

IN THE SUPREME COURT OF OHIO

Brian Treon, M.D., et. al.,

Petitioners-Defendants,

Case No. 07 - 0507

v.

On Certified Question of State Law
From Federal Court

Mark Albrecht, et. al.,

Respondents-Plaintiffs.

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Commissioners and Franklin County Coroner In Support of
Petitioners-Defendants**

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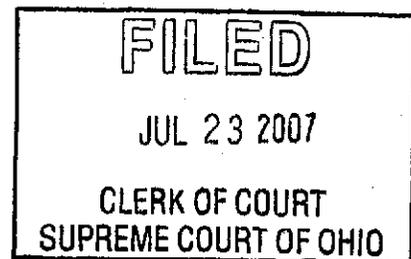
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I. INTRODUCTION

The question before the Court is:

Whether the next of kin of a decedent, upon whom an autopsy has been performed, have a protected right under Ohio law in the decedent's tissues, organs, blood or other body parts that have been removed and retained by the coroner for forensic examination and testing.

The question owes its genesis to the Complaint filed in *Albrecht v. Treon*, S.D. Ohio Case No. 1:06 CV 00274, wherein Respondents-Plaintiffs, (hereinafter "Respondents") allege an entitlement to damages under 42 U.S.C. § 1983 for "loss of property" when the Clermont County Coroner retained decedent's brain while performing an autopsy. (Compl. ¶¶ 11, 35-37, 41, 45.) The Complaint further alleges that "[t]he determination as to the existence of a property interest, as a practical matter, puts the whole panoply due process rights and obligations into play for all members of defendant class." (Compl. ¶ 33.) As a result, Respondents' action centers on whether or not a third party, in this case decedent's parents, are vested with a property right in the body, and parts thereof, of another.

Petitioners-Defendants, (hereinafter "Petitioners"), and Amicus, urge the court to definitively state that Ohio does not recognize an enforceable property interest in the body, or its parts, of another. It must be emphasized, the claims herein are separate and distinct from a claim that there has been an infringement of Respondent's limited interest to prepare, mourn and bury their deceased. Respondents own Complaint alleges they received the benefit of this limited interest, having had the opportunity to bury (and presumably to also mourn) their deceased. (Compl. ¶ 40.) Distinguishing between these interests and the question before the Court is imperative. Doing so, and in context with the moral and common law foundations which surround this rather macabre, though

novel discussion, provides the proper context for evaluation of the question before the Court.

II. ARGUMENT

A. **History and tradition do not support finding that a third party enjoys a property right in the body, or its parts, of another.**

A review of history and of the common law interests in dead bodies helps appreciate and understand the distinction of issues and serves to guide the Court's decision herein. There can hardly be any dispute that mankind has, even since pre-historic times, placed a fair degree of emphasis on protecting the dignity of the body of the deceased. Ceremonial burial of the deceased is indeed a time honored and ancient tradition recognizable to archeologists and historians. Over time, of course, the laws of our various civilizations have had occasion to contemplate the nature of this tradition from a legal perspective. Operating from a traditional understanding that the *dead person* enjoys a right to be buried, history confirms the *survivors* were under a consequent *duty* to see to it that the deceased was interred. In ancient Rome, for example,

the charge of burial was first placed upon the person to whom it was delegated by the deceased; second, upon the *scripti haeredes* (to whom the property was given), and if none, then upon the *haeredes legitimi* or *cognati* in order ... The heirs might be compelled to comply with the provisions of the will in regard to burial."

Pierce v. Proprietors of Swan Point Cemetery (1873), 10 R.I. 227, 235-36.

Likewise,

In 17th century England, and in much of Europe, duties to bury the dead and protect the dignified disposition of the body, described as flowing from a "right of burial, ... a person's right to be buried," were borne primarily by churches, which had a duty to bury the bodies of those residing in their parishes. These duties, and the explanation of their genesis in the rights of the dead, carried over into New England colonial practice where "in many parts ... the parish system prevailed, and every

family was considered to have a right of burial in the churchyard of the parish in which they lived.”

The Roman practice of including duties to protect the body of the dead in civil law had no parallel in the early English common law because burials were matters of ecclesiastical cognizance. Thus, Blackstone explained that “though the heir has a property [interest] in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any suit or action against such as indecently, at least, if not injuriously, violate and disturb their remains, when dead and buried.”

Newman v. Sathyavaglswaran (2002), 287 F.3d 786, 790-91 (9th Cir.) (internal citations omitted).

The *Newman* court recounts, in *Rex v. Stewart* (1840), 12 AD. & E. 773, the court considered whether the hospital where a pauper had died or the parish in which she was to be buried had the duty to carry the body to the grave. *Newman* 287 F.3d at 791. While the *Rex* court had “extreme difficulty” basing their ultimate holding in principles of law, it did indeed find – in holding it was the duty of the hospital to carry the body – that “every person ... has a right to [a religious] burial ... that implies the right to be carried from the place where his body lies to the parish cemetery.” *Newman* 287, F.3d at 791 (quoting *Rex*, 12 AD. & E at 776-78.)

