[Cite as *Breno v. Mentor*, 2003-Ohio-4051.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 81861

RON BRENO, ET AL. Plaintiffs-Appellants vs. CITY OF MENTOR, ET AL. Defendants-Appellees	:	JOURNAL ENTRY AND OPINION
DATE OF ANNOUNCEMENT OF DECISION	:	July 31, 2003
CHARACTER OF PROCEEDINGS	:	Civil appeal from Common Pleas Court Case No. CV-429581
JUDGMENT DATE OF JOURNALIZATION	:	AFFIRMED.

APPEARANCES:

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SEAN C. GALLAGHER, J.:

{¶1} Appellants Ron and Cindy Breno, ("the Brenos"), appeal the decision of the trial court granting appellee James R. Hausler, ("Hausler"), summary judgment on Ron Breno's claims of negligent infliction of emotional distress and intentional infliction of emotional distress and Cindy Breno's claim for loss of consortium. The claims arise out of a police investigation involving an erroneous report of child pornography. The Brenos claim the trial court erred in finding that their claims were disguised defamation claims subject to a one-year statute of limitations. Finding no error in the proceedings below, we affirm.

{¶2} The following facts give rise to this appeal. On February 9, 1999, Hausler contacted the City of Mentor Police Department ("Mentor police") and alleged that Ron Breno had viewed and/or stored child pornography on his personal computer. Based on these allegations, Detective Michael A. Toth prepared an affidavit and search warrant that was signed by Municipal Judge Richard A. Swain on the same day. Detective Toth and other police officers executed the warrant at the Breno residence and seized a personal computer. The contents of the computer were analyzed by the Federal Bureau of Investigation. As a result of that analysis, no charges were brought and the computer was returned to the Brenos. On February 6, 2001, the Brenos filed a complaint against Hausler, the City of Mentor Police Department, and Detective Toth. The complaint included claims for negligent and intentional infliction of emotional distress, defamation, and loss of consortium.

{¶3} The case was removed to the United States District Court for the Northern District of Ohio and the Brenos eventually dismissed their claims against the Mentor police and Detective Toth without prejudice. With only the state law claims remaining, the case was then remanded back to the Common Pleas Court of Cuyahoga County. Although Hausler had never answered the complaint in the common pleas action, the record reflects that a telephone status conference resulted in an order that Hausler file "in this court forthwith" the motion for summary judgment he had filed in federal court. Hausler filed his motion for summary judgment on July 11, 2002. The motion was based on the grounds that all of the Brenos' remaining state law claims were, in essence, rooted in defamation and, under R.C. 2305.11, such claims must be brought within one year of accrual.[1]

{¶4} On September 4, 2002, the trial court granted Hausler's motion for summary judgment finding that the remaining claims of the Brenos were premised on conduct that was a "communication" and, as such, were disguised defamation claims subject to the one-year statute of limitations.

{¶5} The Brenos filed a timely appeal to this court raising three assignments of error. The second and third assignments of error are discussed together for clarity of the analysis. The first assignment of error is discussed last.

{¶6} "II. The trial court committed error by applying Ohio Revised Code Section 2305.11, the one year statute of limitations for defamation, to appellant's claim for

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[1] Mr. Breno agreed that the defamation claim he pleaded was time-barred and conceded that it should be dismissed in his brief in opposition to Hausler's motion for summary judgment and his brief to the court. His attorney reaffirmed this position at oral argument in this appeal. As such, it is not a matter under review by this court.

intentional infliction of emotional distress because Ohio Revised Code Section 2305.09 provides for a four year statute of limitation for such claim and Appellant's claim for intentional infliction of emotional distress is not disguised as a claim for defamation."

{¶7} "III. The trial court committed error by applying Ohio Revised Code Section 2305.11, the one year statute of limitations for defamation, to appellant's claim for negligent infliction of emotional distress because Ohio Revised Code Section 2305.10 provides for a two year statute of limitation for such claim and Appellant's claim for intentional infliction of emotional distress is not disguised as a claim for defamation."

