar. 239 Kan. 474, 721 P.2d 239. The mother brought a cause of action for negligent infliction of emotional distress. *Id.* at 477. The Supreme Court of Kansas found that the facts did not rise to the level of outrageous conduct and the Court did not consider the autopsy or communication to be in violation of Restatement (Second) of Torts Section 868 ("interference with a dead body") even though the plaintiff had not consented to the full autopsy and removal of the brain. Although this case was not against the coroner, the discussion that the body is not property and that Kansas would not adopt the minority rule that there could be a negligent mishandling of a corpse claim where the claims involved statutory conduct of a coroner is pertinent.

v. Michigan.

In *Deeg v. Detroit* (1956), 76 N.W.2d 16, 345 Mich. 371, a cause of action was brought on behalf of the widow of a deceased whose death occurred as a result of a traffic accident wherein a motor bus owned and operated by the defendant Department of Street Railways ran over the deceased. A medical representative of the Department of Street Railways attended the autopsy and requested the medical examiner to remove certain organs from the body. 76 N.W.2d at 374. The organs were sent to a laboratory for examination, specifically for the purpose of determining the presence, or absence, of alcohol. After examination, the organs were destroyed. *Id.* The widow's cause of action was based upon the alleged mutilation of the body of her

relative that was done without her consent and in violation of her legal rights with reference to the possession and burial of the body. *Id.* The court concluded that the widow did, in fact, have a cause of action. *Id.* at 375. However, it is helpful to examine what the court stressed in its analysis: 1) Considering the manner and cause of death, the autopsy was not conducted with lawful authority, since there was no reason or necessity for the performance of the autopsy on the deceased; and 2) The organs were removed (and eventually destroyed) solely as the result of the request of an interested party present at the autopsy and not because the medical examiner deemed such removal and additional dissection necessary as part of the post-mortem examination. *Id.* at 374.

E. Other Jurisdictions' Cases Answer Questions That Are Distinct From The Question At Issue In This Case.

Although distinct and inapplicable, it is helpful to examine other types of cases because it serves to classify this case and to put into context exactly what this case is not:

- i. This is not a case involving the removal of a body part or organ for sale or transplant or relating to the Uniform Anatomical Gift Statute;
- ii. This is not a case involving the issue of consent to an autopsy. In many states, the coroner statutes provide that the coroner obtain consent to perform the autopsy;
- iii. This case does not involve maltreatment of a corpse or any action prior to an autopsy; and
- iv. This case does not involve the right to give a decent burial.

Much of the case law argued by Plaintiffs-Respondents in this case to date has relevance only to the extent that the cases involve coroners. However, merely because a case involves a coroner does not create a similar or even comparable analysis.

i. This Case Does Not Involve The Removal Of Organs For Sale Or Transplant, Or Donations Of Organs Under Any Gift Statute.

Transplant or donation cases involve situations where coroners or medical examiners extract or permit others to extract organs for the purposes of implantation into living recipients. In some cases, the statutes themselves are challenged, in other cases, liability depends on whether the statutes' elaborate procedures are followed; no such statute is at issue in this case.

- *State v. Powell* (Fla. 1986), 497 So.2d 1188, 11 Fla. L. Weekly 557 (upholding cornea removal statute against due process challenge); *Hartt v. County of Los Angeles* (Cal. Ct. App. Nov. 20, 2003), No. B158539 (although California does not recognize property right in body parts, parents were entitled to damages for cornea removal and for lung donation to medical researcher); *Newman v. Sathyavaglswaran* (9th Cir. 2002), 287 F.3d 786, 798 (cornea removal practice pursuant to California statute violated property right); *Whaley v. County of Tuscola* (C.A.6, 1995), 58 F.3d 1111 (removal of corneas and eyeballs violated property interest); *Bourgoin v. Stanley Medical Research* (Nov. 23, 2005), Me. Super. No. CV-05-34, CV-05-82, CV-05-83, CV-05-121, CV-05-252, CV-05-186, CV-05-195, unreported (Court did not find a cause of action for conversion where medical examiners and a series of research institutes either harvested or assisted in harvesting 99 brains to be used for research.)

ii. This Case Does Not Involve Consent To An Autopsy.

