

IN THE SUPREME COURT OF OHIO

ANDREW FOLEY, et al.,

Plaintiffs,

-vs-

UNIVERSITY OF DAYTON, et al.,

Defendants.

Case No. 2015-2032

On Certified Questions of State Law from the
United States District Court for the Southern
District of Ohio Western Division

S.D. Ohio Court Case No. 3:15-cv-96

**PRELIMINARY MEMORANDUM OF PETITIONER MICHAEL GROFF
ADDRESSING CERTIFIED QUESTIONS OF STATE LAW**

Timothy P. Heather, Esq. (0002776)
R. David Weber, Esq. (0090900)
Benjamin, Yocum & Heather, LLC
The American Book Building
300 Pike Street, Suite 500
Cincinnati, Ohio 45202-4222
Telephone: 513-721-5672
Facsimile: 513-562-4388
*Attorneys for Petitioner/Defendant,
Michael R. Groff*

Michael Anthony Hill, Esq. (0088130)
Dennis Landowne, Esq. (0026036)
Spangenberg, Shibley & Liber, LLP
1001 Lakeside Avenue East, Suite 1700
Cleveland, OH 44114
Telephone: 216-696-3232
Facsimile: 216-696-3924
*Attorneys for Respondents/Plaintiffs,
Andrew Foley, Evan Foley,
and Michael Fagans*

Jane M. Lynch, Esq. (0012180)
Jared A. Wagner, Esq. (0076674)
Green & Green Lawyers, LPA
800 Performance Place
109 North Main St.
Dayton, OH 45402-1290
Telephone: 937-224-3333
Facsimile: 937-224-4311
*Attorney for Petitioner/Defendant,
Dylan Parfitt*

I. INTRODUCTION

The U.S. District Court for the Southern District of Ohio has certified the following three questions to this Court:

1. What is the statute of limitations of negligent misidentification?
2. Is the doctrine of absolute privilege applicable to claims of negligent misidentification and, if so, does it extend to the statements made to law enforcement officers implicating another person in criminal activity?
3. Is the doctrine of qualified privilege applicable to claims of negligent misidentification?

Petitioner, Michael Groff, respectfully submits that, should this Court choose to exercise its jurisdiction in this matter, it should hold (1) that the tort of negligent misidentification is subject to a one-year statute of limitations pursuant to R.C. 2305.11(A); (2) that the doctrine of absolute privilege is applicable to claims of negligent misidentification and does extend to statements made to law enforcement officers implicating another person in criminal activity; and (3) that the doctrine of qualified privilege is applicable to claims of negligent misidentification.

II. RELEVANT FACTS

In the early morning hours of March 14, 2013, Respondents Andrew Foley, Evan Foley, and Michael Fagans were walking back to Evan Foley's apartment when they came upon a townhouse shared by Defendants, Michael Groff ("Michael") and Dylan Parfitt ("Dylan"). Pl. First. Am. Compl. ¶¶ 31-33. With the mistaken belief that Michael and Dylan's townhouse belonged to a friend of Evan Foley, Respondents knocked on the front door. *Id.* at ¶ 33. Despite it being "the early morning hours," Michael answered the door, informed Respondents that they were mistaken and had the wrong home, and closed the door. *Id.* at ¶¶ 37-38.

Apparently offended, Respondent Evan Foley again knocked on Michael and Dylan's front

door knowing that he was at the wrong apartment and that it was the early morning hours. *Id.* As Respondents began to leave, Michael reopened his front door and informed Respondents that, since they would not leave, he had contacted the University of Dayton Police Department (“UDPD”). *Id.* at ¶ 40. Respondents then left and began walking back down the street, where they were eventually stopped by UDPD Sergeant Thomas Ryan. *Id.* at ¶¶ 43-44. When questioned by Sgt. Ryan, Respondent Evan Foley indicated that he knew that he was being stopped as a result of Michael’s call to the police. *Id.* at ¶ 46. Respondent Evan Foley was then arrested by Sgt. Ryan for burglary. *Id.* at ¶ 47. Michael did not speak with Sgt. Ryan until after Evan Foley was placed under arrest. *Id.* at ¶ 54.

Shortly after Sgt. Ryan arrived on the scene, Respondents Andrew Foley and Michael Fagans, who had initially walked away from the police activity, approached and were briefly detained. *Id.* at ¶¶ 62-64. The next day, they too were arrested for burglary. *Id.* at ¶ 73. The criminal cases against Andrew and Michael were eventually dismissed, and the criminal proceedings against Evan were also subsequently “resolved.” *Id.* at ¶¶ 66, 73-75.

On March 13, 2015, Respondents filed suit against Michael, Dylan, the University of Dayton, and seven University of Dayton employees. Respondents’ Complaint was subsequently amended on March 16, 2015.¹ Michael and Dylan each filed Motions for Judgment on the Pleadings, or in the alternative, to Certify Questions of Law to the Ohio Supreme Court. Dist. Ct. Order at p. 2. On December 7, 2015, the District Court issued a Decision and Entry granting Michael and Dylan’s Motion to Certify Questions of Law to the Ohio Supreme Court. *Id.* at p. 9. That same day, the District Court certified the three questions posed above to this Court. *Id.*

¹ A true and correct copy of Respondents’ First Amended Complaint, filed with the United States District Court for the Southern District of Ohio, is attached hereto and incorporated as Exhibit “A.”

III. ARGUMENT

As will be shown below, this Court's precedent is dispositive of the first certified question, meaning that the one-year statute of limitations found in R.C. 2305.11(A) must apply to Respondents' negligent misidentification claim. As to the second certified question, this Court's holding in *M.J. DiCorpo, Inc. v. Sweeney*, 69 Ohio St.3d 497, 634 N.E.2d 203 (1994) mandates that statements made to law enforcement officers implicating another in a crime are absolutely privileged. Finally, as to the third certified question, the prior decisions of the Ohio District Courts of Appeal and the federal District Courts easily resolve the question of qualified privilege in favor of Petitioners.

A. **The Substance of a Negligent Misidentification Cause of Action Dictates Application of the One-Year Statute of Limitations found in R.C. 2305.11(A).**

There is no enumerated statutory limitation period for claims of negligent misidentification. Petitioners have argued that since the substance of the claim is closely related to defamation, the one-year statute of limitations set forth in R.C. 2305.11(A) should apply regardless of the form of the cause of action. Respondents counter that the indicia of negligence in the form of their cause of action moves the limitations period back to four years as set forth in R.C. 2305.09(D). However, the holdings of this and other Ohio courts determine this question in favor of Petitioners.

This Court has long held that "...in 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.**" (Emphasis added.) *Hambleton v. R.G. Barry Corp.*, 12 Ohio St.3d 179, 183, 465 N.E.2d 1298 (1984). Additionally, it is axiomatic that "[a] party cannot transform one cause of action into another through clever pleading or an alternate theory of law in order to avail itself of

a more satisfactory statute of limitations.” *Wilkerson v. O’Shea*, 12th Dist. No. 2009-03-068, 2009-Ohio-6550, ¶ 12 (citing *Love v. Port Clinton*, 37 Ohio.St.3d 98, 100, 524 N.E.2d 166 (1988)).

R.C. 2305.11(A) sets forth a one year statute of limitations for defamation claims. This statute of limitations is applicable to claims premised upon a communication regardless of how such claims are classified by the plaintiff in the complaint. *Worpenberg v. The Kroger Co.*, 1st Dist. No. C-010381, 2002 WL 362855, *5-6. In *Worpenberg*, the plaintiff, an ex-employee of the defendant grocery store chain, alleged that her reputation was negligently damaged after she was accused of stealing from the store. *Id.* Upon analyzing the plaintiff’s allegations, the First Appellate District found that her negligence claim, based upon an allegedly improper or wrongful communication, was essentially a “disguised defamation claim” and subject to the one year statute of limitations. *Id.* With regard to the plaintiff’s negligence claim, the Court explained its rationale:

Indeed, if we were to accept Worpenberg’s argument that this claim did not sound in defamation, then every person accused of defaming another would be susceptible to two distinct torts: the first sounding in defamation based upon the statement itself, and the second sounding in negligence based upon the defendant’s failure to take reasonable steps to repair or control the damage caused by the statement.

Id. at *6.

Accordingly, claims based upon statements or communications to law enforcement implicating another person in criminal activity should also be subject to the one year statute of limitations for defamation claims. *Cromartie v. Goolsby*, 8th Dist. Cuyahoga No. 93438, 2010-Ohio-2604, ¶¶ 27-30. In *Cromartie*, the plaintiff alleged libel, slander, and malicious prosecution based upon statements that the defendant made about plaintiff to police. *Id.* at ¶¶ 5-6. After the defendant moved to dismiss those allegations based upon the one year statute of limitations, the plaintiff amended the complaint, relabeling those allegations as, among other causes of action, “negligent identification.” *Id.* at ¶ 27. The Eighth Appellate District ultimately found that, “[t]hese

claims were based on the same grounds he alleged for libel, slander, and malicious prosecution in the original complaint. [Plaintiff] cannot circumvent the statute of limitations period by reclassifying his claims.” *Id.* at ¶ 28.

Here, the Respondents have also attempted to take statements made to the police and reclassify them as a negligent identification claim.² Indeed, Respondents’ sole claim against Michael is based upon “statements” he allegedly made to law enforcement, “negligently improperly identifying [Respondents] as being responsible for a criminal act.” (Am. Com. at ¶¶ 1, 54-57, 154). However, these claims, sounding in defamation, are merely disguised under the banner of negligence. Yet, a plaintiff may not classify claims sounding in defamation as being for negligent identification, as Respondents have done in this case. *Cromartie* at ¶¶ 27-30. Thus, Respondents’ claim is based upon an alleged improper or wrongful communication and, although it is labeled as a “negligence” claim, it is, in fact, a disguised defamation claim and subject to the one year statute of limitations. *Cromartie*, 2010-Ohio-2604 at ¶ 27-30; *Worpenberg*, 2002 WL 362855 at *5-6.

