

IN THE SUPREME COURT OF OHIO

Andrew Foley, et al. : Supreme Court Case No. 2015-2032
Respondents, : On certified questions of state law from the
vs. : U.S. Southern District Court of Ohio
University of Dayton, et al. : Trial Court Case No. 3:15-CV-96
Petitioners/Respondents. :

PRELIMINARY MEMORANDUM OF PETITIONER DYLAN PARFITT IN SUPPORT
OF THIS COURT ANSWERING THE CERTIFIED QUESTIONS OF STATE LAW

Jane M. Lynch (0012180) (COUNSEL OF RECORD)
Jared A. Wagner (0076674)
Green & Green, Lawyers
800 Performance Place
109 North Main Street
Dayton, Ohio 45402-1290
Tel. 937.224.3333
Fax 937.224.4311
jmlynch@green-law.com
jawagner@green-law.com

COUNSEL FOR PETITIONER DYLAN PARFITT

Timothy P. Heather(002776) (COUNSEL OF RECORD)
Benjamin Yocum & Heather
300 Pike Street, Suite 500
Cincinnati, Ohio 45202
Tele. 513.721.5672
Fax 513.562.4388
tpheather@byhlaw.com

COUNSEL FOR PETITIONER MICHAEL R. GROFF

Michael A. Hill (0088130) (COUNSEL OF RECORD)
Dennis Lansdowne (0026036)
Spangenberg Shibley & Liber LLP
1001 Lakeside Avenue East, Suite 1700
Cleveland, Ohio 44114
Tele. 216.696.3232
Fax 216.696.3924
mhill@spanglaw.com
dlansdowne@spanglaw.com

COUNSEL FOR RESPONDENTS ANDREW FOLEY, EVAN FOLEY, AND MICHAEL FAGANS

INTRODUCTION

Pursuant to S.Ct.Prac.R. 9.05(A)(1), petitioner Dylan Parfitt (“Parfitt”) submits the following preliminary memorandum in support of this Court answering the following three questions of law certified to it by the United States Southern District Federal Court:

- 1. What is the statute of limitations for claims of negligent misidentification?**
- 2. 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?**
- 3. Is the doctrine of qualified privilege applicable to claims of negligent misidentification?**

It is necessary and appropriate for the Court to answer these questions of law because:

- An answer to the first question is necessary to resolve a conflict among the Ohio Appellate Courts regarding whether a claim based on negligently implicating another person in criminal activity to a police officer should be subject to the one year statute of limitations in R.C. 2305.11(A) for defamation claims or to the general four year statute of limitations in R.C. 2305.09(D);
- An answer to the second question is necessary to resolve a conflict among lower courts, including both state and federal, regarding the scope and application of the absolute privilege recognized in *M.J. DiCorpo, Inc. v. Sweeney*, 69 Ohio St.3d 497 (1994), and to determine whether that absolute privilege extends to statements made to police officers;
- An answer to the third question is necessary in order to establish whether there is a defense of qualified privilege for the tort of negligent misidentification, which is an issue of first impression for this Court;
- Answers to these questions will determine whether the claims against petitioners Parfitt and Michael Groff (“Groff”) are viable and, if so, the nature and extent of the privileges

and defenses available for the claims against them. Thus, answers to these questions are potentially dispositive of the claims against petitioners and are necessary in order to fully inform both the trial court and the parties in the underlying federal action, which has not moved past the initial pleading stages and is currently stayed in full pending a determination of the certified questions of law;

- If these questions are not answered by this Court, the current state of the law in Ohio will remain confused and contradictory, with both the absolute privilege recognized in *DiCorpo* and the tort of negligent misidentification being treated differently in different jurisdictions and, at least in the case of federal court, with judges on the same court doing so. This will adversely affect not only persons throughout the state, but also Parfitt and Groff specifically, who will be forced to defend the claims against them in federal court without a clear understanding of the status of Ohio law on these issues, which even the trial court has admitted is not clearly defined;
- These questions present the first opportunity for this Court to address the statute of limitations and defenses applicable to the tort of negligent misidentification. In fact, this Court has never even expressly acknowledged negligent misidentification as a separate and distinct tort under Ohio law, and these questions arguably present the Court with its first opportunity to address this tort in any manner;
- These questions relate to an important area of law that will have a widespread, statewide impact, affecting the liability of citizens who engage in the civic duty of reporting potential criminal activity to police officers, which will in turn affect the desire, willingness, and ability of citizens to engage in such discourse with the police.