{¶8} This court reviews the trial court's grant of summary judgment de novo. *Brown v. Scioto Bd. of Commrs.* (1993), 87 Ohio App.3d 704. Summary judgment is appropriately rendered when no genuine issue as to any material fact remains to be litigated, the moving party is entitled to judgment as a matter of law, it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Turner v. Turner* (1993), 67 Ohio St.3d 337, 1993-Ohio-176, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64.

{¶9} The issue in this case is whether the claims for intentional and negligent infliction of emotional distress are based on a "communication" and are thus, subject to the one-year statute of limitations for a defamation claim under Ohio Revised Code Section 2305.11.

{¶10} This court has previously held that in determining which statute of limitations should be applied to a particular cause of action, "'***courts must look to the actual nature

or subject matter of the case rather than the form in which the action is pleaded. The grounds for bringing the action are the determinative factors; the form is immaterial.'" *Krause v. Case Western Reserve Univ.* (Dec. 19, 1996), Cuyahoga App. No. 70526, quoting *Lawyers Cooperative v. Muething* (1992), 65 Ohio St.3d 273, 277-278. Where a claim for intentional infliction of emotional distress is set forth under a separate count in a complaint, the applicable statute of limitations for the entire claim is determined by the essential character of the underlying tort action. *Hoppel v. Hoppel* (Mar. 29, 2000), Columbiana App. No. 99-CO-46, citing *Love v. Port Clinton* (1988), 37 Ohio St.3d 98, 99.

{¶11} Counts two and three of the complaint outline claims for negligent and intentional infliction of emotional distress. In both instances, the assertion is that Hausler was negligent by providing *information* to the Mentor police that he believed was child pornography when, in fact, it was not. The providing of information is a communication that forms the basis of the claim. A claim is "complete under defamation" if, under the facts, it hinges upon the defendant communicating something by speech or conduct. *Worpenberg v. The Kroger Co.*, Hamilton App. No. C-010381, 2002-Ohio-1030, citing Silbaugh, Sticks and Stones Can Break My Name: Nondefamatory Negligent Injury to Reputation 59 U.Chi.L.Rev. 865, 868. "Communication" is a term of art used to denote the fact that one person has brought an idea to the perception of another. Id.

{¶12} Where the underlying wrong which the complaint alleges is defamation, the one-year statute of limitations applicable to defamation applies to the emotional distress claim. *Lusby v. Cincinnati Monthly Publishing Corp.* (C.A. 6 1990), 904 F.2d 707. As noted by the Sixth Circuit Court of Appeals, "[i]t would be unfair to permit [a] plaintiff to recover for the alleged [defamation] under the guise of an action for emotional distress

when the Ohio General Assembly has specifically elected to limit the availability of such an action through a brief filing period." Id. Thus, where a claim is expressly premised upon a "communication" of false information, it is properly characterized as a "disguised defamation" claim. *Worpenberg v. The Kroger Co.*, Hamilton App. No. C-010381, 2002-Ohio-1030. Moreover, although a claim for emotional distress is recognized as a separate tort under Ohio law, if the claim sounds in defamation it is subject to the one-year statute of limitations for defamation. See Id.; *Lusby*, 904 F.2d 707; *Hoppel*, Columbiana App. No. 99-CO-46.

{¶13} We recognize where a claim for reputational harm sounds in defamation, some courts have allowed a negligence claim to survive in spite of the communication if the complaint addresses other noncommunicative negligent conduct by the defendant. *Silbaugh,* Sticks and Stones Can Break My Name: Nondefamatory Negligent Injury to Reputation 59 U.Chi.L.Rev. 865. In the instant case, however, both claims for negligent and intentional infliction of emotional distress are based exclusively on Hausler providing information to the police. Since this "communication" forms the basis of both these claims, they sound in defamation and are subject to the one-year statute of limitations.

