IN THE SUPREME COURT OF OHIO

ANDREW FOLEY, *et al.*	:	CASE NO. 2015-2032
	:	
Plaintiff-Respondents	:	On Certified Questions of State
	:	Law from the U.S.D.C. for the
v.	:	Southern District of Ohio,
	:	Western Division
UNIVERSITY OF DAYTON, *et al.*	:	
	:	3:15-CV-96
Petitioners	:	

MERIT BRIEF OF PLAINTIFF-RESPONDENTS ANDREW FOLEY, EVAN FOLEY, AND MICHAEL FAGANS

JANE MICHELE LYNCH (012180)
JARED A. WAGNER (076674)
GREEN & GREEN, LAWYERS
800 Performance Place
109 North Main Street
Dayton, OH 45402
(937) 224-3333
jmlynch@green-law.com
jawagner@green-law.com

Counsel for Petitioner Dylan Parfitt

TIMOTHY P. HEATHER (002776)
BENJAMIN, YOCUM, & HEATHER, LLC
300 Pike Street, Suite 500
Cincinnati, OH 45202
(513) 721-5672
tpheather@byhlaw.com

Counsel for Petitioner Michael R. Groff

MICHAEL A. HILL (0088130)
DENNIS R. LANSDOWNE (026036)
SPANGENBERG, SHIBLEY & LIBER
1001 Lakeside Avenue, East, Ste. 1700
Cleveland, OH 44114
(216) 696-3232 | (216) 696-3924 (fax)
mhill@spanglaw.com
dlansdowne@spanglaw.com

Counsel for Plaintiff-Respondents

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INTRODUCTION

For almost 100 years this Court has recognized the tort of negligent misidentification. Petitioners ask this Court to sweep that precedent away, turning it into a defamation claim. Or write the words "and negligent misidentification" into the Revised Code's list of tort claims with a one-year statute of limitations. Just so Petitioners can avoid accountability.

The unintended consequences, however, would be far reaching. Accepting the Petitioners' arguments would result in shielding people who intentionally mislead police officers into arresting innocent people. Police time and resources would be wasted, making their job harder.

Petitioners offer no reason to take this extreme step, because there is no reason to take this extreme step. The Court can answer the first certified question by relying on the words of the revised code and settled Ohio law—its own precedent—finding the statute of limitations is exactly what the revised code says it is for negligence-based claims: two or four years, depending on the nature of the injuries claimed. The Court can likewise rely on its own precedent to find that absolute and qualified immunity apply to defamation, not negligent misidentification, and judicial proceedings do not include talking to the police. That is the sensible choice to avoid inventing new law with uncertain consequences.

FACTS STATEMENT

Plaintiff-Respondents Evan Foley and Michael Fagans were students at the University of Dayton. (Am. Com. ¶27-29).[1] On March 14, 2013, Evan's brother, Respondent Andrew Foley, visited for the weekend, intending to tour the campus and possibly transfer to the University of Dayton. Id. at ¶28. Respondents socialized with friends, after which time they walked toward Evan's home. Id. at ¶30. While walking, Evan noticed the lights on at a house he recognized as his friend's. Id. at ¶¶31-33. This was one of many townhouses with very similar appearances, and the townhouse Evan thought was his friend's actually belonged to Petitioner Dylan Parfitt. Id. Evan's friend lived at 417 Lowes Street, while Petitioner Parfitt lived at 411 Lowes Street. Id. at ¶32. After Evan knocked on the front door, Petitioner Michael Groff opened the door while holding a case of beer. Id. at ¶34.

Evan immediately asked Groff if Evan's friend was at the residence. Id. at ¶36. At that point, Groff, who was substantially larger and physically more imposing than any of the Respondents, became belligerent and shouted profanities at them. Id. Evan explained that he made an honest mistake by knocking on the door to the home he believed was his friend's

[1] Unless otherwise stated, all factual references are cited to Respondents' Amended Complaint.

and offered to shake Groff's hand as a friendly gesture. Id. at ¶37. Groff then slammed the door in Evan's face. Id. Evan knocked on the door once more, received no answer, and left. Id. at ¶38. While leaving, Groff yelled to Respondents that he had called the police. Id. at ¶40.

