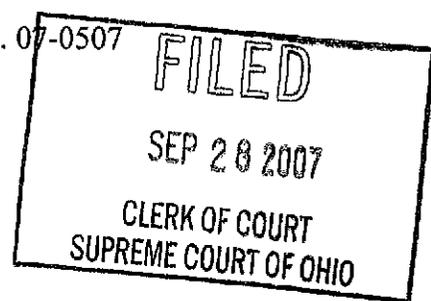


IN THE SUPREME COURT OF OHIO

MARK ALBRECHT, et al., :
 :
 Plaintiffs-Respondents, :
 :
 vs. :
 :
 BRIAN TREON, M.D., et al., :
 :
 Defendants-Petitioners. :

Case No. 07-0507



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

Mark Landes, Counsel of Record (0027227)
email: ml@isaacbrant.com
David G. Jennings (0040487)
email: dgj@isaacbrant.com
Jennifer H. George (0080808)
email: jhg@isaacbrant.com
ISAAC, BRANT, LEDMAN & TEETOR LLP
250 East Broad Street, Suite 900
Columbus, Ohio 43215-3742
(614) 221-2121 (phone) / (614) 365-9516 (fax)
Attorneys for Sixty-five (65) Ohio Counties, County Commissioners' Association of Ohio, Buckeye State Sheriffs' Association, Ohio Association of Chiefs of Police, Ohio Prosecuting Attorneys Association, and Ohio Society of Pathologists

Helen E. Mason (0051967)
email: emason@co.clermont.oh.us
CLERMONT COUNTY PROSECUTOR'S OFFICE
101 E. Main Street
Batavia, Ohio 45103
(513) 732-7585 (phone)
Attorneys for Defendants-Petitioners

John R. Climaco, Counsel of Record (0011456)
email: jrclim@climacolaw.com
David M. Cuppage (0047104)
email: dmcupp@climacolaw.com
Scott D. Simpkins (0066775)
email: sdsimp@climacolaw.com
CLIMACO, LEFKOWITZ, PECA, WILCOX & GAROFOLI Co., LPA
55 Public Square, Suite 1950
Cleveland, Ohio 44113
(216) 621-8484 (phone) / (216) 771-1632 (fax)

Attorneys for Cuyahoga County
Nick A. Soulas (0062166)
A. Paul Thies (0074641)
Patrick J. Piccininni (0055324)
Assistant Prosecuting Attorney
373 South High Street, 13th Floor
Columbus, Ohio 43215
(614) 462-3520 (phone) / (614) 462-6012 (fax)
Attorneys for Franklin County Board of Commissioners and Franklin County Coroner

Mark D. Tucker, Counsel of Record (0036855)
email: mtucker@bfca.com
BENESCH, FRIEDLANDER, COPLAN & ARONOFF LLP
88 East Broad Street, Suite 900
Columbus, Ohio 43215
(614) 223-9358 (phone) / (614) 223-9330 (fax)
Attorneys for Ohio State Coroners Association and Ohio State Medical Association

Patrick M. Fardal, M.D., J.D. (0058600)
365 Stonewall Court
Dublin, Ohio 43017
(614) 889-0333 (phone)
Attorney for National Association of Medical Examiners

Patrick J. Perotti (0005481)
email: pperotti@dworkenlaw.com
DWORKEN & BERNSTEIN Co., LPA
60 South Park Place
Painesville, Ohio 44077
(440) 352-3391 (phone) / (440) 352-3469 (fax)
Attorneys for Plaintiffs-Respondents

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
I. INTRODUCTION	1
II. LAW AND ARGUMENT	2
A. THE COURT SHOULD ANSWER THE CERTIFIED QUESTION IN THE NEGATIVE, BASED UPON HISTORY, OHIO LAW AND THE RAMIFICATIONS OF THIS PROPOSED NEW RIGHT	2
B. OHIO’S STATUTES DO NOT PROVIDE THE NEXT OF KIN A PROTECTED RIGHT IN FORENSIC SPECIMENS	3
1. R.C. 313 Grants Next Of Kin A Preference In The Final Disposition Of The Deceased’s Body, But Not A Right To Receive A Body Or Organ In As “Complete As Possible” State For Final Disposition.....	3
2. R.C. 2108 Is A Separate And Unrelated Statutory Section.....	7
C. SINCE OHIO’S STATUTES HAVE NEVER PROVIDED FOR A PROTECTED RIGHT IN FORENSIC SPECIMENS, R.C. 313.123 DOES NOT REPRESENT A CHANGE IN LAW.....	7
1. Plaintiffs-Respondents’ Request For This Court To Create A New Right And Corresponding Cause Of Action Is Improper	7
2. Prior To The Enactment Of R.C. 313.123, Ohio’s Coroner Statutes Were Silent Regarding Any Rights To Medical Waste.....	8
D. NEITHER THE COMMON LAW OF OHIO NOR ANY OTHER STATE, AS SET FORTH BY PLAINTIFFS-RESPONDENTS, HOLDS THAT THE NEXT OF KIN HAVE A PROTECTED RIGHT IN FORENSIC SPECIMENS	9
1. Ohio	9
2. Other States.....	11
E. OHIO LAW ALREADY PROVIDES CAUSES OF ACTION THAT ALLOW REDRESS FOR WRONGS COMMITTED TO THE DECEASED AND THEIR NEXT OF KIN.....	12
F. PLAINTIFFS-RESPONDENTS’ MORALITY ARGUMENTS DO NOT CREATE A PROTECTED RIGHT IN FORENSIC SPECIMENS.....	15