B. The Doctrine of Absolute Privilege, Which Applies to Claims of Negligent Misidentification, Protects Persons Who Make Statements to Law Enforcement Officers Implicating Other Persons in Criminal Activity.

Michael’s statements to the UDPD regarding the possible criminal activity of Respondents are absolutely privileged under long-standing Ohio law. In 1993, this Court held that:

1. A complaint filed with the grievance committee of a local bar association is part of a judicial proceeding.
2. A statement made in the course of an attorney disciplinary proceeding enjoys an absolute privilege against a civil action based thereon as long as the statement bears

² Respondents have referred to their cause of action as “negligent misidentification,” however, Petitioner respectfully submits that whether labeled as “negligent identification” or “negligent misidentification,” the cause of action is one and the same.

some reasonable relation to the proceeding. (*Surace v. Wuliger* [1986], 25 Ohio St.3d 229, 25 OBR 288, 495 N.E.2d 939, approved and followed.)

Hecht v. Levin, 66 Ohio St.3d 458, 613 N.E.2d 585 (1993), paragraphs one and two of the syllabus.

The next year, in 1994, this Court decided the case of *M.J. DiCorpo, Inc. v. Sweeney*. In *Sweeney*, the issue was whether an affidavit filed with the county prosecutor accusing another person of criminal activity was absolutely privileged under *Levin*. This Court, in holding that such statements were absolutely privileged, explained:

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. The filing of a grievance with the local bar association sets the process in motion for the investigation of the grievance and the possible initiation of a formal complaint. **Similarly, the filing of an affidavit, information or other statement with a prosecuting attorney may potentially set the process in motion for the investigation of a crime and the possible prosecution of those suspected of criminal activity. In our judgment, it would be anomalous to recognize an absolute privilege against civil liability for statements made in a complaint filed with a local bar association, while denying the protections of that privilege to one who files an affidavit with the prosecutor's office reporting that a crime has been committed.** Granting an absolute privilege under the circumstances of this case is merely a logical extension of this court's holding in *Hecht, supra*.

Sweeney, (Emphasis added.) 66 Ohio St.3d at 506, 634 N.E.2d 203.

1. The Absolute Privilege Applies to Negligent Misidentification and Other Civil Actions.

The *Sweeney* court recognized “an absolute privilege against **civil liability** for statements made which bear some reasonable relation to the activity reported.” (Emphasis added.) *Id.* at paragraph one of the syllabus. By use of the term “civil liability,” instead of “defamation,” the *Sweeney* Court signaled that the privilege applied to civil claims other than defamation, including negligent misidentification. Had this Court wished to limit its holding only to defamation claims, it certainly could have done so. Yet, recognizing that a clever attorney could simply plead around such a limited holding, this Court wisely chose not to limit its holding only to defamation claims.

Recognizing this Court's signal, the Tenth Appellate District has twice applied the *Sweeney* absolute privilege doctrine to bar claims other than defamation. *Haller v. Borrer*, 10th Dist. Franklin No. 95APE01-16, 1995 WL 479424 (Aug. 8, 1995) (malicious prosecution claim based upon citizen's statements to police barred by doctrine of absolute privilege); *Lee v. City of Upper Arlington*, 10th Dist. Franklin No. 03AP-132, 2003-Ohio-7157 (absolute privilege shielded bank from claims of malicious prosecution and defamation for statements made to police and/or prosecutor about customer). Thus, *Sweeney* not only applies to claims pled as defamation, but also to other civil causes of action. As a result, the first portion of the certified question should be answered in the affirmative; the absolute privilege does apply to other torts, including negligent misidentification.

2. The Absolute Privilege Extends to Statements to Law Enforcement.

The *Sweeney* Court recognized that “an affidavit, information or other statement...may potentially set the process in motion for the investigation of a crime and possible prosecution of those suspected in criminal activity.” *Sweeney*, 66 Ohio St.3d at 506, 634 N.E.2d 203. This observation resolves the second part of the certified question in Petitioner's favor. Much like going to the prosecuting attorney, giving “an affidavit, information, or other statement” to law enforcement also “may set the process in motion for the investigation of a crime and possible prosecution of those suspected in criminal activity.” *Id.* In other words, there is no functional difference between a citizen reporting a possible crime to the prosecuting attorney or instead going to the local police or sheriff's department. The result is identical. As the federal District Court for the Southern District of Ohio aptly noted, a citizen's level of protection from civil liability should not turn on the particular authority he or she chooses to turn to for assistance. *Brunswick v. City of Cincinnati*, S.D. Ohio No. 1:10-cv-617, 2011 WL 4482373, fn. 5 (Sept. 27, 2011).

Here, with the events giving rise to this case having occurred in the early morning hours, a call to the prosecuting attorney's office would have almost undoubtedly gone unanswered. Thus, Michael's only realistic option in reporting the possible commission of a crime and having the perpetrators, whom he did not know or recognize, investigated rested with the UDPD. The absolute privilege must extend to statements made not just to the prosecuting attorney, but also to law enforcement.

The Ninth Appellate District has recognized this very situation. In *Lasater v. Vidahl*, it noted that, "[i]n [its] experience, as much or more criminal activity is first reported to a police or sheriff's department as to a prosecutor's office." *Lasater v. Vidahl*, 2012-Ohio-4918, 979 N.E.2d 828, ¶ 10 (9th Dist.). Thus, the Ninth District concluded that:

Adopting the Ohio Supreme Court's own language, it "would be anomalous to recognize an absolute privilege against civil liability for statements made in a complaint filed with a [prosecutor's office], while denying the protections of that privilege to one who files [a complaint] with the [police,] reporting that a crime has been committed." *M.J. DiCorpo Inc. v. Sweeney*, 69 Ohio St.3d 497, 506, 634 N.E.2d 203 (1994).

Id.

Indeed, the majority of Ohio Appellate Districts, as well as two of the three federal District Courts that have spoken on the issue, have recognized that "[t]he level of immunity afforded to complainants...should not turn on whether [citizens] decide to go straight to a prosecutor or talk to a police officer first." *Brunswick*, 2011 WL 4482373 at fn. 5; *see also Ventura v. The Cincinnati Enquirer*, 246 F.Supp.2d 876, 882 (S.D. Ohio 2003). In a case similar to the one at bar, a student at the University of Akron sued the university after the student was arrested by university police after becoming "belligerent" during argument with a university administrator. *Savoy v. Univ. of Akron*, 2014-Ohio-3043, 15 N.E.3d 430 (10th Dist.). In upholding summary judgment of the student's defamation claim, the Tenth Appellate District held that an "[a]bsolute privilege applies

to shield individuals from civil liability for statements to prosecutors **or police** reporting possible criminal activity.” (Emphasis added.) *Id.* at ¶ 20.

Numerous other Ohio courts have found that an absolute privilege applies to statements made to the police. *Mettke v. Mouser*, 10th Dist. No. 12AP-1083, 2013-Ohio-2781 (statements made in police report and petition for civil protective order were absolutely privileged); *Morgan v. Cmty. Health Partners*, 9th Dist. No. 12CA010242, 2013-Ohio-2259 (nurse’s statements to police regarding possible domestic violence against a patient were absolutely privileged); *Lee v. City of Upper Arlington*, 10th Dist. Franklin No. 03AP-132, 2003-Ohio-7157 (absolute privilege shielded bank from claims of malicious prosecution and defamation for statements made to police and/or prosecutor about customer); *Fair v. Litel Comm. Inc.*, 10th Dist. Franklin No. 97APE06-804, 1998 WL 107350, *3-6 (Mar. 12, 1998) (absolute privilege shields citizens from civil liability in reporting a possible felony to police detectives even if the information was erroneous); *Brown v. Chesser*, 4th Dist. Vinton No. 97 CA 510, 1998 WL 28264, *3-5 (Jan. 28, 1998) (citizen’s report of possible criminal activity to police absolutely privileged); *Haller v. Borrer*, 10th Dist. Franklin No. 95APE01-16, 1995 WL 479424, *2-4 (Aug. 8, 1995) (malicious prosecution claim based upon citizen’s statements to police barred by doctrine of absolute privilege). Thus, the absolute privilege should extend to statements made to law enforcement, provided that those statements comport with the other requirements of *Sweeney*.

3. Michael’s Statements are Absolutely Privileged.

Applying Ohio law to the facts here, absolute privilege must apply to Respondents’ negligent misidentification claim. Here, Michael answered a knock on his door late at night, asked the visitors to leave, and contacted the police when they failed to comply with that request. When the police caught up with the Respondents, Evan Foley indicated that he knew why they were being stopped.

He was immediately taken into custody with Andrew Foley and Michael Fagans following soon after. UDPD Sgt. Ryan did not speak to Michael until after Evan was arrested and the rest of the Respondents left the area. Michael did not attempt to frame or harass Respondents. Rather, he just wanted them to leave his house. There is absolutely no evidence that Michael called the police in bad faith, and his statements were reasonably related to the purpose of reporting a crime.

Much like reporting a crime to the county prosecutor's office, Michael's call to the UDPD set the process in motion for the investigation of an alleged crime and the possible initiation of criminal proceedings. That Michael may have ultimately been mistaken in what he saw or perceived on the night of the incident should not expose him to civil liability. Citizens, like Michael, should be encouraged to report possible criminal activity without fear of civil liability so long as the statements made bear some reasonable relation to the alleged criminal behavior. That idea is central to the public policy behind *Sweeney* and its progeny. Michael simply reported what he thought to be crime. That report should be absolutely privileged whether made to a county prosecutor or a police officer.