MEMORANDUM

I. Relevant Facts as Alleged¹ and Procedural History

Plaintiffs/respondents Andrew Foley (“Andrew”), Evan Foley (“Evan”), and Michael Fagans (“Michael”) allege that in the early morning hours of March 14, 2013, they were walking back to Evan’s apartment after having spent a night out with friends. At the time, Evan and Michael were students at the University of Dayton, and Andrew was visiting his brother Evan.

As they were walking, the three plaintiffs came to the townhome where the defendants/petitioners Parfitt and Groff lived, which Plaintiffs mistakenly believed was the home of their friend. Despite the fact that it was “[i]n the early morning hours”, Plaintiffs approached Parfitt’s home and knocked on the front door. Groff answered the door and informed Plaintiffs that they had the wrong home. Groff then allegedly “slammed the door in Evan’s face”, to which Evan responded by knocking on the door again, even though at that point in time he admittedly knew his friend did not live there and it was early in the morning hours.

As Plaintiffs started to leave, Groff reopened his front door and informed them that he had contacted the University of Dayton Police Department. Plaintiffs did not have any encounter or interaction with Parfitt.

Shortly after leaving Parfitt’s house, Evan was stopped by defendant University of Dayton Police Sergeant Thomas Ryan (“Sgt. Ryan”). Michael and Andrew, however, were not stopped, and they continued walking to Evan’s apartment. When Sgt. Ryan asked Evan if he knew why he was being stopped, Evan responded “of course” and pointed to Parfitt’s home “because he had heard **Groff** state that he had called the police.” (Emphasis added.) Sgt. Ryan informed Evan that he was being arrested for burglary and placed him under arrest.

¹ Because this matter has come before the Court as part of a Rule 12(C) motion, Plaintiffs’ version of the facts must be accepted as true. Plaintiffs’ version of the facts is also summarized in the trial court’s decision granting the request to certify questions of law to this Court, which is attached to the order of certification filed with this Court.

After arresting Evan, Sgt. Ryan spoke with Parfitt and Groff regarding the potential criminal nature of Plaintiffs' actions. Sgt. Ryan did not discuss Plaintiffs' actions with Parfitt until **after** he had already arrested Evan for burglary.

After Evan was arrested, Andrew and Michael returned to the scene and began approaching marked police cruisers. Andrew and Michael were both briefly taken into custody, but were subsequently released that night without criminal charges. The next day, Andrew and Michael were arrested for burglary. Eventually, the criminal cases against Andrew and Michael were dismissed, and the criminal proceedings against Evan were "subsequently resolved."

On March 13, 2015, almost two full years after the incident had occurred, Plaintiffs filed suit in United States Federal District Court against the University of Dayton and eleven of its police department employees, seeking relief under 42 U.S.C. 1983 and asserting various state law claims. Three days later, Plaintiffs filed an amended complaint, which added a single claim for "negligent misidentification" against Parfitt and Groff, who filed answers and moved for judgment on the pleadings or, in the alternative, to certify questions of law to the Ohio Supreme Court. On December 7, 2015, the trial court sustained the motions of Parfitt and Groff to the extent they sought certification of state law questions to this Court. The trial court also stayed the entire federal court matter and withheld ruling on the substantive arguments regarding the merits of Plaintiffs' negligent misidentification claim until after the certified questions of law are addressed by this Court.

II. **This Court should answer the first certified question of law in order to resolve a conflict among Ohio Appellate Courts regarding the appropriate statute of limitations for the tort of negligent misidentification**

This Court has never addressed the question of which statute of limitations is applicable to a claim of negligent misidentification. However, it has given the following general guideline

for determining the appropriate statute of limitations: “it is necessary to determine the **nature or subject matter** of the acts giving rise to the complaint rather than the form in which the action is pleaded. The grounds for bringing the action are determinative factors, **the form is immaterial.**” *Doe v. First United Methodist Church*, 68 Ohio St.3d 531, 536, 1994-Ohio-531 (both emphases added). In other words, “[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 (1988)).