III. CONCLUSION18
CERTIFICATE OF SERVICE.....21

TABLE OF AUTHORITIES

Page

CASES

<i>Bd. Educ. Pike-Delta-York Local School Dist. v. Fulton Cty Budget Comm.</i> (1975), 41 Ohio St.2d 147, 324 N.E.2d 566.....	8
<i>Biro v. Hartman Funeral Home</i> (1995), 107 Ohio App.3d 508, 669 N.E.2d 65.....	14
<i>Brotherton v. Cleveland</i> (C.A.6, 1991), 923 F.2d 477	3, 7, 9
<i>Carney v. Knollwood Cemetery Ass'n</i> (1986), 33 Ohio App.3d 31, 514 N.E.2d 430	14
<i>Carter v. City of Zanesville</i> (1898), 59 Ohio St. 170.....	10
<i>Crocker v. Pleasant</i> (Fla. 2001), 778 So.2d 978, 26 Fla. L. Weekly S61	12
<i>Everman v. Davis</i> (1989), 54 Ohio App.3d 119, 561 N.E.2d 547	10
<i>Frys v. Cleveland</i> (1995), 107 Ohio App.3d 281, 668 N.E.2d 929	10
<i>Hainey v. Parrott</i> (Sept. 28, 2005), S.D. Ohio No. 1:02-CV-733	7, 8, 9, 10, 11, 20
<i>Martin v. Kim</i> (N.D. Ind. 2005), No. 2:03 CV 536	11
<i>Montgomery v. Clinton</i> (C.A.6, 1991), 940 F.2d 661.....	7
<i>Newman v. Sathyavaglswaran</i> (9th Cir. 2002), 287 F.3d 786.....	12
<i>Papieves v. Lawrence</i> (1970), 263 A.2d 118, 437 Pa. 373.....	12
<i>Shults v. U.S.</i> (U.S.D. Kan. 1998), 995 F. Supp. 1270	4
<i>State ex rel. Atty. Gen. v. Guilbert</i> (1897), 56 Ohio St. 575, 47 N.E. 551	8
<i>State ex rel. Curran v. Brookes</i> (1945), 144 Ohio St. 582, 60 N.E.2d 62	8
<i>Whaley v. County of Tuscola</i> (C.A.6, 1995), 58 F.3d 1111.....	12

STATUTES

R.C. 2108.....	7, 13
R.C. 2108.02.....	7
R.C. 2108.60.....	7

R.C. 313.....	4, 5, 7
R.C. 313.123.....	8, 9, 17
R.C. 313.131.....	4, 15, 17
R.C. 313.14.....	4, 5
R.C. 3705.....	5
R.C. 3705.01.....	5

OTHER AUTHORITIES

Cremation Association of North America (CANA) (www.cremationassociation.org).....	16
National Funeral Directors Association (NFDA) (www.nfda.com).....	16
Restatement of the Law, Restatement 2d of Torts (1979), Section 868.....	12, 14

I. INTRODUCTION

However Plaintiffs-Respondents wish to posture this case, it essentially involves one central question: Does the next of kin have a right to file a legal claim for damages against a county coroner for a properly conducted and legally sanctioned autopsy in which tissues were removed as forensic specimens and disposed of as medical waste in accordance with medical standards and Ohio law?

While Plaintiffs-Respondents posit this right or interest in a number of different ways, this is the cause of action they are asking this Court to create. Plaintiffs-Respondents cannot support that a right has been infringed by the legal autopsy process. Consequently, Plaintiffs-Respondents are left attempting to appeal to morality arguments concerning death and burial. Plaintiffs-Respondents posit that a corpse should be as whole as possible when it is buried, and if it is not, then a right has been infringed. Autopsies have been done in Ohio, without incident or complaint regarding actions taken in the name of proper forensic procedure, for over a century. Yet, Plaintiffs-Respondents want this Court to sanction their cause of action so they can ask the federal court to scrutinize Ohio coroners' decision-making with respect to specimens following forensic analysis. Consequently, a cause of action, which heretofore has not existed, will work to subject Ohio's county coroners to millions of dollars of potential liability for proper and legally-sanctioned autopsies, and will discourage coroners from exercising the fullest extent of forensic science to learn the cause and manner of death of Ohioans.

II. LAW AND ARGUMENT

A. THE COURT SHOULD ANSWER THE CERTIFIED QUESTION IN THE NEGATIVE, BASED UPON HISTORY, OHIO LAW AND THE RAMIFICATIONS OF THIS PROPOSED NEW RIGHT

The closest Plaintiffs-Respondents have come to posing the question is on page 7 of their Merit Brief:

“... as is 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.”

The terms “whole body” or “complete remains” are not in the autopsy statute and are not consistent with autopsy procedure. Seeking a “yes” response to that question, Plaintiffs-Respondents then argue that it is then up to the federal court to determine whether there was a violation of the law determined by this Court (second-guessing procedures or techniques followed by coroners in examining forensic specimens and disposing of medical waste). Plaintiffs-Respondents wish to ask federal courts the impossible and wide open question of whether the coroner has returned the body “in a condition as complete as possible” as a standard for damages. (Pl-Resps’ Merit Brief at 5.)

The question is not whether a family member is morally interested in their decedent’s remains, the question is whether next of kin have a protected interest and protected right under the coroner statutes such that they can seek the protection of state and federal courts and sue for damages solely for the retention of forensic evidence or the disposal of medical waste. Plaintiffs-Respondents’ briefs obscure the right question, and attempt to substitute their own question.

Plaintiffs-Respondents’ suggestion that a right in forensic specimens has always existed or is deeply imbedded in our social fabric, is simply not true. The right does not have a history in our legal system. After over a century of autopsies in Ohio, Plaintiffs-Respondents now stand

before this Court seeking to sue counties and coroners for what amounts to simply performing the autopsy.