When law enforcement arrived, Petitioners misidentified Plaintiffs as individuals who had attempted to burglarize Parfitt's residence, despite knowing that those claims were false. Id. at ¶¶39; 151-55. Over the course of the following day, Respondents were arrested for and charged with burglary. *Id*. at ¶¶59-75. On March 22, 2013, the cases against Andrew and Michael were dismissed upon a finding that no probable cause existed for their arrests and charges could not continue against them. Id. at ¶75. The proceedings against Evan also subsequently resolved. Id. Respondents were imprisoned and have suffered substantial economic and non-economic harm as a consequence of these events, including by way of lost employment opportunities due to having felony arrest records. Id. at ¶77.

Respondents filed this lawsuit in the United States District Court Southern District Ohio. Respondents filed claims against the University of Dayton and various employees. Those claims are not before this Court. Respondents brought an Ohio negligence claim against Petitioners Parfitt and Groff for their negligent misidentification of Respondents, which led to

their arrest, imprisonment, and damages. Petitioners filed Motions for Judgment on the Pleadings or, in the Alternative, to Certify Questions of Law to the Ohio Supreme Court. The court declined Petitioners' motion for judgment but certified the following questions to this Court:

A. What is the statute of limitations for claims of negligent misidentification?

B. Is the doctrine of absolute privilege applicable to claims of negligent misidentification and, if so, does it extend to statements made to law enforcement officers implicating another person in criminal activity?

C. Is the doctrine of qualified privilege applicable to claims of negligent misidentification?

ARGUMENT ON CERTIFIED QUESTIONS OF LAW

I. First Certified Question: What is the statute of limitations for claims of negligent misidentification?

A. Negligent Misidentification is a Common Law Claim Sounding in Negligence.

The Supreme Court of Ohio has recognized the tort of negligent misidentification for nearly 100 years. Mouse v. Cent. Sav. & Trust Co., 120 Ohio St. 599, 602–603, 167 N.E. 868, 869 (1929). In Mouse, the plaintiff was arrested after a check bounced. Id. at 602. The plaintiff's account had the necessary funds, and the bank erred by checking the wrong account, thus causing the plaintiff's arrest. Id. The Ohio Supreme Court recognized a tort cause of action against the bank for its negligence in reporting the issue to the police. Id. at 611. The court reasoned that the plaintiff's arrest was a natural and probable result of notifying the police that his check bounced. Id. at 605. The court found the tort constitutes real damage to the plaintiff, as confinement to a county jail humiliates a person of good reputation and confines their liberty. Id. at 611.

Following Mouse, Ohio appellate courts have continued to apply the tort of negligent misidentification. As the Sixth District explained in 1995:

> Our careful reading of the *Mouse* case and of the *Walls* case leads us to the conclusion that there is a tort cause of action, separate from defamation, which exists in Ohio 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.

Wigfall v. Soc. Natl. Bank, 107 Ohio App.3d 667, 673, 669 N.E.2d 313, 316-17 (6th Dist.1995).

This claim has been consistently defined as a negligence claim involving giving false information about the plaintiff's alleged commission of a crime to the police. See, e.g., Walls v. Columbus, 10 Ohio App.3d 180, 182-83, 461 N.E.2d 13, 14-15 (10th Dist. 1983) ("[I]t has been recognized in Ohio through the *Mouse* case . . . that giving false information which results in the arrest and imprisonment of another may be grounds for tort liability"); Woods v. Summertime Sweet Treats, Inc., 2009-Ohio-6030 ¶37 (7th Dist.) (recognizing claim); Breno v. City of Mentor, 2003-Ohio-4051, ¶19 (8th Dist.) ("We also note that under Ohio law, there is a tort cause of action, separate from defamation, which exists 'for persons 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.'"); Hersey v. House of Ins., 6th Dist. No. L-00-1131, 2001 WL 173080, at *2 (Feb. 23, 2001) (setting forth elements of claim for negligent misidentification); Barilla v. Patella, 144 Ohio App.3d 524, 534, 760 N.E.2d

898, 905 (8th Dist. 2001) (setting forth elements of negligence-based claim).