R.C. 2305.11(A) sets forth a one year statute of limitations for defamation claims, and it has been recognized as the appropriate statute of limitations for any claims premised upon an alleged improper 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-Ohio-1030, 2002 WL 362855, at *5-*6. Thus, consistent with this Court’s holding in *Doe*, a negligence claim based on an allegedly improper or wrongful communication is essentially a “disguised defamation claim” and should be subject to the one year statute of limitations in R.C. 2305.11(A). *Id.* “As defined in the Restatement of the Law 2d, Torts, ‘communication’ is a term of art used to ‘denote the fact that one person has brought an idea to the perception of another.’” *Id.* at *6 (quoting 1 Restatement of the Law 2d, Torts, Section 559, Comment (1977)).

To prove their claim of negligent misidentification, Plaintiffs must establish that Parfitt made statements to law enforcement officers improperly implicating them in criminal activity. *Wigfall v. Soc. Natl. Bank*, 107 Ohio App.3d 667, 673 (1995); *Cummerlander v. Patriot Preparatory Academy Inc.*, No. 2:13-CV-0329, 2015 WL 519308, at *18 (S.D. Ohio Feb. 9, 2015).

Accordingly, it has been recognized that a claim premised on the defendant having incorrectly identified another person to the police as having been involved in criminal activity is subject to the one year statute of limitations in R.C. 2305.11(A) regardless of whether the term “negligence” is used in conjunction with such a claim. *Cromartie v. Goolsby*, 8th Dist. No. 93438, 2010-Ohio-2604, ¶¶ 27-30; *see also Darriss v. Whitelow*, 10th Dist. No. 08AP-545, 2008-Ohio-6314, ¶¶ 10-17 (affirming the trial court’s refusal to allow plaintiff the ability to amend her complaint to include a negligent identification claim where her claims were based on alleged improper statements to police officers and were barred by the one year statute of limitations).

In contrast, the Sixth District has held that a negligent misidentification claim is “separate from the tort of defamation, and is subject to the four-year statute of limitations found in R.C. 2305.09(D).” *Wigfall*, 107 Ohio App.3d at 672. Thus, as the trial court properly found, there is a direct conflict between the Sixth District’s decision in *Wigfall* and Eighth District’s decision in *Cromartie*, and an indirect conflict between *Wigfall* and the First District’s decision in *Worpenberg*. As such, this Court should accept and answer the first certified question of law in order to resolve this conflict and determine the appropriate statute of limitations in Ohio for the tort of negligent misidentification.

III. **This Court should answer the second certified question of law in order to resolve a conflict among lower courts (both state and federal) regarding whether the scope of absolute privilege recognized in *DiCorpo* extends to statements made to police officers**

In *DiCorpo*, this Court recognized that absolute privilege protects statements made by individuals reporting a possible crime to a prosecutor, reasoning that “[a]s a matter of public policy, extension of an absolute privilege under such circumstances will encourage the reporting of criminal activity by removing any threat of reprisal in the form of civil liability. This, in turn, will aid in the proper investigation of criminal activity and the prosecution of those responsible

for the crime.” *DiCorpo*, 69 Ohio St.3d at 505. Moreover, “[t]he absolute privilege or ‘immunity’ for statements made in a judicial proceeding extends to every step in the proceeding, **from beginning to end.**” *Id.* at 506 (emphasis added).

