

IN THE SUPREME COURT OF OHIO

MARK ALBRECHT, etc., et al.,

CASE NO. 07-0507

Plaintiffs-Respondents,

vs.

BRIAN TREON, M.D., et al.

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

Defendants-Petitioners.

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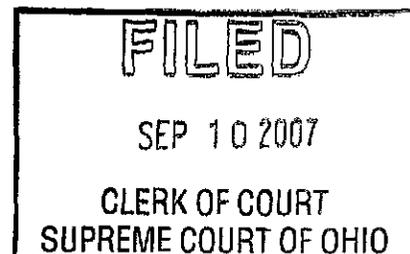


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SUMMARY

The next-of-kin have the right to possess and direct the disposition of the remains of their deceased loved ones, and the right to exclude others from possessing or directing the disposition of those remains. The right to disposition of the loved one's dead body includes all of its parts. Ohio has, throughout its history, recognized these rights, together with their corresponding obligations, both in caselaw and in statutes. These rights do not conflict with the state's interest in determining the cause of death through an autopsy. They yield to the state's authority to conduct an autopsy but come to the fore when the autopsy is completed and the organs are admittedly no longer needed by the government. Upon the completion of the initial autopsy, the removed organs are returned to the body and the remains are released to the next-of-kin for disposition. It does not matter that some period of time passes before the autopsy of other body parts is completed; the next-of-kin's rights of possession and disposition of those parts remain undiminished. These rights, based on statutes, caselaw and mutually reinforcing understandings, are well grounded in Ohio and give a legitimate claim of entitlement to those organs after examination. Thus, this Court should answer the certified question in the affirmative.

STATEMENT OF FACTS AND OF THE CASE

Respondents assert that they have been deprived of a right to bury their loved ones in a condition that is as complete as possible.

The facts related to the named Plaintiffs frame the issue. The Albrecht's son, Christopher, died and an autopsy was performed. Organs were removed, examined, and returned to the body. Christopher's body and those organs were then released to his parents for burial. Christopher's brain, however, which had also been removed for examination was still in the

possession of the coroner.¹ The coroner provided no notice to the Albrechts that their son's brain had been retained when the body was released to them for burial. Further, when the examination was completed and the coroner admitted he had no further need for Christopher's brain, it was destroyed and the next-of-kin were not given the opportunity to determine its disposition.

This case is about the next-of-kin's interest in the remains of a deceased loved one. Specifically—and make no mistake about this fact—it deals with circumstances where the coroner has fully completed the autopsy and all examinations attendant to it and has no further need for or interest in the organs which were temporarily retained to conduct that examination. May the government under *those* circumstances fail to give notice to the next-of-kin that the body part has been retained, and fail to give the next-of-kin the opportunity to determine the disposition of the body part of their loved one after it is no longer needed by the government? For purposes of argument, Respondents will assume that the State of Ohio attempted to abrogate that interest as of August 17, 2006 when it enacted R.C. 313.123(B).² The question is thus whether the next-of-kin had a protected interest in the remains of a deceased loved one prior to August 17, 2006.

Just as important as what this case is about, is what it is not about. With due respect to opposing counsel and the impassioned and heated arguments about the crucial nature of autopsies and the paramount government interest in them, 95% of those arguments and nearly all those briefs are irrelevant. Contrary to the Petitioners and their *amici*, this case is not about the

¹ The procedure related to “fixing” the brain for dissection has been discussed at length in briefing already before the Court and will not be recounted here.

² R.C. 313.123, effective August 17, 2006, purports to give the coroner the right to dispose of retained organs as medical waste. It is unclear whether that provision is constitutionally valid; however, that issue is not before this Court. Very peculiar is the notion that this notice would somehow alert a “person of interest” in a criminal case. The body is now released to the next-of-kin after autopsy, even if the next-of-kin is a person of interest, which would “alert” the next-of-kin to the fact that the coroner is interested in the death.

authority of a coroner to conduct autopsies. Respondents recognize that the family's interest in the remains of their loved ones yields to legitimate state interests, such as the state's right to conduct autopsies pursuant to its police power. Under Ohio law prior to August 17, 2006 the state's superior interest ceased, however, when the autopsy was completed. At that point the family's interest in the remains is superior.

Respondents also recognize that in the course of an autopsy, various fluids, tissues and organs must be examined, and that in the course of such examination, some of this material is necessarily destroyed. Respondents also recognize that some material may need to be retained indefinitely for various reasons. Contrary to the *reduction ad absurdum* argument presented by the National Association of Medical Examiners and others, Respondents are not seeking 'all cells of blood remaining in the syringe'. The question here is nothing what the Petitioners in their *amici* suggest in their parade of horrors about epithelial cells from a fingerprint, scraps of tissue, or drops of blood in a test tube.

Their son's entire brain was removed when his body was released to them for burial. "The brain is the man. Its health is essential for normal living. Its disorders are surely the most profound of human miseries and its destruction annihilates a person humanly, however intact his body." H. Chandler Elliott, *The Shape of Intelligence. The Evolution of the Human Brain* (1969).

Christopher's brain was not retained as evidence of some crime. The government's interest in this most important organ of the deceased was completely ended when the autopsy was over.

Your plaintiff-respondents submit that the court in *Hainey v. Parrott* (S.D. Ohio, 2005), 2005 U.S. Dist. LEXIS 44837, 18-19 analyzed these points in a manner which is not only perfectly reasonable but is also a correct statement of Ohio law:

Although it is a given that of necessity tissue and fluids will be destroyed a result of performing the autopsy, the right to take possession of what remains of the deceased's body following the completion of the autopsy in no way conflicts with the coroner's admittedly superior prior interest to take custody of the body and complete what procedures are necessary to determine the cause of death. The right and duty of the coroner to perform the autopsy can co-exist with the right to possess what is left of the remains following the autopsy for preparation, mourning, and burial.

Another thing this proceeding is not about is "\$99 million dollars," as Petitioners keep parroting. Lady Justice wears a blindfold. The question here relates to the law in Ohio. In that regard, it is somewhat akin to statutory construction, and as the court in *Aulizia v. Westfield Nat'l Ins. Co.*, 11th Dist. No. 2006-T-0057, 2007-Ohio-3017, p.44 explained:

In Ohio, "a decision of the Supreme Court interpreting a statute is retrospective in its operation because it is a declaration of what is and always was the correct meaning or effect of the enactment."

See also, *Peerless Electric Co. v. Bowers* (1955), 164 Ohio St. 209, 129 N.E.2d 467.

This court's determination of what always was the correct law in Ohio on this issue is not altered by considerations of who may have violated it. The determination of whether a right exists is not affected by who might be required to respond in damages. In any event, whether the right was *violated* is a question of federal law; it is not the question certified to this court.

Finally, this case is not about distinctions between the body and parts of the body. As demonstrated in the various briefs before this court, an autopsy is an invasive procedure. Fluids, gasses, tissue and organs are removed and examined. Upon completion of the examination the organs are replaced in the body, the incisions are closed, and the body is released to the next-of-kin. It is altogether right and proper that this be done. The next-of-kin have a right to possess

the remains of their loved ones in a condition that is as complete as possible. It would not be countenanced that Ohio law would permit the coroner to open a body, remove all the internal organs for examination, but then sell or discard them as the coroner saw fit, presenting the next-of-kin with nothing but a dressed-out carcass. If the next-of-kin's interest in the possession and disposition of the remains of their loved ones require that the heart, lungs, liver and stomach be returned once their examination is completed, then why not the brain? The only distinction is that it takes longer to complete the examination of the brain. That does not alter the right. The right to the remains of their loved ones upon completion of the examination is the same, regardless of how long the examination process takes. Prior to August 17, 2006 the next-of-kin had a right to possess the remains of their loved ones in a condition as complete as possible, including organs removed for examination.

LAW AND ARGUMENT

Proposition of Law

Prior to August 17, 2006 the next-of-kin of a decedent upon whom an autopsy had been performed had a protected right under Ohio law to the decedent's organs and other body parts removed and retained by the coroner for forensic examination and testing once the forensic examination and testing was completed and the organ was no longer needed by the coroner.

The Certified Question

The question which Judge Dlott certified to this 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 parts that have been removed and retained by the coroner for forensic examination and testing. (Emphasis added.) (Judge Dlott's March 12, 2007 Order Granting Motions to Certify a Question to the Ohio Supreme Court, at page 12.)

Technically, the issue of whether the interest recognized by the state of Ohio is *protected* is a question of federal law. *Brotherton v. Cleveland*, 923 F.2d 477, 480 (6th. Cir. 1991). The state law question is the nature of the interest recognized. *Id.*

It is very important to note that the question that Judge Dlott certified to this court, and this court agreed to answer, is not the question which Defendants-Petitioners sought to have certified. Petitioners attempted purposely to frame the issue differently:

Whether the next-of-kin of a decedent, upon whom an autopsy has been performed, have a property 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. (Emphasis added.) (Judge Dlott's March 12, 2007 Order Granting Motions to Certify a Question to the Ohio Supreme Court, at page 3.)³

Judge Dlott specifically rejected Petitioners' framing of the question. At page 10 of her order Judge Dlott noted that the controlling issue was not whether or not the interest was denominated a "property right," but rather was whether there was a "protected right." Judge Dlott stated, "Contrary to the position taken by the interested parties in their motions to certify, the question is not whether the next-of-kin have a 'property interest' in the decedent's body parts." *Id.* at 10. It is "whether, under Ohio law, there exists for the next-of-kin of a decedent upon whom an autopsy has been performed 'an interest' in the decedent's tissues and organs." *Id.* at 7.