Most American courts have held fast to Blackstone’s holding that a dead body is not the subject of a property right. *Newman*, 287 F.3d at 791 (Citing, *Bessemer Land & Improv. Co. v. Jenkins* (1895), 111 Ala. 135.) Instead, “the duty to protect the body by providing a burial was often described as flowing from the ‘universal ... right of sepulture,’ rather than from a concept of property law.” *Newman*, 287 F.3d 791 (Citing, *Wynkoop v. Wynkoop* (1862), 42 Pa. 293, 300-01.) Indeed, far from being the property of a third party, one’s own body was not considered one’s own property and could not properly be part of one’s estate, nor could it be disposed of by will. *Newman*, 287 F.3d at

793 (citing, *Enos v. Snyder* (1900), 131 Cal. 68, 63 P. 170). Likewise, a next of kin cannot inherit a dead body. *Hadsell v. Hadsell* (1893), 3 Ohio Cir. Dec. 725 (3rd Cir.).

In any event, a review of the history surrounding interest in dead bodies reveals third parties have traditionally been subject to various *duties* regarding decedents and have themselves no particular “rights” in the matter, much less a property interest. Over time, however, there has been some recognition that next of kin maintain some limited interests with respect to the treatment of their dead loved ones, albeit that those interests stem from the rights suggested to be held by the dead themselves, even though “strictly speaking ... a dead man cannot be said to have rights.” *Pierce*, 10 R.I. at 239.

B. Ohio Law is not inclined to recognize a property right held by a third party in the body, or its parts, of another.

Ohio law is in accord with this history and follows Blackstone’s view that a dead body is not the subject of an enforceable property right held in another. By answering the certified question in the negative, that Ohio does not afford next of kin a property right in the body or its parts of a deceased, Ohio law will remain consistent with the historical underpinnings, as well as be in line, as discussed further below, with the clear direction Ohio law has taken since 2006 with the passage of R.C. § 313.123. There are two decisions of reasonably recent vintage which address Ohio’s stance on the matter. In *Carney v. Knollwood Cemetery Ass’n* (1986), 33 Ohio App. 3d 31, 541 N.E.2d 430 (8th Dist.), the court contemplated the nature of an action against a cemetery which had disturbed the buried remains of one individual to make way for another. While not making any effort to label a survivor’s interest as sounding in one’s “liberty” interests under the Constitution, the court *specifically rejected* the “theory that a surviving

custodian has quasi-property rights in the body of the deceased.” *Id* at 37. The *Carney* court observed there is,

[a] trend away from the quasi-property fiction is discernible in the case law. In *Scarpaci v. Milwaukee County* (1980), 96 Wisc. 2d 663, 672 292 N.W. 2d 816, 820-21 the court stated:

“The law is clear in this state that the family of the deceased has a legally recognized right to entomb the remains of the deceased family member in their integrity and without mutilation. Thus the next of kin have a claim against one who wrongfully mutilates or otherwise disturbs the corpse.”

“The basis for recovery of damages is found not in a property right in a dead body but in the personal right of the family of the deceased to bury the body. The mutilating or disturbing of the corpse is held to be an interference with this right and an actionable wrong.”

Carney, 33 Ohio App. 3d at 36 (Emphasis added.) Thus, the court instead held that the cause of action for mishandling of a dead body is brought as a subspecies of the tort of infliction of serious emotional distress. *Id.* at 37. For purposes on the instant question before this Court, it is clear Ohio is not inclined to recognize even a quasi-property interest in dead bodies held by survivors, much less a “true” property interest. It logically follows, then, that one cannot maintain an enforceable property interest in the blood, organs, or tissues of a dead body where statute does not expressly so provide.

The other case, *Everman v. Davis* (1989), 54 Ohio App. 3d 119, 561 N.E.2d 547, (2nd Dist.), also refuses to call a third party’s interest in the body of another a property right. In rejecting an argument which relied on the unreasonable search and seizure language of the Fourth Amendment, the court first noted that the Coroner’s “search,” if it were so construed, would have been reasonable as required by law. *Everman*, 54 Ohio App. 3d at 122 . The court also observed,

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 amendment. Words used in a series apply to the same person or similar

objects unless the context otherwise requires. *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.

Id. (emphasis added.) Thus, the *Everman* court remarked – in line with the history noted above – that the only interest a surviving loved one has in the body of another is limited specifically to “preparation, mourning and disposal of the body,” Id. As the preceding discussion demonstrates, and excepting the claimed interest in mourning one’s dead, these interests are born of a presumed right of the deceased to a proper burial.

Amicus respectfully submits that the phrase “disposal of the body” should be read as meaning the surviving loved one(s) would have a superior interest over some other custodian, for example a county coroner, in the *manner* of internment, be it cremation, burial, or some other lawfully appropriate way and not as suggesting some “absolute” right of possession. Indeed, as already demonstrated, the disposal of a dead body is better understood as a duty, and one which Ohio law regulates strictly.