Currently, a next of kin has various rights under Ohio law, including a preference to receive the rest of the body after an autopsy for purposes of burial or cremation. There are tort claims if a corpse is mutilated. There are statutes and court protection (*Brotherton*) if a coroner should take a body part without consent as an anatomical gift or for transplant. The statutes also provide for specific religious objection to an autopsy. All of these rights and protections co-exist with the rights, discretion, authority and responsibility of a coroner to complete his/her public duty, to investigate crimes, and to further health and safety. There is not a need for this Court to create further rights. We submit this is far from a “classic either/or” case as argued by Plaintiffs-Respondents on page 12 of their Merit Brief. The protections and statutes do not give coroners unfettered discretion to “take body parts at will” (also described as “socialism”) and use such body parts for any purpose. This argument by Plaintiffs-Respondents is pure fiction. There is nothing alleged in this case other than coroners holding evidence or disposing of medical waste. This is not actionable under Ohio law nor should it be. It does not follow that coroners have “violated” the “law in Ohio” as argued on page 4 of Plaintiffs-Respondents’ Merit Brief. If this Court answers “yes” to the question submitted, it is the same as finding that coroners’ practices are a violation of Ohio law -- “law” which, heretofore, has not existed.

B. OHIO’S STATUTES DO NOT PROVIDE THE NEXT OF KIN A PROTECTED RIGHT IN FORENSIC SPECIMENS

1. R.C. 313 Grants Next Of Kin A Preference In The Final Disposition Of The Deceased’s Body, But Not A Right To Receive A Body Or Organ In As “Complete As Possible” State For Final Disposition

Under Ohio’s statutes, after the performance of an autopsy, the next of kin simply have an interest to receive the deceased’s body for purposes of accomplishing its final disposition.

R.C. 313.14. In the absence of any religious objection, this interest in the disposition of the body of the deceased, upon whom an autopsy has been performed, is in no way compromised by the extraction of forensic specimens and disposal of medical waste.

There is no language in R.C. 313, the body of law that governs the actions and procedures of the coroner, to suggest that the next of kin have an interest to bury a body that is unaffected by the forensic process. Yet, Plaintiffs-Respondents and their amici continuously propound that some individuals were "... deprived of their right to bury their deceased ... in a condition that was complete as possible, ..." (Monreal Merit Brief at 2.) Aside from Plaintiffs-Respondents' ill-defined and ill-supported position that a human body that does not contain its whole organs prevents the next of kin from giving the body its proper and final disposition, there is no authority to support such a stance. Conversely, it has been found that a deceased's body, minus the forensically necessary specimens, that is returned to the next of kin after performance of a legally and medically appropriate autopsy does not violate a statutory direction that next of kin possess the body for purposes of burial. *Shults v. U.S.* (U.S.D. Kan. 1998), 995 F. Supp. 1270, 1275. None of the Plaintiffs-Respondents allege that a coroner failed to present them with the deceased's body. Further, none of the Plaintiffs-Respondents claim that they were denied their interest in giving the deceased's body its proper and final disposition.

No provision within R.C. 313 provides next of kin a right to receive the body of the deceased back from an autopsy in as "complete as possible" state. Consideration of the definitional and procedural realities of the autopsy demonstrate why such alleged right is not and cannot be a reality.

If next of kin have a desire to receive the body of the deceased in as complete a state as possible, R.C. 313.131 provides a vehicle for the next of kin to accomplish such a goal by

voicing religious objection to the entire autopsy process. However, once the body of the deceased has undergone the dissection of an autopsy process, returning a body and/or its organs in a complete state is infeasible and impossible.

Plaintiffs-Respondents extracted the definition of “dead body” found in R.C. 3705.01 and attempted to interchangeably insert such definition in the R.C. 313.14 provision. (Monreal Merit Brief at 5.) It is important to note that the “dead body” definition is expressly stated to be restricted to Chapter 3705, which deals with the topic of “vital statistics,” requiring specific and precise definitions for purposes of keeping track of statistics. Interestingly, R.C. 313 does not contain a definition of “body” that leads to the conclusion that next of kin have a right to bury the decedent in “as complete as possible, including organs removed for examination” state as Plaintiffs-Respondents misrepresented within their Merit Brief. (Pl-Resps’ Merit Brief at 5, 16.) Perhaps the reason that there is no calculated definition of “body,” as it is used in R.C. 313 is because of the very nature and varying consequences of the autopsy that is performed, according to law, on the decedent. Depending on the cause and manner of death of the decedent, an autopsy can have varying results as to what specimens are extracted and tested and, therefore, what ultimately constitutes the “body” that is given to the next of kin for purposes of final disposition is not uniform.

Similar to Plaintiffs-Respondents’ insistence on a whole body being given to the next of kin for final disposition, Plaintiffs-Respondents also arbitrarily argue as to the importance of notice and return of whole organs as opposed to parts of organs or other body parts. (Monreal Merit Brief at 3.) Such erratic line-drawing on the part of Plaintiffs-Respondents to attempt to demonstrate that a whole organ somehow possesses more value than any other forensic specimen

further highlights the lack of Ohio law to support a protected right in any forensic specimen, whether whole or part.

In the spirit of all parties keeping their foci on the certified question at hand, it is important to confront what Plaintiffs-Respondents refer to as the “*reductio ad absurdum*” argument presented by [Defendants-Petitioners] . . .” and Plaintiffs-Respondents’ insistence that the “. . . question here is nothing . . . about epithelial cells from a fingerprint, scraps of tissue, or drops of blood in a test tube.” (PI-Resps’ Merit Brief at 3.)

Without justification, either from the form of the certified question, or anything asserted in the way of Ohio law, Plaintiffs-Respondents repeatedly emphasize and hone in on the fact that the Albrecht’s son’s “. . .entire brain was removed . . . [t]he brain is the man.” (Monreal Merit Brief at 1.) Nothing, aside from Plaintiffs-Respondents’ liberal interpretation of literary sources, places any higher value on the brain compared to any other part of the human body that is affected by an autopsy.

More importantly, the actual question before this Court is as to whether there is a protected right in “. . . the decedent’s tissues, organs, blood, or other body parts removed and retained by the coroner for forensic examination and testing.” Once again, referring back to Ohio law, as is this Court’s main concern, nothing in the state’s authority draws a line between the value placed on a whole organ verses a part of an organ or body part. The form of the certified question and common logic ask the Court, assuming that it answers in the affirmative, to find that the next of kin have just as much of a protected right in the smallest forensic specimen as to the largest. Such an answer to the certified question is at odds with Ohio coroner statutes and basic logic.