{¶14} We also recognize that this court has previously held that in certain circumstances a claim for intentional infliction of emotional distress that is susceptible to a conventional tort cause of action may be based upon facts so extreme and outrageous in character that the longer statute of limitations prescribed under R.C. 2305.09 should be applied. See *Presti v. Aherns* (Nov. 17, 1988), Cuyahoga App. No. 54620, citing *Pournaras v. Pournaras* (Dec. 12, 1985), Cuyahoga App. Nos. 49936 and 49937. However, as this court has stated:

{¶15} "'***[T]he requirement of 'extreme and outrageous' conduct necessary to the tort of intentional infliction of emotional distress (sic) is not established simply by ordinary tortious or even criminal activity. If that were the case, untimely claimants for any sort of intentionally tortious actions could easily subvert an applicable statute of limitations simply by entitling their action as one for intentional infliction of emotional distress. This would clearly contravene the legislative authority which has limited certain actions to be brought within specified times. Thus, if the set of facts complained of gives rise to a conventional tort action for which the legislature has clearly delineated a statute of limitations, the claim should usually be governed by that statute.'" *Presti*, supra, quoting *Pournaras*, supra.

{¶16}We respectfully disagree with the dissent's reliance on *Presti*, supra, as support for imposing the longer statute of limitations to this case. In *Presti*, Presti accused a chief of police of preparing a written sexual harassment report which included a statement attributed to Presti. Id. After voluntarily dismissing a complaint grounded in libel and slander, Presti filed a second complaint recasting the claims as intentional and negligent infliction of emotional distress. Id. This court recognized the four-year limitation may be applicable under facts which surmount the facts that ordinarily establish prima facie liability for a conventional tort and establish the conduct is "extreme and outrageous" in comparison thereto. Id. Under the facts of Presti, we determined the conduct amounted to a tortious

claim of libel and slander and applied the one-year statute of limitations. Id.

{¶17}In the instant matter, while we recognize a report of child pornography is a very serious allegation, we find nothing extraordinary, intolerable, or extreme in degree about the facts of this case as compared to an ordinary claim for defamation arising out of the reporting of alleged criminal activity.[2] We also do not agree with the dissent that Hausler needed to introduce evidence to the absence of an issue of material fact as to the Brenos' claims. The issue before the court was whether the Brenos' claims were barred by the applicable statute of limitations, not the likelihood of success on the merits of those claims. Hausler did not present any facts which would warrant application of the four-year statute of limitations. Because the facts complained of sound in defamation and do not surmount the conventional tort, the relevant limitations period for defamation was appropriately applied.

{¶18}Further, with respect to the negligent infliction of emotional distress claim, Hausler's conduct produced no actual threat of physical harm to the Brenos or any other person. Ohio law does not recognize a cause of action for negligent infliction of emotional distress where the defendant's negligence produced no

[2] Counsel for the Brenos even conceded at oral argument that there was no evidence of malicious intent by Hausler in reporting the alleged crime.

actual threat of physical harm to the plaintiff or any other person. *Wigfall v. Society Nat'l Bank* (1995), 107 Ohio App.3d 667, 676,citing *Heiner v. Moretuzzo* (1995), 73 Ohio St.3d 80, 82.

{¶19}We also note that under Ohio law, there is a tort cause of action, separate from defamation, which exists "for persons who are negligently improperly identified as being responsible for committing a violation of the law and who suffer injury as a result of the wrongful identification. As with any cause of action sounding in negligence, there must be a showing of a duty, a breach of duty, proximate cause and injury before the person improperly identified for committing a crime can establish a valid claim." *Barilla v. Patella* (2001), 144 Ohio App.3d 524, 534, quoting *Wigfall*, 107 Ohio App.3d at 673; citing *Mouse v. The Central Savings & Trust Co.* (1929), 120 Ohio St. 599; *Walls v. City of Columbus* (1983), 10 Ohio App.3d 180; *Hersey v. The House of Insurance* (Feb. 23, 2001), Lucas App. No. L-00-1131. This tort includes providing false information to authorities that another has committed a crime. *Walls*, 10 Ohio App.3d 180. As courts have recognized, a person owes a duty to use due care when providing information to the authorities which indicates a person has committed a crime. *Wigfall*, 107 Ohio App.3d at 674; *Walls*, 10 Ohio App.3d at 182-183. As stated in *Wigfall*: "[w]e acknowledge that public policy does encourage citizens to cooperate with investigating authorities to identify perpetrators of crime.

However, we are unwilling to extend public policy to such an extent that due care need not be used when information is supplied to investigating authorities. The serious consequences which accompany an individual being identified as a suspected criminal require the imposition of a duty to use due care on those who give information to assist investigating authorities." *Wigfall*, 107 Ohio App.3d at 675.