Judge Dlott rejected Petitioners' efforts to narrowly frame the issue strictly in terms of whether human remains are "property." Judge Dlott did not merely draw a distinction without a

³ There were numerous motions to certify and memoranda in support filed, and the exact form of the question varied somewhat. For example, the Motion to Certify Question of State Law to the Ohio Supreme Court filed by Cuyahoga County on December 15, 2006, framed the question at page 1 as "Whether the next-of-kin of a decedent upon whom an autopsy has been performed have a property right under Ohio law in the decedent's tissues, organs, blood or other specimens removed and retained by the coroner for forensic examination and testing?" Judge Dlott used the question as framed by Clermont County.

difference when she re-cast the Petitioner's question to eliminate the term "property." The certified question is not what label is employed. It is whether Ohio law recognizes an enforceable right in the next-of-kin. In disregard of the federal court's certification order, Petitioners continue in their briefing here to try to focus on the label—"property." The reason Petitioners misstate the question is as obvious, as it is unavailable. Historically, the law has been uncomfortable with applying conventional notions of property to any of the human body. That is because the human body and its parts, whether alive or dead, are of sacred character and should not be bought and sold.⁴ Accordingly, courts will not describe the interest of the next-of-kin in the body and remains of the deceased loved ones as a right to property, because they are not a commodity. However, what has been consistently granted in Ohio and other states—as requested in the certified question to the court—is an enforceable right and interest in the next-of-kin to the disposition of the complete remains of the loved one upon death.

Petitioners have thus seized and relied on the historical discomfort that the law has had with the body and its parts as "property" in their attempt to carry the day. Petitioners shout the ancient maxim that the human body and its parts are not "property." That does not address the issue. The issue is whether the next-of-kin have an *interest* in the remains of their decedent. As Judge Dlott noted on page 7 of her Order of Certification, "the threshold question in this due process claim is whether, under Ohio law, there exists for the next-of-kin of a decedent upon whom an autopsy has been performed 'an interest' in the decedent's tissues and organs removed and retained by the coroner for forensic examination and testing. If so, then regardless of the nature of that interest, it is a matter of federal law whether that interest rises to a level of a 'legitimate claim of entitlement' protected by the Fourteenth Amendment." The next-of-kin do

⁴ At least, in this country, since the adoption of Thirteenth Amendment to the United States Constitution.

have such an interest under Ohio law, and this court should thus answer the certified question in the affirmative.

The Interest

The United States Supreme Court in *Bd. of Regents v. Roth* (1972), 408 U.S. 564; 577 explained the source of the rights or interest which, once existing under state law, are subject to Federal protection. *Roth* held that the “interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” 408 U.S. at 577.

These rules and understandings which define the interests can be found in a range of sources which create the “law” of the state. They may be found in statutes. They may be found in judicial decisions. They may also be found in long-standing customs and usages, which are equally recognized as a legitimate source of such rules and understandings. As the United States Supreme Court noted in *United States v. Arredondo* (1832), 31 U.S. 691, 714:

There is another source of law in all governments, usage and custom, which is always presumed to have been adopted with the consent of those who may be affected by it.

The court in *Nixon v. United States* (D.C. Cir. 1992), 298 U.S. App. D.C. 249 explained:

The essential character of property is that it is made up of mutually reinforcing understandings that are sufficiently well grounded to support a claim of entitlement. These mutually reinforcing understandings can arise in myriad ways. For instance, state law may create entitlements through express or implied agreements; and property interests also may be created or reinforced through uniform custom and practice. (Citations omitted.)

The Sixth Circuit in *Brotherton v. Cleveland* (6th Cir. 1991), 923 F.2d 477, 481 put the notion of “property,” as that term is used in “property interest,” in the context of this matter:

The concept of "property" in the law is extremely broad and abstract. The legal definition of "property" most often refers not to a particular physical object, but rather to the legal bundle of rights recognized in that object. Thus, "property" is often conceptualized as a "bundle of rights." The "bundle of rights" which have been associated with property include the rights to possess, to use, to exclude, to profit, and to dispose. (Citations omitted.)

Ohio law does not recognize the right to profit from the remains of a loved one, but it recognizes all the other rights in the bundle mentioned in *Brotherton*. The absence of one of these rights is not dispositive, as the court in *First Victoria Nat'l Bank v. United States* (5th Cir, 1980), 620 F.2d 1096, 1104 explained:

An interest may qualify as "property" for some purposes even though it lacks some of these attributes. For example, an individual can have a "property" right in his job so that he cannot be fired without appropriate procedural safeguards; yet the job is not assignable, transferable, descendible, or devisable. The "right to publicity" is transferable during life but may not be devisable. (Citations omitted.)

Ohio law grants the next-of-kin the protective interests at issue here by statute; by case law; as well as by custom and usage.

Ohio Law Before August 17, 2006

Turning now to the specific and precise question before this court, does Ohio law grant the next-of-kin an enforceable interest, after an autopsy is completed, for the disposition of their loved ones including body parts? The answer is yes. That enforceable interest is specifically granted by statutes in Ohio. Further, Ohio judicial decisions grant a recognized and enforceable interest to the next-of-kin. Finally, custom and usage grant the same enforceable interest.

Before August 17, 2006 Ohio recognized the next-of-kin's right to possess the remains of their deceased loved ones, to use the remains (for mourning), to exclude others from possession of the body or parts of the body, and to dispose of the remains (including by gift). These rights were well established with regard to the interests of the next-of-kin in their decedent's remains.

A. Statutory Interest

The possessory, dispositional and exclusory rights of the next-of-kin in the remains of their deceased loved ones at issue here are explicitly granted by the law of Ohio, in three different statutes. First, R.C. 313.14 provides;

The coroner shall notify any known relatives of a deceased person who meets death in the manner described by section 313.12 of the Revised Code by letter or otherwise. The next-of-kin, other relatives, or friends of the deceased person, in the order named, shall have prior right as to disposition of the body of such deceased person. If relatives of the deceased are unknown, the coroner shall make a diligent effort to ascertain the next-of-kin, other relatives, or friends of the deceased person. *** . (Emphasis added.)

Second, R.C. 313.08(A) provides:

In all cases of the finding of the body or remains of a deceased person within a county in which a county morgue is maintained, when the identity of the deceased person is unknown, or the deceased person's relatives or other persons entitled to the custody of the body or remains of the deceased person are unknown or not present, the body or remains shall be removed to the county morgue, where it shall be held for identification and disposal. (Emphasis added.)

Third, the Ohio Anatomical Gift Act grants the next-of-kin the interest in the remains of their loved ones. This interest is not only in the body, but in the organs. See, R.C. 2108.01(A) and (G) ("donation of all or part of the body", where part means, "any portion of a human body"). The Act recognizes not only the 'property' nature of human bodies, organs and tissue, by prohibiting their sale. It also recognizes the right to exclude others from possessing or directing the disposition of the remains. R.C. 2108.02(B) ("Any of the following persons *** in the absence of actual notice of *** of opposition by a member of the same or a prior class, may make an anatomical gift.") The Act articulates the interest of the next-of-kin in directing the disposition, not only of the body itself, but of its organs and tissue. R.C. 2108.02 (anatomical gift of all or any part of the body.)

As set forth above, the next-of-kin's possessory, dispositional and exclusionary rights are not confined to the "body" as in an intact entity but equally to its parts. In fact, R.C. 2108.02(F) explicitly provides that the "donee has a property right in an anatomical gift donated pursuant to sections 2108.02 and 2108.04 of the Revised Code ***. (Emphasis added.)

Notwithstanding the express language in R.C. 2108.02, Petitioners argue that the term "body" as used in R.C. Chapter 313 refers only to the whole, and that once a part is removed, it is no longer part of the dead "body." This is nonsense at best and macabre at worst. It is nonsense because the Code **does** define the term "dead body," and does it very specifically. R.C. 3705.01(C) provides, "'Dead body' means a human body or part of a human body from the condition of which it reasonably may be concluded that death recently occurred." (Emphasis added.)

It is macabre because of the door it widely opens. The Petitioners' argument that the term "body" is undefined by the General Assembly would turn the courts to application of the doctrine of common usage. *State ex rel. Law Office Pub. Defender v. Rosencrans* (2006), 111 Ohio St.3d 338, 342 ("we must read undefined words or phrases in context and then construe them according to rules of grammar and common usage"). It cannot be plausibly maintained that, in common usage, a severed head or leg, or a removed heart or brain, is not considered a component of the body for purposes of a decent burial. The American Heritage Dictionary of the English Language, Fourth Edition. Houghton Mifflin Company, 2004, defines "body" as:

- (a) The entire material or physical structure of an organism, especially of a human or animal.
- (b) The physical part of a person.
- (c) A corpse or carcass.⁵

⁵ There is also a more restrictive definition in certain contexts where the body means the "trunk or torso of a human or animal," as distinguished from the extremities. The Ohio Revised

Petitioners steer us into the grotesque when they demand a ruling that items which are detached or removed from a body are at the will of the coroner.

The extreme consequence of the coroners' argument must be considered very carefully. The coroner argues that Ohio law does not recognize any protectable interest in the next-of-kin to these organs. If *that* were the law in Ohio, then the government had the ability to do whatever it wanted with the organs of a decedent following autopsy.

That is socialism. The State of Ohio does not adhere to socialism—where the rights of the individual are subordinate to the interests of the state. This is illustrated best by the striking contrast between our system of laws and government, and those now practiced in the countries formerly part of Europe and now the collective “European Economic Community” (EEC).