C. The Doctrine of Qualified Privilege Applies to Claims of Negligent Misidentification.

Regardless of whether statements made to a police officer implicating another in criminal activity are absolutely privileged, such statements would be, at the very least, protected by a qualified privilege. In *McGuinness v. Smith*, the Second Appellate District applied the doctrine of qualified privilege to claims of intentional infliction of emotional distress, negligent infliction of emotional distress and malicious defamation arising from the defendant's allegedly "false and malicious" statements to law enforcement. *McGuinness v. Smith*, 2d. Dist. Greene No. 94-CA-52, 1995 WL 63679 (Feb. 15, 1995). Although the Second District ultimately found a fact question as to actual malice and reversed the trial court on that basis, it notably stated:

We also agree with the trial court that information given to proper governmental authorities for the prevention or detection of crime, such as the statement Smith allegedly gave to the Beavercreek Police Department, is entitled to a qualified privilege, which can only be overcome by a showing that the speaker was moved by actual malice.

Id. at *3.

In this case, the occasion of the alleged “improper and inaccurate” statements by Michael occurred within his discussions with law enforcement investigating potential criminal activity. (Am. Com. at ¶¶ 54-57, 152-155). While Respondents could have asserted a defamation claim, they instead brought a negligence claim based upon communications to law enforcement officers. As addressed in the discussion regarding the first certified question, above, the gravamen of the action sounds in defamation, not negligence. Thus, the qualified privilege should apply to claims based upon communications to another, but cleverly pled to avoid a defamation cause of action. Much in the same way that plaintiffs are not permitted to circumvent a statute of limitations by reclassifying their claims, *Cromartie*, 8th Dist. Cuyahoga No. 93438, 2010-Ohio-2604 at ¶ 28, Respondents are similarly prohibited from reclassifying their claims to avoid the doctrine of qualified privilege. *Id.* at ¶¶ 27-30.

In addition to the *McGuinness* court, numerous Ohio Appellate Districts, as well as federal District Courts, have applied the qualified privilege doctrine to civil claims, albeit claims pled as defamation, arising from statements to law enforcement. *Dehlendorf v. City of Gahanna, Ohio*, 786 F.Supp.2d 1358 1363-65 (S.D. Ohio 2011) (noting a line of Ohio cases extending a qualified privilege for statements to police officers). In fact, the qualified privilege for information given to law enforcement has been recognized since at least the 1920’s and continues into the modern era. *Popke v. Hoffman*, 21 Ohio App. 454, 456, 153 N.E. 248 (6th Dist. 1926), *Stokes v. Meimaris*, 111 Ohio App.3d 176, 189-90, 675 N.E.2d 1289 (8th Dist. 1996); *Atkinson v. Stop-N-Go Foods*,

Inc., 83 Ohio App. 3d 132, 136, 614 N.E.2d 784 (2d Dist. 1992); *Hartunge-Teter v. McKnight*, 3d Dist. No. 4-91-2, 1991 WL 117274, *1 (June 26, 1991); *Paramount Supply Co. v. Sherlin Corp.*, 16 Ohio App.3d 176, 180, 475 N.E.2d 197 (8th Dist. 1984) (statements made to federal customs agents about possible illegal exportation of goods are qualifiedly privileged); *Tillimon v. Sullivan*, 6th Dist. No. L-87-308, WL 69163, *11 (June 30, 1988) (court endorsed a trial court's statement that information given to a police officer or police detective is under a qualified privilege).

This Court has held that “[w]here the circumstances of the occasion for the alleged defamatory communications are not in dispute, the determination of whether the occasion gives the privilege is a question of law for the court.” *A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 73 Ohio St. 3d 1, 7, 651 N.E.2d 1283. In this case, the occasion of the alleged improper statements by Michael occurred within his reports of possible criminal activity to the police. (Am. Com. at ¶¶ 54-57, 152-155). Accordingly, based upon the facts alleged in the Amended Complaint, Michael’s statements are subject to the qualified privilege.

IV. CONCLUSION

Petitioner Michael Groff respectfully requests that this Court, in the event that it accepts jurisdiction herein, hold that: (1) the tort of negligent misidentification is subject to a one-year statute of limitations pursuant to R.C. 2305.11(A); (2) the doctrine of absolute privilege is applicable to claims of negligent misidentification and does extend to statements made to law enforcement officers implicating another person in criminal activity; and (3) the doctrine of qualified privilege is applicable to claims of negligent misidentification.

Respectfully submitted,

BENJAMIN, YOCUM & HEATHER, LLC

s/ Timothy P. Heather

Timothy P. Heather, Esq. (0002776)

R. David Weber (0090900)

The American Book Building

300 Pike Street, Suite 500

Cincinnati, Ohio 45202-4222

Telephone: 513-721-5672

Facsimile: 513-562-4388

Email: tpheather@byhlaw.com

Attorneys for Petitioner/Defendant,

Michael R. Groff

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing has been served via ordinary United States mail upon the following parties and/or counsel of record on this 5th day of January, 2016.

Dennis Landowne, Esq.
Michael A. Hill, Esq.
Spangenberg, Shibley & Liber, LLP
1001 Lakeside Avenue East, Suite 1700
Cleveland, OH 44114
*Attorneys for Respondents/Plaintiffs,
Andrew Foley, Evan Foley, and Michael Fagans*

Jane M. Lynch, Esq.
Green & Green Lawyers, LPA
800 Performance Place
109 North Main St.
Dayton, OH 45402-1290
*Attorney for Petitioner/Defendant,
Dylan Parfitt*

s/ Timothy P. Heather
Timothy P. Heather, Esq.

A true and accurate courtesy copy of the foregoing has also been sent via ordinary United States mail to following additional Defendants who are interested, but not directly involved, in the issues to be certified on this 5th day of January 2016:

Todd M. Raskin, Esq.
Mazanec, Raskin & Ryder Co., LPA
100 Franklin's Row
34305 Solon Road
Cleveland, OH 44139
Attorneys for the University Defendants

Caroline H. Gentry, Esq.
Porter Wright Morris & Arthur, LLP
One S. Main St., Suite 1600
Dayton, OH 45402
*Co-Counsel for Defendants,
University of Dayton and
Thomas Burkhardt*

s/ Timothy P. Heather
Timothy P. Heather, Esq.

Exhibit "A"

BRUCE BURT, Chief of Police)
University of Dayton Police Department)
Fitz Hall 195)
300 College Park)
Dayton, OH 45469)

and)

THOMAS BURKHARDT)
University of Dayton Police Department)
Fitz Hall 195)
300 College Park)
Dayton, OH 45469)

and)

HARRY SWEIGART)
University of Dayton Police Department)
Fitz Hall 195)
300 College Park)
Dayton, OH 45469)

and)

SGT. THOMAS RYAN (#201))
University of Dayton Police Department)
Fitz Hall 195)
300 College Park)
Dayton, OH 45469)

and)

OFFICER KEVIN BERNHARDT (#319))
University of Dayton Police Department)
Fitz Hall 195)
300 College Park)
Dayton, OH 45469)

and)

OFFICER ROBERT BABAL (#309))
University of Dayton Police Department)
Fitz Hall 195)
300 College Park)
Dayton, OH 45469)

and)

OFFICER ERIC ROTH (#311))
University of Dayton Police Department)
Fitz Hall 195)
300 College Park)
Dayton, OH 45469)

and)

OFFICER JONATHON MCCOY (#313))
University of Dayton Police Department)
Fitz Hall 195)
300 College Park)
Dayton, OH 45469)

and)

SGT. MICHAEL SIPES)
University of Dayton Police Department)
Fitz Hall 195)
300 College Park)
Dayton, OH 45469)

and)

SGT. BRADLEY SWANK)
University of Dayton Police Department)
Fitz Hall 195)
300 College Park)
Dayton, OH 45469)

and)

LT. JOSEPH CAIRO)
University of Dayton Police Department)
Fitz Hall 195)
300 College Park)
Dayton, OH 45469)

and)

MICHAEL R. GROFF)
5500 Hillside Road)
Independence, OH 44131)

and)
)
DYLAN PARFITT)
103c Main Street)
Schwenksville, PA 19473)
)
Defendants.)
)

Now come Plaintiffs, Andrew Foley, Evan Foley, and Michael Fagans, by and through counsel, pursuant to Federal Rule of Civil Procedure 15(A)(1)(a), and for their First Amended Complaint against the above-named Defendants, state and aver as follows:

INTRODUCTION

1. This is a civil rights action stemming from incidents that occurred in Montgomery County, Ohio, on March 14, 2013, at which time Plaintiffs were assaulted, battered, and subjected to an unreasonable search, seizure, and excessive force, were wrongfully/falsey arrested/imprisoned by law enforcement officers employed by the University of Dayton, were detained at the Montgomery County Jail, and were maliciously prosecuted. As a direct and proximate result of the actions and inactions of the Defendants, Plaintiffs were denied their constitutionally guaranteed rights and endured and continue to endure physical and emotional pain and suffering. Plaintiffs seek compensatory and punitive damages, as well as reasonable attorneys' fees and the costs of this litigation, pursuant to 42 U.S.C. § 1988.

2. Plaintiffs assert claims under Title 42, Section 1983 of the United States Code for violation of their right to be free from unreasonable searches and seizures,

excessive force, wrongful/false arrest/imprisonment, and malicious prosecution, under the protection of the Fourth Amendment to the United States Constitution.

3. Plaintiffs assert Section 1983 claims against the University of Dayton Bruce Burt, in his official capacity as Chief of the University of Dayton Police Department ("UDPD"), and Thomas Burkhardt for failure to properly train and/or supervise law enforcement officers and for promulgating customs, policies, and/or procedures, which proximately caused the violation of Plaintiffs' federal constitutional rights.

4. Plaintiffs assert pendant state common law claims for wrongful/false arrest/imprisonment, malicious prosecution, assault, battery, negligence, negligent hiring, supervision, training, and retention, and intentional infliction of emotional distress. Additionally, Plaintiffs assert common law claims against Michael Groff and Dylan Parfitt for common law negligent identification, or misidentification.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331, as certain claims asserted herein arise under the Constitution and laws of the United States, to wit, the Fourth Amendment to the United States Constitution and 42 U.S.C. § 1983.

