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I. INTRODUCTION

The Cuyahoga County Coroner and the Board of Commissioners of Cuyahoga County (collectively "Cuyahoga County"), being interested parties and pursuant to Supreme Court Rule of Practice XVIII, Section 7, hereby submit this Amicus Curiae brief in support of answering the certified question in the negative. The certified question stems from a civil rights lawsuit alleging the violation of constitutional rights secured by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

On May 8, 2006, Plaintiffs-Respondents Mark and Diane Albrecht ("Respondents") filed their Complaint against Brian Treon, M.D., Coroner of Clermont County, as well as the Board of Commissioners of Clermont County. In their complaint, Respondents seek declaratory, compensatory and injunctive relief under 42 U.S.C. § 1983.

Respondents allege the Clermont County Coroner committed an unconstitutional taking of property without due process by removing and retaining the brain of Respondents' decedent for forensic examination and testing as part of an autopsy without notifying Respondents of the retention and ultimate medical cremation of the brain. Although Respondents have sued one relatively small County defendant, they seek to transform the case in question into a landmark case by certifying not one but two statewide classes of parties. The first class is a statewide class of plaintiffs of all beneficiaries or next-of-kin of decedents who had brains and/or hearts removed and retained by county coroners for forensic examination and testing as part of the autopsy process since 1991. The second class for which class certification is sought is a statewide

class of defendants comprised of the County Commissioners and Coroners of 87 of the 88 Ohio counties.¹

On June 11, 2007, this Court accepted from the United States District Court for the Southern District of Ohio certification of the following question:

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.

Interested Party Cuyahoga County submits that the certified question should be answered in the negative, based on Ohio statutory and common law, as well as the potential detrimental impact on the police power of the State as relates to the county coroners' performance of their statutory duties.

The question of state law at issue herein is one of first impression in Ohio. This Court's ruling as to whether Ohio grants next-of-kin a protected right in autopsy specimens will have a significant impact on the quality of Ohio's forensic medicine, law enforcement, public health, and fiscal well-being.

¹ Hamilton County is not named in the complaint in the instant matter, as the Hamilton County Coroner's Office was the defendant in *Hainey v. Parrott* (S.D. Ohio 2005), *unreported*, 2005 WL 2397704. Hainey was a plaintiffs' class action case filed on behalf of the next-of-kin of approximately one thousand decedents whose brains were retained and fixed by the Hamilton County Coroner, and involved claims nearly identical to those alleged by plaintiffs in this matter. See Section IV. F., *infra*. In the *Hainey* case, Hamilton County did not request that the United States District Court certify the unanswered question of state law to this Court, as has been done in the instant matter. Following the District Court's ruling in favor of the *Hainey* plaintiffs on cross-motions for summary judgment, Hamilton County, for reasons only known to it, settled the *Hainey* case for astonishing sum of \$6 million, or approximately \$6 thousand per brain that was "fixed" by the Hamilton County Coroner. See, Section II. A., *infra*, concerning the necessity and process of "fixing" organs for forensic examination and testing.

The performance of a forensic autopsy is the practice of medicine and must be conducted by a licensed forensic pathologist. See Forensic Autopsy Performance Standards, National Association of Medical Examiners, October 16, 2006, Standard B4, (See Exhibit A of John Hunsaker, III, MD's Affidavit, attached as Exhibit B to Cuyahoga County's Memorandum in Support of Motion to Certify Question of State Law to the Ohio Supreme Court). While a forensic autopsy involves many standard procedures, the forensic pathologist's professional discretion is necessary to determine the need for additional dissection and laboratory tests. *Id.* As such, a coroner must be free to make professional judgments in the execution of his/her statutory duties without the interference of the decedent's family members. One such statutory duty is the determination of the cause, manner, and mode of unexplained deaths in the county. R.C. §§ 313.15, 313.19. In order to fulfill this responsibility, the coroner has statutory authority to perform an autopsy. R.C. §§ 313.121, 313.131. As part of an autopsy, the retention of tissues, whole organs, blood, fluids, and other specimens for testing and examination is a widely recognized and standard forensic medical practice. Indeed, coroners world-wide have engaged in this practice for many years.

A coroner's forensic examination, findings, and report are quintessential functions of the police power of the State. Often times the autopsy specimens and the results of the forensic examination are essential evidence in the prosecution of a crime. Other times a coroner's examination may reveal contagious disease or other public health concerns. Thus, any restriction on the manner in which a coroner conducts an autopsy, will not only adversely affect the quality of forensic medicine in Ohio, it will also have a negative impact on the State's law enforcement and public health matters.

Furthermore, the integrity of all, except one, of Ohio's counties is dependent upon this Court's response to the certified question. Respondents' putative class-action lawsuit involves autopsies performed during a fifteen-year period and has the potential to be a financial catastrophe for 87 of Ohio's 88 counties. During the relevant fifteen-year time frame, Cuyahoga County alone has performed more than 24,000 statutorily-authorized autopsies, including 5,517 in which brains or hearts have been retained or "fixed" for further examination and testing.² Consequently, the potential ramifications of answering the certified question in the affirmative would be catastrophic to Cuyahoga County, the other named counties, and therefore, the State of Ohio and all its citizens. It would also single out coroners in this state for unique and special treatment among all coroners in the United States and, indeed, the world; subjecting them to civil liability for performing autopsies in a manner dictated by the relevant standard of care imposed upon forensic pathologist throughout the world.

II. STATEMENT OF THE FACTS AND CASE

A. The Autopsy Protocol

The underlying lawsuit pending in the United States District Court is a putative class action against all county coroners and/or medical examiners in the State of Ohio

² In arguments before the district court, Respondents maintained that they are really only interested in those cases where brains and/or hearts have been "fixed". But Respondents' argument only underscores the essence of the question presented to this Court: What is the nature of Respondents' claimed right? If they have a protected right in a decedent's brain, why do they not have a protected right in the liver or spleen? If they have a protected right in a decedent's heart, why do they not have a protected right in the blood pumped through the heart? And, if they have a protected right in the brain and heart, why do they not have a protected right in the portions of those organs taken and preserved for forensic purposes by a coroner? What is the legal principle being espoused that distinguishes between having a protected right in the brain and heart but not the other organs, blood and tissues? To determine the nature of Respondents' claimed protected right, this Court must, perforce, determine the parameters of that right.

that have removed, retained, and disposed of autopsy specimens without prior notice to next-of-kin, as well as against the County Commissioners of those counties.

Because the performance of autopsies is at the heart of this case, a brief description of what an autopsy consists of is in order. An autopsy performed by a coroner is a precise examination of a decedent's body undertaken to determine the decedent's cause of death. A critical reason for such an examination is to determine whether a criminal act is the cause of a person's death, thereby setting the stage for a police investigation and prosecution of a crime. *See* Affidavit of Cuyahoga County Coroner Elizabeth K. Balraj, M.D. at ¶ 7 (Attached as Exhibit A to Cuyahoga County's Memorandum in Support of Motion to Certify Question of State Law to the Ohio Supreme Court). A proper determination of the cause and manner of death (be it natural causes, disease, or foul play) is important to the parties involved and to society at large, whether it serves as evidence for a legal action or to protect the public health.

In order for a coroner to properly perform a forensic examination, the decedent's organs must be surgically exposed, removed, and examined. Among the critical organs that must be examined is the brain, since the brain is a common site of both disease and trauma that causes death. Therefore, all autopsies performed under a coroner's jurisdiction require the examination of the head, skull, and brain. Forensic Autopsy Performance Standards, National Association of Medical Examiners, October 16, 2006, Standard F21, (See Exhibit A of John Hunsaker, III, MD's Affidavit, attached as Exhibit B to Cuyahoga County's Memorandum in Support of Motion to Certify Question of State Law to the Ohio Supreme Court). It is sometimes necessary to perform a detailed examination of a decedent's brain in order to determine the cause of death. Balraj

Affidavit at ¶ 10. Such an examination requires the removal of the brain from the skull and its fixation in a solution of formaldehyde and saline (i.e., formalin) for a period of approximately fourteen days. *Id.* This process causes the brain to solidify and to produce a consistency that allows the coroner to slice the brain so as to obtain a cross section sample of the brain for microscopic examination and testing. If the brain is not “fixed,” it soon becomes too soft and jelly-like to be properly examined and/or tested. *Id.*

Upon notification of a death coming under his/her jurisdiction, Ohio law requires the coroner to maintain custody of the deceased until the coroner ascertains the cause of death or determines that the body is no longer necessary to assist in the fulfillment of the coroner’s statutory duties. R.C. § 313.15. Given the length of time required for proper fixation of the brain, as a courtesy to the family, it is standard practice for coroners to deliver the body to a funeral home for its final disposition within twenty-four hours of his/her receipt of the body, and thus before the brain is properly “fixed.” Balraj Affidavit at ¶ 7-8.

B. The Pending Federal Lawsuit

Respondents, Mark and Diane Albrecht, filed their lawsuit in the United States District Court for the Southern District of Ohio on May 8, 2006 against the coroner of Clermont County, Ohio, and the Board of County Commissioners. Respondents seek declaratory, injunctive, and monetary relief under 42 U.S.C. § 1983 based upon an autopsy performed on their son, Christopher Albrecht. Christopher died under circumstances requiring an autopsy. *See* R.C. § 313.121. The coroner conducted the autopsy and in accordance with standard forensic practice the decedent’s brain was removed for forensic analysis to enable the coroner to determine the cause of death. The

decedent's body was released for burial and Respondents buried their son. Respondents later became aware that the coroner had lawfully retained the decedent's brain for fixation and further examination. Consequently, the decedent's brain was not buried with the body.