{¶20}All the claims in Brenos' complaint are based on a communication to the police and therefore sound in defamation. No separate cause of action was brought for negligent misidentification, or otherwise sounding in negligence by setting forth a duty, breach, cause, and damage.

{¶21}Under these circumstances, we find that the trial court did not abuse its discretion in granting the motion for summary judgment. The Brenos' second and third assignments of error are overruled.

{¶22}The Brenos' first assignment of error states:

{¶23} "I. The trial court committed plain error by dismissing, as time barred, Appellant's claims for loss of consortium because Ohio Revised Code Section 2305.09 provides for a four year statute of limitations for such actions."

{¶24} A claim for loss of consortium is derivative. *Messmore v. Monarch Machine Tool Co.* (1983), 11 Ohio App.3d 67, 68-69; *Hallbauer v. Koblenz* (Jan. 2, 1997), Cuyahoga App. No. 69711. Therefore, if the main claim does not survive, the derivative claim fails as well. Id.

{¶25} In light of our findings on the second and third assignments of error, this assignment of error is overruled.

Judgment affirmed.

PATRICIA ANN BLACKMON, P.J., CONCURS.

ANNE L. KILBANE, J., CONCURRING IN PART AND DISSENTING IN PART, (SEE SEPARATE OPINION).

SEAN C. GALLAGHER
JUDGE

ANNE L. KILBANE, J., CONCURRING IN PART AND DISSENTING IN PART:

{¶26}In this appeal from an order of Judge Nancy A. Fuerst I concur in part with the majority affirming the grant of summary judgment on Breno's negligent infliction of emotional distress claim. However, I respectfully dissent on the majority's decision to affirm the grant of summary judgment on Breno's claim for intentional infliction of emotional distress and Mrs. Breno's claim for loss of consortium because it is not supported by the record.

I. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.

{¶27}The Ohio Supreme Court has consistently held that a cause of action for "negligent infliction of emotional distress" is only properly supported by factual allegations that, as a

result of personally viewing another being physically harmed through the negligent acts of the tortfeasor, or in fearing injury to one's self as a result, the claimant had suffered serious emotional distress.[1] Because Hausler's claimed negligence did not allegedly result in Breno physically observing immediate physical injury to another, this cause of action is facially flawed, and it would have been appropriate to dismiss it on this rationale alone.

II. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

{¶28}In the complaint, Breno alleged that "James Hausler intentionally or recklessly acted in an extreme manner by providing false information to the City of Mentor Police Department,"[2] causing him serious psychic and physically manifesting injuries. Although the statute of limitations for a claim sounding in libel or slander is one year,[3] the statute of limitations for a claim of intentional infliction of emotional distress is four years.[4]

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[1]*Gearing v. Nationwide Ins. Co.*, 76 Ohio St.3d 34, 1996-Ohio-113, *Lawyer's Coop. Publishing Co. v. Muething* (1992), 65 Ohio St. 3d 273, 280, *High v. Howard* (1992), 64 Ohio St.3d 82, 85-86, overruled on other grounds in *Gallimore v. Children's Hosp. Med. Ctr.* (1993), 67 Ohio St.3d 244, Paugh v. Hanks (1983), 6 Ohio St.3d 72.

[2]Complaint, Paragraph 31.

[3]R.C. 2305.11(A).

[4]*Yeager v. Local Union 20, Teamsters, Chauffers, Warehousemen and Helpers of America* (1983), 6 Ohio St.3d 369, 375, applying R.C. 2305.09(D).

{¶29}As the Ohio Supreme Court stated in *Doe v. First United Methodist Church*,[5]

> **"To determine which of these two statutes applies to appellant's claims against [the defendant], it is necessary to determine the true nature or subject matter of the acts giving rise to the complaint. *** '[I]n determining which limitation period will apply, courts must look to the actual nature or subject matter of the case, rather than to the form in which the action is pleaded. The grounds for bringing the action are the determinative factors, the form is immaterial.'"[6]**

{¶30}In attempting to define when an otherwise actionable claim in tort may rise to the level of intentional infliction of emotional distress, this court has remarked,