6. Pendant jurisdiction over state law claims asserted herein is invoked pursuant to 28 U.S.C. § 1367.

7. The matter in controversy exceeds \$75,000.00 exclusive of interest and costs.

8. Venue in this judicial district is proper pursuant to 28 U.S.C. § 1391(b)(2), (e)(1) and (e)(2).

PARTIES

9. Plaintiff Andrew Foley is, and was at all times relevant, a citizen of the United States of America residing in the State of Massachusetts and entitled to the protections of the Constitution and laws of the United States of America and the State of Ohio.

10. Plaintiff Evan Foley is, and was at all times relevant, a citizen of the United States of America residing in the State of Massachusetts and entitled to the protections of the Constitution and laws of the United States of America and the State of Ohio.

11. Plaintiff Michael Fagans is, and was at all times relevant, a citizen of the United States of America residing in the State of Ohio and entitled to the protections of the Constitution and laws of the United States of America and the State of Ohio.

12. The University of Dayton is a private university located in the City of Dayton, Ohio and is a body politic that exercises certain governmental functions through the operation of a law enforcement agency. Specifically, pursuant to section 1713.50 of the Ohio Revised Code, the University of Dayton operates a police department that exercises full police powers and shares a "governmental role" with the State. The University of Dayton has assumed powers traditionally exclusively reserved to the State. Pursuant to section 3345.011 of the Ohio Revised Code, however, the University of Dayton is not an arm or entity of the State of Ohio. The University of Dayton is a "person" under 42 U.S.C. § 1983.

13. University of Dayton Police Officers, including Defendants Bruce Burt, Harry Sweigart, Thomas Ryan, Kevin Bernhardt, Robert Babal, Eric Roth, Jonathon McCoy, Michael Sipes, Bradley Swank, and Joseph Cairo, are commissioned under section 1713.50(c) of the Ohio Revised Code, and at all times relevant were exercising their authority under color of law. These individuals are given the same law enforcement authority, power, and responsibility as are all other law enforcement officers of the State of Ohio. These powers include, but are not limited to: powers of arrest for the commission of a crime; investigative authority, including the ability to secure a warrant for a lawful search or arrest under certain circumstances; ability to detain a suspect; access to the criminal justice process; and the ability to carry and use weapons. The State of Ohio has delegated to the University of Dayton Police Officers the same powers as those possessed by ordinary municipal police officers. Accordingly, their actions and inactions taken in furtherance of their employment as law enforcement officers with the UDPD are carried out under color of law for purposes of 42 U.S.C. § 1983.

14. Bruce Burt is, and at all times relevant was, the Chief of the University of Dayton Police Department and resided in the Southern District of Ohio, Western Division. Defendant Burt was responsible for the administration, operation, training, and supervision of law enforcement officers and personnel of the UDPD, and for the promulgation, enforcement and review of rules, regulations, policies, customs, and practices relevant thereto, who was acting under color of law. As set forth in Paragraph 13, Defendant Burt is a "person" under 42 U.S.C. § 1983. Defendant Burt is sued herein in his Official and Individual Capacities.

15. Thomas Burkhardt is, and at all times relevant was, an employee of the University of Dayton who was responsible for the administration, operation, training, and supervision of law enforcement officers and personnel of the UDPD, and for the promulgation, enforcement and review of rules, regulations, policies, customs, and practices relevant thereto, who was acting under color of law and resided in the Southern District of Ohio, Western Division. Defendant Burkhardt was, as set forth in Paragraph 13, a "person" under 42 U.S.C. § 1983. Defendant Burkhardt is sued herein in his Official and Individual Capacities.

16. Harry Sweigart is, and was at all times relevant, a law enforcement officer employed by the University of Dayton who was acting under color of law. As set forth in Paragraph 13, Defendant Sweigart is a "person" under 42 U.S.C. § 1983. Defendant Sweigart is sued herein in his Individual Capacity.

17. Thomas Ryan is, and was at all times relevant, a law enforcement officer employed by the University of Dayton who was acting under color of law. As set forth in Paragraph 13, Defendant Ryan is a "person" under 42 U.S.C. § 1983. Defendant Ryan is sued herein in his Individual Capacity.

18. Kevin Bernhardt is, and was at all times relevant, a law enforcement officer employed by the University of Dayton who was acting under color of law. As set forth in Paragraph 13, Defendant Bernhardt is a "person" under 42 U.S.C. § 1983. Defendant Bernhardt is sued herein in his Individual Capacity.

19. Robert Babal is, and was at all times relevant, a law enforcement officer employed by the University of Dayton who was acting under color of law. As set forth in

Paragraph 13, Defendant Babal is a "person" under 42 U.S.C. § 1983. Defendant Babal is sued herein in his Individual Capacity.

20. Eric Roth is, and was at all times relevant, a law enforcement officer employed by the University of Dayton who was acting under color of law. As set forth in Paragraph 13, Defendant Roth is a "person" under 42 U.S.C. § 1983. Defendant Roth is sued herein in his Individual Capacity.

21. Jonathon McCoy is, and was at all times relevant, a law enforcement officer employed by the University of Dayton who was acting under color of law. As set forth in Paragraph 13, Defendant McCoy is a "person" under 42 U.S.C. § 1983. Defendant McCoy is sued herein in his Individual Capacity.

22. Michael Sipes is, and was at all times relevant, a law enforcement officer employed by the University of Dayton who was acting under color of law. As set forth in Paragraph 13, Defendant Sipes is a "person" under 42 U.S.C. § 1983. Defendant Sipes is sued herein in his Individual Capacity.

23. Bradley Swank is, and was at all times relevant, a law enforcement officer employed by the University of Dayton who was acting under color of law. As set forth in Paragraph 13, Defendant Swank is a "person" under 42 U.S.C. § 1983. Defendant Swank is sued herein in his Individual Capacity.

24. Joseph Cairo is, and was at all times relevant, a law enforcement officer employed by the University of Dayton who was acting under color of law. As set forth in Paragraph 13, Defendant Cairo is a "person" under 42 U.S.C. § 1983. Defendant Cairo is sued herein in his Individual Capacity.

25. Michael R. Groff is, and was at all times relevant, a citizen of the United States of America residing in the State of Ohio and is subject to the laws of the United States of America and of the State of Ohio. At the time of the incidents that give rise to this cause of action, he resided at 411 Lowes Street in Dayton, Ohio.

26. Dylan J. Parfitt is, and was at all times relevant, a citizen of the United States of America. Upon information and belief, he is currently a resident of the State of Pennsylvania and is subject to the laws of the United States of America and of the State of Ohio. At the time of the incidents that give rise to this cause of action, he resided at 411 Lowes Street in Dayton, Ohio.

STATEMENT OF FACTS

27. Evan Foley was a student of the University of Dayton at the time of the incidents that form the basis of this Complaint. Evan was about to receive his MBA from the University of Dayton. Through an accelerated program, he was receiving both his undergraduate degree in Entrepreneurship and Marketing with a concentration in sales and his MBA in a period of five years.

28. Andrew Foley is the younger brother of Evan Foley. He was a student at Fairfield University in Fairfield, Connecticut at the time of the incidents that form the basis of this Complaint. The prior year, Andrew had been accepted to the University of Dayton and was offered multiple scholarships. While Andrew had chosen to attend Fairfield University, he was reconsidering that decision and had traveled to the University of Dayton to decide whether he should transfer schools.

29. Plaintiff Michael Fagans was a student of the University of Dayton at the time of the incidents that form the basis of this Complaint. He was scheduled to receive

his undergraduate degree from the University of Dayton just weeks after the incidents that form the basis of this Complaint.

30. Andrew Foley arrived in Dayton on the night of March 13, 2013. Evan, Andrew, and Michael chose to go out that night and spend time with friends. In the early morning hours of March 14, 2013, they began walking to Evan's apartment, which was located at 435 Irving Avenue in Dayton, Ohio.

31. While walking home and when just a short distance from Evan's apartment, the group passed a series or row houses of town houses that had recently been constructed on Lowes Street. These structures are student housing and look virtually identical to one another.

32. While passing 411 Lowes Street, Evan mistook the building for a different structure, which was located at 417 Lowes Street and where a friend of his lived.

33. Mistakenly believing that 411 Lowes Street was the residence of his friend who resided at 417 Lowes Street, Evan, Andrew, and Michael approached the home, stepped onto the porch of 411 Lowes Street, and knocked on the front door.

34. The door was opened by a large and apparently intoxicated individual named Michael Groff, who was holding a case of beer under one arm and a can of beer in his hand.

35. Groff was a significantly larger and a substantially more physically imposing individual than Evan, Andrew, or Michael.

36. Still believing that this was the home of his friend, Evan asked if his friend was present. Groff became belligerent and angry that Evan, Andrew, and Michael were

knocking on the wrong door at that time in the morning. Groff's anger increased and he began to shout profanities at Evan, Andrew, and Michael.

37. Realizing that he had been mistaken about the residence, Evan extended his hand in an effort to shake Groff's hand, calm the situation, and move on with the morning so that he, Andrew, and Michael could return to Evan's home. Groff refused to shake Evan's hand and slammed the door in Evan's face. Andrew and Michael were positioned behind Evan and were farther from Groff than Evan was when this occurred.

38. Evan knocked on the door once again. Evan, Andrew, and Michael agreed to leave 411 Lowes Street and proceeded to walk in the direction of Evan's apartment.

39. There was never any suspicion that Evan, Andrew, or Michael were attempting to steal anything or intending to take any goods or items from or enter the premises of 411 Lowes Street without the residents' permission. Likewise, the individuals within the home were not afraid and had no reason to be afraid of Evan, Andrew, or Michael.

40. As Evan, Andrew, and Michael were walking away from the house, the front door to 411 Lowes Street opened. Groff hollered that he had contacted the UDPD police. Groff was holding a cellular phone to his ear as he shouted this at Evan, Andrew, and Michael. He did not state why he had contacted UDPD police.