Although Respondents have chosen to sue one relatively small County defendant, they seek to transform this case into a landmark class-action lawsuit. Respondents seek to represent a class of all beneficiaries or next-of-kin of decedents who have had organs removed and retained by Ohio county coroners since 1991. Respondents also seek to certify a class of defendants consisting of the Boards of Commissioners and Coroners of eighty-seven of Ohio's counties.

III. LAW AND ARGUMENT

A. Property Rights Are Defined By State Law For Claims Brought Pursuant to 42 U.S.C. § 1983.

Respondents allege they were denied due process of law when the coroner removed specimens, including the brain, from their deceased son's body, without their prior knowledge, during a statutorily mandated autopsy. A threshold requirement of Respondents' 42 U.S.C. § 1983 action is that they enjoy a property interest protected by the due process clause. If any such property interest exists, it is created by state law. *Board of Regents v. Roth* (1972), 408 U.S. 564.

A Section 1983 cause of action may be stated against a state actor for the deprivation of a liberty or property interest without due process of law. In order to succeed in bringing a claim under 42 U.S.C. § 1983, a plaintiff must prove the following: (1) the conduct in controversy must be committed by a person acting under color of state law, and (2) the conduct must deprive the plaintiff of rights, privileges or immunities

secured by the Constitution or laws of the United States. *Parratt v. Taylor* (1981), 451 U.S. 527, 535. When a Section 1983 claim rests on an alleged deprivation of a property interest, the constitutional right invoked is not a substantive right, but rather the procedural due process right to notice and hearing. *Board of Regents v. Roth* (1972), 408 U.S. 564, 576-77. The *Roth* court took pains to explain that for procedural Due Process claims based upon property (as opposed to liberty) interests, a federal court must look to state law to determine if the state law creates such a property interest. Only if such an interest exists under state law are the procedural protections of the Due Process Clause even implicated. As the Supreme Court held:

Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Roth, 408 U.S. at 577. Applying this rule to the facts of the case, the *Roth* Court determined that under Wisconsin law, an untenured professor did not have a property right in continued employment beyond the one-year term of his contract. *Id.* As such, the professor's due process rights were not implicated when he was fired without notice or an opportunity for a hearing. *Id.*

Roth continues to be the seminal case on the origin and nature of property interests that are worthy of the protection of the Due Process Clause. The United States Supreme Court and the Sixth Circuit Court of Appeals have repeatedly and consistently held that property interests are defined by state law for purposes of Section 1983 claims. See, e.g., *McClain v. NorthWest Community Corrections Center Judicial Corrections Board*, 440 F.3d 320, 330 (6th Cir. 2006) (holding that an unclassified civil servant does

not have a property interest in continued employment and ruling that state law creates property interests of kind protected by Due Process Clause); *Leary v. Daeschner*, 228 F.3d 728, 741 (6th Cir. 2000) (holding that property interests are defined by State law and that teachers had a property interest in continued employment); and *TriHealth, Inc. v. Board of Commissioners, Hamilton County, Ohio*, 430 F.3d 783 (6th Cir. 2005) (holding that hospitals did not have a property right in participation in competitive bidding process and that property rights for purposes of due process stem from State law).

In the case sub judice, the Respondents' Section 1983 claim rests on whether Ohio law recognizes a protected right 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. Interested Party Cuyahoga County submits that under Ohio law, a next-of-kin does not have a protected right in their decedent's tissues, organs, blood, or other body parts that have been removed and retained by the coroner for forensic examination and testing.

B. There is no Statutory Authority or Case Law recognizing a Property Interest in a Dead Body.

Respondents' federal lawsuit is an effort to significantly expand the rights of next-of-kin to their decedent's organs, tissues, and other autopsy specimens. As aptly noted by Judge Dlott, "[a]t issue here are not 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." *See Order Granting Motions To Certify a Question to the Ohio Supreme Court*. Respondents' attempted expansion of the rights of next-of-kin is without any basis in the statutes or common law of this state, and therefore, must be rejected by this Court.

There is no statutory authority in Ohio creating a protected right for next-of-kin in a decedent's remains, nor has this Court ever found such a protected right to exist. In fact, while protecting tort remedies, which are not at issue here, four Ohio state courts have addressed the issue of a property right in a dead body and found that no such right exists. See *Carney v. Knollwood Cemetery Ass'n* (8th Dist. 1986), 33 Ohio App.3d 31; *Everman v. Davis* (2nd Dist. 1989), 54 Ohio App.3d 119; *Hadsell v. Hadsell* (Cir. Ct. 1893), 3 Ohio C.D. 725, 726, 7 Ohio C.C. 196 ("A dead body is not property."); *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 of same and it does not become part of his estate.")

In *Carney*, next-of-kin brought claims for mental anguish and mishandling of a corpse after a cemetery disinterred a decedent's remains. The Eighth District Court of Appeals explained that any rights the next-of-kin have in a decedent's remains are protected by tort remedies, not property law.

"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. The plaintiff, in these actions, does not seek to vindicate any "quasi property" right. He sues simply because of the mental suffering and anguish that he has undergone from the realization that disrespect and indignities have been heaped upon the body of one who was close to him in life. (Emphasis added.)

Carney, 33 Ohio App.3d at 36. The Court of Appeals correctly ruled that the next-of-kin were adequately protected through tort remedies and stated:

Instead, this court rejects the theory that a surviving custodian has quasi-property rights in the body of the deceased, and acknowledges the cause of action for mishandling of a dead body as a sub-species of the tort of

infliction of serious emotional distress. (Emphasis added.)

Id.

In *Everman*, a husband claimed that his Fourth Amendment rights were violated by an autopsy performed on his late wife. The Second District Court of Appeals correctly upheld the trial court's dismissal for failure to state a claim. The court ruled:

The argument that a dead body is an "effect" within the meaning of "houses, papers and effects" stretches the imagination and the language of the [Fourth] amendment...**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. (Emphasis added.)

Everman, 54 Ohio App.3d at 122. Also, significantly, the Court examined the language of R.C. § 313 *et seq.* and stated, "The compelling interest of the state in determining the true cause of death...overrides the interest of relatives to immediate possession for burial." *Id.*

Neither *Carney* nor *Everman* addressed the specific question at issue in the instant matter. In *Carney*, the Court specifically rejected the notion of next-of-kin having a quasi-property right in a decedent's remains. The *Everman* case, in which the court based its decision partially on the undeniable importance of the county coroner's duties under R.C. § 313 *et seq.*, likewise refused to find a constitutionally-protected right in the remains of a decedent.

In *Hadsell*, the children of a deceased man attempted to enjoin their father's widow from exhuming their father's body and relocating his grave. 3 Ohio C.D. 725. In ruling in favor of the widow, the Court stated:

A dead body is not property. There are no next of kin to inherit it. It cannot be inherited, and hence the holding made in some adjudicated cases. **That the bodies of the dead belong to the surviving relatives** in the order of inheritance as other property, and that they have the right to the custody and burial of the same, **is not supported by reason, statute or custom.** (Emphasis added.)

Id. Similarly, in *Hayhurst*, the Ohio Court of Common Pleas settled a dispute between children of a decedent over where the body was to be buried. 4 Ohio Law Abs. 375. The Court ruled, "There can be no property in a dead body and therefore a man cannot by will dispose of same, and it does not become part of his estate." *Id.*

These cases, while protective of individualized tort remedies, do not hold that a next-of-kin has a property interest or protected right in a decedent's body; let alone, the tissues, organs, blood or other body parts that have been removed and retained by the coroner for forensic examination and testing. The Ohio state courts that have addressed similar issues to those in the instant matter have found no such protected right to exist. These cases are highly persuasive as to how Ohio courts have regarded a next-of-kin's interest.

C. Important County Coroner's Statutory Duties are Implicated by the Certified Question.

The duties of the county coroners are inextricably linked with the important state interests of crime prevention, law enforcement, and protection of the public health. Ohio Revised Code § 313.12 defines the broad circumstances under which a county coroner is provided with notice of a suspicious death, including when a person dies by "criminal or

other violent means, by casualty, by suicide, or in any suspicious or unusual manner, any person, including a child under two years of age, dies suddenly when in apparent good health, or when any mentally retarded person or developmentally disabled person dies regardless of the circumstances.” Ohio Revised Code § 313.121 defines the circumstances under which a county coroner is required to perform an autopsy. Ohio Revised Code § 313.131 states that the county coroner, “shall perform an autopsy if, in the opinion of the coroner...an autopsy is necessary,” unless an autopsy is contrary to the decedent’s religious beliefs. (Emphasis added). Pursuant to R.C. § 313.121(B), the coroner “shall perform an autopsy” on any child under the age of two years who dies suddenly and in apparent good health, in accordance with public health council rules. (Emphasis added.)