2. R.C. 2108 Is A Separate And Unrelated Statutory Section

Plaintiffs-Respondents again attempted to muddy the waters by including R.C. 2108 (the Ohio Anatomical Gift Act) as statutory authority to create a right of the next of kin in the forensic specimens removed from the decedent. As distinguished in the prior briefs before this Court, R.C. 2108 expressly grants certain individuals the authority to make and/or object to an anatomical gift. (65 Counties,¹ *et al.*'s Merit Brief at 18.) This right is limited and is in no way connected to the separate body of statutory law governing coroners and autopsy procedures in R.C. 313.

Similarly, the cornerstone of the *Hainey* case, which Plaintiffs-Respondents now argue as precedent for the case at bar was *Brotherton v. Cleveland* (C.A.6, 1991), 923 F.2d 477. *Brotherton* is completely distinguishable from the issue presented by the state law question before this Court. (65 Counties, *et al.*'s Merit Brief at 16-19.) The *Brotherton* decision revolved around a very different fact pattern involving unauthorized taking of corneas, in violation of separate statutory provisions concerning anatomical gifts. R.C. 2108.60, 2108.02, *Brotherton*, 923 F.2d 482. Verification that the *Hainey* and *Brotherton* decisions are inapplicable to the case at bar is the fact that the Sixth Circuit itself indicated that *Brotherton* and its analysis involving R.C. 2108 is not applicable to a case involving a coroner's proper, state-sanctioned autopsy procedures. *Montgomery v. Clinton* (C.A.6, 1991), 940 F.2d 661.

C. SINCE OHIO'S STATUTES HAVE NEVER PROVIDED FOR A PROTECTED RIGHT IN FORENSIC SPECIMENS, R.C. 313.123 DOES NOT REPRESENT A CHANGE IN LAW

1. Plaintiffs-Respondents' Request For This Court To Create A New Right And Corresponding Cause Of Action Is Improper

Plaintiffs-Respondents argue that custom and usage are important to the establishment of a new right and cause of action in Ohio. Here is another example of where

¹ See Exhibit A.

Plaintiffs-Respondents' argument fails. The custom and practice of coroners in Ohio has been to properly dispose of medical waste as a necessary part of the autopsy process. Plaintiffs-Respondents' attempt to now challenge this practice, after a hundred years of autopsy custom, practice and statutorily sanctioned responsibility, is misplaced. History, custom and practice show there has not, heretofore, been a right to sue for the disposition of medical waste following a legally sanctioned autopsy, and there has not, heretofore, been a challenge or allegation that such procedure has infringed upon any interest of next of kin to bury our dead.

If Plaintiffs-Respondents wish to link these two issues, and create a new right under Ohio law, this is not the proper forum. Plaintiffs-Respondents have the right, through the legislative process, to enact changes to Ohio law. If Plaintiffs-Respondents believe that R.C. 313.123 does not adequately protect their interests or their beliefs, they can utilize the legislative process.² What Plaintiffs-Respondents must admit, and why their argument fails, is that prior to the enactment of R.C. 313.123 the coroner's statutes were silent as to this issue and did not provide next of kin with any express rights to the disposition of medical waste.

2. **Prior To The Enactment Of R.C. 313.123, Ohio's Coroner Statutes Were Silent Regarding Any Rights To Medical Waste**

Plaintiffs-Respondents are likely correct that R.C. 313.123 was in response to *Hainey*, a case where Plaintiffs' same counsel convinced one federal court to misinterpret Ohio law that the removal of an organ, as part of a properly conducted and necessary autopsy (and subsequent

² The primary function of this Court is to adjudicate to protect the rights and interests of Ohio citizens, and to construe and apply the laws of Ohio in accomplishing such end. *State ex rel. Atty. Gen. v. Guilbert* (1897), 56 Ohio St. 575, 47 N.E. 551. However, for this Court to either create a legal right or a legally protected interest, as Plaintiffs-Respondents have requested in the case at bar, is to act outside of the power legally conferred upon the Court. *State ex rel. Curran v. Brookes* (1945), 144 Ohio St. 582, 60 N.E.2d 62. Therefore, Plaintiffs-Respondents' desire to create a new right, not provided for in Ohio law, must properly be brought before the General Assembly, rather than advocated for before the Ohio Supreme Court. *Bd. Educ. Pike-Delta-York Local School Dist. v. Fulton Cty Budget Comm.* (1975), 41 Ohio St.2d 147, 324 N.E.2d 566.

disposal as medical waste), is somehow the same as the rights associated with the unauthorized harvesting of corneas under *Brotherton*. However, Plaintiffs-Respondents are wrong in their analysis that such a reaction by the Ohio Legislature to prevent a *Hainey* line of cases presupposes that either *Hainey* was correct or that there was a right that existed in specimens removed and disposed of during an autopsy. The adoption of R.C. 313.123 was solely a reaction to the *Hainey* decision and the potential for litigation like this, not a pronouncement as to what rights existed prior to the enactment of the statute in May 2006.

Prior to the enactment of R.C. 313.123, Ohio's coroner statutes had no provisions that discussed the alleged right of next of kin to specimens removed in an autopsy. Without any specific right created by statutes, Plaintiffs-Respondents do not have a protected interest in those specimens properly disposed of by coroners. Given the lengthy history of autopsies and practices in Ohio, it is much more logical to argue that the passage of R.C. 313.123 was a continuation of the law and practice in Ohio that no right exists in forensic specimens disposed of following an autopsy.

The statute currently provides for a right to specimens if the next of kin have a specific religious objection/belief and follow the procedures in the statute. Plaintiffs-Respondents call this religious objection a new right created by the legislation that "did not previously exist." (PI-Resps' Merit Brief at 29.) Absent a religious objection, the coroner has the right he/she always had (under governmental powers) to dispose of medical waste.