41. At no point up until this time had Andrew, Evan, or Michael encountered, seen, or known of Dylan Parfitt. Their only brief interaction had been with Groff.

42. Andrew, Evan, and Michael continued to walk away from the house and toward Evan's apartment, which was about a tenth of a mile down the street. At this point, Michael and Andrew were slightly ahead of Evan.

43. As the group crossed Lowes Street, a UDPD cruiser turned off of Lawnview Street and onto Lowes Street and approached with its lights on. The UDPD vehicle divided the group, with Michael and Andrew on one side of the street and Evan on the opposite side of the street. The vehicle was driven by Defendant Ryan.

44. Defendant Ryan signaled that Evan come over to the UDPD vehicle. Evan complied with Defendant Ryan's orders.

45. Michael and Andrew remained next to the street and within the view of Defendant Ryan. After some time passed and assuming that Evan's interaction with Defendant Ryan would conclude at any moment, Andrew and Michael began to walk back to Evan's apartment. Defendant Ryan did not speak or make any gestures to Michael or Andrew.

46. Defendant Ryan asked Evan, "do you know why you are being stopped?" Evan replied, "of course" and pointed back to the house he had just left because he had heard Groff state that he had called the police.

47. Evan was then handcuffed and informed by Defendant Ryan that he was being arrested. When he asked, "why are you arresting me?" the Defendant Ryan responded, "burglary."

48. Defendant Ryan placed Evan under arrest for burglary before performing any investigation into the circumstances for his being dispatched to the location and without determining whether any criminal act did occur or was likely to have occurred.

49. Defendants Bernhardt, Babal, Roth, and McCoy arrived at the scene in their UDPD cruisers.

50. Defendant Ryan ordered Evan to stand by his UDPD cruiser with Defendants Bernhardt, Babal, Roth, and McCoy.

51. Defendants Bernhardt, Babal, Roth, and McCoy threw Evan, who was handcuffed, onto a UDPD cruiser and began choking Evan as they rummaged through and removed items from his pockets.

52. Fearful and in pain, Evan attempted to explain that he was an honor student at the University of Dayton and that this was a misunderstanding, but these Defendants continued to laughingly say, "we've caught a burglar."

53. These Defendants continued to choke Evan and push him on top of the police cruiser before throwing him in the back of the police cruiser.

54. After Defendant Ryan had arrested Evan Foley for burglary and Evan had been subjected to excessive and unreasonable force, Defendant Ryan, for the first time, spoke to Groff and Parfitt at 411 Lowes Street.

55. Upon information and belief, Defendants Groff and Parfitt were noticeably intoxicated.

56. Having already arrested Evan Foley, Defendant Ryan spoke with Groff and Ryan and elicited statements that tended to implicate Evan in a criminal act, which was improper and inaccurate.

57. Groff and Parfitt, improperly and wrongfully identified Andrew, Evan, and Michael as refusing to leave the property at 411 Lowes Street after having been asked to do so and as possessing an intent to cause harm.

58. Andrew and Michael had walked back to Evan's apartment. When Evan did not return to the apartment within the anticipated timeframe, Andrew and Michael walked back to the area where Evan had been stopped by Defendant Ryan.

59. Michael and Andrew saw multiple police cruisers parked in the area. They did not see Evan, however.

60. In an effort to determine what was happening, Andrew and Michael approached the police cruisers that were parked on Lowes Street.

61. These Defendants yelled for Andrew and Michael to stop. Michael and Andrew complied with Defendants' instructions, commands, and orders.

62. These Defendants handcuffed Michael and Andrew and forcibly placed them in the back a UDPD cruiser where they remained for approximately 1-2 hours.

63. On multiple occasions both Andrew and Michael asked these Defendants to remove or loosen the handcuffs because they were in excruciating pain and losing feeling in their arms, wrists, and hands. None of the Defendants responded to these complaints.

64. After around 1-2 hours had passed, these Defendants drove Michael and Andrew to a local convenient store and told them they were free to leave.

65. When the handcuffs were released, Andrew had bruising on his wrists and no feeling in his thumbs, which continued following this interaction with Defendants.

66. On the instructions of Defendant Ryan, Evan was taken to the Montgomery County Jail by Defendants Roth and McCoy where he was booked and processed. Evan was placed in a cell with a drug addict who was experience severe

symptoms of withdrawal and was incapable of controlling his vomiting or bowel movements.

67. The following day, Defendant Sweigart called Andrew and Michael and told them that they needed to complete some paperwork, which was necessary to help Evan.

68. Defendant Sweigart instructed Defendants Sipes and Swank to arrest Andrew and Michael. Defendants Burkhardt and Cairo were aware of this plan and participated in its execution.

69. When Defendants Sweigart, Sipes, and Swank arrived at Evan's apartment, which is where Andrew and Michael were located, Andrew was on the phone with his mother frantically trying to explain situation.

70. Without a warrant, permission, or consent, Defendants Sipes, Swank, and Sweigart entered the apartment, in which all Plaintiffs had an expectation of privacy.

71. These Defendants screamed for Andrew to "get the f*** off the phone." Andrew complied with their commands, instructions, and orders and dropped the phone.

72. These Defendants screamed for Andrew and Michael to provide their names. Once again, Michael and Andrew complied with these Defendants' commands, instructions, and orders by providing their names.

73. Defendants Sipes and Swank placed Andrew and Michael in handcuffs and instructed them that they were under arrest for burglary.

74. Defendants Sipes and Swank took Michael and Andrew to the Montgomery County Jail where they were booked and processed for the alleged criminal offenses.

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. The proceedings against Evan also subsequently resolved.

76. Defendant Groff did not appear at the March 22, 2013 hearing.

77. As a direct and proximate result of the actions and inactions of the Defendants as alleged herein, Plaintiffs Andrew Foley, Evan Foley, and Michael Fagans have suffered emotional injuries and mental distress, sleep disturbances, lost concentration and ability to focus, distrust of authority, physical injuries, pain, and suffering, as well as lost wages, vocational opportunities, medical bills, and attorneys' fees. Some or a portion of these injuries are permanent.

FIRST CLAIM FOR RELIEF

**(42 U.S.C. § 1983 Against Defendants Ryan, Bernhardt, Babal, Roth,
McCoy, Sipes, and Swank for Excessive Force
in Violation of the Fourth Amendment)**

78. Plaintiffs repeat, reiterate, and reallege each and every allegation contained in this Complaint with the same force and effect as if fully set forth herein.

79. At the aforementioned times and places, Defendants Ryan, Bernhardt, Babal, McCoy, Sipes, and Swank, acting under color of law and within the course and scope of their employment as law enforcement officers with the UDPD used and/or failed to intervene to prevent the use of unnecessary, unreasonable, outrageous, and excessive force on Plaintiffs Andrew Foley, Evan Foley, and Michael Fagans in violation of their rights guaranteed by the Fourth Amendment.

80. Defendants Ryan, Bernhardt, Babal, McCoy, Sipes, and Swank's use and/or failure to prevent the use of unnecessary, unreasonable, outrageous, and

excessive force, as described herein, constitutes wanton, willful, reckless, unjustifiable, and malicious conduct warranting the imposition of exemplary punitive damages.

81. Faced with the circumstances present at the aforementioned time and place, reasonably prudent law enforcement officers/personnel would or should have known that the uses of force described herein violated Plaintiffs Andrew Foley, Evan Foley, and Michael Fagans' clearly established Fourth Amendment rights to be free from unreasonable searches and seizures.

82. Defendants Ryan, Bernhardt, Babal, McCoy, Sipes, and Swank callously and recklessly disregarded Plaintiffs Andrew Foley, Evan Foley, and Michael Fagans' federally protected rights.

83. As a direct and proximate result of Defendants Ryan, Bernhardt, Babal, McCoy, Sipes, and Swank's uses and/or failure to intervene to prevent uses of force in violation of Plaintiffs Andrew Foley, Evan Foley, and Michael Fagans' Fourth Amendment rights, Plaintiffs Andrew Foley, Evan Foley, and Michael Fagans were forced to endure and suffer, and continue to endure and suffer, extreme physical, mental, and emotional pain and suffering and pecuniary loss.

WHEREFORE, Plaintiffs Andrew Foley, Evan Foley, and Michael Fagans pray for judgment against Defendants Ryan, Bernhardt, Babal, McCoy, Sipes, and Swank, jointly and severally, for:

- a. Compensatory damages in an amount that will fully and fairly compensate Plaintiffs for their injury, damage, and loss;
- b. Punitive damages in an amount that will serve to adequately punish and deter the conduct alleged herein;
- c. Costs of suit and reasonable attorneys' fees pursuant to 42 U.S.C. § 1988; and

- d. All such other relief to which Plaintiffs are entitled and/or the Court deems appropriate.

SECOND CLAIM FOR RELIEF

(42 U.S.C. § 1983 Against Defendants Sweigart, Ryan, Bernhardt, Roth, Babal, McCoy, Sipes, and Swank for False/Wrongful Arrest/Imprisonment in Violation of the Fourth Amendment)

84. Plaintiffs repeat, reiterate, and reallege each and every allegation contained in this Complaint with the same force and effect as if fully set forth herein.

85. Defendants Sweigart, Ryan, Babal, Bernhardt, Roth, McCoy, Sipes, and Swank lacked probable cause for their arrests of Plaintiffs Andrew Foley, Evan Foley, and Michael Fagans on March 14, 2013.

86. Plaintiffs Andrew Foley, Evan Foley, and Michael Fagans were detained and held by Defendants Sweigart, Babal, Ryan, Bernhardt, Roth, McCoy, Sipes, and Swank against their will and without lawful justification on March 14, 2013, through the time they were released after their arrest.

87. Defendants Sweigart, Babal, Ryan, Bernhardt, Roth, McCoy, Sipes, and Swank acting under color of law, and within the course, scope, and in furtherance of their employment as law enforcement officers with the UDPD detained, arrested, and held Plaintiffs Andrew Foley, Evan Foley, and Michael Fagans against their will without probable cause or lawful justification in violation of Plaintiffs' clearly established rights guaranteed under the Fourth Amendment.