Ohio Revised Code § 313.15 requires that the county coroner retains the body of a decedent for as long as necessary and states:

All dead bodies in the custody of the coroner shall be held until such time as the coroner, after consultation with the prosecuting attorney, or with the police department of a municipal corporation, if the death occurred in a municipal corporation, or with the sheriff, has decided that it is no longer necessary to hold such body to enable him to decide on a diagnosis giving a reasonable and true cause of death, or to decide that such body is no longer necessary to assist any of such officials in his duties.
(Emphasis added.)

Significantly, after the *Hainey* decision, discussed further at Section III. G., *infra*, the Ohio General Assembly enacted R.C. § 313.123. This newly-enacted provision of the Revised Code specifically states that “retained tissues, organs, blood, other bodily fluids, gases, or other specimens from an autopsy are medical waste and shall be disposed of in accordance with applicable federal and state laws, . . .” R.C. § 313.123. Undoubtedly,

the Ohio General Assembly has determined that the tissues, organs, blood, fluids, and other specimens taken and retained as part of an autopsy are to be treated as medical waste, and are not the property of the next-of-kin.

Ohio Revised Code § 313.123 clarified the state of the law as in regards to organs and tissues retained by coroners when performing forensic autopsies. As discussed above, no Ohio court has ever held that next-of-kin have a property right in a decedent's remains. Thus, Ohio common law as it exists now and when the Legislature enacted § 313.123 did not, and does not, grant a property right in a decedent's remains.

This Court has stated:

Statutes are to be read and construed in the light of and with reference to the rules and principles of the common law in force at the time of their enactment, and in giving construction to a statute the legislature will not be presumed or held to have intended a repeal of the settled rules of the common law unless the language employed by it clearly expresses or imports such intention. (Emphasis added.)

State v. Sullivan (1909), 81 Ohio St. 79, syllabus Para. 3. The Ohio General Assembly is presumed to have known the state of the common law when it enacted R.C. § 313.123. See, *State ex rel. Cromwell v. Myers* (1947), 80 Ohio App. 357, 368. Ohio Revised Code § 313.123, when read and construed with reference to the rules and principles of the common law in force at the time of its enactment, is a clarification of a basic principle already existing in Ohio common law: next-of-kin do not have a protected interest in any part of a decedent's remains.

D. The County Coroner's Exercise of Police Powers is Valid.

The certified question implicates clear, well-defined police powers to protect the general health, safety, morals, or welfare of the public. These well defined police powers

prevail over any rights the next-of-kin may have in the present case. As this Court held in *Benjamin v. City of Columbus* (1957), 167 Ohio St. 103, at paragraph five of the syllabus:

Although almost every exercise of the police power will necessarily either interfere with the enjoyment of liberty or the acquisition, possession and production of property, within the meaning of Section 1 of Article I of the Ohio Constitution, or involve an injury to a person within the meaning of Section 16 of Article I of that Constitution, or deprive a person of property within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States, **an exercise of the police power having such an effect will be valid if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it is not unreasonable or arbitrary.** (Emphasis added.)

See, also, State v. Thompkins (1996), 75 Ohio St.3d 558, 560.

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 police power and, as such, this Court should afford them great deference.

E. The Sixth Circuit's Holdings In *Brotherton* and *Whaley* Were Based, In Significant Part, On The Uniform Anatomical Gift Act, And Therefore, Are Distinguishable From This Case.

As grounds for their claim that a property right exists, Respondents are likely to rely upon the decision of the United States Court of Appeals for the Sixth Circuit in *Brotherton v. Cleveland* (6th Cir. 1991), 923 F.2d 477. Respondents' reliance on *Brotherton* is misplaced for several reasons.

First, *Brotherton* is distinguishable from the case at bar. In *Brotherton*, the court held that a widow had a constitutionally protected right in her deceased husband's

corneas taken for donation over her objections³ in violation of the Uniform Anatomical Gift Statute, Ohio Revised Code §§ 2108.01 *et seq.* In contrast, the statutes implicated in the within matter are found in Chapter 313, which governs County Coroners. This distinction is significant because the Sixth Circuit's *Brotherton* decision rested, in substantial part, on R.C. §§ 2108.60 and 2108.02, which allow a next-of-kin to donate, but not possess, a decedent's remains, including corneas. Specifically, the Court stated, "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." *Brotherton* 923 F.2d at 482. Revised Code § 2108.02(B) states, in part:

[a]ny of the following persons, in the order of priority stated...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: (1) the spouse....

As further justification for finding that the spouse had a substantive interest in the corneas removed from her deceased husband's body, the court relied upon another section of the Uniform Anatomical Gift Act, which provides:

[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 (4) 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...(b) the decedent's spouse.....

R.C. §2108.60(B).

³ It was the policy and custom of the Hamilton County Coroner to not review records or paperwork which might contain the objections of the next-of-kin to the removal of corneas. The *Brotherton* majority opinion characterized the Coroner's policy and custom as "intentional ignorance." *Id* at 482.

The Ohio statutes at issue in *Brotherton v. Cleveland* expressly grant certain individuals (i.e., next-of-kin), under specific circumstances, the right to make or decline to make anatomical gifts of the body parts of another. Given these explicit consent requirements surrounding anatomical gifts, the individuals identified in the anatomical gift statutes have been found to have a protected interest relative to anatomical gifts.

In stark contrast, Chapter 313 of the Revised Code does not contain any language indicating an interest held by the next-of-kin in the autopsy specimens removed and retained by the coroner in the performance of the coroner's statutory duties. Consequently, this case is completely distinguishable from *Brotherton*. There is no Ohio statutory authority that would even hint at creating a property interest in tissue, organs, blood and other body parts that are removed, tested, examined and retained as part of a forensic autopsy.⁴ Because the case at bar involves completely separate statutory provisions, *Brotherton* is not controlling and Respondents' reliance upon it is misplaced.

Second, despite acknowledging that this Court had never ruled on the state law issue pending before it, the *Brotherton* court created rights previously nonexistent under Ohio law:

State supreme court decisions are the controlling authority for such determinations. *Clutter v. Johns-Manville Sales Corp.*, 646 F.2d 1151, 1153 (6th Cir. 1981). **However, the Ohio Supreme Court has not ruled on the precise issue before this Court; thus, we must look to "other indicia of state law..."** *Kveragas v. Scottish Inns, Inc.*, 733 F.2d 409, 412 (6th Cir. 1984). (Emphasis added.)

Brotherton 923 F.2d at 480.

⁴ The *Brotherton* Court was expressly concerned about the potential medical use of and market for said corneas for transplant purposes or medical research. *Id.* at 481. Clearly, there is no medical use of or market for the types of tissues, organs, blood or other body parts at issue herein.

The “only other indicia of [Ohio] law” reviewed by the Court was the language of Uniform Anatomical Gift Act, which granted to Ms. Brotherton the right to make, or refuse to make, an anatomical gift. *Brotherton*, 923 F.2d at 482.

Unlike the case sub judice involving forensic autopsies, the *Brotherton* Court seemed particularly concerned that the corneas were being donated to an organ bank.

The Court explained:

The importance of establishing rights in a dead body has been, and will continue to be, magnified by scientific advancements. The recent explosion of research and information concerning biotechnology has created a market place in which human tissues are routinely sold to and by scientists, physicians and others. The human body is a valuable resource. As biotechnology continues to develop, so will the capacity to cultivate the resources in a dead body. A future in which hearts, kidneys, and other valuable organs could be maintained for expanded periods outside a live body is far from inconceivable. (Emphasis added.)

Id. at 481, internal citations omitted.

In a strong dissenting opinion, Judge Joiner unequivocally stated, citing the *Carney*, *Everman*, *Hayhurst* and *Hadsell* decisions, “Ohio law has made it very clear that there is no property right in a dead person’s body.” *Brotherton*, 923 F.2d at 483 (Joiner, J. dissenting). Judge Joiner explained:

Thus, the court is wrong in its holding that the procedural requisites for dealing with non-property can rise to become property and be protected by the fourteenth amendment. Nor can the grant of procedures to enhance the health and wellbeing of others in society and the imposition of duties on persons (coroners or hospitals) grant property rights protected by the fourteenth amendment in favor of decedent’s relatives.

The statute does not give plaintiff any rights. It gives rights to the coroner...Simply stated, the “bundle of rights” in the plaintiff, in light of common law history and the express purpose of the two statutes, is virtually nonexistent. (Emphasis added.)

Brotherton, 923 F.2d at 484 (Joiner, J. dissenting).

In the District Court, Respondents also relied on *Whaley v. County of Tuscola* (6th Cir. 1995), 58 F.3d 1111. In *Whaley*, which involved Michigan law, the coroner’s diener (assistant) owned and operated an eye bank and tissue center. The diener allegedly would remove the corneas and/or eyeball after the coroner completed the autopsy and sell them from his eye bank, all without the permission of the next of kin. *Id.* at 1113. Just as in *Brotherton*, the removal of the corneas was for a strictly private reason, totally unrelated to the coroner’s statutory duties.

In *Whaley*, the Sixth Circuit discussed the *Carney* and *Everman* decisions, as characterized in the *Brotherton* decision. The Court reiterated that *Carney* and *Everman* did not announce that, in Ohio, a decedent’s next of kin had a “property interest” in the decedent’s body:

Neither *Carney* nor *Everman* made a sweeping pronouncement of the next of kin’s right to possess and prevent the mutilation of a decedent’s body. *Carney* declared that the cause of action for mishandling a corpse was a derivative of the tort of causing emotional distress, and the statement in *Everman* was dicta, an offhand reference unnecessary to the court’s decision.