As a dictate of raw social policy, the EEC is poised to supersede entirely the rights of the individual in mandating that the state government is permitted to harvest any or all organs or body parts from a deceased based on “presumed consent”. This approach was strongly criticized by staff members of the United States Congress reviewing the practice. Kenneth Gundle, Presumed Consent for Organ Donation: Perspectives of Health Policy Specialists, Stanford Undergraduate Research J. (Spring 2004).

That is not the rule or system that we follow in the United States or in Ohio. All of the denials and protests by the government Petitioners aside, that is specifically what is being presented here. This case is a classic either/or. Either Ohio law granted the next-of-kin an enforceable interest in the disposition of the body including organs of their loved ones, or no such rights and interests existed. In the latter situation, the organs and remains of a deceased

Code, in reference to the body of a deceased, certainly did not intend to confine the term body to the trunk and exclude the head and limbs.

were in the custody and possession of the government at the end of the autopsy. Absent any countervailing right or interest in the next-of-kin to determine the disposition of those body parts, no constraint existed upon the government to do as it wished with them. The government could take organs for donation, or experimentation, or otherwise.

And the ultimate “rub” here? The government will protest that the foregoing illustration is ludicrous, and cannot exist, because Ohio law does not allow the government to proceed in that manner to take body parts at will.

But that is exactly the point. If the next of kin have a protectable right to the disposition of the organs of their loved ones, the certified question is answered in the affirmative. If not, then the certified question is answered in the negative, and the government’s right to do as it will with body parts (including involuntary organ donation) exists unchecked. That is not, and cannot be, the law in this state.

It is argued however, that these statutes and laws in Ohio granting the right to the next of kin do not contain sufficiently mandatory language to support a due process claim. But, as Judge Dlott noted, that is a question of federal law. Moreover, both R.C. 313.08 and 313.14 contain the mandatory “shall.” While R.C. 2108.02(B) uses the permissive “may” with regard to making an anatomical gift, the statute is explicit with regard to who “may” make to gift. The test is whether a particular outcome must follow if the regulations’ substantive predicates are present. *Kentucky Dep’t of Corrections v. Thompson* (1989), 490 U.S. 454, 463. That is satisfied here. Once the autopsy is completed, and without newly enacted R.C. 313.123, the remains were to be released to the next-of-kin.

i. **The scope of the coroner's authority.**

Notably, the Defendants-Petitioners' arguments are inconsistent with the express, statutory scope of the authority given to the coroner by Chapter 313. As correctly stated in the amicus brief of the Cuyahoga Coroner Brief at p. 6, the statutory authority for the coroner to maintain control only continues *until* the coroner ascertains the cause of death.

Upon notification of a death coming under his/her jurisdiction, Ohio law requires the coroner to maintain custody of the deceased until the coroner ascertains the cause of death or determines that the body is no longer necessary to assist in the fulfillment of the coroner's statutory duties. R.C. § 313.15.

This is in accord with the statutory language at R.C. 313.123(A)(1) which provides for the coroner in conducting an autopsy to retain the body and organs only "for diagnostic and documentary purposes". Once the examination is complete and the organ is no longer needed for those purposes, the "interests" which the Defendants-Petitioners announce in their briefs come to an end.

Thus, and contrary to the Defendants-Petitioners' attempt to distinguish *Brotherton* or *Whaley* as only dealing with cases where the retained organ was later sold by the coroner or a third party, the question is not what the use of the organ, but whether the coroner's statutory authority to have and retain it has ended. The coroner has no more right, *after* admittedly finished entirely with it and intending on throwing it away rather than keeping it for diagnosis or evidence, to keep Christopher's brain without notice to his family, than the coroner would to keep a heart, head, leg, or any other body part.

Even the Defendants-Petitioners admit that would be contrary to established custom usage, under which the removed organs, once their examination is completed, are returned to the body, which is returned to the family.

The serious concern from a legal and policy standpoint, however, against random retention of organs is very real. It was admitted in the amicus briefing of the National Association of Medical Examiners, who insist that the coroner should have the right to take and use entire body parts, without family knowledge or consent, if the coroner deems it important to advance science. Specifically, in the NAME brief at pages 4, 6, and 7, the Association first indicates “society’s strong interest” in the use of body parts and tissues for biomedical purposes (p. 4). The Association next indicates that although the next-of-kin may have limited rights, those rights “should not be allowed to extend to biological specimens” which are in the control of the coroner during an autopsy (p. 6). Finally, the Association indicates that, “The dead body is itself a biological specimen. In the case of body fragmentation, as in an airplane crash, the fragmented remains, such as a leg or liver, may be all that is recovered and will constitute ‘the body’” (p. 7). The coroner, however, does not have such authority, despite the alleged good motives asserted by NAME.

Thus, the Defendants-Petitioners’ litany of dire consequences to efficient and proper autopsy practiced is spurious. Both Franklin and Hamilton County now provide the exact notice and protection sought by this suit. See, Exhibits “A” and “B”, attached. The Hamilton County representative just confirmed to the federal court in a hearing this date the importance of giving prior notice and the ability of a county to do exactly that. See, Exhibit “B”. Hamilton County has also entered into a Consent Decree in *Hainey* complying with “notice” and “right to return of body parts” (and has continued to forensically function since 2002). Notably, the same entire process has been adopted by the government of New Zealand in their Code of Health and Disability Services Consumers’ Rights 1996. Right 7(9) provides that every patient consumer has the right to make a decision about the return or disposal of any body parts removed or

obtained in the course of a health care procedure. Right 7(10) states that, "No body part of bodily substance removed or obtained in the course of a health care procedure may be stored, preserved or used otherwise than- a) with the informed consent of the consumer..."
<http://www.nsu.govt.nz/Health-Professionals/1084.asp>.

The fundamental human interest in a loved one's body and its organs was very recently exemplified when information came to light (in similar fashion as the case sub judice) regarding London's Alder Hey Children's Hospital. The hospital had retained the heart of Helen Rickard's daughter after autopsy. It was then exposed that over 104,000 organs, body parts and entire bodies and 480,600 samples of tissues had been kept after autopsy without knowledge to the parents. This scandal resulted in more than 2,000 families filing suit and being compensated. This also led to major changes in English law ("Human Tissue Act") requiring "notice" and "consent." This demonstrates that such does not result in the sky falling.

B. Custom and Usage.

Although granted by statute, the next-of-kin's interests are of more ancient lineage even than the Ohio Revised Code. They are deeply embedded in our social fabric by custom and usage. Both law and society have historically granted rights and imposed obligations on the next-of-kin of a deceased. The obligations relate to the duty to provide for a decent and complete burial. The rights relate to a possessory and dispositional right in the whole body in order to fulfill that obligation. As noted above, such custom and usage separately provides a legitimate source of an interest entitled to protection.

The interest of the next-of-kin in the proper burial of their deceased loved ones is at the very core of humanness. Funeral rituals have been associated with Neanderthal remains dated

100,000 years ago, and there is some evidence to suggest that humans ritually buried their dead as much as 350,000 years ago.⁶

More recently (440 B.C) Sophocles' *Antigone*, who buried her brother though it meant certain death, said of her fate:

...but if I had suffered my mother's son to lie in death an unburied corpse, that would have grieved me; ***.⁷

In *The Iliad*, Achilles desecrates the body of slain Hector and the epic ends on the necessity of retrieving the body of Hector from Achilles for funeral rites.

As William Tegg said in 1876, "there is perhaps nothing else so distinctive of the condition and character of a people as the method in which they treat their dead" (Tegg W: *The Last Act: Being the Funeral Rites of Nations and Individuals*. London: Willia Tegg & Co, 1876, p. 9).

The court in *Ritter v. Couch* (W. Va. 1912), 76 S.E. 428, 430 struck a similar note when it observed:

The world does not contain a tribunal that would punish a son who should resist, even to death, any attempt to mutilate his father's corpse or tear it from the grave for sale or dissection; but where would he find the legal right to resist except in his peculiar and exclusive interest in the body?"

The approach by defendant-petitioners to strip the body's organs and parts from the traditional respect and protection afforded by law and society does insult to some of our most important and respected institutions and beliefs. In recent news, the American quest to recover "all body parts" of its servicemen was reiterated when it was announced that a search team was

⁶ Rincon, Evidence of Earliest Human Burial (March 26, 2003), BBC News, August 13, 2007 <http://news.bbc.co.uk/1/hi/sci/tech/2885663.stm>; Pardi, MM: Death: An Anthropological Perspective. Washington, D.C.: Univ. Press of America, 1977, 11.

⁷ Sophocles, *Antigone* (440 B.C.), translated by R. C. Jebb, August 13, 2007 www.greektexts.com/library/Sophocles/Antigone/eng/55.html.

being sent back to Iwo Jima to find the rest of the remains of more Marines, including the photographer who took the historic Iwo Jima photo. (AP 2007-06-22: "U.S. Searching for Iwo Jima Marine's Remains"): See: <http://www.military.com/NewsContent/0,13319,139993,00.html?ESRC=marine.nl>).

The U.S. Marine Corps motto is "No man left behind." If there is no "interest" in the entirety of a "dead carcass" (as Defendants-Petitioners' *Amicus* calls the body) then why risk life and limb of the living to retrieve it? And retrieve not only the body "whole", but return to fire zones to recover lost limbs and other body *parts* detached or mutilated as casualties of war?

No American will forget the battle of Mogadishu, Somalia in 1993 when we were all outraged at seeing the body of an American serviceman dragged through the streets. Petitioners describe that body as a "dead carcass." That would ring poorly to anyone who has ever visited Arlington Cemetery, or Gettysburg.