The majority, and most recent, of the courts that have considered the issue have found that the absolute privilege recognized in *DiCorpo* extends to statements made to police officers implicating another person in criminal activity. *Savoy v. Univ. of Akron*, 10th Dist. No. 13AP-696, 2014-Ohio-3043, ¶ 20 (“Absolute privilege applies to shield individuals from civil liability for statements made to prosecutors **or police** reporting possible criminal activity.”) (emphasis added); *Morgan v. Cmty. Health Partners*, 9th Dist. No. 12CA010242, 2013-Ohio-2259, ¶¶ 30-40; *Lasater v. Vidahl*, 9th Dist. No. 26242, 2012-Ohio-4918, ¶¶ 7-13; *Lee v. City of Upper Arlington*, 10th Dist. No. 03AP-132, 2003-Ohio-7157, ¶¶ 14-19; *Fair v. Litel Communication, Inc.*, 10th Dist. No. 97APE06-804, 1998 WL 107350, at *3-*6 (Mar. 12, 1998) (recognizing that persons are entitled to absolute privilege from civil liability for damages in reporting possible criminal felony activity by another person even if they provide erroneous information to the police); *Brown v. Chesser*, 4th Dist. No. 97 CA 510, 1998 WL 28264, at *3-*5 (Jan. 28, 1998); *Haller v. Borrer*, 10th Dist. No. 95APE01-16, 1995 WL 479424 *2-*4 (Aug. 8, 1995) (recognizing absolute privilege for statements to the police concerning the plaintiff’s possible commission of a crime), discretionary appeal not allowed 74 Ohio St.3d 1500 (1996); *see also Brunswick v. City of Cincinnati*, No. 1:10-CV-617, 2011 WL 4482373, at *9 (S.D. Ohio Sept. 27, 2011) (recognizing that statements to an investigating police officer are entitled to absolute privilege); *Rodojev v. Sound Com Corp.*, No. 1:10CV1535, 2010 WL 5811886, at *3 (N.D. Ohio Dec. 30, 2010) (“Ohio courts have extended the absolute privilege against civil liability to an individual who had contacted the police about a suspected crime against him and who had

cooperated with the police in gathering evidence against the accused.”); *Ventura v. Cincinnati Enquirer*, 246 F.Supp.2d 876, 882 (S.D. Ohio 2003) (noting that Ohio appellate courts have extended the absolute privilege in *DiCorpo* to statements made to police officers accusing another person of a crime); *Slye v. London Police Dep't*, 12th Dist. No. CA2009-12-027, 2010-Ohio-2824, ¶ 10-15, 46 (affirming a trial court’s decision to grant sanctions for filing a frivolous action after finding that the defendant’s statements to the police accusing plaintiff of criminal activity were protected by absolute privilege).

The same public policies acknowledged by the Ohio Supreme Court in *DiCorpo* as the basis for granting absolute privilege to statements made to prosecutors (encouraging reporting of criminal activity, aiding proper investigation of criminal activity, and prosecuting those responsible for the crime) all apply equally, if not more so, to statements made to police officers. *Lasater* at ¶ 7-13; *Lee* at ¶ 14-19; *Brown*, 1998 WL 28264, at *3-*5; *Brown*, 1998 WL 28264, at *4 (“Citizens must be encouraged to report criminal activity without fear of reprisals in the form of civil liability.”); *Brunswick*, 2011 WL 4482373, at *9 n.5. Indeed, criminal activity is more regularly reported to the police as opposed to the prosecutor, and it would be anomalous to recognize an absolute privilege from civil liability for statements made to a prosecutor accusing another of a crime, but deny such protection to persons making statements to a police officer, which occurs more frequently and regularly. *Lasater* at ¶ 10; *see also Brunswick*, 2011 WL 4482373, at *9 n.5 (“The level of immunity afforded to complainants in cases such as this should not turn on whether they decide to go straight to a prosecutor or to talk to a police officer first.”).

However, there are three outlier cases (two from state court and one from federal court), holding that the absolute privilege recognized in *DiCorpo* does not apply to statements made to police officers. *Olsen v. Wynn*, 11th Dist. No. 95-A-0078, 1997 WL 286181, at *5 (May 23,

1997); *Scott v. Patterson*, 8th Dist. No. 81872, 2003-Ohio-3353, ¶ 12; *Dehlendorf v. City of Gahanna, Ohio*, No. 2:10-cv-263, 2011 WL 1233464, at *8 (S.D. Ohio Mar. 28, 2011). In *Scott*, the Eighth District specifically recognized that its decision is in direct conflict with decisions from other courts. *Scott* at ¶ 13-16. Additionally, this unresolved conflict among Ohio's Appellate Courts was also specifically recognized by the Ninth District in *Lasater*. *Lasater* at ¶ 8. There is even a recognized unresolved conflict on this issue among the Ohio Federal District Court Judges. *Brunswick*, 2011 WL 4482373, at *9 n.5 (finding that statements to officers investigating a potential crime are absolutely privileged and specifically declining to follow *Dehlendorf*). Accordingly, this Court should accept and answer the second certified question of law in order to resolve this conflict and determine whether the absolute privilege in *DiCorpo* extends to statements made to police officers. .

