

IN THE SUPREME COURT OF OHIO

BRIAN TREON, M.D., et al. )  
 )  
 Petitioners-Defendants, ) OHIO SUPREME COURT  
 ) CASE NO. 07-507  
 v. )  
 ) *AMICUS CURIAE* REPLY BRIEF  
 ) ON CERTIFICATION OF  
 ) QUESTION OF STATE LAW  
 MARK ALBRECHT., et al. )  
 )  
 Respondents-Plaintiffs. )

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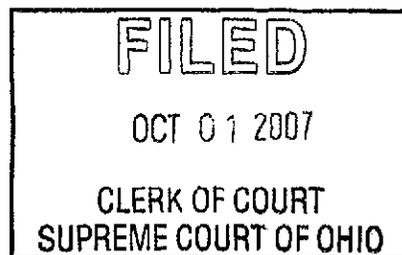
CUYAHOGA COUNTY CORONER AND BOARD OF COMMISSIONERS OF  
CUYAHOGA COUNTY'S *AMICUS CURIAE* REPLY BRIEF IN SUPPORT OF  
PETITIONERS-DEFENDANTS REQUESTING SUPREME COURT TO ANSWER IN  
THE NEGATIVE THE QUESTION CERTIFIED ON BEHALF OF  
PETITIONERS-DEFENDANTS

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**TABLE OF CONTENTS**

	<u>Page(s)</u>
<b>TABLE OF AUTHORITIES</b> .....	ii
<b>I. INTRODUCTION</b> .....	1
<b>II. LAW AND ARGUMENT</b> .....	2
A. Ohio Statutory and Administrative Law Defines as Medical Waste the Decedent’s Tissues, Organs, Blood or Other Body Parts That Have Been Removed and Retained by the Coroner for Forensic Examination and Testing.....	2
B. Custom and Usage Support that There is No Property Right or Protected Interest in a Decedent’s Tissues, Organs, Blood or Other Body Parts. ....	6
C. Ohio Courts Have Not Recognized a Property Right or Protected Interest in a Decedent’s Remains.....	7
<b>III. CONCLUSION</b> .....	7
<b>CERTIFICATE OF SERVICE</b> .....	9

## TABLE OF AUTHORITIES

Page(s)

### **Cases**

<i>Biro v. Hartman Funeral Home</i> (8th Dist. 1995), 107 Ohio App.3d 508, 512 .....	7
<i>Brotherton v. Cleveland</i> (6th Cir. 1991), 923 F.2d 477 .....	5
<i>Carney v. Knollwood Cemetery Ass'n</i> (8th Dist. 1986), 33 Ohio App.3d 31, 36.....	7
<i>Hainey v. Parrott</i> (S.D. Ohio 2005), <i>unreported</i> , 2005 WL 2397704.....	4, 7

### **Statutes**

Ohio Revised Code § 2108.02 .....	5
Ohio Revised Code § 2108.02(B).....	5
Ohio Revised Code § 2108.60 .....	5
Ohio Revised Code § 313.08(A).....	2
Ohio Revised Code § 313.123 .....	4
Ohio Revised Code § 313.14 .....	2
Ohio Revised Code § 313.15 .....	3
Ohio Revised Code § 3705.01(C).....	3

### **Other Authorities**

Ohio Administrative Code § 3745-75-01 (B)(27)(c).....	3
Uniform Anatomical Gift Act.....	5, 6

### **Rules**

Rule 407 of the Ohio Rules of Evidence .....	6
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## I. INTRODUCTION

The Cuyahoga County Coroner and the Board of Commissioners of Cuyahoga County (collectively "Cuyahoga County"), being interested parties and pursuant to Supreme Court Rule of Practice XVIII, Section 7, hereby submit this *Amicus Curiae* reply brief in support of answering the certified question in the negative.

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

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

Interested Party Cuyahoga County submits that the certified question should be answered in the negative, based on Ohio statutory and common law.

On July 20, 2007, Petitioners-Defendants and their *amici* filed briefs urging this Honorable Court to answer the certified question in the negative. Respondents-Plaintiffs and their *amici* filed their briefs on September 10, 2007. The summary of Respondents' argument is that the next-of-kin have a right to possess and direct the disposition of the remains of their deceased loved ones and that this right, therefore, extends to the organs, tissues, blood and other body parts removed by a county coroner in performing an autopsy in accordance with his or her statutory duties.

For the reasons set forth in Cuyahoga County's Merit Brief and further set forth herein, Cuyahoga County respectfully disagrees. While Respondents argue that this is not a case about distinctions between a body and parts of the body, and that any such distinction steers this Court into the grotesque and macabre, such distinction was drawn by the pleadings and the facts of a

standard protocol for an autopsy. The facts in this case are limited. While Respondents attempt to lead the Court down a slippery slope, the issue in this case is limited to the removal and eventual medical cremation of organs and tissues by a coroner in the course of a forensic autopsy in accordance with applicable state and federal law and environmental regulations. The relevant issues are framed by the certified question, not the certified question posed by any of the Respondents or other interested parties, and Ohio law, as found in its statutes and case law. The statutes and case law do not support Respondents' position.