Amicus also respectfully submits that a brief discussion of some of Ohio’s restrictions on the disposal of the dead is germane for proper consideration of the question before the Court. In exercise of one’s “right to disposal of the body” one cannot lawfully bury or otherwise intern their loved one without a permit. R.C. § 3705.17. Likewise, R.C. § 3705.29(C)(2) forbids transportation of a dead body or the acceptance of that body for internment without a permit. Id. Of course, a next of kin could also not lawfully choose to lay a loved one to rest in violation of R.C. § 2927.01(A) – prohibiting treatment of a corpse which would offend reasonable *family* sensibilities, nor R.C. §

2927.01(B) – prohibiting treatment of a corpse which would offend reasonable *community* sensibilities.

Amicus respectfully asserts that a coroner who releases a body to a grieving family for internment, even while keeping samples of tissues, organs, or blood, is *facilitating* that the loved one's limited interests, and in particular the interest in mourning, as recognized by law are advanced. It must be emphasized, the Respondents herein do not advance the theory that the Claremont County Coroner behaved disrespectfully with regard to the body of their loved one, and furthermore do *not* assert that the Coroner was without authority to conduct the forensic examination he did indeed conduct. There is no allegation which tends to suggest next of kin have been unable to prepare or to bury decedents owing to the coroner's lawful actions. To the contrary, Respondents allege they did indeed bury their deceased, presumably having prepared him and mourned him. (Compl. ¶ 40.) The Court is urged, then, to decline to give rise to Constitutional causes of action by finding Ohio law does not recognize any property interest in dead bodies or their parts, held by next of kin and certainly herein, where the limited interests which a loved one may have in their deceased have not, in fact, been infringed upon.

The Court is urged to consider the peculiar argument Respondents must, at its core, advance and upon which they seek to establish an enforceable – and constitutional – right. Again, Respondents' decedent's body was released to them for preparation, mourning and burial, and they did indeed bury their decedent. Oddly, Respondents now argue the body was released, and they thereby able to properly mourn and bury their son, "too soon." In doing so, Respondents would prefer the Court to make law a preference

where surviving loved ones are told, coldly, A) their loved one's organs have been removed and placed in various solutions for dissection and examination, and/or B) that they could take their loved one for burial so long as they understood that if they wanted his brain, or other parts held for forensic purposes, to be buried along with him, they'd have to wait at least approximately two weeks, quite possibly longer, and even indefinitely. Amicus submits that grieving people are likely, and understandably so, to not respond well to these or like comments. See, e.g. *Hainey v. Parrott*, 2005 U.S. Dist. LEXIS 44837, *18, fn. 5 ("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.") (unreported, attached).

C. The federal court holdings in *Brotherton v. Cleveland* and *Hainey v. Parrott* are distinguishable and do not establish that Ohio law recognizes a property interest in the body, or its parts, of another.

Respondents base their Complaint on two federal cases, *Brotherton v. Cleveland* (1991), 923 F.2d 477 (6th Cir.) and *Hainey v. Parrott*, 2005 U.S. Dist. LEXIS 44837. Amicus submits that *Brotherton* is easily distinguishable from the facts and circumstances at issue here and is in accord both with Ohio law and a finding from this Court that there is generally no property right in tissues, organs, blood and other body parts. Amicus further submits, as demonstrated below, that the *Hainey* decision is simply erroneous and not in accord with Ohio law.

1. *Brotherton v. Cleveland* distinguished

Preliminarily, it must be emphasized that the federal court in *Brotherton* never purported to hold that Ohio law recognizes a third party interest in the dead body of another. The court specifically avoided determining whether Ohio law grants third

parties property rights in the body of others, *Id.*, 923 F.2d at 481, and stated directly that “the Ohio Supreme Court has not ruled upon the precise issue before this Court.” *Id.* at 480. Also, and importantly, *Brotherton* was litigated prior to there being any vehicle for certification of questions of state law to the Ohio Supreme Court. *Brotherton* was decided in 1991. The Ohio Supreme Court Rule of Practice XVIII, establishing the procedure for certification of questions of Ohio law to the Court, came in to effect in June 1994.

Finally, Amicus notes that the Sixth Circuit itself immediately attempted to limit the impact of its decision in *Brotherton*. In *Montgomery v. Clinton, Michigan*, 1991 U.S. App. LEXIS 19070 (6th Cir., 1991) (unreported, attached), the court considered a procedural due process claim akin to that which is brought herein, and 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 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.”

Montgomery at 6-7. Much as there is not a recognized right of a survivor to be notified of the decision to perform an autopsy supported in Ohio law, there is *nothing* in Ohio law which suggests that a coroner engage in the macabre practice of notifying survivors of the various gruesome details of what happens to organs – in this case, brains – either before, or upon release of the body for internment by the family.