D. NEITHER THE COMMON LAW OF OHIO NOR ANY OTHER STATE, AS SET FORTH BY PLAINTIFFS-RESPONDENTS, HOLDS THAT THE NEXT OF KIN HAVE A PROTECTED RIGHT IN FORENSIC SPECIMENS

1. Ohio

Plaintiffs-Respondents stated in their Merit Brief that, "[c]ontrary to the Petitioners and their *amici*, this case is not about the authority of a coroner to conduct autopsies." (PI-Resps'

Merit Brief at 2-3.) However, the fact is that Plaintiffs-Respondents are questioning coroners' lawful and necessary procedures that are performed on the deceased. This fact is of utmost importance to consider in arriving at an answer to the certified question.

We are not dealing with the body of the deceased who passed away minus any attendant circumstances that trigger the autopsy performance mandate, and is directly transported to a funeral home to undergo funereal preparation. Instead, we are dealing with the body of a deceased that is mandated by Ohio law to undergo what is widely and commonly known as an intricate dissection of the human body. For these reasons, the authority of a coroner to perform an autopsy (while not the focus of the question) is essential to consider in the Court's review of the certified question.

Yet, curiously, none of the case law cited by Plaintiffs-Respondents involve the coroner's role and established procedure with regard to forensic specimens. See *Frys v. Cleveland* (1995), 107 Ohio App.3d 281, 286, 668 N.E.2d 929 (Court held that there was no evidence that the cemetery's conduct in transferring the remains from one gravesite to another constituted the outrageous or disrespectful type of conduct necessary for the tort of mishandling or desecration of a corpse); *Everman v. Davis* (1989), 54 Ohio App.3d 119, 122, 561 N.E.2d 547 (Court rejected a husband's claim that challenged an Ohio coroner's decision to perform an autopsy on the deceased); *Carter v. City of Zanesville* (1898), 59 Ohio St. 170, 52 N.E. 126 (Court focused on applicability of a statute prohibiting unlawful possession of body and remains where gravesite remains were unlawfully taken up and commingled with many other remains).

Plaintiffs-Respondents reiterated their support for the *Hainey v. Parrott* (Sept. 28, 2005), S.D. Ohio No. 1:02-CV-733 decision and erroneously stated that *Hainey* represents a "correct statement of Ohio law." (Pl-Resps' Merit Brief at 4.) It is essential to remember that *Hainey v.*

Parrott is a federal court decision that did not reach its ultimate conclusion on the basis of Ohio law because Ohio law that supported any right in forensic specimens did not exist at the time of the 2005 *Hainey* decision and, certainly, does not exist now. It is important for this Court to decide whether Ohio law has ever provided a right to the next of kin in forensic specimens removed during the course of an autopsy.

2. Other States

Amici, in support of Plaintiffs-Respondents, at one point attempt to back this honorable Court into a corner in answering the certified question in the affirmative, in a statement that to find otherwise is “. . . contrary to the legal precedent of the entire country.” (Monreal Merit Brief at 4.) First, the certified question is one of Ohio law, therefore, ultimately what other states’ courts hold is at most instructive. Second, it is essential to note that Plaintiffs-Respondents and their amici failed to place a factually similar case before this Court that held that next of kin have a protected right in forensic specimens.

In stark contrast, amici supporting Defendants-Petitioners furnished this Court with a succinct and broad survey of other states’ judicial decisions dealing with any and all causes of actions pertaining to the deceased and their next of kin. (65 Counties, *et al.*’s Merit Brief at 20-25.) The cases furnished by Defendants-Petitioners’ amici confirmed that there is no case law in support of Plaintiffs-Respondents’ alleged protected right in forensic specimens.

Plaintiffs-Respondents and their amici set forth factually distinguishable cases to attempt to support a next of kin’s right in forensic specimens taken pursuant to police power. Most of these cases deal with the unauthorized harvesting of the deceased’s organs and body parts. (Monreal Merit Brief at 6.) See *Martin v. Kim* (N.D. Ind. 2005), No. 2:03 CV 536 (parents of deceased planned to donate deceased’s kidneys, however, coroner interfered with harvesting because the removal would interfere with the coroner’s autopsy as well as the investigation of

the death; court found that the parents had an interest in the kidneys intended for transplant); *Newman v. Sathyavaglswaran* (9th Cir. 2002), 287 F.3d 786 (cornea removal practice pursuant to California statute violated property right); *Whaley v. County of Tuscola* (C.A.6, 1995), 58 F.3d 1111 (removal of corneas and eyeballs violated property interest).

Another collection of cases asserted by Plaintiffs-Respondents and their amici deal with maltreatment of a corpse or interference with the right to give a decent burial. See *Crocker v. Pleasant* (Fla. 2001), 778 So.2d 978, 26 Fla. L. Weekly S61 (parents, who continued to search for missing son months after he was buried by city, that negligently failed to contact them, were denied their “legitimate claim of entitlement” to the body for burial purposes); *Papieves v. Lawrence* (1970), 263 A.2d 118, 437 Pa. 373 (parents’ mental anguish at defendant’s secret burial of their son sufficient to provide grounds for damage award). These are cases that could be brought in Ohio under Restatement of the Law, Restatement 2d of Torts (1979), Section 868, for appropriate redress.

As explained above, these cases are not comparable to the situation involved with the certified question placed before this honorable Court. Plaintiffs-Respondents attempt to steer the Court away from the essential part of the certified question in their recitation of factually distinguishable case law. None of the cases asserted by Plaintiffs-Respondents hold that next of kin can stretch their interest in the body’s final disposition to encompass the byproducts of the autopsy process that coroners have properly and necessarily extracted and disposed of in accordance with the law.