## **II. LAW AND ARGUMENT**

### **A. Ohio Statutory and Administrative Law Defines as Medical Waste the Decedent's Tissues, Organs, Blood or Other Body Parts That Have Been Removed and Retained by the Coroner for Forensic Examination and Testing.**

Respondents, in their Merit Brief, argue that the next-of-kin of a deceased person have "possessory, dispositional and exclusionary rights" granted under Ohio statutory law to the organs, tissues and other body parts of a deceased person taken by a coroner for forensic examination in accordance with his or her statutory duties. This position has no support in Ohio statutory and administrative law.

Ohio Revised Code § 313.14 states, in pertinent part, "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." This statute does not grant a right of disposition to all of the parts of the body, particularly not those classified by other statutes and administrative codes as medical waste.

Ohio Revised Code § 313.08(A) discusses "persons entitled to the custody of the body or remains." However, while Respondents attempt to twist the statute to grant a right in *both* the body and its parts, the language and purpose of the statute is clear. In instances where less than a

full body is recovered, such as in an airline disaster, the next-of-kin have a right to custody of whatever remains exist, even though the complete body may have been lost in the disaster. Similarly, Ohio Revised Code § 3705.01(C) defines a dead body as “a human body or part of a human body from the condition of which it reasonably may be concluded that death recently occurred” for purposes of Vital Statistics. Again, in the event of an airline disaster or other occurrence where only parts of bodies are found, the Department of Vital Statistics can “count” the parts as a whole in terms of tallying numbers of deaths.

Ohio Revised Code § 313.15 requires that the county coroner retain the body of a decedent for as long as necessary to make a diagnosis and then return the body to the next-of-kin. However, nothing in Ohio statutory law mandates the coroner return tissues, organs, blood or other body parts that have been removed and retained by the coroner for forensic examination and testing. In fact, the Ohio Administrative Code and the Ohio Revised Code expressly *prohibit* such actions.

Ohio Administrative Code § 3745-75-01 (B)(27)(c) states, in pertinent part,

**Medical/infectious wastes** include all of the following substances or categories of substances:

\* \* \*

**(c) Human pathological waste, including tissues, organs, and body parts and body fluids that are removed during surgery or autopsy, or other medical procedures, and specimens of body fluids and their containers; (Emphasis added).**

This section of the Administrative Code, effective July 9, 1991, defines the very things listed in the Certified Question to be medical waste. Federal and state health and environmental regulations require that medical waste be disposed of in controlled ways. Just as, after surgery, a patient has no right to be given an organ or tissue removed from his body, neither do the next-of-

kin of a deceased person have the right to be given tissues, organs, body parts, or body fluids removed during a forensic autopsy and classified as medical waste.

Ohio Revised Code § 313.123 specifically states that “retained tissues, organs, blood, other bodily fluids, gases, or other specimens from an autopsy are medical waste and shall be disposed of in accordance with applicable federal and state laws, . . .” R.C. § 313.123. *Hainey v. Parrott* (S.D. Ohio 2005), *unreported*, 2005 WL 2397704, broadly and incorrectly interpreted the law of Ohio and found a next of kin to have a property right with regard to organs removed and retained by a coroner as part of an autopsy. Ohio Revised Code § 313.123 was enacted in immediate response to the *Hainey* decision. By enacting Ohio Revised Code § 313.123, the Ohio General Assembly clarified the state of the law, reinforcing relevant portions of the Ohio Administrative Code, in regards to organs and tissues retained by coroners when performing forensic autopsies. Ohio statutory and administrative law as it existed prior to *Hainey* under the Ohio Administrative Code and as it exists now and when the Legislature enacted § 313.123 did not, and does not, and never has granted a property right in a decedent’s tissues, organs, blood or other body parts to a next of kin.

Respondents attempt to turn what is defined as medical waste by both the Ohio Administrative Code and the Ohio Revised Code into something in which next-of-kin have a protected interest and would, taking Respondents’ argument to its natural conclusion, then have monetary value to the next-of-kin. This contradicts both logic and Ohio law. A hypothetical example further illustrates that Respondents’ position is both illogical and contradictory to Ohio law. A patient is one day away from having surgery to install a Jarvic artificial heart. Prior to surgery, the patient dies and a forensic autopsy is performed. Had the patient lived and surgery had been performed, the patient would have had no right to return of the heart that was removed.

The heart would have been disposed of as medical waste. Under Respondents position, the next-of-kin of the now deceased patient have a right to return of the heart after forensic examination. How can the next-of-kin claim a protected interest in the organs removed during the autopsy, when the patient himself had no such right to the same organ that would have been removed during surgery when he was alive?<sup>1</sup> Yet, this is what Respondents argue is and should be the state of the law in Ohio. Such a position is contrary to both logic and Ohio statutory and common law.