Regardless of these considerations, *Brotherton* is easily distinguished. The factual background of *Brotherton* is particularly important in understanding how it is very different from what is before the Court herein, a case which has been described as “state sponsored grave-robbing.” *Hainey*, 2005 U.S. Dist. LEXIS 44837 at 15. Deborah Brotherton brought a 42 U.S.C. § 1983 claim for the wrongful removal of her deceased husband’s corneas. On February 15, 1988 Steven Brotherton was found in an automobile, taken to a Hospital and pronounced dead on arrival. *Brotherton*, 923 F.3d at 478. The Hospital, having made contact with Steven Brotherton’s surviving spouse, asked if she would consider making an anatomical gift. *Id.* Deborah Brotherton declined to authorize such a gift, and such refusal was documented. *Id.*

The Hamilton County coroner’s office became involved because Brotherton’s death was considered a possible suicide. *Id.* An autopsy was performed on February 16, 1988. *Id.* Afterwards, the coroner allowed Brotherton’s corneas to be removed and used as anatomical gifts. *Id.* The coroner was not advised by the hospital of Deborah Brotherton’s objection to the gift, nor did the coroner inquire into whether Mrs. Brotherton had made any objection. *Id.* Ohio Revised Code § 2108.60 directly outlines the procedure which a coroner must follow for cornea removal. R.C. § 2108.60(B).

Far from holding that Chapter 2108 purports to establish that survivors have any sort of *general* property right in the body, or parts thereof, of a deceased, the *Brotherton* court expressly refused to so find.¹ *Brotherton* 923 F.3d at 481-82. It cannot be overstated that the critical difference between *Brotherton* and the issues herein is that Ohio law specifically addresses the issue of cornea donation and also the procedure – or

¹ To re-iterate as noted *supra*, given the opportunity to do so in *Montgomery*, even the Sixth Circuit itself refused to read its holding in *Brotherton* broadly.

process – a coroner must follow when removing corneas for donation as it regards the interests Ohio grants to survivors in the same. See, R.C. §§ 2108.02(B); 2108.60(B). The coroner in *Brotherton* quite simply failed to follow that procedure, willfully ignoring Deborah Brotherton's written objection.

R.C. § 2108.60 permits the removal of corneas of autopsy subjects without consent, if the coroner has no knowledge of an objection by the decedent, the decedent's spouse, or, if there is no spouse, the next of kin, the guardian, or the person authorized to dispose of the body. In other words, under the correct conditions, a next of kin retains a right to object to the harvesting of corneas. Unlike a property right, it must be emphasized, this objection does not come with it any statement of a right of a third party survivor to possess the corneas as one might possess a chattel or real property, or even in the manner which a transplant bank temporarily might so possess. Indeed, R.C. § 2108.60 carefully limits any "right" in the parts of another, describing the relationship not as a *right* at all but instead as a *duty* of disposal. R.C. § 2108.60(B)(4)(g) (... "any other person authorized or under obligation to dispose of the body"). As Blackstone stated centuries ago, a dead body is simply not the subject of a property right, much less is such a right vested in other persons.

Nonetheless, the federal court in *Brotherton* was correct in determining that the state law of Ohio provided for a third party survivor's interest in making or declining to make specific anatomical gifts. R.C. §§ 2108.02(B); 2108.60(B) specifically addresses anatomical gifts and who has what interest in the making or the declining to make such a gift. Here, importantly, there is no provision in Law which supports that Ohio recognizes a *generalized* interest in the organs, blood, or tissues of another person. Indeed, R.C. §

2108.12 expressly prohibits treating human organs and tissues as property which may be sold or traded establishing that whatever our interests in our organs, it is not akin to a property right as an owner of property is able to trade that property at his pleasure, among other things, including for example, devising it to his heirs. In this later respect, and in accord with *Hadsell v. Hadsell* (1893), 3 Ohio Cir. Dec. 725 (3rd Cir.), it is clear a dead body is not property, nor can it be inherited by a next of kin.

In any event, the *Brotherton* court was free to determine whether the failure of the coroner to follow the express and clearly defined procedures of Ohio law as it regards a third parties statutory interest in the making or declining to make anatomical gifts rose to the level of a constitutional deprivation. While one may agree or disagree that such behavior is a *constitutional* deprivation, there is no question that the federal court was competent to so find. For these reasons, *Brotherton* may be distinguished from the issues present on resolution of the question before the Court. Ohio, now having the direct opportunity to do so, should, as the Sixth Circuit itself tried to do in *Montgomery*, expressly limit broader interpretations of *Brotherton* and firmly establish that Ohio does not recognize a property interest in blood, tissues, organs and parts of a body where the Ohio Revised Code does not expressly grant any interest.

2. *Hainey v. Parrott* distinguished

Amicus respectfully submits that *Hainey v. Parrott* is fundamentally flawed and is based on far too broad an interpretation of *Brotherton*. In a factual scenario alarmingly similar to the instant case, the *Hainey* court erroneously determined federal law established that plaintiffs therein had an enforceable property interest in their loved one's brain. Amicus respectfully cautions the Court to consider *Hainey* carefully, as its being

so factually similar might provide Respondent with a specious argument in support of their position.

Hainey should be rejected as it violates principles of federalism. The *Hainey* decision is clearly erroneous owing to the import of the following remark, “at first blush, the holding in *Brotherton* appears to establish a property interest in the decedents remains in a very broad fashion. The question is whether *Brotherton* is distinguishable in any meaningful way.”² *Hainey* at 15. Even the *Brotherton* court itself openly recognized it was without authority to *establish* what is or is not Ohio law. See, *Brotherton* 923 F.3d at 480. The *Hainey* court’s reliance on *Brotherton* as if it were precedent establishing the meaning of Ohio law is clear error.