> **"[W]e recognize that certain claims, although susceptible to a conventional cause of acton (sic) in tort, can be based upon facts so extreme in character that they not only establish the conventional tort, but constitute intentional conduct which is "extreme and outrageous" as well. A battery, for example, which amounts to a form of torture, or a particularly diabolical false imprisonment, might establish a cause of action which overlaps the conventional tort and intentional infliction of emotional distress. In such cases, a claimant should be permitted the full four-year limitation period applicable to actions for intentional infliction of emotional distress.**
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> **The problem, therefore, lies in establishing when a conventionally recognized intentional tort is susceptible as well to a claim for intentional infliction of emotional distress, for purposes of using the longer limitations period. Respecting this, we hold that in order for the "overlap" to exist, there must be something so extraordinary, intolerable, or extreme in degree about a particular set of facts constituting a conventional tort, that compared with a set of facts constituting ordinary**

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[5]68 Ohio St.3d 531, 1994-Ohio-531.

[6]Id. at 536, internal citation omitted.

prima facie liability for that tort, its commission is "extreme and outrageous." This test, we believe, complies with the standard of conduct prescribed in *Yeager*,[7] yet does not preclude deserving claimants from the benefit of the longer limitation period simply because the "extreme and outrageous" conduct causing emotional distress fits the mold of a conventional tort."[8]

{¶31}Defamation is a false publication that injures a person's reputation, exposes him to public hatred, contempt, ridicule, shame or disgrace; or affects him adversely in his trade or business.[9] The essential elements of a defamation action are a false statement, that the false statement was defamatory, that the false defamatory statement was published, the plaintiff was injured and the defendant acted with the required degree of fault.[10] In contrast, in defining the contours of a claim for intentional infliction of emotional distress, the Ohio Supreme Court observed, "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes serious emotional distress to

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[7]*Yeager v. Local Union 20, Teamsters, Chauffers, Warehousemen and Helpers of America*, supra.

[8]*Presti v. Ahrens* (Nov. 17, 1988), Cuyahoga App. No. 54620, citing *Pournaras v. Pournaras* (Dec. 19, 1985), Cuyahoga App. No. 49936, 49937.

[9]*Matalka v. Lagemann* (1985), 21 Ohio App.3d 134, 136, 486 N.E.2d 1220.

[10] *Celebrezze v. Dayton Newspapers, Inc.* (1988), 41 Ohio App.3d 343, 346, 535 N.E.2d 755.

another is subject to liability for such emotional distress."[11] This cause of action represents an independent tort.[12]

{¶32}The elements of an action rooted in the intentional infliction of emotional distress are:

> **"(1) the defendant either intended, or should have anticipated, the emotional distress caused by his or her actions;**
>
> **"(2) the conduct was 'so outrageous in character, and so extreme in degree' that it transgressed all societal bounds of decency and should be regarded as 'atrocious,' and 'utterly intolerable';**
> **"(3) the conduct proximately caused the psychic injury; and**
> **"(4) the emotional distress was 'serious,' meaning that a reasonable person would be unable to adequately cope with it."[13]**

{¶33}In the instant case, Breno pleaded a valid cause of action for intentional infliction of emotional distress: he alleged that Hausler intentionally or recklessly made an allegation he had engaged in activities involving child pornography which were false, and that his resulting emotional distress was more serious than a reasonable man could be expected to endure. I cannot agree with the majority that Hausler's motion for summary judgment, which simply characterized Breno's various claims and allegations as a single claim of defamation and never addressed or challenged a lack of material fact as to any of these

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[11]*Russ v. TRW, Inc.* (1991), 59 Ohio St.3d 42, 47.

[12]Id.

[13]Restatement of the Law 2d, Torts (1965) 73, Section 46, Comment d; *Yeager*, supra, 6 Ohio St.3d at 375.

elements, should have been granted on this claim. Indeed, there has been *no evidence of any kind whatsoever* introduced into the record of this case.[14]

{¶34}There is no evidence of exactly what Hausler saw and perceived to be child pornography or how he reported the incident; whether any pornography or child pornography was, in fact, present; whether Hausler intended or should have anticipated that his actions would cause Breno emotional distress; or, whether Breno suffered serious, extreme emotional distress as a result of the allegedly wrongful actions.