Respondents' argument is also partially based on the Uniform Anatomical Gift Act and the Sixth Circuit's holding in *Brotherton v. Cleveland* (6th Cir. 1991), 923 F.2d 477. However, the statute at issue in *Brotherton* is significantly different than O.R.C. § 313 *et seq.* This distinction is significant because the Sixth Circuit's *Brotherton* decision rested, in substantial part, on R.C. §§ 2108.60 and 2108.02, which allow a next-of-kin to donate, but not possess, a decedent's remains, including corneas. Revised Code § 2108.02(B) states, in part:

[a]ny of the following persons, in the order of priority stated... may make an anatomical gift of all or any part of the body of a decedent for any purpose specified in section 2108.03 of the Revised Code:  
(1) the spouse....

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

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<sup>1</sup> This is why the Ohio Administrative Code specifically states that medical waste includes "tissues, organs, and body parts and body fluids that are removed during surgery or autopsy, or other medical procedures . . ." O.A.C. § 3745-75-01 (B)(27)(c) (emphasis added).

Respondents attempt to lead the Court down an unwarranted slippery slope, arguing that under Petitioners' position, "the government had the ability to do whatever it wanted with the organs of a decedent following autopsy. That is socialism." However, the facts of this case do not support this hysterical argument. This case deals with the coroners' right to retain a decedent's tissues, organs, blood or other body parts as needed for forensic examination, then properly dispose of them as medical waste, as required by statutory and administrative law. All of Respondents' recurring arguments about coroners keeping organs and doing with them whatever they wish are meant to lead this Court astray from the genuine issue.<sup>2</sup>

**B. Custom and Usage Support that There is No Property Right or Protected Interest in a Decedent's Tissues, Organs, Blood or Other Body Parts.**

Respondents' "custom and usage" argument cannot stand. Relevant custom and usage of organs is illustrated by the hypothetical heart transplant example given above. *See* Section II.A., *supra*. Patients have no protected interest in return of organs after medical procedures. Custom and usage dictate that these are disposed of as medical waste. Therefore, if the living patient would have no right to his own tissues, organs, blood or other body parts, how can the next-of-kin claim such a right after the patient is dead?

Respondents attached to their Merit Brief two county coroner's notice forms in an attempt to argue that notice of organ retention is possible. These exhibits were improperly attached to Respondents' Merit Brief and are outside the scope of evidence this Court may consider. As such, they should be stricken from the record. Further, Rule 407 of the Ohio Rules of Evidence governs the admission of subsequent remedial measures and provides, "When, after an event, measures are taken which, if taken previously, would have made the event less likely to

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<sup>2</sup> Further, Respondents ignore the fact that the Uniform Anatomical Gift Act, tort remedies, and criminal sanctions exist to protect against sale of organs or desecration of a corpse.

occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event.” Hamilton and Franklin County’s notice forms, in the wake of the *Hainey* decision and settlement, are subsequent remedial measures, which cannot be considered in determining liability and merely represent an effort by the County Coroner’s to deal with the uncertainty created by the erroneous *Hainey* decision.

**C. Ohio Courts Have Not Recognized a Property Right or Protected Interest in a Decedent’s Remains.**

In their Merit Brief, Respondents did not cite a single Ohio case that granted a property or protected interest in the tissues, organs, blood or other body parts of a deceased person. In fact, all of the Ohio cases cited by Respondents specifically state that there is no property right in a dead body. *See, e.g., Biro v. Hartman Funeral Home* (8th Dist. 1995), 107 Ohio App.3d 508, 512 (“The basis for recovery of damages is found not in a property right in a dead body...”). The Ohio cases recognize that the next-of-kin are protected from “mental suffering and anguish” by tort remedies. *Carney v. Knollwood Cemetery Ass’n* (8th Dist. 1986), 33 Ohio App.3d 31, 36. These remedies do not elevate the deceased’s body to the level of a protected interest. The cases cited recognize a protected interest and a remedy to be free from mental anguish and other forms of mental suffering, but these cases manifestly do not create a property right or protected interest in and to the bodies or body parts themselves. There is no Ohio common law creating a protected interest in a decedent’s tissues, organs, blood or other body parts.

**III. CONCLUSION**

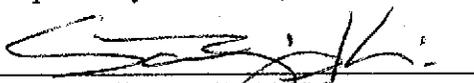
For the foregoing reasons, Interested Party Cuyahoga County respectfully requests this Honorable Court answer the certified question thus:

The next of kin of a decedent, upon whom an autopsy has been performed, **do not have** a protected right under Ohio law in the decedent’s tissues, organs, blood or other body parts that have been

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

Answering the question in the negative is consistent with Ohio statutory and common law and will protect the ability of county coroners to effectively execute their critically important police powers and statutory duties of performing forensic autopsies and determining cause of death.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

A copy of the foregoing has been sent via regular U.S. mail this 25<sup>th</sup> day of September,

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