The *Brotherton* Court never purported to establish the meaning of Ohio law and made efforts to indicate it was actually avoiding the issue entirely. See, *Brotherton* 923 F.3d at 481 (“Thankfully, we do not need to determine whether the Supreme Court of Ohio would categorize the interest in the dead body granted to the spouse as property, quasi-property or not property.”) Likewise, as mentioned above, the *Brotherton* Court was without any vehicle to seek a directive from this Court regarding the issue. Conversely, the *Hainey* court well could have, in the same manner as the certified question *now* finds its way before the Court. In as much as *Hainey* simply relies on *Brotherton* so as to establish the meaning of Ohio law as it relates to if dead bodies are property, its rationale must be rejected as infringing on principles of federalism. In any event, it remains well established that the Ohio Supreme Court is the final arbiter of the

² As discussed below, even if the court were correct that the “question is whether *Brotherton* is distinguishable,” (which, incidentally, is not correct – the question should have been the same as the question here: does Ohio law recognize an interest held by survivors in the dead bodies or parts thereof of others), the court failed to realize that *Brotherton* is easily, and in *critical respects*, distinguishable.

meaning of Ohio law. The Court may therefore wholly ignore *Hainey* and its reasoning even in spite of its factual similarities.

Amicus respectfully submits, the Court should ignore *Hainey*. The *Hainey* court's inability to distinguish *Brotherton* in a meaningful way is nothing short of peculiar. As discussed above, the *Brotherton* court did not find that Ohio law recognized an interest in body parts, tissues, blood or organs generally. Again, the *Brotherton* case concerned corneas and their harvest for transplant where a survivor had expressly declined to allow such an event to occur and also where Ohio has a *specific statute directly on point* with respect to both a survivor's potential rights to give or refuse to give consent as well as what precisely are the coroners rights and obligations on the issue. *Hainey*, dealing with non-transferable organs (like here, brains), where there are no specific statutes directly on point, and where Ohio case law cuts definitively *against* the establishment of a property interest in the dead bodies of others, is not at all similar to *Brotherton*. Consequently, the instant action being so factually similar to *Hainey* is likewise unlike *Brotherton*.

Even if the Court disagrees, and chooses not to ignore *Hainey*, the Court should reject *Hainey* where it is based on the rationale that, "in any event, these differences in facts do not take the 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." *Hainey*, 2005 U.S. Dist. LEXIS 44837 at 17. Even setting aside the Sixth Circuit's own attempt to limit its *Brotherton* holding in *Montgomery*, something oddly ignored by *Hainey*, the decision remains erroneous. Even at face value, the recognition of some interest in the dead body of another, the interest is meaningless without examination of

what precisely that right is. Any rational court would consider the *nature* of the right as it relates to the facts of the case. The *Hainey* court did not.

The *Hainey* court forgoes any discussion of the actual meaning of the alleged interest upon which the plaintiff sought to base a Section 1983 procedural due process claim (as do Respondents). As Oliver Wendell Holmes observed, rights are “intellectual constructs used to describe the consequences of legal obligations.” *Newman*, 287 F.3d at 791, fn. 5. Thus, while *Everman* can be read to endorse that Ohio law recognizes that decedents are afforded an interest – and possibly, though not necessarily, a constitutional interest – that interest is limited to “preparation, mourning and disposal of the body.” *Everman*, 54 Ohio App. 3d at 122. As history reveals, these “rights” are actually the *duties* of the survivor(s) as the rights themselves flow from the right of the dead to be buried. *Newman*, 287 F.3d at 791, fn 5 (Quoting, *Pierce*, 10 R.I. at 239).

The distinction between rights and duties notwithstanding, taking the *Everman* expression of interests at face value, like in *Hainey*, Respondents herein were afforded the benefits of these limited interests, having had a proper and timely burial of their loved one. Amicus notes, the argument that the failure to include the body part at issue in the burial – here the brain – means they did not enjoy the benefit of their interest is undercut heavily by the realization that an amputee, for example, may not retain his amputated appendage so that he may be buried “complete,” much less may his next of kin assert any interest in the same.

As it is, the very fact that an autopsy has been lawfully performed requires the conclusion that the individual will assuredly be something less than “whole” upon release and burial. Even *Hainey* recognized, “it is a given that of necessity tissue and fluids will

be destroyed as a result of performing an autopsy.” *Hainey*, 2005 U.S. Dist. LEXIS 44837 at 18. There is no obligation in law that the coroner reveal this truth to grieving next of kin, nor that he take extreme care and caution to ensure each tissue or fluid returns to the corpse. Indeed, in the coroner’s discretion, if needed for forensic purposes, he may keep samples indefinitely. As such, the fact that the body released to burial by the coroner is something less than whole is best understood as highly likely. There is no Ohio law which requires the coroner to explain this fact to survivors. Indeed, in the interest of not making the mourning of a deceased more scientifically cold or otherwise morbid than it already is, it is wise that the coroner is not so required. Again, as *Hainey* recognized, most people would prefer not to know what organs are being retained. *Hainey*, 2005 U.S. Dist. LEXIS 44837 at 17, fn 5.