Similarly, why the extreme effort to *filter* sections of debris from the World Trade Center bombing to ensure all parts of the victims were recovered to allow a complete burial, including reinterment? Indeed, the State of New Jersey enacted legislation, 210 S.B. 1924 (2002) requiring that even spoil ash from the excavation also be interred. See, Exhibit "C", attached.

C. Judicial Decisions

In addition to both statutes and custom usage in Ohio granting this specific interest to the next-of-kin, that interest is separately recognized by Ohio courts.

Ohio courts have long recognized the interest that the next-of-kin have in the remains of their deceased loved ones. The court in *Hadsell v. Hadsell* (1893), 3 Ohio Cir. Dec. 725, 726 observed "[t]hat when a person dies he is to be accorded decent burial, is recognized by society." This court, in *Carter v. City of Zanesville* (1898), 59 Ohio St. 170, 178, discussing a statute

which prohibited unlawful possession of a corpse, noted that “the object of the statute is to secure to the bodies of dead interment and that secure repose which natural affection and a decent respect for the remains of a human being demand.” The court in *Brownlee v. Pratt* (1946), 77 Ohio App. 533, 537-538 observed “[t]his salutary rule [to protect the dead and preserve the sanctity of the grave] recognizes the tender sentiments uniformly found in the hearts of men, the natural desire that there be repose and reverence for the dead, and the sanctity of the sepulcher.” The court in *Carney v. Knollwood Cemetery Ass’n* (1986), 33 Ohio App.3d 31, 36 noted that “[t]he policy of the law to protect the dead and preserve the sanctity of the grave comes down to us from ancient times.” In *Everman v. Davis* (1989), 54 Ohio App.3d 119, 122 the court explained that “[t]here is no issue in this case of the 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. This right is recognized by law and by the decisions.” The court in *Frys v. City of Cleveland* (1995), 107 Ohio App. 3d 281, 284 observed, “Ohio law has long recognized ‘a cause of action for abuse of a dead body’ which would include mishandling of a dead body and desecration of a grave,” and in *Biro v. Hartman Funeral Home* (1995), 107 Ohio App.3d 508, 512 the court explained that “[t]he 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.”

More important, Ohio courts have long recognized the interest that the next-of-kin have in the *complete* remains of their deceased loved ones, to receive all of the body in the same condition as in life. The seminal *Carney* decision expressed it as “the right to custody of the body; to receive it in the condition in which it was left, without mutilation”. *Carney v. Knollwood Cemetery Ass’n*, 33 Ohio App.3d 31, 36 (Cuy. Cty App. 1986).

After considering both the Ohio cases and the Ohio statutes, the Sixth Circuit in *Brotherton v. Cleveland*, 923 F.2d at 482 determined that:

[T]he aggregate of rights granted by the state of Ohio to Deborah Brotherton rises to the level of a "legitimate claim of entitlement" in Steven Brotherton's body, including his corneas, protected by the due process clause of the fourteenth amendment.

Petitioners argue that *Brotherton's* analysis was confined to the Ohio Anatomical Gift Act. This is false. That was only one factor which the Sixth Circuit referenced in ascertaining the aggregate of rights granted by the State of Ohio to next-of-kin. The court in *Brotherton* looked to the whole range of statutory and decisional law in reaching its conclusion. The Sixth Circuit explained this in *Whaley v. County of Tuscola, ex rel. Tuscola County Bd. of Comm'rs* (6th Cir., 1995), 58 F.3d 1111, 1115:

The Brotherton court nevertheless thought these decisions, with the Ohio statutes, were sufficient, and rightly so. When these Ohio cases, and the Ohio statute granting the next-of-kin the prior right to dispose of the body, and the Ohio Anatomical Act are taken together, it demonstrates that in Ohio there are existing "rules and understandings" which grant the next-of-kin the right to dispose of the body by making a gift of it, to prevent others from damaging the body, and to possess the body for purposes of burial. Such rights in an object are the heart and soul of the common law understanding of "property." It was therefore appropriate for the Brotherton court to decide that the next-of-kin had a legitimate claim of entitlement to the decedent's body. Nothing could be more clear.

The Anatomical Gift Act shows a serious flaw in the argument of defendant-petitioners. The premise of the defense argument is that the next of kin had no enforceable interest in the decedent's organs post autopsy. The coroner was free to keep the organs post autopsy.

If that were true, why did the General Assembly enact R.C. 2108.53 and R.C. 2108.60?

Those statutes grant the coroner the right to keep the pituitary gland (2108.53) and the corneas (2108.60).

These statutes would be unnecessary if the coroner already had the right to all organs. Again, the General Assembly does not enact laws for no reason. *Pfizer, Inc. v. Porterfield* (1971), 25 Ohio St.2d 5.

Significantly, *Brotherton* held that Ohio law grants the next-of-kin the right to determine the disposition of body organs. The General Assembly responded to *Brotherton* by enacting R.C. 313.30 in 2000. That statute granted immunity for coroners who cooperate with eye banks but did not overturn *Brotherton's* holding. The General Assembly is presumed to be aware of *Brotherton's* judicial construction of the law. *State ex rel. County Bd. of Ed. of Huron County v. Howard*, 167 Ohio St. 193 (1958).

Further, these statutes raise the maxim, *expressio unis est exclusio alterius*. The General Assembly only enacted provisions allowing the coroner to keep the corneas and pituitary gland. No authorization was given to keep the brain.

Defendant-petitioners next argue that the Sixth Circuit abandoned *Brotherton* in *Montgomery v. County of Clinton* (6th Cir. 1991), 1991 U.S. App. LEXIS 19070, or at least found *Brotherton* inapplicable to autopsies. Again, this argument is false. The issue in *Montgomery* did not involve the rights of the next-of-kin in the remains of a decedent, an issue the Sixth Circuit determined in the affirmative in both *Brotherton* and *Whaley*. *Montgomery* involved whether the coroner had a right to perform autopsies under Michigan law without permission of the next of kin. It did not implicate any right to possession and disposition of remains. The Sixth Circuit clearly explained this distinction in *Montgomery* at *6-7:

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 does not state or even imply that the Sixth Circuit thought *Brotherton* was inapplicable to autopsies. *Montgomery* did not apply to the *Brotherton* facts. As such, the Sixth Circuit reaffirmed *Brotherton* in *Whaley*, a case involving autopsies, decided four years after *Montgomery*, and reaffirmed *Brotherton* yet again in *Collins v. Crabbe* (6th Cir. 1999), 1999 U.S. App. LEXIS 533 (“This court has twice, in somewhat analogous circumstances, held that under the law of states other than Tennessee, a plaintiff had a constitutionally protected property interest in the body of a deceased next-of-kin. See *Whaley v. County of Tuscola*, 58 F.3d 1111, 1115-16 (6th Cir. 1995); *Brotherton v. Cleveland*, 923 F.2d 477, 480 (6th Cir. 1990).”).

Finally, it is argued that the Sixth Circuit found *Brotherton* inapplicable to the present case when it recently denied a writ of mandamus. To the contrary, the Sixth Circuit noted that mandamus is an extraordinary remedy, and distinguished a case where mandamus had been used in another circuit. The Sixth Circuit noted that there were changes in Ohio law (such as the enactment of R.C. 313.123) which rendered mandamus inappropriate. The Sixth Circuit made no suggestion that its reasoning in *Brotherton* was in any way flawed.⁸

The “Body as Property” Argument

Petitioners chant the proposition that a dead body and its organs are not “property.” They point to two Ohio cases which state that a dead body is not “property,” e.g. *Hadsell v. Hadsell*, 3 Ohio Cir. Dec. at 726 (“A dead body is not property. ***. It cannot be inherited ***.”) and *Carney v. Knollwood Cemetery Ass’n.*, 33 Ohio App.3d at 37 (“this court rejects the theory that a surviving custodian has quasi-property rights in the body of the deceased”). Aside from the fact that this premise is legally questionable, the more important consideration is that it misses the

⁸ In fact, such a determination could only be made by the court sitting en banc. *Naturalite v. Ciarlo* (6th Cir. 2001), 22 Fed. Appx. 506, 507 (“Only an en banc panel of the court may reverse a published decision. Rule 206(c), Rules of the Sixth Circuit”).

issue, which is not the "property" status of the decedent's body and parts, but the interest granted under law to the next-of-kin.

First, the notion that there can be no property rights in human remains comes from a semantically mistaken reading of English law. As the author of Note, *The Application of Traditional Criminal Law to Misappropriation of Gametic Materials* (1997), 24 Am. J. Crim. L. 503, 517 explained:

The traditional American common law rule that there can be no property right in a corpse, passed down from the English courts, has its origins in the writings of Sir Edward Coke. Coke, citing the decision in *Haynes's Case*, determined that the "burial of the Cadaver (that is, caro dara vermibus) is nullius in bonis, and belongs to Ecclesiastical cognizance." "Nullius in bonis" is interpreted as "in the goods of no one." Thus, no one may own a corpse, but the case cited does not support this contention. In *Haynes's Case*, the issue was the proper form of an indictment for theft of a winding sheet. For purposes of the indictment, it was necessary to determine the owner of the winding sheet before establishing that it was stolen. Reasoning that "[a] man cannot relinquish his property in goods, unless they be vested in another," it was decided that the winding sheet remained the property of the owner before it was used on the corpse. It did not become the property of the corpse because a "dead body being but a lump of earth hath no capacity" to accept it. Furthermore, "it is no gift to the person, but bestowed on the body for the reverence towards it, to express the hope of resurrection." From this case supporting the idea that a corpse may not retain property rights in goods, Coke erroneously gleaned the proposition that there are no property rights in corpses.