Negligent misidentification includes the allegations in this case, namely, "providing false information to authorities that another has committed a crime. 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." Breno, 2003-Ohio-4051 at ¶19.

B. Negligent Misidentification is Distinct from Defamation.

The elements for a negligent misidentification claim are: (1) a duty, (2) a breach of duty, (3) which causes, (4) arrest, (5) due to improper identification to law enforcement, (6) for committing a crime. Barilla at 534; see also Wigfall at 316-317; Hersey v. House of Ins., 6th Dist Lucas No. L-00-1131, 2001 WL 173080, *2 (Feb. 23, 2001); Cummerlander v. Patriot Preparatory Acad. Inc., 86 F.Supp.3d 808, 826 (S.D. Ohio 2015) ("To make a claim for the tort of negligent identification, or misidentification, Plaintiffs must show that a person was negligently improperly identified as being responsible for committing a violation of law, and suffered injury as a result of the wrongful identification.").

In contrast, defamation has entirely different elements: "(1) that a false statement of fact was made, (2) that the statement was defamatory, (3)

that the statement was published, (4) that the plaintiff suffered injury as a proximate result of the publication, and (5) that the defendant acted with the requisite degree of fault in publishing the statement." Am. Chem. Soc. v. Leadscope, Inc. (2012), 133 Ohio St.3d 366, 389, 2012-Ohio-4193, 978 N.E.2d 832, 852, ¶77.

No doubt claims for negligent misidentification can overlap with defamation, as both often involve speech and the reporting of information. Just as either may overlap with claims for invasion of privacy, or negligent infliction of emotional distress. See, e.g., Pollock v. Rashid, 117 Ohio App.3d 361, 369, 690 N.E.2d 903, 909 (1st Dist.1996).

The fact that different claims can overlap is no reason to eliminate them, or force them into a single framework. Different claims can have different elements, different bases (common law, statutory, etc.), different defenses, different policy considerations at work, different measures of damages, and different statutes of limitations. An Ohio plaintiff who is arrested because of another person's negligent misidentification is not required to plead a defamation claim and, indeed, they may not have one.

Ohio Courts considering the Petitioners' argument—that Courts should simply treat negligent misidentification as defamation—have rejected them: "[T]here is a tort cause of action, ***separate from***

defamation . . . 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." Wigfall, 107 Ohio App. 3d at 673 (6th Dist. 1995); see also Woods v. Summertime Sweet Treats, Inc., 7th Dist. Mahoning No. 08-MA-169, 2009-Ohio-6030 ¶37 ("While the magistrate found that no tort cause of action exists for claims that are covered by defamation, case law indicates otherwise").

In Wigfall, a customer of a bank filed a lawsuit against the bank and various bank employees after he was incorrectly implicated as a suspect in a bank robbery leading to his picture being published in the media and reports that he was a suspect in a bank robbery. The plaintiff brought claims for, among others, negligent identification and defamation. The trial court dismissed the plaintiff's claim for negligent identification on the basis that it sounded in defamation and therefore was untimely. On appeal, the Sixth Appellate District reversed the trial court's determination, based on the existance of the separate claim for negligent misidentification. Wigfall, 107 Ohio App. 3d at 673. As the Court noted, "[t]he one-year statute of limitations applicable to a defamation claim ***is not applicable to this separate cause of action."*** Id., n. 4.

The Petitioners' argument, that this is really a defamation claim merely because it involves communication, makes no sense. If any communication to law enforcement meant the claim was for defamation, there could never be a claim for negligent misidentification. Negligent misidentification, by its very elements, requires communication to law enforcement. But that is Petitioners' real argument: if you communicate, it must be defamation. They simply ignore negligent misrepresentation and the case law surrounding it. The effect of accepting this position would mean there is no longer a negligent misrepresentation claim. And it ignores the reality that Respondents' claim for negligent misidentification includes additional elements not found in a defamation claim, namely, being arrested. They have no explanation for this.