Furthermore, as the *Hainey* court itself recognized, “it is true ... 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.” *Id.* at 17. Recognizing the interplay, then, between the Coroner’s authority to keep the body of a deceased, perhaps even *indefinitely*, as against a next of kin’s desire to mourn and bury their deceased, along with the obvious – though perhaps better unspoken – fact that the autopsy *necessarily* destroyed tissues, etc., supports that where possible the Coroner should keep only that part or parts of the body he needs to complete his analysis, thereby affording the next of kin an opportunity to properly grieve their loss. That the Revised Code supports this particular “morality” should be encouraged as it is in line with the historical underpinnings surrounding the subject, and also in line with the more modern recognition that grieving individuals should be afforded the opportunity to

mourn. In any case, there is no expression of a property, or any other, right that a next of kin has in the body, or its part, of a dead third party.

D. A coroner's ability to discharge his statutory obligations would be negatively affected upon the creation of a property right of a next of kin in the dead body of another.

As the preceding discussion tangentially considers, coroners and their deputies are directed by the Ohio Revised Code to perform the duties outlined in R.C. § 313.01 through R.C. § 313.22. R.C. § 313.06. Those duties include, but are not limited to; being the official custodian of a county morgue, R.C. § 313.08(A), appointing one to dispose of his statutory duties in his disability or absence, R.C. § 313.04, disposing of unidentified individuals in a proscribed manner, R.C. § 313.08(B), taking charge of dead bodies, R.C. § 313.13(A), making determinations as to whether an autopsy is required, *Id.*, R.C. §§ 313.121, 313.131, and determining causes of death and filing a report outlining the same. *Everman*, 54 Ohio App. 3d 122; R.C. § 313.19. Likewise, because the coroner “is a public officer acting in quasi-judicial character[] [h]is duties are discretionary and in the absence of bad faith or corrupt motive he is protected by limited immunity from ordinary civil liability.” *Everman* 54 Ohio App. 3d at 121 (citation omitted.)

The Revised Code contemplates a broad discretion held in the coroner to properly meet his statutory obligations. For example, R.C. § 313.131(B) provides: “The coroner ... shall perform an autopsy if, in the opinion of the coroner ... an autopsy is necessary.” *Id.* Furthermore, the coroner is authorized to retain the body of a deceased however long is necessary to discharge his duties. R.C. § 313.15. The only limitation on the coroner's broad discretion to perform an autopsy he opines is necessary is where there is a religious objection. R.C. § 313.131(B); R.C. § 313.121(C). The Court is cautioned against now

finding a property right vested in the next of kin which may severely impair the coroner's ability to discharge his duties.

The recognition of a property interest here would create an absolute right in not only the whole corpse, but the parts thereof, held by a third party. Thus, any perceived violation of the property right would create an actionable 42 U.S.C. § 1983 claim. *Daniels v. Williams* (1986), 474 U.S. 327, 331. Amicus notes, while beyond the scope of this brief, other entities would be affected by such a holding, including hospitals, funeral homes, medical schools and various law enforcement agencies. The exposure to liability which would result in a finding of a property right would, of course, be dealt with by coroners – and other affected entities – in some manner and at expense. While it is wholly unknown what steps would be required to protect them from whatever potential liability, or to calculate at what cost, it can hardly be disputed the citizens and taxpayers of Ohio would suffer as a result.

Additionally, far beyond the religious limitation recognized by Ohio law, R.C. § 313.131(B), a next of kin might, for any of several reasons, attempt to exercise his property rights in a manner which severely hampers, or even completely undermines, that an autopsy be performed on “his property.” Indeed, a next of kin might even go so far as require the coroner, an arm of the government, to compensate him for the “taking” of his private property without compensation as required by the Fifth Amendment to the Constitution, whether the taking is of the whole body or just the tissues, blood and organs thereof. The effect of requiring the coroner to compensate next of kin before or while discharging his statutory obligations of finding the cause of death would be devastating and contrary to Ohio law.

Again, Ohio law already protects that interest which has traditionally been afforded next of kin without exposing Ohio counties to the potential devastating consequences of recognizing a *property* interest in the body, and its parts, of another. While born of a duty owed the deceased, there is little question that a next of kin litigant may attempt to recover for real infringements to his or her interests in preparing, mourning, and burying their deceased. See, *Everman*, 54 Ohio App. 3d at 122. Ohio law recognizes, in the right case, the torts of negligent infliction of emotional distress and intentional infliction of emotional distress to compensate for such injuries. Additionally, Ohio law has long recognized as a tort action, the mishandling and desecration of a corpse. See, *Brownlee v. Pratt* (1946), 77 Ohio App. 533, 537-540, 68 N.E. 2d 798, 800-801. This Court's recognition of a property right held by one person in the body, or parts thereof, of another would do little to advance those interests the law has traditionally sought to protect where death is concerned. To the contrary, in as much as autopsies are required where the death was possibly owing to foul play, and where the coroner is obligated to determine the cause of death and to assist law enforcement in their investigation, hampering his ability to discharge his obligations is unreasonably detrimental to the living.