As a result of Coke's writings, the prohibition on property rights in corpses was passed down in English law, and later, adopted as American common law. Writers and judges assumed that the proposition was true to the extent that often no authority was even cited for the proposition that there are no property rights in corpses.

Thus, the old maxim that a human corpse is not "property" was a statement of the jurisdictional difference between judicial courts and ecclesiastical tribunals. The English common law did not develop any meaningful jurisprudence on the issue of property rights in corpses because ecclesiastical courts were vested with exclusive jurisdiction over human remains. These courts applied canon law. As the author in *Nwabueze, Biotechnology and the*

New Property Regime in Human Bodies and Body Parts (2002), 24 Loy. L.A. Int'l & Comp.L.Rev. 19, 22 explained, "The establishment of Christianity in Britain favored burial in consecrated grounds rather than in caves or city outskirts. Ecclesiastical courts assumed complete jurisdiction over dead bodies and applied canon law, or religious law, as the substantive law. As a result, the common law, formed in non-ecclesiastical courts, did not have the opportunity to develop comprehensive rules on dead bodies."⁹

In 1905 Justice Josephn Henry Lumpkin of the Georgia Supreme Court commented on the courts treatment of dead bodies:

"Death is unique. It is unlike aught else in its certainty and its incidents. A corpse in some respects is the strangest thing on earth. A man who but yesterday breathed and thought and walked among us has passed away. Something has gone. The body is left still and cold, and is all that is visible to mortal eye of the man we knew... It must be laid away. And the law — that rule of action which touches all human things—must touch also this thing of death. It is not surprising that the law relating to this mystery of what death leaves behind cannot be precisely brought within the letter of all the rules regarding corn, lumber and pig iron. And yet the body must be buried or disposed of... And the law, in its all-sufficiency, must furnish some rule... in dealing with the dead and those sentiments connected with decently disposing of the remains of the departed which furnish one ground of difference between men and brutes.

Louisville & N.R. Co. v. Wilson (1905), 123 Ga. 62, 51 S.E. 24, 25.

Developments in law, in society and in science have rendered the maxim inapposite because scientific advances have completely undone the underlying premise: that parts of a human corpse have no value other than for burial. As the courts of Ohio in *Brownlee* and

⁹ As explained in Note, "She's Got Bette Davis['s] Eyes": Assessing the Nonconsensual Removal of Cadaver Organs Under the Takings and Due Process Clauses (1990), 90 Colum.L.Rev. 528, 550, n. 106 "The earlier English cases suffered from the historical anomaly that all matters concerning dead bodies were under the purview of the ecclesiastical courts and hence were never available for common-law analysis. As the ecclesiastical courts waned, the English common-law courts nonetheless continued to apply the old principles, thereby finding no property right to exist. When one examines the early precedents more closely, they turn out to be highly questionable endeavors and their conclusion that no property right can exist is seen to be not based on adequate precedent or reasoning." (Citations omitted.)

Carney conclude, there are fundamental human rights and interests vested in the next-of-kin that are to be protected by our legal system. This Court specifically recognized that a claim for "emotional distress" involving dead bodies involves a special exception to the usual "actual-peril requirement," as stated in the Court's footnote Number 3 in *Heiner v. Moretuzzo*, 73 Ohio St.3d 80, 652 N.E.2d 664.

The importance of addressing this issue in context of current technology is going to be ever more pressing, as the Sixth Circuit observed in *Brotherton v. Cleveland* (6th Cir. 1991), 923 F.2d 477, 481. "The importance of establishing rights in a dead body has been, and will continue to be, magnified by scientific advancements. The recent explosion of research and information concerning biotechnology has created a market place in which human tissues are routinely sold to and by scientists, physicians and others. Note, *Toward the Right of Commerciality*, UCLA L.Rev. 207, 219 (1986). The human body is a valuable resource. See *Moore v. Regents of the University of California* (1990), 51 Cal.3d 120, 271 Cal.Rptr. 146, 793 P.2d 479 (physician used patient's cells in potentially lucrative medical research without his permission). As biotechnology continues to develop, so will the capacity to cultivate the resources in a dead body. A future in which hearts, kidneys, and other valuable organs could be maintained for expanded periods outside a live body is far from inconceivable."

The couple of earlier Ohio cases which Defendants-Petitioners rely upon to insist that there are no "property rights", defeat rather than support their position. The historical difficulty in employing the term "property" when discussing the human body and its remains after death has resulted frequently in an out-of-hand rejection of the title "property" or "quasi property"; but correspondingly has produced a specific legal recognition of the enforceable interests of the next-of-kin in a complete, unmolested body for burial. An interest not to own or profit from the

body or its parts, but to possess, control and direct their disposition. To repeat, Judge Dlott carefully emphasized that the issue certified in this case is not a “property right” as Defendant-Petitioners insist, but an interest after autopsy regarding the organs and their disposition.

To illustrate this distinction, consider the leading case cited by Defendant-Petitioners in this regard of *Carney v. Knollwood Cemetery Ass'n* (1986), 33 Ohio App.3d 31, where the court rejected a quasi property argument but at the same time expressly recognized the next-of-kin's interest, observing that “[t]he policy of the law to protect the dead and preserve the sanctity of the grave comes down to us from ancient times.” The *Carney* court rejected the quasi property argument since it was being advanced by the defendants in an attempt to challenge the standing of the family members. The *Carney* court then clearly recognized the existence of the underlying legally protected interests of the next-of-kin to a complete body. *Id.* at 36.

As explained in Vines, *The Sacred and the Profane: The Role of Property Concepts in Disputes About Post-mortem Examination* (2007), 29 Sydney L. Rev. 235, 236:

Historically the dead body or corpse has been an object of peculiar fascination and concern. The body itself is undeniably a thing, but the peculiar difference between a live body and a dead one (so much the same, and yet so different), and religious ideas about the soul and its level of connection to the body affect its status as a thing, lending it a sense of sacredness. For hundreds of years in Western Europe the body was regarded as essential for the purpose of resurrection at the end of time, when it rose from the grave to be judged on Judgment Day. While modern Westerners are far more likely to think the body is no longer of significance after the person has died, the body continues to be thought of as far more than a simple ‘thing’ and disputes about it, its disposal and its treatment after death continue to turn on issues of human dignity and respect. It is submitted that the importance of the body as a sacred or semi-sacred object in most religious or cultural traditions is a significant part of what creates complexity in the question of whether it should be treated as property or not and that this is exemplified in disputes about postmortem examinations.

The author concluded at 256:

The refusal to treat the body as property and use the protective powers of the conclusion ‘this is property’ has paradoxically been on the basis that the body is

too sacred to be commodified as property, as if that is the only form of property there is.

This paradox of “what word to use” in describing the interest in the next of kin had no effect on the courts and legislatures throughout the 50 states expressly granting and recognizing the next-of-kin’s interest at issue here. The author of Note, Personalizing Personality: Toward a Property Right in Human Bodies (1990), 69 Tex. L. Rev. 209, 225 explained the concept of quasi property:

The English common law hesitated to denominate the interest in a corpse as “property,” but recognized the essence of a market-inalienable property right by upholding the right of possession. American courts have traditionally recognized a “quasi-property” right in a corpse, enforcing a family’s right of possession but preventing commercial exploitation of the corpse.

This returns us, again, to the questions presented by the certification. The next-of-kin in this case do not now, and have never, asserted a right to own or commoditize the remains of their loved one. Their sole interest asserted is the rights of possession, disposition, and exclusion (excluding others from the possession and disposition of the remains). See, e.g. Exhibit “D”.

As discussed above, prior to August 17, 2006 Ohio recognized the rights of possession and disposition and exclusion with regard to human remains. Functionally, these rights amount to what some courts have called a quasi property interest, other courts have called an interest in burial, while others have called them a right of sepulcher. More important than what these rights are called, however, is their substance. These rights lie at the heart of the common law understanding of a legitimate interest. This interest is recognized in Ohio in her cases, her statutes, her custom and usage, and in the hearts and minds of her citizens. This court should answer the certified question in the affirmative.

The Effect of the Enactment of R.C. 313.123

Defendants-Petitioners claim that when the General Assembly passed R.C. 313.123(B) it merely clarified that Ohio law always *denied* the interest in question here (right of disposition of remains) to the next-of-kin. If that was already the law in Ohio, R.C. 313.123 would have been a meaningless enactment, and the General Assembly is presumed not to engage in meaningless acts. *Pfizer, Inc. v. Porterfield* (1971), 25 Ohio St.2d 5, 10 (“we cannot ascribe to the General Assembly an intention to enact a meaningless amendment”).

R.C. 313.123 was introduced as H.B. 235 on May 3, 2005. The provision was introduced after the Sixth Circuit’s decision in *Brotherton* and, more to the point, in the midst of the *Hainey v. Parrott* litigation. It was introduced at the request of the coroners’ association. *Hainey* was filed on October 9, 2002. The court certified a class on August 3, 2004. HB 235 was introduced on May 3, 2005. The *Hainey* court granted plaintiffs’ motion for summary judgment on September 28, 2005, and HB 235 was ultimately passed on May 16, 2006.

As a matter of statutory construction, courts presume that the legislature is aware of the current case law when it drafts its statutes. *State v. Thompson*, 2004-Ohio-2946, 102 Ohio St.3d 287. R.C. 313.123(B) does not apply to all organs and tissues removed and examined, only those that are temporarily “retained”. That was exactly the issue in *Hainey v. Parrott*. R.C. 313.123(B) did not “clarify” the law in Ohio; it changed the law in Ohio. But it only changed the law going forward. It did not change the law in Ohio prior to August 17, 2006.