Whaley, 58 F.3d at 1115. It was only when the Court added to the *Carney* and *Everman* decisions the rights set forth in R.C. § 2108.02 *et seq.*, that it found an “aggregate of rights” created under Ohio law. *Id.*

As found by the Court in *Whaley*, however, the State of Michigan's law is much clearer than Ohio's:

Turning to Michigan law, its courts have explicitly held what Ohio courts have not: that the next of kin have a right to possess the body for burial and prevent its mutilation. The Supreme Court of Michigan has repeatedly held that the next of kin "[are] entitled to possession of the body as it is when death comes, and that it is an actionable wrong for another to interfere with that right by withholding the body or mutilating it in any way." ...Furthermore, Michigan's Anatomical Gift Act is the same as Ohio's.

Whaley, supra, at 1115.

Clearly, both the *Brotherton* and *Whaley* decisions relied upon, respectively, Ohio's and Michigan's codification of the Uniform Anatomical Gift Act, and the right conferred therein on the next of kin to make the decision as to whether to donate body parts for transplant purposes, and the right to possess and prevent a mutilation of the dead body.⁵ Conversely, in this matter the retention of body organs, tissues, blood, and other specimens are being retained for scientific purposes directly related to the statutory duties of the coroner to determine the cause and manner of death.

Contrary to the arguments made by Respondents in the District Court, it is clear that the "aggregate of interests" that were present in *Brotherton* and *Whaley* simply do not exist in the present factual and statutory framework. *Brotherton* and *Whaley* are clearly distinguishable insofar as they involve a different statutory framework - the Uniform Anatomical Gift Act versus the various state laws regulating and empowering coroners in the present case. The *Brotherton* and *Whaley* decisions also involved a different type of interest - the taking of corneas for their donation or sale to private

⁵ There is no question that a coroner's removal and retention of body organs, tissues, blood, and other specimens for purposes of forensic testing does not constitute intentional mutilation.

persons versus organs and tissues removed and retained by coroners as part of their statutory duty to determine the manner and cause of death. For these reasons, this Court should reject Respondents' attempt to use the *Brotherton* and *Whaley* as establishing that a state law protected right is recognized under Ohio law.

F. The *Montgomery* Decision Limits the Holding of *Brotherton*.

The Sixth Circuit limited the holding in *Brotherton*, in *Montgomery v. County of Clinton, Michigan* (6th Cir. 1991), No. 90-1940, 1991 WL 153071 *unreported* (attached). In *Montgomery*, a mother brought a claim under § 1983 against the county medical examiner for performing a forensic autopsy on her deceased son without notifying her first. The Sixth Circuit affirmed the District Court's grant of summary judgment in favor of the county, stating that the unauthorized removal of corneas for transplantation to a third party was a completely different interest than what is involved in a statutorily mandated autopsy. The Court correctly stated:

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 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 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.** (Emphasis added.)

1991 WL 153071 at *2.

The Sixth Circuit's opinion in *Montgomery* turned on the difference in the language and purpose of the statutes at issue in that case as compared with *Brotherton*. The Court held that the autopsy statute did not create a right sufficient to maintain a procedural due process claim under § 1983. Similar to the statute in *Montgomery*, Ohio Revised Code § 313.131 leaves the decision as to whether to perform a forensic autopsy to the county coroner. It does not create an interest sufficient for a claim under §1983. In this regard, the case at bar is analogous to *Montgomery*.

G. The *Hainey* Decision Improperly Expanded the Holding Of *Brotherton*.

In 2005, the United States District Court for the Southern District of Ohio decided a case with facts basically identical to those raised by Plaintiffs in the instant matter.⁶ *Hainey v. Parrott* (S.D. Ohio 2005), No. 1:02-CV-733, 2005 WL 2397704, *unreported* (attached). In *Hainey*, a Section 1983 claim was brought against the Hamilton County Coroner based on the alleged violation of the next-of-kin's property rights in the organs of a decedent removed and retained for forensic examination. As in the present case, plaintiffs challenged the coroner's standard practice of removing brains for fixation in order to determine the cause of death without providing notice to the next-of-kin.

Unlike *Brotherton*, which relied upon the Uniform Anatomical Gift Act, the issue in *Hainey* implicated the coroner's statutory duty "to maintain custody of the deceased until he ascertains the cause of death or determines that the body is no longer necessary to assist him in the fulfillment of his duties... [and] the authority to retain the body parts or

⁶ As previously mentioned, the question certified in the instant matter was not certified to the Ohio Supreme Court in the *Hainey* case. See fn. 1, *supra*.

organs which he needs to determine the cause of death.” 2005 WL 2397704 at *4 (citing Ohio Rev. Code § 313.15).

The *Hainey* Court ignored the *Montgomery* decision and inexplicably turned to *Brotherton* as “the primary case on point.” 2005 WL 2397704 at *4. Despite this characterization, the Court went on to acknowledge significant factual differences between the two cases, stating:

The question is whether *Brotherton* is distinguishable from the facts of this case in any meaningful way. An important but not necessarily dispositive point of distinction is that **in the present case, the coroner’s decision to retain the deceased’s brain was determined to be forensically or scientifically necessary to determine the cause of death.** As noted above, this decision appears to be completely within the purview of the coroner. **In contrast, *Brotherton* involved what amounted to state-sanctioned grave robbing...It appears that the coroner’s policy of not notifying the next-of-kin that he had retained the brains of their decedents was motivated by nothing more than a desire to avoid inflicting additional unnecessary pain on Plaintiffs.** In any event, these differences in facts likely do not take this case outside the **broad** holding in *Brotherton* that there is a substantial and protectable constitutional interest in the dead body of a relative or loved one. (Emphasis added.)

Id. at *5. The *Hainey* Court completely disregarded the language in *Brotherton* emphasizing the dangers of the practice at issue in that case because of the potential for abuse of organ donation. *See, Brotherton*, 923 F.2d at 481 (“The recent explosion of research and information concerning biotechnology has created a market place in which human tissues are routinely sold to and by scientists, physicians and others.”). Moreover, the *Hainey* Court mischaracterized *Brotherton* by finding the holding to be “broad” and further ignored the decision in *Montgomery*.

Despite acknowledging the difference between removing a brain to determine the cause of death and taking corneas for organ donation for the private use and benefit of another, the *Hainey* Court inexplicably equated the two for purposes of determining whether the next-of-kin have a property interest in a decedent's organs. As the Court in *Everman* ruled, "The compelling interest of the state in determining the true cause of death...overrides the interest of relatives to immediate possession for burial." 54 Ohio App.3d at 122, 561 N.E.2d at 550. The governmental interest implicated in *Everman* and *Hainey*, that of using forensic autopsies to determine the true cause of death, is different from and clearly superior to the governmental interest of promoting organ donation, at issue in *Brotherton*. The factual circumstances of the *Hainey* case clearly placed it well outside the Sixth Circuit's ruling in *Brotherton*.

The *Hainey* court improperly expanded *Brotherton* to include situations where tissue and organs are removed and retained for additional forensic examination and testing. This expansion is unwarranted and completely unsupported by Ohio law.

Indeed, following the *Hainey* decision the Ohio General Assembly enacted R.C. §313.123, which expressly governs Ohio County Coroners' disposition of retained tissue and organs. R.C. §313.123 unequivocally removes any suggestion that Ohio law confers property rights in autopsy specimens to next-of-kin. This statute alone provides a sound basis for this Court to answer the certified question in the negative.

H. No Other Jurisdictions' Case Law Answers the Certified Question.

No other state or federal court across the country has dealt with this precise issue, except for the United States District Court in *Hainey*. A survey of cases from across the country shows that, while there are cases dealing with various issues concerning rights in

decedent's body, no case other than *Hainey* has found a protected interest in a decedent's tissues, organs, blood or other body parts that have been removed and retained by the coroner for forensic examination and testing. See, e.g., *Fuller v. Marx* (8th Cir. 1984), 724 F.2d 717 (stating the court knows "of no Arkansas cases which extend this quasi-property right to all of the body's organs . . ."); *Shults v. U.S.* (D. Kan. 1998), 995 F.Supp. 1270 (finding that organs taken and removed as part of an autopsy "has no compensable value" for purposes of an alleged conversion claim); *Colavito v. New York Organ Donor Network, Inc.* (2nd Cir. 2006), 438 F.3d 214 (involving an organ donee's protected interest in receiving a functioning organ); *Newman v. Sathyavaglswaran* (9th Cir. 2002), 287 F.3d 786, 796-797 (involving California's codification of the Uniform Anatomical Gift Act and holding that California affords parents "...property interests in the corneas of their deceased children protected by the Due Process Clause of the Fourteenth Amendment."); *Greenberg v. Miami Children's Hospital Research Institute, Inc.* (S.D. Fla. 2003), 264 F.Supp.2d 1064 (holding that "The Court finds that Florida statutory and common law do not provide a remedy for Plaintiffs' donations of body tissue and blood samples under a theory of conversion liability.").

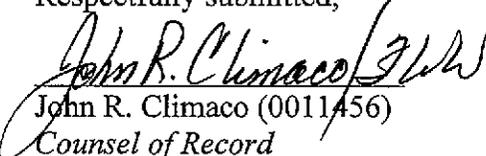
IV. CONCLUSION

For the foregoing reasons, Interested Party Cuyahoga County respectfully requests this Honorable Court answer the certified question thus:

The next of kin of a decedent, upon whom an autopsy has been performed, **do not 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.