The differences between defamation and negligent misidentification, in addition to the elements and statutes of limitation, includes the extensive statutory and common-law framework for defamation claim defenses, immunities, and the like, that are inapplicable to the instant claims. Again, the Petitioners seek to collapse all these differences, because it would help their case. For example, the General Assembly defined libel and slander—written and spoken defamation—by statute, as opposed to the common-law negligent misidentification claim. The entirety of Revised Code chapter

2739 is dedicated to defamation, defenses, special rules for newspapers and television, and the like. And the General Assembly acknowledges elsewhere the difference between defamation, invasion of privacy, and negligence related to disclosure of information. It makes no sense to assume negligent misidentification was ever intended to be part and parcel of this statutory framework, when the common law claim was recognized despite the existence of defamation claims. In Revised Code section 3904.22 (Authorized disclosures of personal or privileged information – immunity), the General Assembly decided no "cause of action in the nature of defamation, invasion of privacy, ***or negligence*** shall arise" against a person "disclosing personal or privileged information" in accordance with the insurance laws.

Likewise, there are instances where defamatory statements would not lead to a cause of action for negligent misidentification. In Barilla, the court held that summary judgment was appropriate because "[i]n the present action, [plaintiff] was not reported to law enforcement authorities as having committed a crime, was not arrested or imprisoned, and suffered no injury from actions taken by law enforcement authorities. Instead, the actions of which [plaintiff] complains were entirely within the private

sector. Accordingly, the cause of action is not applicable. . . ." Barilla, 144 Ohio App.3d at 534, 760 N.E.2d 898 at 534.

Petitioner Parfitt cites the Breno case to argue "courts have specifically recognized that claims based on statements made to law enforcement officers implicating the plaintiff in criminal activity are subject to the one year statute of limitations for defamation claims." (Parfitt Merit Brief at 4.) This is misleading at best. In Breno, the court ruled the defamation claim was time barred, but ***explicitly noted the alternative claim for negligent misrepresentation*** sounding in negligence, not defamation:

> 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). . . . This tort ***includes providing false information to authorities that another has committed a crime.*** 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. . . .
>
> 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.

Breno v. City of Mentor, 2003-Ohio-4051, ¶19-20 (8th Dist.) (emphasis added). It was the failure to plead the negligent misidentification, not that the claim sounded in defamation, that was at the heart of the decision, and the Court expressly noted the alternative claim was available, just not pled.

The Petitioners' reliance on Cromartie v. Goolsby is similarly misplaced. Petitioners fail to disclose that in that case the plaintiff filed a complaint exclusively alleging "claims for libel, slander, and malicious prosecution, which all have one year statute of limitations that had expired by the time Cromartie filed his complaint." Cromartie v. Goolsby, 2010-Ohio-2604, ¶27 (8th Dist.). It was only after the motion to dismiss, later converted to a motion for summary judgment, was filed that he simply "reclassified his claims" as "negligent misrepresentation, negligent identification, abuse of process, and intentional infliction of emotional distress." Id. That is not the case here: the complaint was based on negligence from the start, properly alleging negligent misidentification.

Petitioners never answer the question: what is the statute of limitations for negligent misidentification? Instead, they argue all negligent misidentification claims, by their very nature, must be

defamation claims. That simply is not true, and their conclusion—that the one-year statute of limitations for defamation claims applies—is meritless.

C. Claims for Negligent Misidentification are Subject to a Two- or Four-Year Statute of Limitations, Depending on the Injuries Sustained.

Determining the appropriate statute of limitations period in this case requires three steps, moving from specific, to typical, to general. Is this a ***specific*** claim that is explicitly listed by statute as one year? If not, is it of a ***type*** of negligence claim (bodily injury and property damage) given a two-year statute? Or does it fit in the catch-all ***general*** negligence four-year statute of limitations?

The answer to the first question—is "negligent misidentification" one of the specific torts listed in Ohio Revised Code section 2305.11(A)—is a definite no. The only claims listed on this explicit, specific list in R.C. 2305.11(A) are actions "for libel, slander, malicious prosecution, or false imprisonment, an action for malpractice other than an action upon a medical, dental, optometric, or chiropractic claim, or an action upon a statute for a penalty or forfeiture. . . ." Because negligent misidentification is not on the list, the one-year period does not apply by this Court's own syllabus law precedent:

> The statute of limitations contained in R.C. 2305.11(A) is ***limited to the areas specifically enumerated*** therein and

> to the common-law definition of "malpractice." (Hocking Conservancy Dist. v. Dodson-Lindblom Assoc., 62 Ohio St.2d 195, 404 N.E.2d 164, approved and followed.)