As originally introduced¹⁰ and as passed¹¹ by the House there was no religious exception as currently found in R.C. 313.123(B)(2). The only thing the original H.B. 235 did in R.C. 313.123(B) was to declare that removed and retained tissues, organs, blood or other parts could

¹⁰ http://www.legislature.state.oh.us/bills.cfm?ID=126_HB_235_I

¹¹ http://www.legislature.state.oh.us/bills.cfm?ID=126_HB_235_PH

be treated and disposed as medical waste following autopsy. If, at that point, the next-of-kin had no interest in the organs, no statute was needed to establish that right in the government. H.B. 235 addressed the interest in the next-of-kin, and abrogated it (in the midst of the *Hainey* litigation).

The religious exception was not added as an amendment by the Senate Judiciary Committee until March 1, 2006, five months after the summary judgment in *Hainey*.¹² The right created by and ultimately enacted by R.C. 313.123 which did not previously exist was the right of religious objection. If creation of this religious objection was the purpose of H.B. 235, it would have been included in the bill as introduced. It was not. It was added later to *limit* the extent to which H.B. 235 abrogated the existing rights in the next-of-kin. This accords with the intent of R.C. 313.123(B) to change the law in Ohio with regard to tissues, organs, blood or other parts that have been removed and retained by the coroner for forensic examination and testing.

The religious exception goes a step further in revealing prior law. It provides that the coroner is to return the organ “to the person who has the right to the disposition of the body.” R.C. 313.123(B)(2). If, at the time this statute was enacted, the law did not provide rights to the next-of-kin to direct the disposition, this language would be incongruous. It would be meaningless, and the General Assembly is presumed not to engage in meaningless acts. Also, the fact that the religious exception includes “specimens” illustrates plaintiff-respondents’ position with regard to their rights, not just in the whole, but in the parts as well.

As to substance, R.C. 313.123 has only prospective application. Pursuant to R.C. 1.48, “A statute is presumed to be prospective in its operation unless expressly made retrospective.” R.C. 313.123 was not expressly made retrospective. Assuming for argument, as Respondents

¹² http://www.legislature.state.oh.us/bills.cfm?ID=126_HB_235_RS

have, that R.C. 313.123 abrogated the rights of the next-of-kin, it did so only on or after August 17, 2006. While the Ohio General Assembly chose to limit the rights of the next-of-kin in organs removed for autopsy in light of *Brotherton* and *Hainey*, the enactment of R.C. 313.123 has neither retroactive application nor does the enactment of R.C. 313.123 change the state of Ohio law prior to August 17, 2006. The only impact R.C. 313.123 would have is on organs removed after August 17, 2006.¹³

CONCLUSION

As the court in *Ritter v. Couch* explained:

The real question is not of the disposable, marketable value of a corpse or its remains, as an article of traffic, but it is of the sacred and inherent right to its custody, in order to decently bury it, and secure its undisturbed repose.

When a coroner performs an autopsy and removes organs or parts from the body, they are returned to the body upon completion and the whole is returned to the family. That is the right of the family under law, in Ohio and elsewhere, and has been for years. The fact that the brain takes a while longer does not change the family's right to return of that integral body part.

Ohio recognizes, in both her statutes and her caselaw, a set of rules and understandings, reinforced by age old custom and usage, which grants the next-of-kin the right to dispose of the

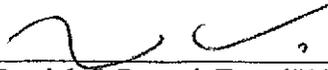
¹³ The County Commissioners Association, et al, posit that R.C. 313.123(B) does not represent a change in the law because R.C. 3734.10(R) classifies autopsy specimens as medical waste. To the contrary, R.C. 3734.01(R) provides "Infectious wastes' includes all of the following substances or categories of substances:

(3) Pathological wastes, including, without limitation, human and animal tissues, organs, and body parts, and body fluids and excreta that are contaminated with or are likely to be contaminated with infectious agents, removed or obtained during surgery or autopsy or for diagnostic evaluation, provided that, with regard to pathological wastes from animals, the animals have or are likely to have been exposed to a zoonotic or infectious agent; ***.
(Emphasis added.)

This section clearly only applies to instances where the remains are contaminated with infectious agents. The amici's reading of the statute would prevent the coroner from replacing any removed organs in the body, which is the routine practice as far as is practicable.

body and its parts by making a gift. R.C. Chapter 2108. Ohio recognizes the right to prevent others from damaging the body and its parts, which right recognizes the family's interest in the body "in the condition when it was left". *Carney, supra*. Ohio recognizes the family's right to possession for purposes of burial, and Ohio law defines the deceased's body to include all of its parts. R.C. 3705.01(C). Such rights are the subject of the question certified by Judge Dlott. They specifically are granted in Ohio, and have been for years. The certified question should be answered in the affirmative.

Respectfully submitted,



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Attorneys for Plaintiffs-Respondents

CERTIFICATE OF SERVICE

This is to certify that a copy of Merits Brief of Plaintiffs-Respondents was sent via email and by regular U.S. Mail on September 10, 2007, addressed as follows:

Thomas L. Blust, Esq.
H. Elizabeth Mason, Esq.
Assistant Prosecuting Attorney
CLERMONT COUNTY PROSECUTOR'S OFFICE
CIVIL DIVISION
Administration Building, 3rd Floor, Suite 313
101 East Main Street
Batavia, Ohio 45103

emason@co.clermont.oh.us

Attorney for Defendants-Petitioners

And as a courtesy to:

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4400 Carew Tower
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metzlegal@aol.com



Patrick J. Perotti, Esq.
DWORKEN & BERNSTEIN CO., L.P.A.
One of the Attorneys for Plaintiffs-Respondents

THIS FORM MUST BE COMPLETED PRIOR TO THE RELEASE OF ANY BODY FROM THE MORGUE.

STATEMENT OF POLICY

Ohio law places a duty upon the Franklin County Coroner's Office to determine the cause and manner of death of persons who have died suddenly while in apparent good health, and those who have died as a result of criminal or violent means, casualty, suicide, and in a suspicious or unusual manner. In most cases, the cause and manner of death is determined by performing an autopsy. An autopsy is a scientific inquiry by a medical professional that involves an external examination of the body and a surgical dissection so that internal tissues and organs can be removed, examined, and subjected to scientific testing. In most cases, remains of organs are returned prior to the release of the body for burial. Bodily fluids and tissue samples kept for microscopic examination and/or testing are not returned. On rare occasions, good medical practice requires that one or more whole organs (usually the brain or the heart) be retained for extended periods of time to complete examination and testing. Because these tests can take as long as three weeks to complete, the body is often released for the purpose of burial or cremation prior to the return of the organs.

Remains of organs that have been retained in observance of good medical practice for the purpose of examination or testing, or as required by law, may be retrieved by the funeral home or crematory if the next of kin desires by delivering written notice of their intention to retrieve the organs to the office of the Franklin County Coroner within SEVEN DAYS of claiming the body from the morgue. When the organs are available to be retrieved, the Coroner will notify the funeral home or crematory. In the event that no written notice is received by the Coroner as described herein, such retained organs may be cremated and dealt with according to law without further notice.

REQUEST TO RELEASE BODY

DECEASED: _____

DATE OF DEATH: _____

The undersigned hereby requests that the Franklin County Coroner release the body of the above named deceased to: _____ (funeral home or crematory). The undersigned represents that he/she is the next of kin of the deceased or other person authorized by law to receive the remains and has full authority to give permission for the release of the body. The undersigned further represents that he/she has read and understands the above statement of policy regarding the autopsy process; the notification procedures required to request the return of organs removed and retained during the autopsy process, and the time limits associated therewith.

Signature / Date

Witnesses:

Name (printed or typed)





Franklin County Coroner's Office

Dr. Bradley J. Lewis

520 King Ave.

Columbus, Ohio 43201

(614) 462-5290 Fax (614) 462-6002

www.coroner.co.franklin.oh.us

October 3, 2005

Dr. Lewis has asked that we have this form completed and signed and returned either with the funeral home when they come to pick up the body or faxed back to us prior to release.

A letter and blanks will be forthcoming to funeral homes in the Central Ohio Area and we will still need to have blanks on hand for the few that are out of the Central Ohio "range".

There are no exceptions to this rule under any circumstances, in-county and out of county alike.

Thank you


Jack Sudinack

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

- - -

KATHY HAINEY, et al.,	.	CASE NO. 1:02-CV-733
Plaintiffs,	.	Cincinnati, Ohio
- v -	.	Monday, September 10, 2007
	.	9:00 a.m. Hearing
CARL L. PARROTT, et al.,	.	Excerpts of Proceedings
Defendants.	.	

.....
TRANSCRIPT OF EXCERPTS OF PROCEEDINGS
BEFORE THE HONORABLE SANDRA S. BECKWITH, CHIEF JUDGE
TRANSCRIPT ORDERED BY: John H. Metz, Esq.