Likewise, there is no question that even without the recognition of a property interest held by a third party, and which gives rise to a constitutional cause of action, that a deceased's dignity in death – traditionally recognized as explained above – remains protected in Ohio law. See, e.g., R.C. § 2927.01. Honoring and respecting the dead will be no further advanced should Ohio recognize a property right in the body, tissues, blood or organs of a dead body held by third parties encouraging that future next of kin seek a

windfall by filing Section 1983 actions against any of the several entities which handle dead bodies, including coroners.

No more true is this remark than with regard to the action which predicated the instant question before the Court, where there is not one allegation of the coroner performing in any manner which would tend to dishonor or disrespect the dead. Indeed, the case predicating the question before the Court provides the Court with a clear indication of the sorts of suits to be expected consequent of its findings. Recognizing a property interest affords next of kin potential recovery even where they allege their *recognized* interests as survivors – of preparation, mourning and burial of their deceased – have not been infringed. Again, respondents admit they received their deceased from the coroner in a timely manner and that they interred their deceased in a manner of their choosing, presumably also mourning him in the process. Ohio law should not be read to afford a property interest held by a third party in the body, of its parts, of another.

E. The Ohio Legislature, by enacting Revised Code § 313.123, supports that this Court find that a third party does not enjoy a property right in the body, or its parts, of a decedent.

On August 17, 2006 the Ohio Legislature passed R.C. § 313.123. In pertinent part it provides,

(B) (1) Except as otherwise provided in division (B)(2) of this section, *retained tissues, organs, blood, other bodily fluids, gases, or any other specimens from an autopsy are medical waste* and shall be disposed of in accordance with applicable federal and state laws, including any protocol rules adopted under section 313.122 of the Revised Code.

(2) If an autopsy is performed on a deceased person and pursuant to 313.131 of the Revised Code the coroner has reason to believe that the autopsy is contrary to the deceased person's religious beliefs, the coroner shall not remove any specimens, including, but not limited to, tissues, organs, blood, or other bodily fluids, from the body of the deceased person unless removing those specimens from the body of the deceased person is a compelling public necessity. Except as otherwise provided in division

(B)(3) of this section, if the coroner removes any specimens from the body of the deceased person, the coroner shall return the specimens, as soon as is practicable, to the person who has the right to the disposition of the body.

R.C. § 313.123. As is now clear, the Ohio Legislature intends that items which a coroner removes during the course of an autopsy, and retained for examination, are not to be treated as property. The only exception to the “medical waste” rule is the religious objection provided for in R.C. § 313.123 (B)(2).

This new law provides the Court with considerable insight as to the intention of the Ohio Legislature. Importantly, while defining retained blood, tissue, organs and other specimens as “waste” the Legislature acknowledge only a religious interest as being superior to the “waste” descriptor. Such a law is in accord, of course, with the long history of how the law has treated the issues surrounding dead bodies in Ohio. That is to say, the history reveals that the protections afforded dead bodies have their genesis in ecclesiastical concerns of how the dead are to be dignified in death. Amicus notes again, however, the history also reveals that these concerns are themselves born in the “rights” of the deceased to be buried in a dignified manner not the rights of third parties. Importantly, the treatment of third parties in law has *always* been in terms of a duty – a duty owed their deceased.

Likewise, R.C. § 313.123 encourages precisely what occurred in the case predicated the instant question. In using the word “retained” with respect to the words “tissues, organs, blood, other bodily fluids, gases, or any other specimens from an autopsy” two things become clear. The coroner is authorized to keep body parts as he may require for discharge of his statutory duties as coroner, and may do so even without

keeping the whole of the body.³ Equally clear, the coroner – in keeping only those parts or fluids he needs to complete his examination or otherwise discharge his statutory duties – becomes encouraged to release the remainder of the corpse for internment. As has been mentioned supra, such a reading of the new Code Section is in complete accord with not only the facts of the case predicating the instant question, but also with the state of Ohio law as well as tradition and history as it relates to this subject.

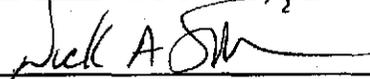
³ If the coroner had the whole of the body until such time as he was done examining the parts, he would simply put the parts back in to the body for internment as he does with un-retained materials.

III. Conclusion

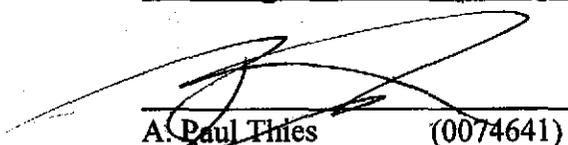
If the Court adopted Respondents view – that a third party has a property interest in the body parts of another – such a finding would clearly go against the history of how the law has treated the issue, and likewise would be a departure from the clear direction the law has taken since the enactment of R.C. § 313.123. Amicus encourages the Court to instead adopt a consistent view, finding that Ohio has never recognized a property right held by third parties in the body, or parts thereof, of another. Amicus respectfully encourages the court to answer the certified question before it in the negative.