Answering the question in the negative will protect not only the ability of county coroners to effectively execute their critically important police powers and statutory duties of performing forensic autopsies and determining cause of death, but will also secure the financial stability of 87 of the 88 Ohio counties.

Respectfully submitted,


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CERTIFICATE OF SERVICE

A copy of the foregoing has been sent via regular U.S. mail this 20th day of July,

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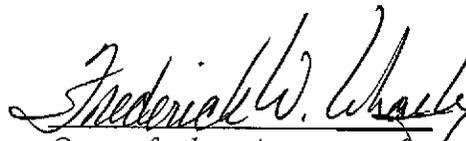
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APPENDIX

Not Reported in F.Supp.2d, 2005 WL 2397704 (S.D. Ohio)
(Cite as: Not Reported in F.Supp.2d)

C

Hainey v. Parrott
S.D. Ohio, 2005.

Only the Westlaw citation is currently available.

United States District Court, S.D. Ohio, Western
Division.

Kathy HAINNEY, et al., Plaintiffs,

v.

Carl L. PARROTT, et al., Defendants.

No. 1:02-CV-733.

Sept. 28, 2005.

John Henry Metz, Cincinnati, OH, for Plaintiffs.
David Todd Stevenson, Cincinnati, OH, Stephen
Kinnear Shaw, for Defendants.

ORDER

BECKWITH, Chief J.

*1 This matter is before the Court on cross-motions for summary judgment filed by Defendants Carl L. Parrot, *et al.* (Doc. No. 31) and Plaintiffs Kathy Hainey, *et al.* (Doc. No. 35). For the reasons set forth below, Defendants' motion for summary judgment is not well-taken and is DENIED; Plaintiffs' motion for summary judgment is well-taken and is GRANTED.

I. Background

This case presents difficult and emotional issues involving the coroner's statutory duty to perform autopsies, the retention of certain organs of the deceased for diagnostic purposes, Plaintiffs' wishes to recover all of the remains and bury their loved ones in as complete a state as the circumstances of death will permit, and whether Plaintiffs' constitutional rights were violated when the coroner's office retained and disposed of organs without notice to Plaintiffs.

The named Plaintiffs in this case and the class

members they represent each had family members who died under circumstances in which the Hamilton County Coroner decided pursuant to his statutory grant of authority and discretion that an autopsy was necessary to determine the cause of death. Plaintiffs do not quarrel with the coroner's determination that an autopsy of their decedent was necessary. In performing the autopsies at issue, the most common scenario involves the coroner removing the brain of the deceased for examination. In order to prepare the brain for examination and to obtain tissue samples, it must be "fixed" by immersing it in a solution of formaldehyde and salt. The fixing solution causes the brain tissue to solidify for dissection. The process, however, takes approximately two weeks for the fixing solution to properly set the brain. After tissue samples are taken and microscopic slides are prepared, the case is presented at an internal neuropathology conference comprised of deputy coroners where the cause of death is determined.

The process outlined above takes about three weeks to complete.^{FN1} In the interim and in the Plaintiffs' cases, the coroner's office completed the other necessary protocols of the autopsy promptly. This usually required two to three days. The organs which did not require fixing for forensic examination were re-sealed in the body cavity and the deceased's body was released to a funeral director. The coroner's office did not notify Plaintiffs, either prior to or at the time of the release of the deceased's body, that it would be retaining the brain of their decedent for further forensic examination. Nor did the coroner's office notify Plaintiffs when examination of the brain was complete so that they could, if they chose, recover the remains to be interred with the other remains of the decedent or for other disposition according to their wishes. It appears that the coroner's office disposed of the remainder of the brain tissue according to its normal procedures, although it should be noted that nothing in the present record suggests that the handling of the remains was

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anything less than respectful. Nevertheless, Plaintiffs believe that they have been deprived of a right to bury their loved ones in a complete-as-possible condition. The question in this case is whether this right rises to constitutional dimensions.

FN1. A similar protocol is required for examination of heart muscle and tissue. None of the named Plaintiffs' cases, however, involved fixing the deceased's heart.

*2 Plaintiffs' first amended complaint alleges that the Hamilton County Coroner's practice or policy of retaining and disposing of their decedents' body parts and/or organs once an autopsy has been completed without notice and an opportunity to reclaim said body parts or organs constitutes a deprivation of their property interests in their decedents' remains without due process of law. Plaintiffs filed suit on behalf of themselves and a class of similarly affected next-of-kin.^{FN2} Pursuant to 42 U.S.C. § 1983, Plaintiffs have sued Dr. Carl Parrott, both individually and in his official capacity as the Hamilton County Coroner, the Hamilton County Board of County Commissioners and the individual members thereof in their official capacities.

FN2. We use "next-of-kin" in a generic manner to indicate any one or more persons entitled to claim a decedent's body from the coroner's office.

On August 3, 2004, upon motion of the Plaintiffs, the Court certified a class consisting of "all beneficiaries and next-of-kin of decedents who have had their decedent's body parts and/or organs removed and retained by defendants without consent and/or in reckless disregard of whether there was any objection or refusal by said next-of-kin to allow such procedure and taking to occur." Doc. No. 20, at 11-12.

Following the close of discovery, the parties filed cross-motions for summary judgment. The motions

are now fully briefed and ready for disposition.

II. Summary Judgment Standard of Review

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The evidence presented on a motion for summary judgment is construed in the light most favorable to the non-moving party, who is given the benefit of all favorable inferences that can be drawn therefrom. *United States v. Diebold, Inc.*, 369 U.S. 654, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962). "The mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (emphasis in original). The Court will not grant summary judgment unless it is clear that a trial is unnecessary. The threshold inquiry to determine whether there is a need for trial is whether "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 250. There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. *Id.*

The fact that the weight of the evidence favors the moving party does not authorize a court to grant summary judgment. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 472, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962). "[T]he issue of material fact required by Rule 56(c) ... to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or a judge to resolve the parties' differing versions of the truth at trial." *First National Bank v. Cities Service Co.*, 391 U.S. 253, 288-89, 88 S.Ct. 1575, 20 L.Ed.2d

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569 (1968).

*3 Moreover, although summary judgment must be used with extreme caution since it operates to deny a litigant his day in court, *Smith v. Hudson*, 600 F.2d 60, 63 (6th Cir.), cert. dismissed, 444 U.S. 986, 100 S.Ct. 495, 62 L.Ed.2d 415 (1979), the United States Supreme Court has stated that the “[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to ‘secure the just, speedy and inexpensive determination of every action.’” *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). According to the Supreme Court, the standard for granting summary judgment mirrors the standard for a directed verdict, and thus summary judgment is appropriate if the moving party establishes that there is insufficient evidence favoring the non-moving party for a jury to return a verdict for that party. *Id.* at 323; *Anderson*, 477 U.S. at 250.

Accordingly, summary judgment is clearly proper “against a party who fails to make a showing sufficient to establish the existence of an element essential to the party’s case and on which that party will bear the burden of proof at trial.” *Celotex Corp.*, 477 U.S. at 322. Significantly, the Supreme Court also instructs that the “the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion” against a party who fails to make that showing with significantly probative evidence. *Id.*; *Anderson*, 477 U.S. at 250. Rule 56(e) requires the non-moving party to go beyond the pleadings and designate “specific facts showing that there is a genuine issue for trial.” *Id.*

Further, there is no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or similar materials negating the opponent’s claim. *Id.* Rule 56(a) and (b) provide that parties may move for summary judgment “with or without supporting affidavits.” Accordingly, where the non-moving party will bear the burden of proof at trial on a dispositive issue, summary judgment may be appropriate based solely on the pleadings, depositions, answers to interrogatories,

and admissions on file.

III. Analysis

A. The Property Interest at Issue

As stated, Plaintiffs claim that the coroner’s policy of retaining their decedents’ organs and then disposing of them without notice deprived Plaintiffs of their property interest in the remains of their decedents without due process of law. A potentially dispositive threshold issue is whether Plaintiffs have any constitutionally cognizable interest in the remains of their decedents.

Property interests are not found in the Constitution, but rather are created by state law. *Whaley v. County of Tuscola*, 58 F.3d 1111, 1113-14 (6th Cir.1995). Although state law determines whether the property interest exists, federal constitutional law determines whether that interest is protected by the due process clause. *Id.* at 1114. Plaintiffs contend that *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir.1991), conclusively establishes that they have a constitutionally protected property interest in the remains of their decedents, including the body parts and organs. Defendants argue that *Brotherton* is distinguishable and that in fulfilling his statutory duties in determining the cause of death, under state law, the coroner’s interest in Plaintiffs’ decedents’ body parts is superior to Plaintiffs’ interests. Therefore, Defendants contend, under the circumstances of this case, Plaintiffs do not have any constitutionally protected interest in the organs retained for autopsy.