88. In arresting, detaining, or otherwise holding Plaintiffs Andrew Foley, Evan Foley, and Michael Fagans against their will under the circumstances at issue, Defendants Sweigart, Ryan, Babal, Bernhardt, Roth, McCoy, Sipes, and Swank acted

wantonly, willfully, recklessly, without justification, and maliciously, warranting the imposition of exemplary punitive damages.

89. Faced with the circumstances present on March 14, 2013, reasonably prudent law enforcement officers/personnel would or should have known that arresting, detaining and/or holding Plaintiffs Andrew Foley, Evan Foley, and Michael Fagans against their will violated their clearly established Fourth Amendment rights.

90. On or about March 22, 2013, the charges against Plaintiffs Andrew Foley and Michael Fagans were dismissed due to a lack of probable cause and, thus, terminated in their favor.

91. As a direct and proximate result of their unlawful/wrongful/false arrest/imprisonment, Plaintiffs Andrew Foley, Evan Foley, and Michael Fagans were forced to endure and suffer, and continue to endure and suffer, extreme physical, mental, and emotional pain and suffering and pecuniary loss.

WHEREFORE, Plaintiffs Andrew Foley, Evan Foley, and Michael Fagans pray for judgment against Defendants Sweigart, Ryan, Babal, Bernhardt, Roth, McCoy, Sipes, and Swank, jointly and severally, for:

- a. Compensatory damages in an amount that will fully and fairly compensate Plaintiffs for their injury, damage, and loss;
- b. Punitive damages in an amount that will serve to adequately punish and deter the conduct alleged herein;
- c. Costs of suit and reasonable attorneys' fees pursuant to 42 U.S.C. § 1988; and
- d. All such other relief to which Plaintiffs are entitled and/or the Court deems appropriate.

THIRD CLAIM FOR RELIEF
(42 U.S.C. § 1983 Against Defendants Sipes and Swank for Unlawful/Unreasonable Entry/Search in Violation of the Fourth Amendment)

92. Plaintiffs repeat, reiterate, and reallege each and every allegation contained in this Complaint with the same force and effect as if fully set forth herein.

93. At the aforementioned times and places, Defendants Sipes and Swank, acting under color of law and within the course and scope and in furtherance of their employment as law enforcement officers with the UDPD entered Plaintiffs' residential property without permission or consent and without probable cause in violation of Plaintiffs' clearly established rights guaranteed by the Fourth Amendment.

94. Defendants Sipes and Swank unlawful and unreasonable entry constitutes wanton, willful, reckless, unjustifiable, and malicious conduct warranting the imposition of exemplary punitive damages.

95. Faced with the circumstances present at the aforementioned time and place, reasonably prudent law enforcement officers/personnel would or should have known that the entry described herein violated Plaintiffs Andrew Foley, Evan Foley, and Michael Fagans' clearly established Fourth Amendment right to be free from unreasonable and unlawful entries, searches, and seizures.

96. As a direct and proximate result of Defendants Sipes and Swanks' entry in violation of Plaintiffs' Fourth Amendment right, Plaintiffs Andrew Foley, Evan Foley, and Michael Fagans were forced to endure and suffer, and continue to endure and suffer, extreme physical, mental, and emotional pain and suffering and pecuniary loss.

WHEREFORE, Plaintiffs Andrew Foley, Evan Foley, and Michael Fagans pray for judgment against Defendants Sipes and Swank, jointly and severally, for:

- a. Compensatory damages in an amount that will fully and fairly compensate Plaintiffs for their injury, damage, and loss;
- b. Punitive damages in an amount that will serve to adequately punish and deter the conduct alleged herein;
- c. Costs of suit and reasonable attorneys' fees pursuant to 42 U.S.C. § 1988; and
- d. All such other relief to which the Plaintiffs are entitled and/or the Court deems appropriate.

FOURTH CLAIM FOR RELIEF

(42 U.S.C. § 1983 Supervisory Liability Against Defendants Ryan, Burkhardt, Sweigart, Cairo, and Burt)

97. Plaintiffs repeat, reiterate, and reallege each and every allegation contained in this Complaint with the same force and effect as if fully set forth herein.

98. Upon information and belief, Defendants Babal, Bernhardt, Roth, McCoy, Sipes, and Swank were the subordinates of Defendant Ryan, Burkhardt, Sweigart, and Cairo and, as alleged herein, Plaintiffs' rights were violated by the actions of Defendants Babal, Bernhardt, Roth, McCoy, Sipes, and Swank.

99. Defendants Ryan, Burkhardt, Sweigart, and Cairo were personally involved in the violation of Plaintiffs' federally protected rights by, among other acts:

- a) Directly participating in the conduct of Defendants Babal, Bernhardt, Roth, McCoy, Sipes, and Swank by ordering and instructing the arrest of Plaintiffs;
- b) Failing to remedy the arrest of Plaintiffs after they had been informed of their occurrences and when they knew that probable cause for the arrests was lacking;
- c) Failing to train their subordinates, including Defendants Babal, Bernhardt, Roth, McCoy, Sipes, and Swank, on making arrests and non-consensual entries into homes when the need for additional training was apparent and through their actions and inactions, creating a policy, practice, or custom in which violations occurred;

- d) Consistently failing to supervise and train their subordinates, including Defendants Babal, Bernhardt, Roth, McCoy, Sipes, and Swank, such that the violation of a citizen's rights were highly predictable under the usual and recurring, circumstances, and did occur against Plaintiffs in the manner predicted; and
- e) Remaining deliberately indifferent to and consciously disregarding the rights of citizens and civilians by failing to act on information that constitutional rights were being violated.

100. Defendants Ryan, Burkhardt, Sweigart, and Cairo's failure to supervise and train, Babal, Bernhardt, Roth, McCoy, Sipes and Swank and their participation in the conduct of their subordinates were affirmatively linked to the violations of Plaintiffs' federally protected rights.

101. As a direct and proximate result of Defendants Ryan, Bernhardt, Sweigart, and Cairo's failure to supervise and train Defendants Babal, Roth, McCoy, Sipes and Swank in ordering, instructing, and otherwise participating in the arrests of Plaintiffs and in the nonconsensual entry of their residential property when they were known to have an expectation of privacy within the dwelling, Plaintiffs Andrew Foley, Evan Foley, and Michael Fagans were forced to endure and suffer, and continue to endure and suffer, extreme physical, mental, and emotional pain and suffering and pecuniary loss.

102. In ordering and otherwise participating in the arrest, detention, and holding of Plaintiffs against their will and in the nonconsensual entry into the residential structure under the circumstances at issue, Defendants Ryan, Bernhardt, Sweigart, and Cairo acted wantonly, willfully, recklessly, without justification, maliciously, and with reckless indifference to Plaintiffs' federally protected rights warranting the imposition of exemplary punitive damages.

WHEREFORE, Plaintiffs Andrew Foley, Evan Foley, and Michael Fagans pray for judgment against Defendants Ryan, Burkhardt, Sweigart, and Cairo for:

- a. Compensatory damages in an amount that will fully and fairly compensate Plaintiffs for their injury, damage, and loss;
- b. Punitive damages in an amount that will serve to adequately punish and deter the conduct alleged herein;
- c. Costs of suit and reasonable attorneys' fees pursuant to 42 U.S.C. § 1988; and
- d. All such other relief to which Plaintiffs are entitled and/or the Court deems appropriate.

FIFTH CLAIM FOR RELIEF

(42 U.S.C. § 1983 Against Defendants Bruce Burt, University of Dayton, and/or Burkhardt for Failure to Train and Supervise and for Customs and Policies Causing Violations of the Fourth Amendment)

103. Plaintiffs repeat, reiterate, and reallege each and every allegation contained in this Complaint with the same force and effect as if fully set forth herein.

104. Plaintiffs are informed and believe and allege thereon that Defendants Sweigart, Ryan, Bernhardt, Babal, Roth, McCoy, Sipes, Swank, Cairo and/or several other UDPD law enforcement officers have a history of violating citizens' constitutional rights, making unreasonable searches and seizures, making warrantless searches, entries, and arrests without probable cause, and arresting and charging citizens with criminal offenses that are not supported by probable cause, about which Defendants Burt, University of Dayton, and/or Burkhardt are, and were at all times relevant, aware.

105. On information and belief, Defendants Burt, University of Dayton, and/or Burkhardt failed to adequately and properly train and/or supervise Defendants Sweigart, Ryan, Bernhardt, Babal, Roth, McCoy, Sipes, Swank, and Cairo.

106. Defendants Burt, University of Dayton, and/or Burkhardt ratified Defendants Sweigart, Ryan, Bernhardt, Babal, Roth, McCoy, Sipes, Swank, and Cairo's conduct described herein.

107. On information and belief, Defendants Burt, University of Dayton, and/or Burkhardt implemented customs and policies for training and supervision of UPDP law enforcement officers on warrantless and nonconsensual entries, searches and seizures, lawful arrests, and criminal prosecution/pursuing criminal charges supported by probable cause that, on their face, violate the Fourth Amendment. Alternatively, on information and belief, Defendants Burt, University of Dayton, and/or Burkhardt implemented otherwise facially valid customs and policies in a manner such that constitutional violations were likely to be and were visited upon those inhabiting, visiting, or otherwise within the jurisdictional limits of UDPD, including Plaintiffs Andrew Foley, Evan Foley, and Michael Fagans.

108. As a direct and proximate result of Defendants Burt, University of Dayton, and/or Burkhardt's customs, policies, and practices described herein, which violate the Fourth Amendment on their face, or otherwise are applied in a manner such that Fourth Amendment violations are likely to and do occur, Plaintiffs Andrew Foley, Evan Foley, and Michael Fagans were forced to endure and suffer, and continue to endure and suffer, extreme physical, mental, and emotional pain and suffering and pecuniary loss.