IV. **This Court should answer the second certified question of law in order to address the issue of whether the absolute privilege recognized in *DiCorpo* is applicable to the tort of negligent misidentification**

The first issue to be addressed within the second question, which is discussed above, is whether individuals generally have an absolute privilege for statements made to police officers. If so, then the second issue within the first question, which is whether that privilege applies to claims of negligent misidentification, becomes relevant.

Although this Court has never **expressly** addressed the issue of whether the absolute privilege in *DiCorpo* extends to torts other than defamation, in that case it declined the invitation to address whether Ohio recognizes a false light invasion of privacy tort, holding that “[g]iven our determination that the statements contained in Sweeney's affidavit cannot form the basis for civil liability, this case * * * is obviously not the appropriate case to consider adopting, or rejecting, the false light theory of recovery.” *DiCorpo*, 69 Ohio St. 3d at 507. Thus, the Court

appears to have indicated, at least by implication, that the absolute privilege in *DiCorpo* is applicable to all claims for civil liability, not just defamation claims. *Id.*

Furthermore, this issue has been directly considered by the Tenth District, which expressly rejected the notion that the absolute privilege doctrine in *DiCorpo* is limited to the context of any one specific tort. *Haller*, 1995 WL 479424, at *2. In *Haller*, which involved claims of false arrest, false imprisonment, abuse of process, and malicious prosecution, the Court held as follows:

Appellant argues that *DiCorpo* involved claims for libel and infliction of emotional distress; whereas, appellant's case involves a claim for malicious prosecution. Appellant would have us distinguish the holding in *DiCorpo* on this basis.

There is nothing in *DiCorpo* to suggest that the Ohio Supreme Court meant to limit its holding that an informant is entitled to an absolute privilege against civil liability for statements made which bear some reasonable relation to the activity reported to claims for libel and infliction of emotional distress. Instead, the court talks about statements or information provided to a prosecuting attorney reporting the actual or possible commission of a crime and finds that such statements or other information are part of a judicial proceeding entitling the informant to an absolute privilege against civil liability. There is no rational reason to distinguish appellant's action for malicious prosecution from the plaintiff's action in *DiCorpo* for libel and infliction of emotional distress.

“The Ohio courts have broadly interpreted the bar against civil liability articulated in *DiCorpo* to apply to a **variety of civil claims** and to extend to information provided during all phases of a judicial proceeding.” *Ventura*, 246 F.Supp.2d at 882-84 (emphasis added). Indeed, the absolute privilege recognized in *DiCorpo* has been extended to police officers in situations involving a multitude of claims other than defamation. *See Lasater*, 2012-Ohio-4918, at ¶ 5-12 (false light); *Brunswick*, 2011 WL 4482373, at *8-*9 (malicious prosecution); *Lee*, 2003-Ohio-7157, at ¶ 5-19 (negligence, malice, intentional and fraudulent misrepresentation, abuse of process, malicious prosecution, false arrest, false imprisonment); *Fair*, 1998 WL 107350, at *3-

*6 (malicious prosecution and infliction of emotional distress); *Brown*, 1998 WL 28264, at *4 (invasion of privacy); *Haller*, 1995 WL 479424, at *2-*4 (malicious prosecution). Put simply, “[a]bsolute privilege applies to shield individuals from **civil liability** for statements made to prosecutors or police reporting possible criminal activity.” *Savoy*, 2014-Ohio-3043, at ¶ 20 (emphasis added); see also *Fair*, 1998 WL 107350, at *6 (“*DiCorpo* and *Haller* stand for the **broad proposition that an individual cannot be held civilly liable** for information, whether true or false, he or she provides to a prosecuting attorney so long as that information bears some reasonable relation to the alleged activity reported.” (emphasis added)). Thus, Parfitt is entitled to absolute privilege from civil liability, regardless of the name of the tort by which Plaintiffs seek to impose such liability.

Nevertheless, as the trial court correctly noted in its decision certifying questions of law to this Court, there is no case law directly addressing the issue of whether the absolute immunity in *DiCorpo* is applicable to claims of negligent misidentification. Therefore, this is another question of first impression for this Court to consider, and an appropriate basis for accepting and answering the second certified question of law.