*4 Before beginning the actual analysis of Plaintiffs’ claimed property interest, a few preliminary observations are in order. First, Plaintiffs do not claim that the coroner violated their constitutional rights by performing autopsies on their decedents. State law clearly gives the coroner complete discretion in deciding when an autopsy is necessary, with or without the next-of-kin’s consent. See Ohio Rev.Code § 313.13(A); Ohio Rev.Code § 313.131(B); *Everman v. Davis*, 54 Ohio App.3d 119, 561 N.E.2d 547, 550 (Ohio Ct.App.1989).^{FN3}

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Second, Plaintiffs do not claim that the coroner was not authorized to remove and retain their decedents' brains for purposes of determining the cause of death. State law also clearly authorizes the coroner to maintain custody of the deceased until he ascertains the cause of death or determines that the body is no longer necessary to assist him in the fulfillment of his duties. See Ohio Rev.Code § 313.15. By implication, § 313.15 also gives the coroner the authority to retain the body parts or organs which he needs to determine the cause of death. Rather, Plaintiffs contend that the coroner should have advised them that it was necessary to retain the brains of their decedents for purposes of performing the autopsy and that upon completion of the autopsy, the coroner should have notified them so that they could have retrieved the remains and interred them according to their wishes. Alternatively, Plaintiffs contend that with prior notice from the coroner, they could have decided to delay the recovery of their decedents' remains until the autopsy was finished, so that the remains could be restored as completely as possible before interment. Nevertheless, Plaintiffs claim that the coroner's policy of not giving them any notice whatever regarding the retention and disposal of their decedents' brains deprived them of their property interest in their decedents' remains without due process of law.

FN3. An exception, not relevant here, is when the coroner is advised or has reason to believe that an autopsy is contrary to the deceased's religious beliefs. Ohio Rev.Code §§ 313.131(B) & (C). In such a case, the coroner must delay the autopsy for forty-eight hours to give the deceased's friend or relative an opportunity to file suit to enjoin the autopsy.

The primary case on point is *Brotherton*. *Brotherton* also involved the Hamilton County Coroner's office. In that case, state law authorized the coroner to remove the corneas of autopsy subjects without specific consent provided he had no knowledge of any objection by the deceased or the deceased's spouse or next of kin. Apparently in order to fulfill the purpose of the statute in obtaining corneas for

use as anatomical gifts, the coroner adopted a policy of deliberate indifference wherein no effort was made to determine whether there were any objections to the removal of the deceased's corneas. *Brotherton*, 923 F.2d at 482. It appears that it was the policy of the coroner not to cooperate with the local eye bank in determining whether there were objections to removal of the corneas. See *Brotherton v. Cleveland*, 173 F.3d 552, 556 (6th Cir.1999). The plaintiffs in *Brotherton* did not discover that their decedents' corneas had been removed until they read the autopsy reports. Subsequently, they sued the coroner and other state and county officials under § 1983 for deprivation of the property interests in their decedents' body parts without due process. In determining whether plaintiffs had a constitutionally protected property interest in the remains of their decedents, the Court in *Brotherton* studied earlier opinions by Ohio appellate courts as well as decisions by other jurisdictions. This survey of earlier cases persuaded the Court that the plaintiffs did have a constitutionally protected interest in their decedents:
*5 Although extremely regulated, in sum, these rights form a substantial interest in the dead body, regardless of Ohio's classification of that interest. We hold the aggregate of rights granted by the state of Ohio to Deborah Brotherton rises to the level of a "legitimate claim of entitlement" in Steven Brotherton's body, including his corneas, protected by the due process clause of the fourteenth amendment.

Brotherton, 923 F.2d at 482. The *Brotherton* Court also concluded that the defendants failed to provide the plaintiffs with the necessary predeprivation due process which would have only minimally burdened the state's interest in implementing the organ donation program. *Id.*

At first blush, the holding in *Brotherton* appears to establish a property interest in the decedent's remains in a very broad fashion. The question is whether *Brotherton* is distinguishable from the facts of this case in any meaningful way. An important but not necessarily dispositive point of distinction is that in the present case, the coroner's decision to retain the deceased's brain was determined to be forensically or scientifically necessary to determine

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the cause of death. As noted above, this decision appears to be completely within the purview of the coroner. In contrast, *Brotherton* involved what amounted to state-sanctioned grave robbing. Additionally, because of the time required to fix the brain for proper forensic examination, the coroner was in the unenviable position of having to either: a) advise grieving next-of-kin that he would not release the body of their relative for several weeks, thereby prolonging and perhaps exacerbating the mourning and grieving process for persons already distraught because their relative died under circumstances requiring an autopsy; or b) releasing the body to the next-of-kin and then, following completion of the neuropathology conference, performing the somewhat gruesome task of informing them that their decedent's brain was available for recovery if they so desired.^{FN4} It appears that the coroner's policy of not notifying the next-of-kin that he had retained the brains of their decedents was motivated by nothing more than a desire to avoid inflicting additional unnecessary pain on Plaintiffs.^{FN5}

FN4. In a case with similar facts, but not presenting federal constitutional questions, a California court of appeals stated with regard to returning removed organs to the next-of-kin following an autopsy: "Their return to the plaintiff (if such were possible) after having served their purpose in aiding in the determination of the cause of death, could have caused her only embarrassment, and, perhaps, horror[.]" *Gray v. Southern Pac. Co.*, 21 Cal.App.2d 240, 68 P.2d 1011, 1015 (Cal.Ct.App.1937).

FN5. As a result of the filing of this lawsuit, the coroner's office has in fact begun notifying the next-of-kin when it must retain organs for examination. Testimony from the deputy coroners shows that in many cases, the next-of-kin would rather not know that the coroner had retained organs of their decedent.

In any event, these differences in facts likely to do

not take this case outside the broad holding in *Brotherton* that there is a substantial and protectable constitutional interest in the dead body of a relative or loved one. It is true, as Defendants correctly observe, that state law gives the coroner virtually unfettered discretion to decide when and how to perform an autopsy and to retain the body, perhaps indefinitely, if needed to determine the cause of death. On the other hand, the same statutory provisions which vest the coroner with his authority also give the deceased's next of kin the right of ultimate disposition of the body. See Ohio Rev.Code § 313.14 ("The next of kin, other relatives, or friends of the deceased person, in the order named, shall have prior right as to disposition of the body of such deceased person."); see also *Everman*, 561 N.E.2d at 550 (recognizing that § 313.14 creates a "possessory right of a spouse or other appropriate member of the family to the body of the deceased person for the purpose of preparation, mourning, and burial."). Supplementing § 313.14, the *Everman* decision, and the cases cited by the Court in *Brotherton*, are two very early Ohio cases which recognize a spousal right of "decent sepulture," or, in other words, the right to give his or her spouse a decent burial. See *McClellan v. Filson*, 44 Ohio St. 184, 5 N.E. 861, 862 (Ohio 1886); *Farley v. Carson*, 8 Ohio Dec. Reprint 119 (Ohio Dist.Ct.1880)(also available at 1880 WL 6831). Thus, Ohio law shows that the next of kin have a substantial interest in the bodies of their decedents for final disposition or burial.

*6 Although it is a given that of necessity tissue and fluids will be destroyed a result of performing the autopsy, the right to take possession of what remains of the deceased's body following the completion of the autopsy in no way conflicts with the coroner's admittedly superior prior interest to take custody of the body and complete what procedures are necessary to determine the cause of death. The right and duty of the coroner to perform the autopsy can co-existent with the right to possess what is left of the remains following the autopsy for preparation, mourning, and burial. In practical terms, however, in future cases this may mean that where examination of the brain is required to determine the cause of death, the coroner will simply exercise his statutory authority under §

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313.15 to retain the entire body for the several weeks it takes to complete fixation and analysis. Whether this a desirable outcome of this litigation is a different question, but in light of state law, such a decision or policy seemingly would not be an infringement on any property interests of the next-of-kin.

Accordingly, the Court concludes that Plaintiffs do have a cognizable constitutional property interest in their decedent's body parts which the coroner's office violated when it disposed of their decedents' brains without prior notice. Therefore, Defendants' motion for summary judgment on this issue is not well-taken and is DENIED; Plaintiffs' motion for summary judgment on this issue is well-taken and is GRANTED.

B. Eleventh Amendment Immunity

Defendants next argue that they are immune from suit under the Eleventh Amendment because the coroner is mandated to follow state law in carrying out his duties. Thus, Defendants argue, the coroner is deemed to be a state actor and is entitled to the immunities provided by the Eleventh Amendment.

A county official who is sued for complying with the mandates of state law is entitled to Eleventh Amendment sovereign immunity. *Gottfried v. Medical Planning Serv., Inc.*, 280 F.3d 684, 692 (6th Cir.2002); *Brotherton v. Cleveland*, 173 F.3d 552, 566 (6th Cir.1999). In *Brotherton*, the Court indicated, however, that where state law provides authority to perform an action, but does not dictate a method of performance, the municipal actor is not entitled to Eleventh Amendment immunity. See *Brotherton*, 199 F.3d at 567 ("Ohio law allowed Dr. Cleveland to harvest corneas in the course of his actions as a county coroner, but it did not dictate a method."). Defendants' argument may be correct insofar as it concerns the coroner's responsibilities to determine when an autopsy is necessary and how it should be performed. This logic may also extend to decisions related to what organs to retain for purposes of determining the cause of death and how long to retain them, as well as decisions related to when to release the decedent's body to the family

members. *But see Brotherton*, 199 F.3d at 563 ("[I]n his daily operations, the Hamilton County Coroner acts as an agent of Hamilton County, and not the State of Ohio."). As stated above, however, Plaintiffs do not contest the coroner's authority to make those decisions, nor do they contend in this case that the coroner violated any constitutional right in the context of making those decisions. Rather, Plaintiffs simply claim that they had a constitutional right to be notified by the coroner when he no longer needed the organs to ascertain the cause of death so that they could control the disposition of the remains.