WHEREFORE, Plaintiffs Andrew Foley, Evan Foley, and Michael Fagans pray for judgment against Defendants Burt, University of Dayton, and Burkhardt, jointly and severally, for:

- a. Compensatory damages in an amount that will fully and fairly compensate Plaintiffs for their injury, damage, and loss;

- b. Costs of suit and reasonable attorneys' fees pursuant to 42 U.S.C. § 1988; and
- c. All such other relief which the Court deems appropriate.

SIXTH CLAIM FOR RELIEF

(42 U.S.C. § 1983 Against Defendants Sweigart, Ryan, Babal Bernhardt, Roth, McCoy, Sipes, Swank, Burkhardt, Burt, and/or University of Dayton for Malicious Prosecution in Violation of the Fourth Amendment)

109. Plaintiffs repeat, reiterate, and reallege each and every allegation contained in this Complaint with the same force and effect as if fully set forth herein.

110. Acting under color of law and within the course, scope, and in furtherance of their employment as law enforcement officers with the UDPD, Defendants Sweigart, Ryan, Bernhardt, Babal, Roth, McCoy, Sipes, and Swank instituted, participated in, or influenced criminal prosecution, charges and/or proceedings against Plaintiffs with knowledge that there was an absence of probable cause to support any such charges, prosecution, and/or proceedings in violation of Plaintiffs' rights guaranteed under the Fourth Amendment.

111. Acting under color of law and in his capacity as Chief of UDPD, Defendant Burt, and Defendant Burkhardt, as head administrator overseeing the actions of UDPD, instituted and/or authorized and/or approved of and/or supervised the criminal prosecution, charges and/or proceedings against Plaintiffs in violation of Plaintiffs' rights guaranteed under the Fourth Amendment.

112. Defendants Sweigart, Ryan, Bernhardt, Babal, Roth, McCoy, Sipes, and Swank had no probable cause for instituting, participating in, or influencing the criminal prosecution, charges and/or proceedings against Plaintiffs, or for otherwise charging Plaintiffs with the offenses described herein.

113. In instituting, participating in, or influencing the criminal prosecution, charges and/or proceedings against Plaintiffs, Defendants Sweigart, Ryan, Bernhardt, Babal, Roth, McCoy, Sipes, Swank, Burt, Burkhardt, and University of Dayton acted willfully, wantonly, recklessly, without justification, maliciously, and with reckless indifference to Plaintiffs' federally protected rights, warranting the imposition of exemplary punitive damages.

114. Faced with the circumstances present on March 14, 2013, and thereafter, reasonably prudent law enforcement officers/personnel would or should have known that instituting, participating in, or influencing the criminal prosecution, charges and/or proceedings against Plaintiffs violated Plaintiffs clearly established Fourth Amendment rights.

115. As a direct and proximate result of Defendants Sweigart, Ryan, Bernhardt, Babal, Roth, McCoy, Sipes, Swank, Burt, Burkhardt, and University of Dayton's malicious prosecution, Plaintiffs suffered a deprivation of liberty, apart from the initial seizure, and were forced to endure and suffer, and continue to endure and suffer, extreme physical, mental, and emotional pain and suffering and pecuniary loss.

WHEREFORE, Plaintiffs Andrew Foley, Evan Foley, and Michael Fagans pray for judgment against Defendants Sweigart, Ryan, Bernhardt, Babal, Roth, McCoy, Sipes, Swank, Burt, in his Official and Individual capacities, Burkhardt, and University of Dayton jointly and severally, for:

- a. Compensatory damages in an amount that will fully and fairly compensate Plaintiffs for their injury, damage, and loss;
- b. Punitive damages in an amount that will serve to adequately punish and deter the conduct alleged herein;

- c. Costs of suit and reasonable attorneys' fees pursuant to 42 U.S.C. § 1988; and
- d. All such other relief which the Court deems appropriate.

SEVENTH CLAIM FOR RELIEF

(Negligent Hiring, Retention, Supervision, and Training Against Bruce Burt, University of Dayton, and/or City of Dayton)

116. Plaintiff incorporates the preceding paragraphs by reference as if fully rewritten herein.

117. Upon information and belief, Defendants Sweigart, Ryan, Bernhardt, Babal, Roth, McCoy, Sipes, Swank, Burt, Burkhardt, and Cairo were engaged in a valid employment relationship with the University of Dayton.

118. Upon information and belief, Defendants Sweigart, Ryan, Bernhardt, Babal, Roth, McCoy, Sipes, Swank, Burt, Burkhardt, and Cairo were incompetent in the performance of their respective jobs and responsibilities within the course and scope of their employment with Defendant University of Dayton and/or otherwise had negligent dispositions in the performance of their jobs and responsibilities.

119. At all times relevant, University of Dayton had actual and/or constructive knowledge of Defendants Sweigart, Ryan, Bernhardt, Babal, Roth, McCoy, Sipes, Swank, Burt, Burkhardt, and Cairo's incompetence and/or negligent dispositions.

120. Defendant University of Dayton knew or reasonably should have known of facts that would have led reasonable and prudent law enforcement agencies to further investigate Defendants Sweigart, Ryan, Bernhardt, Babal, Roth, McCoy, Sipes, Swank, Burt Burkhardt, and Cairo's competence and/or negligent dispositions through the hiring/retention process and/or during the training and/or supervision processes.

121. Defendant University of Dayton knew or reasonably should have known that the incompetence and/or negligent dispositions of Defendants Sweigart, Ryan, Bernhardt, Babal, Roth, McCoy, Sipes, Swank, Burt, Burkhardt, and Cairo would likely lead to and/or was substantially certain to lead to unlawful arrests, searches, seizures and prosecutions of individuals they confronted.

122. Defendant University of Dayton was negligent in hiring, retaining, supervising, and training in that it knew or should have known of their propensity to act negligently, carelessly, and/or recklessly.

123. As a direct and proximate result of Defendant University of Dayton's negligent hiring, retention, training, and supervision of Defendants Sweigart, Ryan, Bernhardt, Babal, Roth, McCoy, Sipes, Swank, Burt, Burkhardt, and Cairo, Plaintiffs Andrew Foley, Evan Foley, and Michael Fagans were forced to and did endure and suffer extreme physical, mental, and emotional pain and suffering, and pecuniary loss.

WHEREFORE, Plaintiffs Andrew Foley, Evan Foley, and Michael Fagans pray for judgment against Defendant University of Dayton for:

- a. Compensatory damages in an amount that will fully and fairly compensate Plaintiffs for their injury, damage, and loss;
- b. Punitive damages in an amount sufficient to deter the conduct alleged herein; and
- c. All such other relief which the Court deems appropriate.

EIGHTH CLAIM FOR RELIEF

(Negligence and Recklessness of Defendants University of Dayton, Sweigart, Ryan, Bernhardt, Babal, Roth, McCoy, Sipes, Swank, Burt, Burkhardt, and Cairo)

124. Plaintiffs repeat, reiterate, and reallege each and every paragraph contained in this Complaint with the same force and effect as if fully set forth herein.

125. Defendants University of Dayton, Sweigart, Ryan, Bernhardt, Babal, Roth, McCoy, Sipes, Swank, Burt, Burkhardt, and Cairo had a duty to act as reasonably safe, careful, and prudent individuals, law enforcement officers, university administrators, and universities would under the same or similar set of circumstances. The failure to act as a reasonably safe, careful, and prudent person would under the same or similar set of circumstances is negligence.

126. As alleged herein and set forth above, Defendants University of Dayton, Sweigart, Ryan, Bernhardt, Babal, Roth, McCoy, Sipes, Swank, Burt, Burkhardt, and Cairo failed to act as reasonably safe, careful, and prudent individuals, law enforcement officers, university administrators, or universities would under the same or similar set of circumstances

127. As a direct and proximate result of Defendants University of Dayton, Sweigart, Ryan, Bernhardt, Babal, Roth, McCoy, Sipes, Swank, Burt, Burkhardt, and Cairo's negligence, Plaintiffs Andrew Foley, Evan Foley, and Michael Fagans were forced to and did endure and suffer extreme physical, mental, and emotional pain and suffering, and pecuniary loss.

WHEREFORE, Plaintiffs Andrew Foley, Evan Foley, and Michael Fagans pray for judgment against Defendants University of Dayton Sweigart, Ryan, Bernhardt, Babal, Roth, McCoy, Sipes, Swank, Burt, Burkhardt, and Cairo for:

- a. Compensatory damages in an amount that will fully and fairly compensate Plaintiffs for their injury, damage, and loss;
- b. Punitive damages in an amount sufficient to deter the conduct alleged herein; and
- c. All such other relief which the Court deems appropriate.

NINTH CLAIM FOR RELIEF

**(Common Law Assault and Battery Against Defendants
Ryan, Bernhardt, Roth, McCoy, Babal, Sipes, Swank, and University of Dayton)**

128. Plaintiffs repeat, reiterate, and reallege each and every paragraph contained in this Complaint with the same force and effect as if fully set forth herein.

129. On March 14, 2013, Defendants Ryan, Bernhardt, Roth, McCoy, Babal, Sipes, and Swank threatened bodily harm against Plaintiffs which caused them to be in fear of imminent peril and death.

130. On March 14, 2013, Defendants Ryan, Bernhardt, Roth, McCoy, Babal, Sipes, and Swank had apparent authority and ability to carry out the threats of bodily harm and, in fact did, intentionally and without permission, touch and injure Plaintiffs.

131. At all times relevant, Defendants Ryan, Bernhardt, Roth, McCoy, Babal, Sipes, and Swank were acting within the course, scope, and in furtherance of their employment with the University of Dayton, rendering Defendant University of Dayton vicariously liable for their conduct.

132. Defendants Ryan, Bernhardt, Roth, McCoy, Babal, Sipes, and Swank assaulted and battered Plaintiffs with malicious purpose, in bad faith, or in a reckless or wanton manner.