Unlike Ohio, some states require that the coroner obtain permission from the family to conduct the autopsy. In some cases, the coroner can be held liable for conducting a "wrongful autopsy." See James O. Pearson, Jr., *Liability For Wrongful Autopsy*, 18 A.L.R. 4th 858 (1982).

- *Grad v. Kaasa* (1984), 321 S.E.2d 888, 312 N.C. 310 (medical examiner who performed autopsy without consent of family did not exceed scope of his office); *Patrick v. Employers Mut. Liab. Ins. Co.* (1938), 118 S.W.2d 116, 233 Mo. App. 251 (coroner failed to conduct inquest and did not obtain consent, so autopsy was conducted without authority under statute); *Hirko v. Reese* (1945), 40 A.2d 408, 351 Pa. 238 (coroner not liable even though no consent obtained because death was accidental and statute permitted investigation without consent).

iii. This Case Does Not Involve Maltreatment Of A Corpse Or Any Action Prior To An Autopsy.

In some cases, an assertion is made that the defendant failed to care for the body, or to protect it from maltreatment by others, or failed to permit relatives to view the body. These issues are not present in this case. See Robert A. Brazener, Annotation, *Liability In Damages For Withholding Corpse From Relatives*, 48 A.L.R. 3d 240 (1973). The Restatement of Torts 2d, Section 868, which provides liability for someone who “removes, withholds, mutilates or operates upon the body of a dead person or prevents its proper interment or cremation” is also inapplicable here, because the cases supporting it do not relate to autopsy.

- *Melton v. Bd. of County Comm'rs of Hamilton County*, 267 F. Supp.2d 859 (S.D. Ohio 2003) (coroner permitted third persons to photograph corpses, “meddl[ing] with property interests of” relatives); *Dick v. City of New York* (N.Y. Sup. Ct. Oct. 30, 2002), No. 607/00 (no cause of action for mishandling body or failure to guard body in elevator shaft); *Gratton v. Baldwinsville Acad. & Cent. Sch.* (N.Y. Sup. Ct. 1966), 49 Misc.2d 329, 267 N.Y.S.2d 552 (school’s refusal to permit parents to see daughter’s body was grounds for damage award); *Papieves v. Lawrence* (1970), 263 A.2d 118, 437 Pa. 373 (parents’ mental anguish at defendant’s secret burial of their son sufficient to provide grounds for damage award); *Darcy v. Presbyterian Hosp. in City of New York* (1911), 95 N.E. 695, 202 N.Y. 259 (hospital that withheld body from relatives until autopsy was performed could be liable for damages).

iv. This Case Does Not Involve The Right To Give A Decent Burial.

In one case, plaintiffs succeeded on a claim that they were denied the right to give any burial at all (regardless of whether autopsy was conducted). An interest in the body for purposes of giving a decent burial is not implicated here.

- *Crocker v. Pleasant* (Fla. 2001), 778 So.2d 978, 988, 26 Fla. L. Weekly S61 (parents, who continued to search for missing son months after he was buried by city that negligently failed to contact them, were denied their “legitimate claim of entitlement” to the body for burial purposes).

F. To Find A Protected Right In Every Forensic Specimen Removed During An Autopsy Has Illogical And Farreaching Consequences.

During the course of an autopsy there are varying amounts and types of the body that are retained based upon medical discretion as to what is required for the coroner's conclusions. If next of kin are found to have a protected right in the specimens removed during an autopsy, the boundaries of such right could be endless. Aside from an opening of the floodgates for the ceaseless filing of causes of action, there is no logic of such defined boundaries for a procedure like the autopsy of the human body. How far will the protected right of next of kin stretch? – will it depend on the weight of the specimen, or the type of forensic specimen, or whether the specimen is deemed as important to specific next of kin?

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.²⁰ It is important to note, however, that this staggering figure is actually modest given the certified question that is before this Court. The *Hainey* decision drew a line in the sand and ultimately only awarded monetary relief to those next of kin whose deceased had a *whole* organ removed during an autopsy. The instant question of state law is whether next of kin have a claim for decedent's *tissues, organs, blood, or other body parts* removed and retained during an autopsy. As discussed extensively above and in other briefs

²⁰ 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://dwarehouse.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.

before this Court, it is illogical, impractical, and infeasible to track and tally every specimen removed during the highly invasive autopsy of the human body. However, if such tally is required to compensate Plaintiffs-Respondents and future litigants, the potential for liability increases exponentially. Further, while such estimations and forecasts relate to the state of Ohio, this Court's finding of the next of kin's protected right in forensic specimens will inevitably have drastic ramifications for states and coroners across the country.