V. **This Court should answer the third certified question of law in order to address the issue of whether the doctrine of qualified privilege is applicable to the tort of negligent misidentification**

As with the doctrine of absolute privilege, this Court has never directly addressed the question of whether the doctrine of qualified privilege extends to the tort of negligent misidentification. However, even prior to *DiCorpo*, Ohio Courts had long recognized that statements made to a police officer implicating another in criminal activity are protected by at least a qualified privilege. *Popke v. Hoffman*, 21 Ohio App. 454, 456 (6th Dist. 1926); *Paramount Supply Co. v. Sherlin Corp.*, 16 Ohio App.3d 176, 180 (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, 1988 WL 69163, at *11 (June 30, 1988) (endorsing a trial court's statement that information given to a police detective is protected under a qualified privilege); *Hartunge-Teter v. McKnight*, 3d Dist. No. 4-91-2, 1991 WL 117274, at *1 (June 26, 1991); *Atkinson v. Stop-N-Go Foods, Inc.*, 83 Ohio App. 3d 132, 136 (2d Dist. 1992) (recognizing that statements to police officers implicating another in a crime are entitled to qualified privilege); *Stokes v. Meimaris*, 111 Ohio App.3d 176, 189-90 (8th Dist. 1996). Furthermore, even the lone federal court that has rejected the application of absolute privilege to such statements recognized that they would at least still be entitled to a qualified privilege. *Dehlendorf*, 786 F.Supp.2d at 1363-65.

However, also as with the issue of absolute privilege, there is no case law directly addressing whether qualified privilege can be raised as a defense to a claim of negligent misidentification. Thus, the Court should also accept and answer the third certified question of law in order to address this specific unresolved issue.

VI. **This Court should answer the certified questions of law because it will be its first opportunity to directly address the tort of negligent misidentification**

The case used by the Ohio Courts of Appeals to create the tort of negligent misrepresentation is the 1929 decision from this Court in *Mouse v Central Sav. & Trust Co.*, 120 Ohio St. 599 (1929). In *Mouse*, the plaintiff cashed a check with a third party person, but the defendant bank refused to honor the check when the third party presented it, informing the third party that the check was not good. *Id.* at 602-03. The third party then sought and obtained a warrant for plaintiff's arrest. *Id.* The issue before the Court, which was specifically set forth in its syllabus, was whether the bank could be considered the proximate cause of plaintiff's arrest. *Id.* at 603-611. Thus, the *Mouse* decision is more properly understood as a case regarding the

parameters of proximate causation rather than a case creating a tort that was never even explicitly discussed within the opinion. Moreover, there have not been any cases issued by this Court in the 86 years since *Mouse* was decided even peripherally acknowledging the existence of a tort of negligent misidentification in Ohio separate from defamation.

Notably, several other states have refused to recognize a claim for negligent identification of a criminal suspect. See *Jaindl v. Mohr*, 541 PA. 163, 167 (1995) ("Joining the ranks of other jurisdictions who have ... refused to recognize a cause of action for negligent identification"); *Davis v. Equibank*, 412 PA. Super. 390, 397-98 (1992) ("declining to recognize a cause of action for negligent identification of another as a perpetrator of a crime"); *LaFontaine v. Family Drug Stores, Inc.*, 33 Conn. Supp. 66, 76 (1976) (quoting Restatement 3 Torts s 653, comment g) ("where a private person gives to a prosecuting officer information which he believes to be true, and the officer in the exercise of his uncontrolled discretion initiates criminal proceedings based upon that information, the informer is not liable under the rules stated in this section even though the information proves to be false and his belief therein was one which a reasonable man would not entertain"); see also *Turner v. Mellon*, 41 Cal.2d 45, 48-49 (1953) (holding that "victims of crime should not be held to the responsibility of guarantors of the accuracy of their identifications ... a view contrary to that ... would, we think, inevitably tend to discourage a private citizen from imparting information of a tentative, honest belief to the police and, hence, would contravene the public interest which must control"); *Haberg v. Cal. Fed. Bank FSB*, 32 Cal. 4th 350, 360-6 (2004) (holding that an absolute privilege applies to statements made in connection with official proceedings); *Jones v. Autry*, 105 F.Supp.2d 559, 561-62 (S.D. Miss. 2000) (applying Mississippi law) (declining to recognize a claim for negligent misidentification);

Shires v. Cobb, 271 Or. 769, 773-74 (1975) (declining to recognize a cause of action for negligent misidentification).