Whitt v. Columbus Co-op. Enterprises, 64 Ohio St.2d 355, 415 N.E.2d 985 (1980), Syllabus; see also Reese v. K-Mart Corp., 3 Ohio App.3d 123, 443 N.E.2d 1391, Syllabus at ¶1 (10th Dist.1981).

The words of the statute cannot be amended by judicial fiat. Doe v. White, 97 Ohio App.3d 585, 590, 647 N.E.2d 198, 201 (2nd Dist.1994) (reviewing the "long line of cases interpreting R.C. 2305.11" that refused to "extend the statute of limitations to include" non-enumerated claims). As much as Petitioners would like to escape accountability for their actions in this case, Ohio law is clear that they cannot do that by shoe-horning negligent misidentification into this statute.

Petitioners try to escape this clear answer by asking the Court to find the "nature" of the claim is defamation. But if a negligent misidentification claim involving communication to law enforcement were *per se* a defamation claim, there would never have been a negligent misidentification claim: "communication to law enforcement" is an element of the negligent misidentification claim. The argument is nonsense.

Second, then, is whether the claim is of the type the General Assembly set out for a two-year statutory period, namely personal injury and property

damage negligence claims in R.C. 2305.10? Unlike the explicit list in R.C. 2305.11(A), claims for "bodily injury or injuring personal property" can include a number of different torts. If not, it fits within the "catch all" negligence claims "affecting a right" not otherwise defined, and has a four year statute of limitations under R.C. 2305.09(D).

When deciding between the two- or four-year limitations period, this Court has instructed that the nature of the injuries asserted may affect the analysis, so the answer to the certified question may be: two or four years, depending on the nature of the claimed injuries. "Unlike courts of other states that have enacted statutes of limitations that are particularized to different types of tort-based product-liability claims, Ohio courts have been repeatedly called upon to analyze the nature of the action and of ***the injuries claimed*** in order to determine which statute of limitations should be applied." Lawyers Coop. Publishing Co. v. Muething, 65 Ohio St.3d 273, 278, 603 N.E.2d 969, 973 (1992) (emphasis added, footnote omitted).

Negligent Misidentification does include an element of bodily injury—arrest and imprisonment—but also a more emotion-based injury to liberty and reputation. While the Lawyers Coop. court was discussing product claims, these fall under the same statutes for limitations purposes when

asserted as negligence claims, and the court further analyzed the same types of injuries at issue in this case, finding them to be personal injuries:

> We now focus our attention on the nature of Muething's remaining injuries. Muething claims that he sustained ***public and professional embarrassment and humiliation, that his professional reputation declined, and that he suffered emotional pain and distress.*** There is no doubt that these are ***personal injuries***.

Id. (eventually applying the two-year statute).

By contrast, claims for intentional infliction of emotional distress and invasion of privacy—which claims naturally involve emotional harms like embarrassment—are put in the four-year category under R.C. 2305.09(D). T.S. v. Plain Dealer, 194 Ohio App.3d 30, 2011-Ohio-2935, 954 N.E.2d 213, ¶6 (8th Dist.) ("The four-year statute of limitations applies to claims for intentional infliction of emotional distress and invasion of privacy. R.C. 2305.09(D)."); Smith v. A.B. Bonded Locksmith, Inc., 143 Ohio App.3d 321, 330-31, 757 N.E.2d 1242, 1249 (1st Dist. 2001) (four-year limitation period applies to abuse of process and invasion of privacy claims).

It appears the nature of the claim at issue, and particularly whenever the claimed injuries include property loss, the two-year statute of limitations is the most logical choice. However, when the claimed injuries

do not involve personal or property injury, but merely embarrassment or being detained, courts can apply the four-year statutory period.