133. As a direct and proximate result of being assaulted and battered by Defendants Ryan, Bernhardt, Roth, McCoy, Babal, Sipes, and Swank, Plaintiffs were forced to endure and suffer, and continue to endure and suffer, extreme physical, mental, and emotional pain and suffering.

WHEREFORE, Plaintiffs Andrew Foley, Evan Foley, and Michael Fagans pray for judgment against Defendants Ryan, Bernhardt, Roth, McCoy, Babal, Sipes, Swank, and University of Dayton, jointly and severally, for:

- a. Compensatory damages in an amount that will fully and fairly compensate Plaintiffs for their injury, damage, and loss;
- b. Punitive damages in an amount that will serve to adequately punish and deter the conduct alleged herein; and
- c. All such other relief to which Plaintiffs are entitled and/or the Court deems appropriate.

TENTH CLAIM FOR RELIEF

(Common Law False Arrest/Imprisonment Against Defendants University of Dayton, Sweigart, Ryan, Bernhardt, Babal, Roth, McCoy, Sipes, Swank, Burt, Burkhardt, and Cairo)

134. Plaintiffs repeat, reiterate, and reallege each and every paragraph contained in this Complaint with the same force and effect as if fully set forth herein.

135. Defendants Sweigart, Ryan, Bernhardt, Babal, Roth, McCoy, Sipes, Swank, Burt, Burkhardt, and Cairo, acting within the course, scope, and in furtherance of their employment with the University of Dayton acted in concert to and did intentionally confine and detain Plaintiffs within a limited area on March 14, 2013, and cause them to be confined for days, against their will and without probable cause and/or lawful justification or privilege.

136. Defendants Sweigart, Ryan, Bernhardt, Babal, Roth, McCoy, Sipes, Swank, Burt, Burkhardt, and Cairo acted with malicious purpose, in bad faith, or in a reckless or wanton manner.

137. At all times relevant, Defendants Sweigart, Ryan, Bernhardt, Babal, Roth, McCoy, Sipes, Swank, Burt, Burkhardt, and Cairo were acting within the course, scope,

and in furtherance of their employment with Defendant University of Dayton, rendering University of Dayton vicariously liable for their conduct.

138. As a direct and proximate result of their false arrest/imprisonment, Plaintiffs were forced to endure and suffer, and continue to endure and suffer, extreme physical, mental, and emotional pain and suffering and pecuniary loss.

WHEREFORE, Plaintiffs Andrew Foley, Evan Foley, and Michael Fagans prays for judgment against Defendants Sweigart, Ryan, Bernhardt, Babal, Roth, McCoy, Sipes, Swank, Burt, Burkhardt, Cairo and University of Dayton, jointly and severally, for:

- a. Compensatory damages in an amount that will fully and fairly compensate Plaintiffs for their injury, damage, and loss;
- b. Punitive damages against Defendants to adequately punish and deter the conduct alleged herein; and
- c. All such other relief which the Court deems appropriate.

ELEVENTH CLAIM FOR RELIEF

**(Common Law Malicious Prosecution Against Defendants
University of Dayton, Sweigart, Ryan, Bernhardt, Babal, Roth, McCoy, Sipes,
Swank, Burt, Burkhardt, and Cairo)**

139. Plaintiffs repeat, reiterate, and reallege each and every paragraph contained in this Complaint with the same force and effect as if fully set forth herein.

140. Acting within the course and scope of their employment as law enforcement officers with UDPD, Defendants Sweigart, Ryan, Bernhardt, Babal, Roth, McCoy, Sipes, Swank, Burt, Burkhardt, and Cairo instituted criminal prosecution, charges and/or proceedings against Plaintiffs Andrew Foley, Evan Foley, and Michael Fagans.

141. Defendants Sweigart, Ryan, Bernhardt, Babal, Roth, McCoy, Sipes, Swank, Burt, Burkhardt, and Cairo had no probable cause for instituting the criminal

prosecution, charges and/or proceedings against Plaintiffs Andrew Foley, Evan Foley, and Michael Fagans.

142. The prosecution and/or criminal proceedings against Plaintiffs Andrew Foley and Michael Fagans were dismissed and, thus, terminated in favor of Plaintiffs Andrew Foley and Michael Fagans on March 22, 2013.

143. Defendants Sweigart, Ryan, Bernhardt, Babal, Roth, McCoy, Sipes, Swank, Burt, Burkhardt, and Cairo acted with malicious purpose, in bad faith, or in a reckless or wanton manner.

144. At all times relevant, Defendants Sweigart, Ryan, Bernhardt, Babal, Roth, McCoy, Sipes, Swank, Burt, Burkhardt, and Cairo were acting within the course, scope, and in furtherance of their employment as law enforcement officers of UDPD, rendering the University of Dayton vicariously liable for their conduct.

145. As a direct and proximate result of Defendants Sweigart, Ryan, Bernhardt, Babal, Roth, McCoy, Sipes, Swank, Burt, Burkhardt, and Cairo malicious prosecution, Plaintiffs Andrew Foley and Michael Fagans were forced to endure and suffer, and continue to endure and suffer, extreme physical, mental, and emotional pain and suffering and pecuniary loss.

WHEREFORE, Plaintiffs Andrew Foley and Michael Fagans pray for judgment against Defendants Sweigart, Ryan, Bernhardt, Babal, Roth, McCoy, Sipes, Swank, Burt, Burkhardt, Cairo, and University of Dayton, jointly and severally, for:

- a. Compensatory damages in an amount that will fully and fairly compensate Plaintiffs for their injury, damage, and loss;
- b. Punitive damages in an amount that will serve to adequately punish and deter the conduct alleged herein; and

- c. All such other relief to which Plaintiffs are entitled and/or the Court deems appropriate.

TWELFTH CLAIM FOR RELIEF

(Common Law Intentional Infliction of Emotional Distress Against Defendants Sweigart, Ryan, Bernhardt, Babal, Roth, McCoy, Sipes, Swank, Cairo, Burt, and University of Dayton)

146. Plaintiffs repeat, reiterate, and reallege each and every paragraph contained in this Complaint with the same force and effect as if fully set forth herein.

147. Defendants Sweigart, Ryan, Bernhardt, Babal, Roth, McCoy, Sipes, Swank, Cairo either intended to cause emotional distress or knew or should have known that their actions would result in serious emotional distress to Plaintiffs.

148. Defendants Sweigart, Ryan, Bernhardt, Babal, Roth, McCoy, Sipes, Swank, and Cairo's conduct was so extreme and outrageous as to go beyond all possible bounds of decency and was utterly intolerable in a civilized society.

149. As a direct and proximate result of Defendants Sweigart, Ryan, Bernhardt, Babal, Roth, McCoy, Sipes, Swank, and Cairo's actions, Plaintiffs Andrew Foley, Evan Foley, and Michael Fagans suffered psychic injury, and the mental anguish suffered by Plaintiffs Andrew Foley, Evan Foley, and Michael Fagans was serious and of a nature that no reasonable person could be expected to endure.

150. Defendants Sweigart, Ryan, Bernhardt, Babal, Roth, McCoy, Sipes, Swank, and Cairo were acting within the course, scope, and in furtherance of their employment with Defendant University of Dayton.

WHEREFORE, Plaintiffs Andrew Foley, Evan Foley, and Michael Fagans pray for judgment against Defendants Sweigart, Ryan, Bernhardt, Babal, Roth, McCoy, Sipes, Swank, Cairo, Burt, and University of Dayton, jointly and severally, for:

- a. Compensatory damages in an amount that will fully and fairly compensate Plaintiffs for their injury, damage, and loss;
- b. Punitive damages against Defendants named in this Claim for Relief in an amount that will serve to adequately punish and deter the conduct alleged herein; and
- c. All such other relief to which Plaintiffs are entitled and/or the Court deems appropriate.

THIRTEENTH CLAIM FOR RELIEF
(Common Law Negligent Misidentification Against Michael Groff and Dylan Parfitt)

151. Plaintiffs repeat, reiterate, and reallege each and every paragraph contained in this Complaint with the same force and effect as if fully set forth herein.

152. Pursuant to Ohio law, Defendants Groff and Parfitt owed Andrew Foley, Evan Foley, and Michael Fagans a duty of care when providing information to law enforcement authorities regarding their involvement in the commission of a crime.

153. Groff contacted law enforcement officials from UDPD, and Groff and Parfitt reported that Andrew Foley, Evan Foley, and Michael Fagans had been involved in a criminal act, namely, the refusal to leave the property at 411 Lowes Street after they had been asked to do so, implicating them as having an intent to cause harm, and claiming that they had been involved in a robbery or an attempted robbery.

154. Groff and Parfitt breached their duty of care to Andrew Foley, Evan Foley, and Michael Fagans by negligently improperly identifying them as being responsible for a criminal act.

155. Because of the improper negligent misidentification of Andrew Foley, Evan Foley, and Michael Fagans being involved in the commission of a criminal act, Andrew

Foley, Evan Foley, and Michael Fagans were imprisoned and suffered economic and non-economic injury due to the actions taken by UDPD law enforcement.

WHEREFORE, Plaintiffs Andrew Foley, Evan Foley, and Michael Fagans pray for judgment against Defendants Michael Groff and Dylan Parfitt, jointly and severally, for:

- a. Compensatory damages in an amount that will fully and fairly compensate Plaintiffs for their injury, damage, and loss; and
- b. All such other relief to which Plaintiffs are entitled and/or the Court deems appropriate.

TRIAL BY JURY ON ALL CLAIMS FOR RELIEF HEREBY DEMANDED.

s/ Michael A. Hill
DENNIS LANSDOWNE (0026036)
MICHAEL A. HILL (0088130)
SPANGENBERG SHIBLEY & LIBER LLP
1001 Lakeside Avenue East, Suite 1700
Cleveland, OH 44114
(216) 696-3232
(216) 696-3924 (FAX)
dlansdowne@spanglaw.com
mhill@spanglaw.com

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