{¶35}While the majority describes this case as a simple one of defamation, a false accusation of involvement with child pornography may well be one of the more extreme and outrageous forms of the underlying tort, based on the largely unknown facts of the case, and the profound stigma or harm that either a true or false publicized statement may cause. Hausler, in my view, introduced no evidence to present the facts of the case or an absence of an issue of material fact that would prove fatal to Breno's claim. Under the reasoning of the majority, facts constituting a defamation claim, or any other cause of action with a statute of limitations of less than four years, can never

[14]Hausler referred to deposition testimony and "Voluntary Disclosures" that are not part of the record in the motion for summary judgment, as did the Brenos' brief in opposition. Any discovery or pleadings in the district court case are not part of this record.

provide the basis for an intentional infliction of emotional distress claim. I do not believe that is an accurate statement of law.

{¶36}Additionally, summary judgment is being upheld in this case based on the representations of Hausler's counsel, with *zero* evidentiary support. While evidentiary support, upon remand, might ultimately result in a proper grant of summary judgment, the majority has not held Hausler to his burden of establishing an absence of an issue of material fact under Civ.R. 56. Upon summary judgment, a movant has the duty to supply a judge with affirmative representations of an absence of issues of material fact about the plaintiff's inability to meet the elements of his claim which, up to this point I submit, Hausler has not. With such a silent record there could be no basis for granting summary judgment on Breno's claim for intentional infliction of emotional distress.

III. LOSS OF CONSORTIUM.

{¶37} Breno and his wife each claim loss of consortium for the emotional distress sustained by Breno, and correctly assert that such claims are governed by the four-year statute of limitations under R.C. 2305.09.[15] Although Mrs. Breno has timely asserted such a claim, I see no allegations in the complaint, or legal authority for the proposition, that

[15]*Bowen v. KilKare, Inc.* (1992), 63 Ohio St.3d 84, *Childers v. Antoniak* (Nov. 2, 2000), Cuyahoga App. No. 77815, *citing Kraut v. Cleveland Ry. Co.* (1936), 132 Ohio St. 125.

Breno may potentially recover because he has suffered the loss of his wife's consortium because of Hausler's purported torts against him.

{¶38} As the majority notes, a loss of consortium claim is "derivative in that the claim is dependent upon the defendant's having committed a legally cognizable tort upon the spouse who suffered bodily injury."[16] A consortium claim, however, is a separate and independent property right reflecting the loss of a spouse's society and conjugal affection and may not be defeated by a valid technical, non-merit-related defense to the spouse's underlying claim against a tortfeasor.[17] In his complaint, Breno claims to have sustained physical and psychic injuries caused by Hausler's actions or omissions, and from the record there is nothing to disprove bodily injury to him, or to disprove Mrs. Breno's claim for damages based on a loss of consortium those damages have caused her.[18]

{¶39} Even though a defendant may use a statute of limitations defense to bar a plaintiff's recovery in tort, such a defense does not bar a spouse's potential loss of consortium claim if the underlying tort is otherwise supported by sufficient evidence.[19] Accordingly, even though Breno's defamation claim is barred by a statute of limitations, if the elements of this claim can be proven, and Mrs. Breno can establish her entitlement to legitimate damages based upon the fact that her husband has been defamed, she should be entitled to compensation. Since I find it inappropriate, based on the record, or, more

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[16]Id, at 93.

[17]Id., which held that a wife's claim for loss of consortium was not barred by the fact that the husband had signed a waiver of entitlement to damages on the underlying tort.

[18]Complaint, Paragraph 31.

[19]*Dean v. Angelas* (1970), 24 Ohio St.2d 99.

properly, the complete absence of it, to grant summary judgment on the intentional infliction of emotional distress claim, I would obviously hold that a loss of consortium claim, at this point, is not precluded, based on that cause of action as well. There is no evidence in the record to refute any of the Brenos' claims and, in my view, no argument has been advanced to bar them as a matter of law. Summary judgment, therefore, was not appropriate on Mrs. Breno's claim for loss of consortium arising out of her husband's claims for either intentional infliction of emotional distress or defamation.

{¶40} I would reverse the grant of summary judgment on Breno's claim of intentional infliction of emotional distress and Mrs. Breno's claim of loss of consortium, and remand.