*7 The Court's research has not discovered any state authority which mandates the coroner's actions with regard to disposition of bodies in his custody, at least insofar as it would preclude the return of retained organs to the decedent's family or friends. To the contrary, as stated above, Ohio Rev.Code § 313.14 specifically directs the coroner to release the decedent's body to the next of kin. This section reasonably may be interpreted to include requiring the return of the decedent's body parts as well. The Court does note that Ohio Rev.Code § 3734.01(R) defines "infectious waste" as, *inter alia*, "Pathological wastes, including, without limitation, human and animal tissues, organs, and body parts, and body fluids and excreta ... removed or obtained during surgery or autopsy or for diagnostic evaluation[.]" The Court further notes that Ohio has enacted an entire regulatory scheme for the disposal of solid and hazardous wastes. See generally Ohio Rev.Code Chapter 3734. Nonetheless, the Court does not believe that anything in the hazardous waste statutes limits the coroner's discretion to return the decedent's body parts to the family members. If they did, it would seem unlikely that the coroner would be permitted to return organs that do not requiring fixing to the body cavity prior to releasing the body to the family, as is the current practice. Additionally, the Court observes that Ohio has enacted a statute which specifically governs the cremation of body parts. See Ohio Rev.Code § 4717.25. Therefore, it does not appear that the hazardous waste disposal provisions mandate the coroner's actions with regard to disposition of retained body parts because he could, at a minimum, release the body part to a funeral home

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or crematorium of the family's choice for disposition according to § 4717.25.

The Court finds that under the circumstances of this case, the coroner, in retaining and disposing of the brains of Plaintiffs' decedents without notice, was not acting as a state actor because state law did not mandate the manner in which disposition of the body parts was to be accomplished. Moreover, state law did not prohibit the coroner from giving Plaintiffs notice of his intent to dispose of the decedents' brains. Accordingly, the Court concludes that the County Defendants are not entitled to Eleventh Amendment immunity.

C. Qualified Immunity

Defendant Parrott argues that he is entitled to qualified immunity in his personal capacity because his conduct did not violate a clearly established constitutional right of which a reasonable official would have known.

A public official is entitled to qualified immunity, and thus shielded from suit under § 1983, for his actions if his conduct does not violate a clearly established statutory or constitutional right of which a reasonable official would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). The contours of the right must be sufficiently clear that a reasonable official would understand that what he was doing violates that right. *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). The official, however, is only entitled to qualified immunity for actions taken in objective good faith within the scope of his duties. *Id.* at 849 fn.34.

*8 Determining a public official's entitlement to qualified immunity presents a two-step inquiry. First, the court must determine, judged in the light most favorable to the party asserting the injury, whether the facts alleged show that the officer's conduct violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). If no constitutional right would have been violated on the facts alleged, the inquiry stops and the officer will be entitled to qualified

immunity. *Id.* If a violation can be made out based on a favorable view of the pleadings, the court must determine whether the right at stake was clearly established. *Id.*

In determining whether a constitutional right is clearly established, the court must first look to decisions of the U.S. Supreme Court, then to decisions of the Sixth Circuit, and, finally, to decisions of other circuits. *Walton v. City of Southfield*, 995 F.2d 1331, 1336 (6th Cir.1993) (citing *Daugherty v. Campbell*, 935 F.2d 780, 784 (6th Cir.1991)). It is only the extraordinary case that will require a reviewing court to look beyond Supreme Court and Sixth Circuit decisions. *Id.* The questions of whether the right alleged to have been violated is clearly established and whether the official reasonably could have believed that his conduct was consistent with the right the plaintiff claims was violated, are ones of law for the court. *Id.* However, if genuine issues of material fact exist as to whether the official committed the acts that would violate a clearly established right, then summary judgment is improper. *Id.*; see also *Jackson v. Hoylman*, 933 F.2d 401, 403 (6th Cir.1991) (affirming district court's denial of summary judgment on the issue of qualified immunity where the parties' factual account of the incident differed).

Based on the above standard, the Court concludes that Dr. Parrott is not entitled to qualified immunity. There is no dispute in this case that the coroner's office retained and then disposed of Plaintiffs' decedents' brains without any notice to Plaintiffs. As explained above in Part III.A, Plaintiffs have established uncontested facts which demonstrate that Defendants violated their constitutional right to receive notice prior to the disposal of their decedent's body parts. The Court also finds that this right was clearly established at the time the coroner's office committed the acts in question here. As the Court stated above, *supra*, at 10-15, in 1991, *Brotherton* very broadly and very clearly held that family members have a property interest in their decedent's body parts which is protected by the due process clause of the Fourteenth Amendment. Finally, a reasonable coroner in this judicial circuit would have known that disposing of body parts

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without notice to the decedent's next of kin would have violated that right. That seems especially true where, as Plaintiffs observe, this same coroner's office was involved in the case that established the right at stake here.

*9 Dr. Parrott argues that he was only acting under the compulsion of state statutes which Plaintiffs do not allege are unconstitutional. As explained above, however, the statutes which establish the coroner's duties and authority do not mandate or otherwise restrict his discretion in providing notice to family members prior to disposition of bodies or body parts in his custody. Therefore, this argument does not establish Dr. Parrott's entitlement to qualified immunity.

Accordingly, the Court concludes that Dr. Parrott is not entitled to qualified immunity.

E. Quasi Judicial Immunity

Dr. Parrot next argues that he is entitled to quasi-judicial immunity because the actions complained of arose out of the performance of his statutory duties to determine the cause of the death of the decedents. Under Ohio law, determination of the cause of death by the coroner is deemed to be a quasi-judicial act. *Everman*, 561 N.E.2d at 549.

Absolute judicial immunity extends to non-judicial officials who perform quasi-judicial duties. *Bush v. Rauch*, 38 F.3d 842, 847 (6th Cir.1994). A quasi-judicial duty is one which is so integral or intertwined with the judicial process that the person who performs it is considered an arm of the judicial officer who is immune. *Id.* However, quasi-judicial immunity is not available for the performance of purely administrative tasks. *Forrester v. White*, 484 U.S. 219, 229, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988).

Assuming without deciding that for purposes of federal law the actual performance of an autopsy by the coroner is a quasi-judicial act, the Court finds that the release of the body to the next-of-kin is purely an administrative task. As indicated above, while the coroner's authority to decide when and

how to perform an autopsy appears to be absolute, state law also commands that he retain the body for only as long as it takes to determine the cause of death. Ohio Rev.Code § 313.15. Once the coroner makes that decision, whenever that may be, he has fulfilled the alleged quasi-judicial aspect of his duties. The release of the body to the next of kin, although commanded by state law, does not fulfill any judicial purpose. For lack of a more artful analogy, this task is simply a return of property in the coroner's custody to its rightful owner. Therefore, this task of releasing the deceased's body to the next of kin can be regarded as no more than a purely administrative duty.

Accordingly, the Court concludes that Dr. Parrott is not entitled to quasi-judicial immunity.

F. Adequacy of Post-Deprivation Remedies

Defendants next argue that, assuming that Plaintiffs have established a constitutionally protected property interest in their decedents' body parts, state law post-deprivation remedies are adequate to redress the injuries. Despite this contention, where predeprivation notice is feasible, the existence of adequate state law post-deprivation remedies is irrelevant. *Moore v. Board of Ed. of Johnson City Sch.*, 134 F.3d 781, 785 (6th Cir.1998); *Harris v. City of Akron*, 20 F.3d 1396, 1401-02 (6th Cir.1994). In this case, as illustrated by the fact that the coroner's office now contacts the next of kin prior to the disposing of retained organs, it was entirely feasible to give predeprivation notice to Plaintiffs. Accordingly, the Court need not consider whether a state law replevin action is sufficient to redress Plaintiffs' injuries.

G. The Hamilton County Commissioners

*10 The Hamilton County Commissioner Defendants move for summary judgment on the grounds that they do not direct or control the activities of the Hamilton County Coroner's Office. The suit against the County Commissioners in their official capacities is really a lawsuit against Hamilton County. *Kentucky v. Graham*, 473 U.S.

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159, 166, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985). A municipality may only be held liable for a constitutional deprivation under § 1983 if the deprivation was the result of an official policy or custom. *Monell v. Department of Social Services*, 436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). However, a municipality may not be held liable for a § 1983 violation under a theory of respondeat superior. *Id.* at 691. Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell* unless proof of the incident includes proof that it was caused by an existing, unconstitutional policy, which policy can be attributed to a policy maker. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985). A policy is a deliberate choice to follow a course of action made from among various alternatives by the official or officials responsible for establishing formal policy with respect to the subject matter in question. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986).