V. CONCLUSION

The answer to the question posed by the district court is – No: There is not a protected right in tissues/organs that are removed as necessary to determine the cause of death in an autopsy. The autopsy process has existed for over a century and serves important public functions relating to health, science and criminal investigation. Pursuant to these important governmental functions, Ohio statutes give coroners the power and discretion to perform autopsies to determine the cause of death. This statutory grant of authority is paramount over any other interest in the decedent's body.

The only interest next of kin have in the decedent's body is to bury the body after the autopsy has been performed. The autopsy process does not interfere with the interest of burial. Plaintiffs-Respondents' claim that the practice of removal of organs/tissues during an autopsy interferes with the interest in burial makes no sense. The very fact that an autopsy has been accomplished is obvious notice that the body has gone through an invasive surgical procedure that requires the removal of organs/tissues/fluids.

Ohio's coroner statute grants coroners the right and duty to remove tissues/organs for analysis. R.C. 313.123. The organs/tissues removed during autopsy are medical waste and have always been medical waste. Ohio Revised Code Section 313.123 defines the removed tissues as

such. This was not a change in the law. Prior to the enactment of the provision, any tissues removed were also defined as medical waste. R.C. 3734.01(R). Next of kin simply have no property right or any type of protected right in those specimens. The Ohio statutes clearly grant anyone who has a religious objection (on behalf of the deceased) to the autopsy itself to enjoin the procedure. R.C. 313.131.

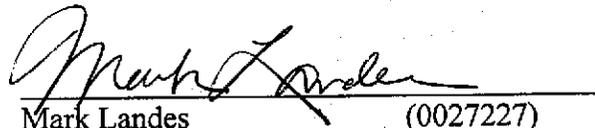
R.C. 313.123 also provides that if next of kin have objected to the autopsy under a religious objection and followed the required procedures, but the autopsy was still warranted, any specimens removed shall be returned as soon as practicable to the person who has the interest in the disposition of the body. Absent a specific religious objection to the autopsy pursued in accordance with the two statutes described above, there is no right, statutory or otherwise, to organs/tissues removed by a coroner during an autopsy.

Plaintiffs-Respondents, who have a pecuniary interest in seeking class action status, do not define the protected right, because there is no protected right. The interest in burial and disposition of the body is not a property right, and Ohio law is clear on this topic. This case does not present an issue even close to *Brotherton* where corneas were removed without consent. The *Hainey* decision is fundamentally flawed in comparing the harvesting of corneas to the procedures involved in performing a thorough autopsy which, by definition, involves the removal of specimens for analysis. To find a protected right to some notice of organ/tissues removed and a right to recover those tissues following autopsy, is not only impracticable, but has no basis in law (statutory or otherwise).

Political subdivisions and coroners have the legal right and statutory duty to accomplish autopsies. The police powers granted to political subdivisions should protect coroners and counties from the novel claims alleged in this class action. Any type of vague protected right found by this

Court, upon which plaintiffs could bring claims (essentially complaining that they did not know the full nature of an autopsy and may have wanted those tissues/specimens returned for their own disposition) would cause complete disarray and financial disaster to many counties in Ohio already suffering from well-known economic issues. To create a new protected right (a right not in Ohio's coroner statute) would be completely inconsistent with autopsy practices of over a century in which these issues (which Plaintiffs-Respondents' counsel seeks tens of millions of dollars for) have seemingly not been contemplated and have not caused distress. For Plaintiffs-Respondents to claim that something unwarranted takes place during autopsy because tissues/specimens are removed to determine the cause of death, simply because the public may not fully understand the autopsy process (or perhaps not want to know) simply makes no sense. Certainly, there is not an actionable or protected right under Ohio law.

Respectfully submitted,



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Prosecuting Attorneys Association, and
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CERTIFICATE OF SERVICE

I hereby certify that on July 20th, 2007, a copy of the foregoing was served upon the parties by regular U.S. mail, postage prepaid.



Mark Landes (0027227)
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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