Nevertheless, over 50 years after *Mouse* was decided, the Tenth District held that “it has been recognized in Ohio through the *Mouse* case, *supra*, that giving false information which results in the arrest and imprisonment of another may be grounds for tort liability.” *Walls v. City of Columbus*, 10 Ohio App.3d 180, 182 (10th Dist. 1983). The *Walls* decision, however, does not contain any further discussion of this issue, and it does not contain any consideration of the absolute privilege doctrine. In fact, even among those appellate courts that have recognized the tort of negligent misidentification, there have not been any cases in which the absolute privilege doctrine has been discussed within the context of a negligent misidentification claim.

Accordingly, it is important for this Court to accept and answer the certified questions of law in order to address, for the first time, whether in fact *Mouse* created a cause of action in Ohio for negligent misidentification separate from the tort of defamation and, if so, what are the applicable elements, defenses, and privileges for such a tort.

VII. **This Court should answer the certified questions of law because they involve far reaching issues of statewide concern and public policy related to the important civic duty of reporting crimes to law enforcement**

It is well documented that the police already have problems obtaining the cooperation of witnesses due to the threat of physical retaliation and intimidation. *State v. Patton*, 6th Dist. No. L-12-1356, 2015-Ohio-1866, ¶ 85-98; *State v. Howse*, 9th Dist. No. 12CA010251, 2012-Ohio-6106, ¶ 4-24; *State v. El-Jones*, 9th Dist. No. 26136, 2012-Ohio-4134, ¶ 34-35. Those problems would be exacerbated if the threat of a civil law suit were also present. At the very least, persons making a report to police of expected criminal activity deserve to know with certainty whether there is a potential exposure for civil liability, particularly in this day and age of terrorism and

mass shootings where citizens are told “if you see something say something.” Thus, the questions before the Court pertain to an important issue of public policy and answers to those questions are necessary in order to remove the cloud of doubt from the issue of whether a person reporting potential criminal activity to the police is exposed to civil liability.

VIII. Conclusion

The Court should answer the three questions of law certified to it by the Southern District because: (1) it is necessary to resolve a conflict in the Ohio appellate courts regarding the statute of limitations for negligent misidentification; (2) it is necessary to resolve a conflict in the lower courts, both federal and state, regarding whether the absolute privilege from *DiCorpo* extends to statements made to police officers; (3) it is the Court’s first opportunity to address the tort of negligent misidentification and the elements, defenses, and privileges that are applicable to that tort; (4) it is necessary in order to give certainty to citizens in Ohio regarding their potential exposure for civil liability for reporting suspected criminal activity to the police. For all these reasons, Parfitt respectfully submits that the Court should elect to answer all three of the certified questions.

Respectfully submitted,

/s/ JARED AWAGNER

JANE M. LYNCH (0012180)

JARED A. WAGNER (0076674)

GREEN & GREEN, Lawyers

800 Performance Place, Suite 109

Dayton, Ohio 45402

Tele. 937.224.3333

Fax 937-224-4311

jmlynch@green-law.com

jawagner@green-law.com

Counsel for Petitioner Dylan Parfitt

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served via regular mail upon the following on the 5th of January 2015: Michael A. Hill and Dennis Lansdowne, counsel for plaintiffs/respondents, and Timothy P. Heather counsel for defendant/petitioner Michael Groff. Courtesy copies were also provided via regular mail to the following other parties in the underlying litigation who are not participating in the certified questions of law issue before this Court: Mary Ann Poirier, general counsel for defendant University of Dayton; Caroline H. Gentry, co-counsel for defendants University of Dayton and Thomas Burlhardt; Todd M. Raskin and David M. Smith, counsel for defendants Bruce Burt, Harry Sweigart, Sgt. Thomas Ryan, Officer Kevin Bernhardt, Officer Robert Babal, Officer Eric Roth, Officer Jonathan Mccoy, Sgt. Michael Sipes, Sgt. Bradley Swank, and Lt. Joseph Cairo.

/s/ JARED AWAGNER

JARED A. WAGNER