Although the coroner's office may be autonomous in terms of oversight from Hamilton County and the Hamilton County Commissioners, that fact does not prevent the County from being liable for the coroner's actions. *Brotherton*, 173 F.3d at 563. Municipal liability may be imposed where the decisionmaker has final authority to establish municipal policy with respect to the action ordered. *Pembaur*, 475 U.S. at 481-83. In this case, the Coroner's Office is an agency of the County and the coroner, as the official responsible for the morgue, obviously has the authority to establish policy on behalf the County with respect to the operation of the morgue. See Ohio Rev.Code § 313.08(A) ("In counties in which a county morgue is maintained, the coroner shall be the official custodian of the morgue."). Therefore, the County Commissioners as representatives of Hamilton County may be held liable in their official capacities for the actions of the coroner.

Accordingly, the County Defendants' motion for summary judgment is not well-taken and is DENIED.

H. Statute of Limitations

In their reply brief, Defendants argue that at least some of the Plaintiffs' claims are barred by the two year statute of limitations in Ohio for § 1983 claims. *Browning v. Pendleton*, 869 F.2d 989, 992 (6th Cir.1989). Defendants argue that any claims arising out of autopsies which were performed more than two years prior to the filing of this lawsuit are barred.

Under § 1983, a cause of action accrues when the plaintiff knows or has reason to know of his or her injury. *Sevier v. Turner*, 742 F.2d 262, 273 (6th Cir.1984). A plaintiff has reason to know of his or her injury when it could have been discovered through the exercise of reasonable diligence. *Id.* Defendants do not identify any particular named Plaintiff whose claim they believe is barred by the statute of limitations for failure to exercise due diligence in discovering the claim. Therefore, whether any named Plaintiff's claim is barred by the discovery rule is not properly before the Court and cannot be resolved at this time.

*11 Defendants appear to argue that Plaintiffs should have been on notice that the coroner had retained their decedents' brains because of the very nature of an autopsy. Thus, Defendants apparently contend that the date of autopsy establishes a bright line rule for commencing the limitations period. The Court rejects this argument, however.

While the average person would understand that an autopsy most likely involves some examination of the deceased's brain, and that there would likely be some destruction of tissue, he or she likely would not know that the brain cannot be immediately examined by the pathologist and that it takes several weeks to prepare the brain for examination. In all candor, the Court was certainly unaware of these facts prior to the filing of this lawsuit. Lay persons generally do not have a grasp of this type of esoteric medical and scientific process. Therefore, the Court concludes that the mere knowledge that an autopsy was performed on the decedent is insufficient to put a class member on notice that the coroner's office had retained his or her decedent's brain for purposes of commencing the running of the statute of

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limitations period.

Whether the absent class members were on notice of their claims also presents individual factual issues which cannot be resolved properly at the present time. How the statute of limitations affects the claims of the class members does not affect resolution of the motion for summary judgment, although a proliferation of individual issues on this topic could affect the issue of continuing this matter as a class action.

Accordingly, Defendants' motion for summary judgment on statute of limitations grounds is not well-taken and is DENIED.

Conclusion

The Court concludes that Plaintiffs have a constitutionally recognized property interest in their decedent's brains of which the Defendant deprived them without due process of law. Accordingly, the Court finds that Defendants' motion for summary judgment is not well-taken and is DENIED; Plaintiffs' motion for summary judgment is well-taken and is GRANTED.

IT IS SO ORDERED

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(Cite as: 940 F.2d 661)

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Montgomery v. County of Clinton, Mich.
C.A.6 (Mich.),1991.

NOTICE: THIS IS AN UNPUBLISHED
OPINION.(The Court's decision is referenced in a
"Table of Decisions Without Reported Opinions"
appearing in the Federal Reporter. Use FI CTA6
Rule 28 and FI CTA6 IOP 206 for rules regarding
the citation of unpublished opinions.)

United States Court of Appeals, Sixth Circuit.
Joan MONTGOMERY, Plaintiffs-Appellants,

v.

COUNTY OF CLINTON, MICHIGAN, et al.
Defendants-Appellees.

No. 90-1940.

Aug. 9, 1991.

On Appeal from the United States District Court for
the Western District of Michigan, No. 89-50002;
Robert Holmes Bell, J.
W.D.Mich., 743 F.Supp. 1253.

AFFIRMED.

Before MERRITT, Chief Judge, BOGGS, Circuit
Judge, and HULL, District Judge.^{FN*}

MERRITT, Chief Judge.

*1 In this case involving a high-speed chase by
police, a sixteen year old boy, Sannie Montgomery,
wrecked his car and was killed. The pursuit by the
police began when the Montgomery boy, speeding
past police on a rural Michigan road, tried to elude
police rather than stop when the police, coming
from behind him, activated their overhead lights.
A second police car joined the chase, tried
unsuccessfully to block one lane of the road, and
then ran into a ditch. Several miles later Sannie
Montgomery lost control of his car and ran into a
utility pole.

When Sannie Montgomery was pronounced dead at

the scene, the medical examiner ordered an autopsy.
The boy's parents were notified immediately of his
death but apparently were not notified of the
autopsy order. The county medical examiner acted
under the authority of Michigan law, M.C.L. §
52.202, which requires investigation of violent
deaths. The medical examiner is to use diligent
effort to notify the next of kin but may order the
autopsy whether or not the next of kin consents.
See M.C.L. § 52.205(4).

The parents of Sannie Montgomery brought two
sets of claims under 42 U.S.C. § 1983. They
asserted that the high speed chase constituted
excessive use of force which led to an unreasonable
seizure and a deprivation of life without substantive
due process. The plaintiffs brought these claims
first against the officers and second against the
county and the sheriff, under the theory that the
officers' training was so deficient as to constitute
deliberate indifference on the part of the county and
the sheriff.

Sannie Montgomery's mother, who is Jewish,
brought a second set of claims. She asserted that
the autopsy, done without notice or consent,
infringed her right under the first amendment freely
to exercise her religion. She asserted also that the
autopsy was not necessary because the cause of
death was not in question. At oral argument
plaintiff appeared to be asserting a procedural due
process claim based on Michigan's statutory
requirement that the medical examiner use diligent
effort to notify the next of kin of the decision to
perform an autopsy.

The District Court granted summary judgment on
all claims. The Court noted first that a claim
asserting that excessive force resulted in a seizure is
to be analyzed under the fourth amendment, not
under a due process approach. The District Court
relied on *Graham v. Conner*, 490 U.S. 386 (1989),
for this proposition. Proceeding with the fourth
amendment analysis, the Court declared there had

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been no seizure because there was no "governmentally caused termination of an individual's freedom of movement ... *through means intentionally applied.*" Jt.App. at 31-32, quoting *Browyer v. County of Inyo*, 489 U.S. 593, 596-97 (1989). The District Court went on to say that although it was unnecessary to assess the reasonableness of the police action under a fourth amendment analysis because there was no seizure, the high-speed pursuit on primarily rural roads was not unreasonable. Jt.App. at 33, relying on *Galas v. McKee*, 801 F.2d 200 (6th Cir.1986). Because no fourth amendment violation occurred, claims against the county and the sheriff were held to be moot.

*2 From the evidence supplied by both parties, including affidavits from religious scholars, the District Court concluded that an autopsy authorized by state law in a case of violent or accidental death and for the purpose of determining the cause of death was not actually contrary to the tenets of Joan Montgomery's faith. The Court nevertheless noted that her beliefs were entitled to respect and that the Court should not question her interpretation of these requirements. The Court held, however, that a religion-neutral law that had the effect of burdening religious practice could be justified by a reasonable relation to a legitimate governmental objective. The Court declared that the Michigan statute clearly had a reasonable relation to the state interest in knowing the cause of death in cases of violent or accidental deaths. The District Court cited *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 110 S.Ct. 1595 (1990), for this less stringent test when religion-neutral laws were at issue.

We affirm the District Court's grant of summary judgment as to both sets of claims. The Court's holding as to the fourth amendment claims is directly within current Sixth Circuit and United States Supreme Court precedent, and the District Court's opinion is clear and well reasoned. The Court's ruling is further strengthened by a recent Supreme Court case, *California v. Hodari*, 111 S.Ct. 1547 (1991), which held that a show of authority to which the subject does not yield does not constitute a seizure. Even if *Graham v.*

Connor, 490 U.S. 386 (1989), did not foreclose the plaintiffs' due process claim in relation to the high speed chase, the plaintiffs' due process complaint would not rise to the level required by *Rochin v. California*, 342 U.S. 165 (1952). The complaint is not founded on police conduct "that shocks the conscience." *Id.* at 172.

We also affirm the District Court's order as to the second set of claims. We are inclined to believe, however, that the plaintiff did not carry her burden in establishing the free exercise violation so as to require a balancing of interests. The proof does not establish that plaintiff's religion forbids autopsies but rather appears to allow them in these circumstances. Moreover, even if such an autopsy is inconsistent with plaintiff's religious practices, the District Court did not err in analyzing the state's superior interest.

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. The plaintiffs did not bring a pendent state law claim based on violation of the state statute. We were advised at oral argument that they have another case pending in state court raising state law claims. Thus we are not asked to determine whether any liability arose simply from a violation of the state statute. Plaintiffs' relief, if any, must come in the state court.

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*3 The judgment of the District Court is affirmed.

FN* The Honorable Thomas G. Hull,
Chief Judge for the United States District
Court for the Eastern District of
Tennessee, sitting by designation.

C.A.6 (Mich.), 1991.
Montgomery v. County of Clinton, Mich.
940 F.2d 661, 1991 WL 153071 (C.A.6 (Mich.))

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