Respectfully Submitted,

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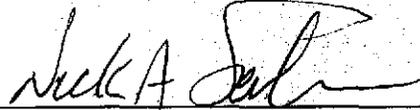
CERTIFICATE OF SERVICE

The undersigned hereby certifies that the forgoing Preliminary Memorandum in Support of Petitioners was forwarded on July 23, 2007, by regular U.S. Mail, postage prepaid, to:

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LEXSEE 2005 U.S. DIST. LEXIS 44837

Kathy Hainey, et al., Plaintiffs, vs. Carl L. Parrott, et al., Defendants.

Case No. 1:02-CV-733

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
OHIO, WESTERN DIVISION**

2005 U.S. Dist. LEXIS 44837

**September 28, 2005, Decided
September 28, 2005, Filed**

COUNSEL: [*1] For Marlene Penny Manes, Special Master: Marlene Penny Manes, LEAD ATTORNEY, Cincinnati, OH.

For Kathy Hainey, Individually and as representative of the Class, John Doe, Individually As Representative Of The Class, Debra A Singler, Individually And As Class Representative, David Michael Kaiser, SR, Individually And As Representative Of The Class, Cynthia Ann Kaiser, Individually And As Representative Of The Class, Michael A Disylvestro, Individually And As Class Representative, Plaintiffs: John Henry Metz, LEAD ATTORNEY, Cincinnati, OH.

For MD Carl L Parrott, Jr, Individually And In His Official Capacity As Coroner Of Hamilton County, Hamilton County Board of Commissioners, Tom Neyer, Jr, President Of The Board Of County Commissioners Of Hamilton County, Ohio, John Dowlin, Vice-President Of The Board Of County Commissioners Of Hamilton County, Ohio, Todd Portune, Commissioner, Commissioner, Board Of County Commissioners Of Hamilton County, Defendants: David Todd Stevenson, Stephen Kinnear Shaw, LEAD ATTORNEYS, Hamilton County Prosecutor, Civil Unit, Cincinnati, OH; Pamela J Sears, Hamilton County Prosecutor, Cincinnati, OH.

For John Defendant, Name And Address Presently [*2] Unknown, Defendant: David Todd Stevenson, Hamilton County Prosecutor, Civil Unit, Cincinnati, OH.

JUDGES: Sandra S. Beckwith, Chief Judge.

OPINION BY: Sandra S. Beckwith

OPINION

ORDER

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 [*3] 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.¹ 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 [*4] 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 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.

¹ 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.

[*5] 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.² 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.

² 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 [*6] 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 [*7] 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 [*8] 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 569 (1968).

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. [*9]

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 [*10] 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* [*11] 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.

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).³ 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 [*12] 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 [*13] process of law.

3 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*. [*14] 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:

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 [*15] 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 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 [*16] 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 that their decedent's brain was available for recovery if they so desired. ⁴ 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. ⁵

4 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).

[*17]

5 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 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 [*18] 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.

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 [*19] 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 § 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 [*20] 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 [*21] 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.

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, [*22] 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 [*23] 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 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 [*24] 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 819 *fn.*34.

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. [*25] *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) [*26] (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 without notice to the decedent's next of kin would have violated that right. That [*27] seems especially true where, as Plaintiffs observe, this same coroner's office was involved in the case that established the right at stake here.

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. [*28] *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 aptful [*29] 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 [*30] is sufficient to redress Plaintiffs' injuries.

G. The Hamilton County Commissioners

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. 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 [*31] 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 of 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 [*32] 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 [*33] before the Court and cannot be resolved at this time.

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 [*34] statute of 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

Date *September 28, 2005*

s/ Sandra S. Beckwith, Chief Judge

United States District Court

1 of 2 DOCUMENTS

JOAN MONTGOMERY, Plaintiffs-Appellants, v. COUNTY OF CLINTON,
MICHIGAN, et al., Defendants-Appellees

No. 90-1940

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

1991 U.S. App. LEXIS 19070

August 9, 1991, Filed

NOTICE: [*1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

SUBSEQUENT HISTORY: Reported as Table Case at 940 F.2d 661, 1991 U.S. App. LEXIS 24083.

PRIOR HISTORY: On Appeal from the United States District Court for the Western District of Michigan; District No. 89-50002; Robert Holmes Bell, District Judge.

JUDGES: Merritt, Chief Judge; Boggs, Circuit Judge; and Thomas G. Hull, District Judge. *

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

OPINION BY: MERRITT

OPINION

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 [*2] 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 [*3] 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. Connor*, 490 U.S. 386 (1989), for this proposition. Proceeding with the *fourth amendment* analysis, the Court declared there had 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 [*4] 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.

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 [*5] 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 [*6] 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 plaintiffs religion forbids autopsies but rather appears to allow them in these circumstances. Moreover, even if such an autopsy is inconsistent with plaintiffs 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 [*7] 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.

The judgment of the District Court is affirmed.