This is consistent with the decisions of Ohio courts that have already addressed the issue. The defendants in Wigfall argued that the plaintiff's claims for negligent misidentification were essentially claims for defamation because they related to speech and the false implication of an individual to a criminal act and, therefore, should be controlled by the one-year limitation period that controls claims for defamation. They further argued that the one-year time period for asserting a defamation claim had expired and, thus, the plaintiff's claims were time-barred. The court, however, rejected that argument and by default applied Ohio's four-year limitation period for certain other torts. Id. at 73. Indeed, in rejecting that argument, the court explained, "[t]he one-year statute of limitations applicable to a defamation claim is not applicable to this separate cause of action." Id., fn. 4.

D. Conclusion

The Court should answer the First Certified Question as:

> Negligent Misidentification is a negligence-based claim distinct from defamation. It is subject to a two-year statute of limitations under R.C. 2305.10, unless the claimed injuries do not involve bodily injury or property damage, in which case it is subject to a four-year statute of limitations under R.C. 2305.09(D).

II. Second Certified Question: Is The Doctrine Of Absolute Privilege Applicable To Claims Of Negligent Misidentification and, if so, Does It Extend To Statements Made To Law Enforcement Officers Implicating Another Person In Criminal Activity?

A. The Doctrine of Absolute Privilege Does Not Apply to Negligence Claims.

Continuing the theme of confusing negligent misidentification with defamation, Petitioners argue that privilege applicable to defamation claims involving statements in judicial proceedings should be greatly expanded to cover negligent misidentification statements to law enforcement. Such a radical approach would encourage lying to police officers and is entirely unwarranted.

Ohio courts have made clear that no such defense exists in the context of a negligence claim. In Wigfall, the court was confronted with an identical argument, and stated:

> Turning to the final argument of the bank, we 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. The summary judgment granted to the bank for appellant's claim for negligent identification is reversed.

Id. at 318. See also, Breno, 2003-Ohio-4051, ¶19 ("This tort [negligent identification] includes providing false information to authorities that another has committed a crime. 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.") (citations omitted and alteration added); Barilla, 144 Ohio App.3d at 534, 760 N.E.2d 898 (explaining that an actionable claim for negligent misidentification that requires that the negligent identification be made to law enforcement.)

In the context of negligent misidentification, there is no immunity or privilege relating to the false or negligent misidentification of a person to law enforcement. In fact, for negligent misidentification claims to be actionable at all, the statements ***must*** be made to law enforcement. Petitioners ask this Court to sanction a new-found immunity that would eviscerate an element of an almost hundred-year-old common law claim.

The only immunity that has been recognized as a defense to a claim for negligent identification is one for Ohio Political Subdivision Tort Immunity pursuant to R.C. 2744.03, which is totally inapplicable to the instant case. See Cummerlander, 86 F.Supp.3d at 826 (recognizing the Ohio common law tort of negligent identification but granting summary judgment because each of the involved actors were provided state law

immunity as they were governmental actors carrying out a governmental function at the time the identification was made); cf. Sampson v. Cuyahoga Metro. Hous. Auth., 131 Ohio St. 3d 418, 423, 2012-Ohio-570, 966 N.E.2d 247, 252, ¶19 (holding that employee's claim against political subdivision for negligent misidentification could proceed under exception to political subdivision immunity exception set forth at R.C. 2744.09(B) because the facts of the claim arose from her employment relationship with the political subdivision). Petitioners were not governmental actors and are afforded no state law immunity for their conduct.

B. Even Under the Inapplicable Defamation Standard, Absolute Immunity Should Never Apply.

Even if the Court analyzed this question under the inapplicable defamation standard, the Petitioners' attempt to radically expand absolute immunity from statements relating to judicial proceedings to statements to law enforcement asks far too much, a radical change.

There is no absolute privilege for purposefully, knowingly, or negligently providing false information to law enforcement. Absolute privilege confers civil immunity upon the speaker even if he makes a "false, defamatory statement … with actual malice, in bad faith and with knowledge of its falsity; whereas the presence of such circumstances will defeat the assertion of a qualified privilege." M.J. DiCorpo, Inc. v. Sweeney,

69 Ohio St.3d 497, 505, 634 N.E.2d 203 (1994). Due to potential abuse, "[t]he class of occasions where the publication of defamatory matter is absolutely privileged is, however, ***confined within narrow limits***, and the courts as a rule have ***steadily refused to enlarge those limits.***" Shade v. Bowers, 93 Ohio Law Abs. 463, 199 N.E.2d 131, 134 (C.P. 1962); see also M.J. DiCorpo, 69 Ohio St.3d, at 505 ("[O]ccasions of absolute privilege are few and that the tendency is to limit them rather strictly to the following types of occasions: (1) [legislative proceedings]; (2) judicial proceedings in established courts of justice; (3) official acts of the chief executive officers…; and (4) [military acts]").