E. OHIO LAW ALREADY PROVIDES CAUSES OF ACTION THAT ALLOW REDRESS FOR WRONGS COMMITTED TO THE DECEASED AND THEIR NEXT OF KIN

The federal court certified a question to this Court to find whether next of kin have a “protected right” in forensic specimens. The notion of a “protected right” in something lends to

the conclusion that there is law first to create a right and then to enforce protection of the right. In the case at bar, Plaintiffs-Respondents stand before this Court and advocate for a right in forensic specimens that, heretofore, has never been created by any law and consequently has never been granted any protection. Plaintiffs-Respondents attempt to weave together the “protected right” in forensic specimens by leading the Court toward situations where the next of kin may deserve redress, but not of the type advocated by Plaintiffs-Respondents. The Court may want the courthouse door open for some redress to next of kin. The law already allows redress when appropriate.

According to statutory law, next of kin have an interest in those body parts of the deceased that the next of kin elects to donate. R.C. 2108. This interest does not let the next of kin donate specimens held for forensic purposes, or disposed pursuant to good medical practice as waste after an autopsy.

However, no Ohio statute or other body of law expressly grants a right to the next of kin in those scientifically necessary autopsy specimens removed from the deceased in accordance with state law. Once removed from the deceased’s body, the specimen is “medical waste,” in which no one has any “protected right.”

Plaintiffs-Respondents attempt to discredit the briefing of Defendants-Petitioners and the interested parties by criticizing the usage of Ohio case law that discusses claims surrounding the deceased’s body in terms of “property.” (Pl-Resps’ Merit Brief at 7.) Within the large span of briefs filed in support of Defendants-Petitioners’ arguments, containing any and all case law from Ohio and other states that could, however tenuously, relate to the claims asserted by Plaintiffs-Respondents in this case there is a majority that concern questions pertaining to property rights. (65 Counties, *et al.*’s Merit Brief at 20-25.) The simple reason for this inclusion

of cases is not strategically-oriented, but rather these are one of the few types of cases with discussions of causes of action surrounding the bodies of the deceased.

The only other Ohio case law that deals with bodies of the deceased and their next of kin are those sounding in tort. Plaintiffs-Respondents and their amici erroneously utilize tort case law to invent the alleged protected right of the next of kin in forensic specimens. (Monreal Merit Brief at 5.) Ohio's tort law relating to the decedent's body and the next of kin, as memorialized in the Restatement of the Law, Restatement 2d of Torts (1979), Section 868³, provides an avenue through which the next of kin of the deceased are able to seek legal remedy for interference with the body of the decedent.

The cause of action based on the Restatement Second of Torts is not for pecuniary injury, but rather for damages that amount to the mental suffering of the next of kin. *Biro v. Hartman Funeral Home* (1995), 107 Ohio App.3d 508, 513, 669 N.E.2d 65. See *Biro*, 107 Ohio App.3d 508, 669 N.E.2d 65 (Court found that son had standing for intentional infliction of emotional distress claim when a funeral home recklessly interred his father's cremated remains "in a mass, unmarked grave"); *Carney v. Knollwood Cemetery Ass'n* (1986), 33 Ohio App.3d 31, 7, 514 N.E.2d 430 (Court held that next of kin had standing for their claim for emotional distress for the cemetery's disturbance of a grandmother's remains and subsequent placement of such remains in a trash dump).

In stark contrast, a coroner's highly scientific, calculated, and statutorily-mandated dissection of the human body during the course of an autopsy in no way recklessly mutilates the

³ Restatement of the Law, Restatement 2d of Torts (1979), Section 868:

Interference with Dead Bodies

One who intentionally, recklessly or negligently removes, withholds, mutilates or operates upon a body of a dead person or prevents its proper interment or cremation is subject to liability to a member of the family of the deceased who is entitled to the disposition of the body.

body of the deceased or prevents the body's proper interment or cremation to warrant a coroner being held liable to the next of kin. Therefore, tort law should not be applied to a scenario involving the legally-mandated procedures of a coroner, absent conduct outside of the coroner's state-regulated procedures.

The very fact that there is no case law and correlating cause of action or claim that supports what Plaintiffs-Respondents assert in the case at bar is further indication that Plaintiffs-Respondents are not asking this fine Court to find that Ohio law demonstrates a right of next of kin in forensic specimens, but rather are asking that this Court create such cause of action where the law does not indicate that one should exist.

F. PLAINTIFFS-RESPONDENTS' MORALITY ARGUMENTS DO NOT CREATE A PROTECTED RIGHT IN FORENSIC SPECIMENS

Plaintiffs-Respondents and their amici have devoted numerous pages of arguments claiming that the disposal of organs by a coroner, following a legally sanctioned and necessary autopsy, is somehow an affront or disrespectful to Catholics, lost servicemen, funeral homes, and the public as a whole. We believe there is a need to address those arguments. However, we submit that the morality/philosophical arguments explored by Plaintiffs-Respondents do not logically follow a path to a relevant legal issue presented by this case.

First, this case is not about religion. Plaintiffs-Respondents in this case have not argued that any religious belief they hold has been denied them by the autopsy conducted by an Ohio coroner. Pursuant to R.C. 313.131, Plaintiffs-Respondents had the right to object to the autopsy conducted in this instance on religious grounds. While Plaintiffs-Respondents note that some established religions may have objection to autopsy, those concerns are alleviated by the rights provided in the statute.

Plaintiffs-Respondents do not argue that the Christian religion (or Catholic viewpoint) has an objection to autopsy or that an autopsy interferes with the next of kin's interest in proper sepulcher or entry into heaven. Plaintiffs-Respondents give absolutely no religious argument that the removal of an organ or any other specimen for forensic purposes violates a current Catholic or Christian decree. Regardless of the history lesson provided in the Catholic League's belief, the modern belief of most Christians is that a whole body burial is not necessary for one's soul to ascend to heaven upon death. This modern belief is admitted by the Catholic League in its brief on pages 7 and 8. Surely Plaintiffs-Respondents and the Catholic League do not advocate the return to archaic beliefs that have predated modern thought, or argue that ancient beliefs somehow control the disposition of this case. The Catholic League, consistent with most Christian belief, readily admits that the church currently advocates the following:

- Autopsies are specifically permitted;
- Organ donation is advocated;
- Cremation is sanctioned as a proper way to dispose of a corpse.⁴