APPEARANCES:

Special Master: Marlene Penny Manes, Esq.
917 Main Street, Suite 400
Cincinnati, Ohio 45202

For the Plaintiffs: John H. Metz, Esq.
4400 Carew Tower
441 Vine Street
Cincinnati, Ohio 45202

For the Defendants: HAMILTON COUNTY PROSECUTOR'S
OFFICE
BY: David T. Stevenson, Esq.
Assistant Prosecuting Attorney
William Howard Taft Law Center
230 E. Ninth Street, Suite 4000
Cincinnati, Ohio 45202

Also Present: Andrea Hatton (Adm. Assistant)
Many Class Members

Law Clerk: Patrick F. Smith, Esq.
Courtroom Clerk: Mary C. Brown
Court Reporter: Mary Ann Ranz



1 MONDAY, SEPTEMBER 10, 2007

2 P R O C E E D I N G S

3 * * *

4 THE COURT: Mr. Stevenson, if you would like to
5 explain briefly what has transpired.

6 MR. STEVENSON: Your Honor, ladies and gentlemen:
7 John pretty well covered it. There's a couple things
8 that have come up during the course of this litigation
9 that I get asked frequently, and one is: Are these
10 parts being used for other things? And that is just not
11 true. None of these things have ever been used for
12 research other than to determine the cause and manner of
13 death of your loved ones. After the coroner's office
14 examines the organs that are removed, they are disposed
15 of in a respectful manner.

16 During the course of this litigation, the policy that
17 John referred to was actually changed. We fine-tuned it
18 a couple of times in the last couple of years. I have
19 written copies of it that I'm going to ask be entered
20 into the record.

21 Just so that you know, right now the way the
22 coroner's office operates, if an organ is kept for
23 further study, the next-of-kin's notified of which
24 specific organs are kept and given an opportunity to
25 seek their return within a few days after the autopsy is

1 completed.

2 John indicated that the coroner's office does have
3 the right to keep the body. And part of what generated
4 this on the front end is the mistaken belief that people
5 needed closure faster than what they were going to get
6 if we kept the brains or the hearts for further
7 examination.

8 Frankly, the notification is a thing that should have
9 been occurring all along but it did not, and it will
10 now.

11 And that's all I have, Your Honor. I'd ask that this
12 be entered as an exhibit.

13 THE COURT: Okay. Thank you very much. Ms.
14 Brown will take it from you.

15 * * *

16 REQUESTED EXCERPT CONCLUDED

17 * * *

18

19

20

21

22

23

24

25

C E R T I F I C A T E

I, Mary Ann Ranz, the undersigned, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.


Mary Ann Ranz
Official Court Reporter

RETENTION NOTIFICATION LETTER

<Date>

1:02 cv-733

<Next of Kin> (as signed on Body Release)

<Address>

<Address>

RE: <Deceased>
<Case Number>

Dear <Next of Kin>,

The death of your <relationship>, <Deceased Name>, was reported to this Office on <Date of report>. An autopsy and investigation were performed to determine the cause and manner of <his/her> death. As outlined in the Body Release Form signed by you (copy attached), it is noted that our autopsy practice requires, when necessary, the retention of whole organs. Such was the case with your <relationship>, and <his/her> brain was retained for fixation and later examination. While our policy states that the next of kin have 7 days from the date of notification to advise this office of the desire to have the <organ> returned, we feel it necessary to confirm that you were made aware of the organ retention and that you do not wish to have the <organ> returned.

Please contact <Investigator Name> at (513)946-<extension>, with your decision by <date, seven days out from date of this notification>. Arrangements can be made at that time should you decide to have the retained organ returned. If you do not want the tissue returned, our office will arrange for its appropriate disposition at no financial cost to you. Thank you in advance for your cooperation with this matter, and please accept my condolences on the loss of your <relationship>.

Sincerely,

<Physician Name>

Deputy Coroner

Enclosure

OU:ash



SECTION 2.15

RELEASE OF IDENTIFIED HUMAN REMAINS

Effective date: 1998

Replaces: N/A

Initiated by: Administrator

Reviewed by: Administrator

Approved by: Coroner

Reviewed: 5/01, 10/02, 2/07

File: Release.Bodies.Sec2.15

Revised: 12/00, 5/01, 10/02, 12/03, 7/27/05

Manual: General Office Policies & Procedures

BACKGROUND: Often more than one family member will make funeral arrangements or the next of kin will change their decision regarding funeral home services leaving all of us uncertain about which instructions to follow. A letter was sent to local funeral directors on November 19, 1997 requiring signed consent from legal next of kin or administrator of the estate prior to release of a body to insure release to the correct funeral home.

POLICY: A signed release form is required. Receipt of the forms by facsimile is acceptable. Exceptions may be made in instances where the family resides out of town or in other special circumstances. In these instances we attempt to obtain verbal authorization, but if we cannot, it is possible to accept and document the funeral director's assurance after consulting with a supervisor.

Direction and permission for release of OC cases must be obtained in writing from the coroner having jurisdiction.

The pathologist is responsible for release of the body.

Effective 8/1/05, a revised release form including statement of policy with respect to retention of organs is required.

PROCEDURE: *The pathologist must hold or release the body in the computer.*

The investigator/night clerk receiving the consent form must scan it to the computer and file the hard copy in the case jacket. The name of the funeral home should be entered in the appropriate computer fields.

Revisions in italics.

SECTION 2.15.2

RELEASE OF RETAINED ORGANS

Effective date: 8/1/05

Replaces: N/A

Initiated by: Administrator

Reviewed by: Administrator

Approved by: Coroner

Reviewed:

File: Release.Retained.Organ.Sec2.15.2

Revised: 1/1/06, 7/26/06, 10/3/06

Manual: General Office Policies & Procedures

BACKGROUND: Ohio law places a duty upon this office to determine the cause and manner of death of persons who have died suddenly while in apparent good health, and those who have died as a result of criminal or violent means, casualty, suicide, and in a suspicious or unusual manner. In most cases, the cause and manner of death is determined by performing an autopsy. An autopsy is a scientific inquiry by a medical professional that involves an external examination of the body and a surgical dissection so that internal tissues and organs can be removed, examined, and subjected to scientific testing. In most cases, remains of organs are returned prior to the release of the body for burial. Body fluids and tissue samples kept for microscopic examination and/or testing are not returned. Good medical practice requires that one or more whole organs (usually the brain or the heart) be retained for extended periods of time to complete examination and testing. The body is often released for the purpose of burial or cremation prior to the return of the organs.

POLICY: Remains of organs that have been retained in observance of good medical practice for the purpose of examination or testing, or as required by law, may be retrieved by the next-of-kin, his or her authorized agent, or other person permitted by law to deal with the remains of the deceased, by delivering written notice of their intention to retrieve the organs to this office within **SEVEN DAYS** of claiming the body from the morgue. In the event that no written notice is received by the Coroner, such retained organs may be cremated and dealt with according to law without further notice.

Funeral directors will be notified when the body is released if an organ(s) has been retained.

The examining pathologist is responsible for making contact with the next of kin or referring county coroner the day of or day following the autopsy to inform he/she of the organ retention. Verbal consent for organ disposal is acceptable and must be documented in the case narrative by the pathologist. In the event the next of kin is unable to be reached by telephone, a *Retention Notification Letter* will be generated by the case investigator and sent to the next-of-kin, indicating what organ was retained and the date a request to return the retained organ must be received by this office. A copy of this letter will be scanned to the case file.

The pathologist is responsible for electronic release of the retained organ(s).

PROCEDURE: Written or verbal requests to return the retained organ(s) must be immediately forwarded to the investigator handling the follow-up on the case. If the request is received after business hours or on the weekend, the night clerk should refer all received requests to the Chief Investigator, who will forward the request the next business day to the responsible investigator. The responsible investigator must scan the document to the computer, file the hard copy in the case jacket and notify the pathologist of the family's request.

If verbal consent to *dispose* of the retained organ is received by someone other than the examining pathologist, that individual is responsible for notifying the pathologist and providing appropriate documentation within the case narrative. Additionally, if verbal request to *return* retained organ is received, the individual receiving said request is responsible for notifying the pathologist and providing appropriate documentation within the case narrative.

Once examination is complete, the pathologist will notify the investigator that the retained organ is available for release. The investigator will notify the person identified in the written notice **and** the person or agency that originally claimed the body of the deceased that the organ(s) is available for release, instructing the parties involved that they have seven (7) days to respond to for organ release. A narrative entry will be made in the LIMS indicating pathologist approval for specimen release as well as the name of next-of-kin and funeral home personnel that have been notified of the specimen availability. Refer the next of kin to the Chief Deputy Coroner or Administrator should he/she indicate personally picking up the retained organ. An investigator will release the hold on the specimen within the LIMS **when the next-of-kin or funeral home personnel are present to pick up specimen.** Release procedures as outlined in Section 2.3 of the Morgue Manual will be followed to facilitate physical release.

Reference: Section 3.6.6.1 Tissue and Organ Retention (General Office Policies and Procedures)
Section 2.3 Releasing Bodies (Morgue Manual)
Section 4.2 Delayed Specimen Examination (Morgue Manual)

SECTION 3.6.6.1

TISSUE AND ORGAN RETENTION

Effective date: May 9, 2002

Replaces: N/A

Initiated by: Coroner.

Reviewed by: Chief Deputy Coroner

Approved by: Coroner

Reviewed: 12/03

File: Tissue.Organ.Retention.Sec3.6.6.1

Revised: 1/1/06, 10/3/06

Manual: General Office Policies & Procedures

BACKGROUND: To insure thorough examination and accurate cause of death, this office follows generally accepted standards in pathology with regard to the retention of tissues for further study when necessary.

POLICY: It is the policy of the Hamilton County Coroner's Office to retain as little tissue as possible.

Ohio law mandates the Coroner determine the cause and manner of death. That same law entitles the coroner's office to hold a body until a diagnosis as to cause and manner of death is made (ORC 313.15). In the small minority of cases where additional testing is needed in order to fulfill our legal duty, or to adhere to principles of good medical practice, certain tissues may be retained. Usually there is a specific target organ or tissue that is more suspect than others and requires further testing. As such, and to avoid creating an unnecessary burden upon the already grieving family, relatives and friends, it is the policy of this office to release the body to the next of kin as soon as possible. In the overwhelming majority of cases, the body is released within 24 hours.