By contrast, Petitioners ask for a wholesale radical enlargement, for reason other than they want to not be liable for their negligent misidentification. That is no good reason at all.

This Court has never recognized that absolute privilege applies to statements made to police, and federal courts addressing the issue have believed it never would. See Dehlendorf v. Gahanna, 786 F.Supp.2d 1358, 1365 (S.D.Ohio 2011) ("the Court believes the Supreme Court of Ohio would not consider statements made to the police part of a 'judicial proceeding' and therefore would not extend absolute immunity") (emphasis added).

This Court has repeatedly stressed the need for limited application of absolute immunity by not creating a new category for protected falsehoods. Instead, the analysis is whether the conduct occurred in what could be considered "judicial proceedings." M.J. DiCorpo, 69 Ohio St.3d, at 506 ("Clearly, if the filing of a grievance with a local bar association is part of a 'judicial proceeding,' the same must also be true of an affidavit filed with a county prosecutor"). One thing that can never be said is that talking to law enforcement is a "judicial proceeding." That would make no sense, and would throw open the door to myriad unintended consequences, as a huge, new area of communication—there are many more police actions than there are judicial proceedings—is now afforded some level of never-before-known immunity. The results can only be imagined.

Ohio Courts have repeatedly held that in the defamation context statements made to police, ***at the most***, are entitled to a qualified privilege analysis, not absolute. Mason v. Bexley City School District, 2010 WL 987047, *29 (S.D. Ohio 2010) ("Assuming that plaintiff has established a *prima facie* case of defamation [regarding statements made to law enforcement] ..., the question becomes whether or not Defendants ... are entitled to qualified immunity"); Tourlakis v. Beverage Distributors, Inc., 2002-Ohio-7252 ¶18 (8th Dist.) ("Because the qualified privilege applies to

the alleged defamatory information that Beverage Distributors supplied to the authorities, plaintiffs must make these additional showings."); Popke v. Hoffman, 21 Ohio App. 454, 456, 153 N.E. 248 (6th Dist. 1926); Stokes v. Meimaris, 111 Ohio App.3d 176, 675 N.E.2d 1289 (8th Dist. 1996); Hartung–Teter v. McKnight, 3rd. Dist. No. 4–91–2, 1991 WL 117274, at *1 (June 26, 1991); Paramount Supply Co. v. Sherlin Corp., 16 Ohio App.3d 176, 475 N.E.2d 197 (8th Dist. 1984) (applying qualified immunity in statements made to customs agents); Tillimon v. Sullivan, 6th Dist. No. L–87–308, 1988 WL 69163 (June 20, 1988).

Ohio courts have explicitly found that absolute immunity does not apply to falsehoods provided to law enforcement for an improper purpose. In Scott v. Patterson, 2003-Ohio-3353 ¶14-16 (8th Dist.), an unknown third-party damaged the defendant, Ruben Patterson's vehicle. Id. at ¶4. Lewis observed the third-party that damaged the defendant's car, but refused to identify him to Patterson. Id. Enraged, Patterson punched Lewis and subsequently framed Scott when the police arrived. Id. The police investigated Scott, arrested him, charged him with assault, and brought him to trial where a jury acquitted him. Id. at ¶5. Scott then sued Patterson for falsely implicating him in Patterson's assault. Id. ¶6. At trial, the Cuyahoga Court of Common Pleas dismissed Scott's claims against

Patterson on the basis of absolute immunity. Id. On appeal, the Eighth District Court of Appeals reversed, finding that "Patterson's statements frame Scott for the crime and cannot be said to bear a reasonable relation to the activity reported." Id. at ¶14. Elaborating, the court wrote:

> In Bigelow, the Supreme Court of Ohio defined what "reasonable relation to the activity reported" meant. The defamatory statement must be pertinent to the inquiry. "To be pertinent and material it (privileged statement) must tend to prove or disprove the point to be established, ***and have substantial importance or influence in producing the proper result.***"
>
> ***
>
> From what we can glean from the record, Patterson picked Scott out of the crowd that had gathered in the Flats and framed him for the crime. The inquiry is a reasonable relation, not an unreasonable one. Here, Patterson's statement***... is designed to frame, not to aid in the proper investigations of the case,*** and it does not have the indicia of false or mistaken information contemplated in Dicorpo.