The Catholic church, as well as other Christian churches, sanctions and advocates the donation of organs for the good of the living, to preserve precious life. Thus, in all of these instances, Plaintiffs-Respondents admit that a whole, intact body for burial is certainly not a prerequisite

⁴ Cremation is now sanctioned by many religions, and is growing rapidly in popularity as a proper way to treat a corpse. It is estimated that cremation has become widely accepted and the norm in many developing countries. For instance, in Great Britain over 70% of deaths and in Japan over 90% of decedents are cremated. Source: Cremation Association of North America (CANA) (www.cremationassociation.org). According to the National Funeral Directors Association, the "sacred choice" of cremation is an evolving trend, and over 26% of Americans are cremated. Source: National Funeral Directors Association (NFDA) (www.nfda.com). This number is expected to grow to 40% by the end of this decade according to the CANA. Regardless of burial or cremation, the next of kin and family members are able to memorialize the life and death of their loved one through a service or other means. Either way, a whole body, as Plaintiffs-Respondents attempt to describe it, is not necessary for the proper memorializing of the decedent, which is what a burial and service are: a memorial to the decedent. To argue that an autopsy somehow has now impacted the memorial to their loved one in retrospect because tissues were removed in an autopsy is disingenuous at best.

for entrance to heaven.⁵ As stated in the Catholic League's Merit Brief, there is a "separation of the body and soul" upon death. (Catholic League Merit Brief at 8.) We could engage in a long philosophical discussion regarding science, the Renaissance and religion, but believe it is misplaced in the determination of the issue at hand.

Certainly, everyone believes that the dead should be treated with respect. Plaintiffs-Respondents' argument that corpses, which have had autopsies performed, have not been treated with respect is not only absurd but seemingly tarnishes the memory of those tens of thousands of decedents upon whom autopsies have been performed. It is gravely misplaced for Plaintiffs-Respondents to characterize coroners' standard, state-sanctioned procedures as "macabre," "socialism," "mutilation," "anathema," "grotesque," "insult[ing]," or "tak[ing] body parts at will." Coroners in Ohio, sanctioned by statute, have performed autopsies following widely adopted forensic procedures for over 100 years.

To equate coroners' practices, which function as a public service, with organ harvesting and mutilation shows how far Plaintiffs-Respondents will reach in the pursuit of a new cause of action they wish to create in this lawsuit. No one argues that next of kin do not have an interest in burying the body of the deceased. Autopsy and the right to bury the body are not at odds and have not been for over a century in Ohio. This is not a moral/religious argument, and should not be such an argument. Plaintiffs-Respondents' (and amici) arguments citing ancient beliefs do not provide a basis to create a right in this case. On the contrary, modern Christian religious beliefs dispel the notion that a body must be fully intact for a proper burial. Death and religion are perhaps the most difficult topics known (and unknown) to mankind -- this case is not the forum to reconcile these issues.

⁵ If there is a religious belief that the whole body is required, there are specific protections in Ohio's coroner statutes that provide for religious objection to the autopsy itself. R.C. 313.131 and for the retrieval of an organ. R.C. 313.123.

Finally, Plaintiffs-Respondents and Amici argue at length that any body part has significance in discussing lost servicemen, victims of 9/11, Native American Indians and the search for remains. We submit that such a discussion is severely misplaced herein and has no relevance to the legal arguments before the Court. The retrieval of a body part of a lost one may certainly have importance to the next of kin for closure, identification, and/or other personal reasons where there is no body, but that has absolutely nothing to do with the next of kin's interest to bury a body after an autopsy under Ohio law. To equate medical waste from an autopsy (where there is a body for next of kin to memorialize and bury or cremate) with the search for any part of a missing person is disjointed and is not relevant to the question of whether this Court should create a new right to sue coroners for performing autopsies in Ohio.

III. CONCLUSION

The next of kin under Ohio law may bury the body. This interest simply does not extend to the byproducts of an autopsy removed and ultimately disposed of as medical waste. Most people would likely prefer to ignore the specific procedures involved in an autopsy. The process itself is invasive and involves dissection of the body. But far from being "macabre," or any of the other largely defamatory descriptions used by Plaintiffs-Respondents, the autopsy is surgical in nature and serves absolute and unquestionable needs of society. We all want to live, yet we all have an interest in learning why we die.

The procedures used and specimens removed and examined are described in a coroner's autopsy report. The procedure is public record and any interested person can obtain the autopsy report, the certificate of death or other information upon inquiry. There is no skullduggery as implied by Plaintiffs-Respondents in their vain attempt to interject hostility or passion into this discussion. This case merely involves coroners who have disposed of specimens as part of their regular autopsy procedures. Plaintiffs-Respondents criticize Defendants-Petitioners'

characterization of forensic specimens as medical waste. Their apparent discomfort with autopsy procedures is not a sound basis for the creation of a new right leading to a \$90 million, unapproved tax upon the people of Ohio. (65 Counties, *et al.*'s Merit Brief at 26.)

The analysis does not change after the specimens are forensically examined. The rights are no different before,⁶ during, or after the autopsy. There is nothing in the coroner statutes that would provide next of kin with a right to specimens that the coroner has treated as medical waste. The specimens were removed for examination, and Plaintiffs-Respondents do not argue that removal and retention was in any way improper. Plaintiffs-Respondents argue that after the coroner is finally done examining the specimens (even after the body has been buried), that the rights to the specimens change and that next of kin then have a superior right. This argument makes little sense, and is not even the issue presented here. The issue is not who would have a better claim to the specimens following an autopsy; the issue is whether Plaintiffs-Respondents can sue coroners for properly retaining a forensic specimen or disposing of medical waste when there is nothing proscribing that long-standing practice. Disposal of medical waste is part of the autopsy process. Rights are not determined by what stage the autopsy is in. Again, the statute is silent as to providing the next of kin with a right to medical waste and silent as to any obligation of the coroner to provide any type of communication or notice to a next of kin as to when medical waste is disposed of.