Organs are retained only for the following reasons:

- 1. Further testing in order to determine a cause and manner of death.**
- 2. Retention for evidentiary and confirmatory purposes.**
- 3. Special requests on the part of the family for further testing in order to clarify an underlying disease process.**

After completion of the postmortem examination, and before releasing the body, the pathologist will indicate in the LIMS whether brain, heart or other organs are retained. The examining pathologist is responsible for making contact with the next of kin or referring county coroner the day of or day following the autopsy to inform he/she of the organ retention. In the event the next of kin is unable to be reached by telephone, a *Retention Notification Letter* will be generated by the case investigator and sent to the next-of-kin, indicating what organ was retained and the date a request to return the retained organ must be received by this office. A copy of this letter will be scanned to the case file. Should the family or referring county coroner request return of retained organ, the pathologist will mark specimen container accordingly. Once examination is complete, the pathologist will place organ remains in an appropriate container and give the case investigator permission to release. The disposition of such retained organs will follow policy Section 4.2 in Morgue Policies and Procedure Manual.

When faced with the choice of retaining the body until a diagnosis can be made or retaining the suspect organ, it is our policy to retain only the organ and release the body, thus facilitating closure on the part of the bereaved.

CRITICAL ASPECTS AND LIMITATIONS: In virtually every case, following accepted autopsy practice; small, representative samples of all tissues are retained for the purposes stated earlier in order to fulfill the legal requirements of the coroner's office.

When organs need to be retained, the family is notified as specified in policy 2.15.2 (General Office Policies and Procedures). We understand and are acutely aware of the grief felt by those facing a sudden and unexpected loss. However, we are also aware that it is our role as impartial investigators to seek the truth as to how a person died unimpeded in our investigation following accepted standards of current death investigation.

Usually the additional testing is completed within six weeks, however, length of retention is determined by evidentiary and confirmatory issues raised by the legal system, state and federal regulations and accepted pathology practices in regard to retention schedules.

Disposal of organs and tissues preserved with formaldehyde, a potential human carcinogen, is governed by federal and state regulations.

SECTION 4.2**DELAYED SPECIMEN EXAMINATION**

Effective date: February 12, 1999
Replaces: n/a
Initiated by: Morgue Director
Reviewed by: Administrator
Approved by: Coroner
Reviewed: 8/2/04
File: morgue42
Revised: 8/2/04, 8/1/05
Manual: Morgue Policies and Procedures

Policy: All specimens which are retained for fixation and later studied are to be rinsed under running water prior to the start of the conference.

- Procedure:**
- A. Each Wednesday at 1:00 p.m. a neuropathology conference is held in the large autopsy room. This conference is attended by all the pathologists and consulting doctors from various hospitals.
 - B. Specimens which have been saved by the pathologists and are intended to be dissected at the conference must be thoroughly rinsed under running water prior to dissection.
 - C. The pathologist will notify the pathology assistant, either verbally or by note, which specimens are to be prepared for the conference.
 - D. The pathology assistant will retrieve the specimens from the doctor's shelf and place them in the sink, allowing running water to rinse them thoroughly.
 - E. After the conference is completed, the dissected specimens will be collected in a plastic bag and discarded in the biohazardous waste.
 - 1. If the next of kin has elected to retrieve the organs after the examination they have seven days after the release of the body to notify this office of that intent. When

this information is learned by the office, the organ container must be marked with orange tape to indicate that the organ is to be returned to the next-of-kin.

2. After the organ is examined by the pathologist it should be placed in a zip-lock plastic bag, marked with a bar code label and have a biohazardous sticker placed on it. The organ can then be placed back on the doctor's shelf to await pickup by the next of kin.
3. Because the family has seven days to notify the Coroner's Office of their intent to pickup the organ, the pathologist will tell the forensic assistant which organs are to be retained and which are to be discarded in biohazardous waste.

SENATE, No. 1924

STATE OF NEW JERSEY
210th LEGISLATURE

INTRODUCED SEPTEMBER 30, 2002

Sponsored by:

Senator PETER A. INVERSO

District 14 (Mercer and Middlesex)

Co-Sponsored by:

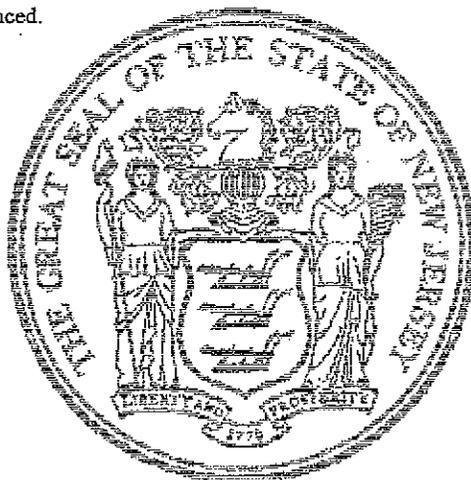
Senators Allen, Bucco, Singer, Vitale, Sweeney, Martin and Baer

SYNOPSIS

Requires Port Authority of New York and New Jersey to use transported remains of victims of September 11, 2001 from World Trade Center in a memorial.

CURRENT VERSION OF TEXT

As introduced.



(Sponsorship Updated As Of: 11/25/2003)

PLAINTIFF'S
EXHIBIT

C

1 AN ACT concerning remains of the victims of September 11, 2001.

2

3 BE IT ENACTED by the Senate and General Assembly of the State
4 of New Jersey:

5

6 1. The Legislature finds and declares that:

7 a. The unprovoked attack on the United States carried out by
8 international terrorists on September 11, 2001 against targets in New
9 York City, Washington, D.C. and Arlington, Virginia resulted in the
10 deaths of thousands of innocent people, injury to countless others, and
11 the disruption of innumerable lives.

12 b. Among the victims of this depraved act were civilian and
13 government workers, military personnel, airline passengers and crew
14 members, police officers, firefighters and paramedics, many of whom
15 resided in this State.

16 c. The remains of many victims of the World Trade Center attacks
17 were never located.

18 d. The ash from the World Trade Center site, which contains
19 remains of the victims of September 11, 2001, has been held at Fresh
20 Kills Landfill in Staten Island, New York.

21 e. This ash should be covered and placed in containers to
22 eventually be transported to the World Trade Center site to become a
23 part of the memorial that will be built at this location.

24 f. It is fitting and proper for the State to honor the victims of
25 September 11, 2001 by returning their ashes to the site of a memorial
26 at the World Trade Center in their honor.

27

28 2. The Port Authority of New York and New Jersey shall cover
29 the site of the remains of the victims of September 11, 2001 and
30 transport those remains in containers to be used in a memorial at the
31 World Trade Center site that will be built in their honor.

32

33 3. This act shall take effect upon the enactment into law by the
34 State of New York of legislation having an identical effect with this
35 act, but if the State of New York has already enacted such legislation,
36 this act shall take effect immediately.

37

38

39

STATEMENT

40

41 This bill requires the Port Authority of New York and New Jersey
42 to honor the victims of the World Trade Center by covering the ashes
43 of their remains, placing them in containers and transporting them
44 from the Fresh Kills Landfill and returning them to the World Trade
45 Center site to be used in a memorial built in their honor.

IN THE SUPREME COURT OF OHIO

MARK ALBRECHT, et al.

Case No. 2007-507

Plaintiffs

-vs-

County of Hamilton

BRIAN TREON, M.D., et al.

SS:

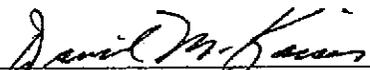
State of Ohio

AFFIDAVIT OF DAVID KAISER

Now comes David Kaiser, after being duly sworn and cautioned, and states the following based upon his personal knowledge and belief:

1. I, David Kaiser, was the natural father of my son, David Michael Kaiser, Jr. who died on March 10, 2001.
2. I am a plaintiff in the Hainey v. Parrott, M.D. class action case against the Hamilton County coroner.
3. I was not given notice that my son's brain had been removed at autopsy, retained and destroyed by Hamilton County coroner's office.
4. When I buried my son, I thought that I was burying my son. I now feel that I have not buried my son without his brain.
5. Every time I visit his grave this haunts me.
6. It is very difficult for those who have not experienced this shocking scenario to understand the emotion.
7. As a parent I feel I had a duty to my son to properly bury him. I feel that I have let him down and not be able to fulfill my fatherly duties to him.
8. I was shocked that this could occur without being informed and approved by myself and my wife. It hurt us very much that we buried a body but not our son. I firmly believe that the brain is what makes each and everyone of us who we are.
9. My son was an intelligent student and a very good athlete as was supported by the fact that he had a full scholarship to college. When we buried the body without the brain, we buried a body, not my son, as his brain was gone.

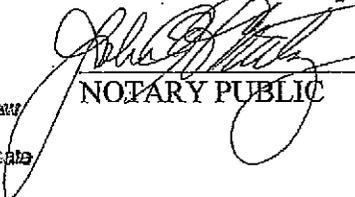
AFFIANT FURTHER SAYETH NAUGHT.



David Kaiser

Sworn and subscribed in my presence on this 7th day of September, 2007.

JOHN H. METZ, Attorney at Law
Notary Public, State of Ohio
My Commission Has No Expiration Date
Section 147.03



NOTARY PUBLIC



PLAINTIFF'S
EXHIBIT

 D