Id. at ¶14-16 (emphasis added). Much like in Scott, Petitioners made statements to the University of Dayton Police not to aid an investigation, but to harass Respondents after a perceived slight. (Am. Compl. ¶33-41; ¶151-55.)

Petitioners' conduct should never be afforded absolute privilege, nonetheless in response to a certified question that would open the

floodgates of immunity defenses for statements made to law enforcement. An absolute privilege over such communications would essentially insulate all speakers for actions and communications that are made for the improper purpose of framing an individual by falsely implicating him or her in a criminal activity.

C. Conclusion

The answer to the Second question should be:

> The doctrine of absolute immunity does not apply to negligent misidentification claims or statements made to law enforcement.

III. Third Certified Question: Is The Doctrine Of Qualified Privilege Applicable To Claims Of Negligent Misidentification?

A. The Doctrine Of Qualified Privilege Does Not Apply To Negligence Claims.

As discussed *supra*, the privilege analysis applies only to defamation claims and has no application to Respondents' negligence claims. This is dues to the different elements of proof, measure of damages, and policy concerns that distinguish negligence from defamation claims. No Ohio Court has expanded from Defamation claims to Negligent Misidentification, and to do so would fundamentally alter the elements of the claim. They represent different policy considerations, elements of

proof, and provide for potentially different measures of damages than defamation claims.

B. Conclusion

The answer to the Third question should be:

> The doctrine of qualified immunity does not apply to negligent misidentification claims.

CONCLUSION

Negligent Misrepresentation is a common-law claim distinct from defamation. Accepting the Petitioners' argument and reducing this case to defamation would eliminate the tort of negligent misidentification altogether, with far-reaching negative consequences for law enforcement. The Court should find the statute of limitations for this claim is two years as it involves injury (arrest and imprisonment), or, if not, that the statute of limitations is four years as an uncategorized negligence claim. There is only one improper option: judicially re-writing the revised code to add in "negligent misidentification" into the exclusive list on one-year statutes of limitations. Because this is not a defamation claim, absolute and qualified immunity do not apply.

Respectfully submitted,

/s/Michael Hill
MICHAEL A. HILL (0088130)

DENNIS R. LANSDOWNE
SPANGENBERG SHIBLEY & LIBER
1001 Lakeside Avenue East, Suite 1700
Cleveland, Ohio 44114
(216) 696-3232 | (216) 696-3924 (fax)
mhill@spanglaw.com
dlansdowne@spanglaw.com

Counsel for Respondents Andrew Foley, Evan Foley, and Michael Fagans

CERTIFICATE OF SERVICE

On April 29, 2016, a true and correct copy of the foregoing was sent via regular U.S. Mail, postage prepaid, to:

JANE MICHELE LYNCH (012180)
JARED A. WAGNER (076674)
GREEN & GREEN, LAWYERS
800 Performance Place
109 North Main Street
Dayton, OH 45402

Counsel for Petitioner Dylan Parfitt

Counsel for Petitioner Michael Groff

TIMOTHY PAUL HEATHER (002776)
BENJAMIN, YOCUM, & HEATHER, LLC
300 Pike Street, Suite 500
Cincinnati, OH 45202

/s/Michael Hill
MICHAEL A. HILL (0088130)
DENNIS R. LANSDOWNE
SPANGENBERG SHIBLEY & LIBER
1001 Lakeside Avenue East, Suite 1700
Cleveland, Ohio 44114
(216) 696-3232 | (216) 696-3924 (fax)
mhill@spanglaw.com
dlansdowne@spanglaw.com

Counsel for Respondents Andrew Foley, Evan Foley, and Michael Fagans