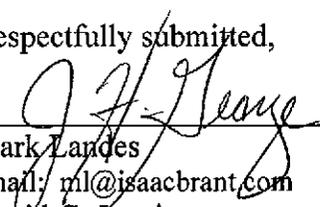
This case would involve the creation of a new right under Ohio law that does not have, as its source, authority in the coroner's statutes or under common law. This right cannot be defined as a right of sepulcher or right to bury the body. The police power, health and safety rights of coroners to practice their procedures and dispose of medical waste cannot be argued to somehow infringe on the interest to bury or memorialize the body as a matter of law or of common sense.

⁶ As stated previously, Ohio law affords a religious objection prior to the autopsy itself.

These practices co-exist, are both contemplated and expressly provided for in the statute, and have co-existed without issue until Plaintiffs-Respondents devised their lawsuit in *Hainey*.

Plaintiffs-Respondents are asking this Court to create a new obligation upon coroners to not dispose of waste and to issue a communication⁷ to next of kin requesting their consent to make the disposal. This is not nor has it ever been a duty of coroners to make such a communication under any statute or under any custom and practice of a century of autopsies. This Court should not read an obligation into the statute that is absent and this Court should not create a new cause of action which would conceivably put counties at risk of countless lawsuits and tens of millions of dollars of exposure for what amounts to coroners following accepted autopsy procedures. No matter how strongly Plaintiffs-Respondents attempt to characterize the autopsy process as insensitive or worse, nothing done by the coroners herein is wrong and certainly not actionable.

Respectfully submitted,


Mark Landes (0027227)

email: ml@isaacbrant.com

David G. Jennings (0040487)

email: dgj@isaacbrant.com

Jennifer H. George (0080808)

email: jhg@isaacbrant.com

ISAAC, BRANT, LEDMAN & TEETOR LLP

250 East Broad Street, Suite 900

Columbus, Ohio 43215-3742

(614) 221-2121 / Fax (614) 365-9516

*Attorneys for Sixty-five (65) Ohio Counties,
County Commissioners' Association of Ohio,
Buckeye State Sheriffs' Association, Ohio
Association of Chiefs of Police, Ohio
Prosecuting Attorneys Association, and Ohio
Society of Pathologists*

⁷ Plaintiffs-Respondents' argument that some counties now provide a communication (after *Hainey*) does not answer the question whether there was or is any obligation to do so -- whether this is a good practice is also very debatable.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by regular U.S. mail, postage prepaid, this 28th day of September, 2007, upon the following:

Patrick J. Perotti (0005481)
email: pperotti@dworkenlaw.com
DWORKEN & BERNSTEIN CO., LPA
60 South Park Place
Painesville, Ohio 44077
(440) 352-3391 (phone)
(440) 352-3469 (fax)
Attorneys for Plaintiffs-Respondents

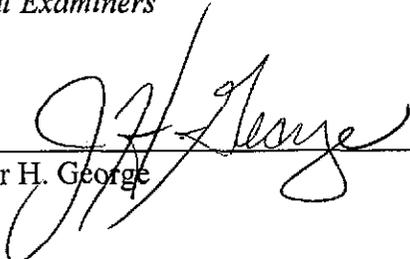
Helen E. Mason (0051967)
email: emason@co.clermont.oh.us
CLERMONT COUNTY PROSECUTOR'S OFFICE
101 E. Main Street
Batavia, Ohio 45103
(513) 732-7585 (phone)
Attorneys for Defendants-Petitioners

John R. Climaco (0011456)
Counsel of Record
email: jrclim@climacolaw.com
David M. Cuppage (0047104)
email: dmcupp@climacolaw.com
Scott D. Simpkins (0066775)
email: sdsimp@climacolaw.com
CLIMACO, LEFKOWITZ, PECA, WILCOX
& GAROFOLI CO., LPA
55 Public Square, Suite 1950
Cleveland, Ohio 44113
(216) 621-8484 (phone)
(216) 771-1632 (fax)
Attorneys for Cuyahoga County

Nick A. Soulas (0062166)
A. Paul Thies (0074641)
Patrick J. Piccininni (0055324)
Assistant Prosecuting Attorney
373 South High Street, 13th Floor
Columbus, Ohio 43215
(614) 462-3520 (phone)
(614) 462-6012 (fax)
*Attorneys for Franklin County Board of
Commissioners and Franklin County
Coroner*

Mark D. Tucker (0036855)
Counsel of Record
email: mtucker@bfca.com
BENESCH, FRIEDLANDER, COPLAN
& ARONOFF LLP
88 East Broad Street, Suite 900
Columbus, Ohio 43215
(614) 223-9358 (phone)
(614) 223-9330 (fax)
*Attorneys for Ohio State Coroners
Association and Ohio State Medical
Association*

Patrick M. Fardal, M.D., J.D. (0058600)
365 Stonewall Court
Dublin, Ohio 43017
(614) 889-0333 (phone)
*Attorney for National Association of
Medical Examiners*



Jennifer H. George

EXHIBIT A

Adams County
Allen County
Ashland County
Ashtabula County
Athens County
Belmont County
Brown County
Butler County
Carroll County
Clark County
Clinton County
Columbiana County
Coshocton County
Crawford County
Darke County
Defiance County
Delaware County
Erie County
Fairfield County
Fayette County
Fulton County
Gallia County
Geauga County
Guernsey County
Hardin County
Harrison County
Henry County
Highland County
Holmes County
Huron County
Jefferson County
Knox County
Lake County

Licking County
Logan County
Lorain County
Madison County
Mahoning County
Marion County
Medina County
Meigs County
Miami County
Monroe County
Morrow County
Muskingum County
Ottawa County
Paulding County
Perry County
Pickaway County
Portage County
Preble County
Putnam County
Richland County
Ross County
Sandusky County
Scioto County
Seneca County
Stark County
Summit County
Trumbull County
Union County
Warren County
Washington County
Williams County
Wyandot County