

IN THE SUPREME COURT OF OHIO

ANDREW FOLEY, et al.) CASE NO. 2015-2032
)
 Respondent)
)
 vs.) Order Certifying Questions of State Law
) From the United States District Court
) Southern District of Ohio, Western
 UNIVERSITY OF DAYTON, et al.) Division
)
)
 Petitioner) 3:15-CV-96
)
)

**MEMORANDUM OF RESPONDENTS ANDREW FOLEY, EVAN FOLEY, AND
MICHAEL FAGANS**

JANE MICHELE LYNCH (012180)
JARED A. WAGNER (076674)
GREEN & GREEN, LAWYERS
800 Performance Place
109 North Main Street
Dayton, OH 45402
Phone: (937) 224-3333
Fax: (937) 224-4311
jmlynch@green-law.com
jawagner@green-law.com

MICHAEL A. HILL (0088130)
DENNIS R. LANSDOWNE (026036)
**SPANGENBERG, SHIBLEY & LIBER,
LLP**
1001 Lakeside Avenue, East, Suite 1700
Cleveland, OH 44114
Phone: (216) 696-3232
Fax: (216) 696-3924
mhill@spanglaw.com
dlansdowne@spanglaw.com

Counsel for Petitioner Dylan Parfitt

TIMOTHY PAUL HEATHER (002776)
**BENJAMIN, YOCUM, & HEATHER,
LLC**
300 Pike Street, Suite 500
Cincinnati, OH 45202
Phone: (513) 721-5672
Fax: (513) 562-4388
tpheather@byhlaw.com

Counsel for Petitioner Michael R. Groff

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I. STATEMENT OF THE CASE AND FACTS

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

Evan immediately asked Groff if Evan's friend was at the residence. *Id.* at ¶ 36. At that point, Groff, who was substantially larger and physically more imposing than any of the Respondents, became belligerent and shouted profanities at them. *Id.* Evan explained that he made an honest mistake by knocking on the door to the home he believed was his friend's and offered to shake Groff's hand as a friendly gesture. *Id.* at ¶ 37. Groff then slammed the door in Evan's face. *Id.* Evan knocked on the door once more, received no answer, and left. *Id.* at ¶ 38. While leaving, Groff yelled to Respondents that he had called the police. *Id.* at ¶ 40.

When law enforcement arrived, Petitioners misidentified Plaintiffs as individuals who had attempted to burglarize Parfitt's residence, despite knowing that those claims were false. *Id.* at ¶¶ 39; 151-55. Over the course of the following day, Respondents were arrested for and charged with burglary. *Id.* at ¶¶ 59-75. On March 22, 2013, the cases against Andrew and

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

Michael were dismissed upon a finding that no probable cause existed for their arrests and charges could not continue against them. *Id.* at ¶ 75. The proceedings against Evan also subsequently resolved. *Id.* Respondents were imprisoned and have suffered substantial economic and non-economic harm as a consequence of these events, including by way of lost employment opportunities due to having felony arrest records. *Id.* at ¶ 77.

Respondents filed this lawsuit in the United States District Court Southern District Ohio. Respondents filed claims against the University of Dayton and various employees. Those claims are not before this Court. Respondents brought an Ohio negligence claim against Petitioners Parfitt and Groff for their negligent misidentification of Respondents, which led to their arrest, imprisonment, and damages. Petitioners filed Motions for Judgment on the Pleadings or, in the Alternative, to Certify Questions of Law to the Ohio Supreme Court. The court declined Petitioners' motion for judgment but certified the following questions to this Court:

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

III. ARGUMENT PERTAINING TO THE QUESTIONS OF LAW CERTIFIED TO THE OHIO SUPREME COURT

A. WHAT IS THE STATUTE OF LIMITATIONS FOR CLAIMS OF NEGLIGENT MISIDENTIFICATION?

- 1. *Claims for Negligent Improper Identification, Or Negligent Misidentification, Are Distinct From Defamation Claims.*

Ohio recognizes the tort of negligent improper identification or misidentification. This is a distinct cause of action with elements and a purpose that are distinguishable from the common

law tort of defamation. The Supreme Court of Ohio has recognized the tort of negligent identification for nearly 100 years. *See Mouse v. Cent. Sav. & Trust Co.*, 120 Ohio St. 599, 602–603, 167 N.E. 868, 869 (1929). In *Mouse*, the plaintiff was arrested after a check bounced. *Id.* at 602. The plaintiff’s account had the necessary funds, and the bank erred by checking the wrong account, thus causing the plaintiff’s arrest. *Id.* While never explicitly referring to the tort as “negligent identification,” the Supreme Court of Ohio nonetheless recognized a tort cause of action against the bank. *Id.* at 611. The court reasoned that the plaintiff’s arrest was a natural and probable result of notifying the police that his check bounced. *Id.* at 605. The court elaborated that such a tort constitutes real damage to the plaintiff, as confinement to a county jail humiliates a man of good reputation and confines his liberty. *Id.* at 611.

Following *Mouse*, Ohio appellate courts have continued to apply the tort of negligent improper identification as a cause of action distinct from defamation. *See e.g Wigfall v. Soc. Natl. Bank*, 107 Ohio App. 3d 667, 673, 669 N.E.2d 313, 316 (6th Dist. 1995) (“[T]here is a tort cause of action, separate from defamation, ... for persons who are negligently improperly identified as being responsible for committing a violation of the law, and who suffer injury as a result of the wrongful identification”); *Walls v. Columbus*, 10 Ohio App.3d 180, 182-83, 461 N.E.2d 13, 14-15 (10th Dist. 1983) (“[I]t has been recognized in Ohio through the *Mouse* case, * * * that giving false information which results in the arrest and imprisonment of another may be grounds for tort liability”); *Woods v. Summertime Sweet Treats, Inc.*, 7th Dist. Mahoning No. 08-MA-169, 2009-Ohio-6030 ¶ 37 (“While the magistrate found that no tort cause of action exists for claims that are covered by defamation, case law indicates otherwise”); *Breno v. City of Mentor*, 8th Dist., 2003-Ohio-4051, ¶ 19 (“We also note that under Ohio law, there is a tort cause of action, separate from defamation, which exists “for persons are negligently improperly

identified as being responsible for committing a violation of the law and who suffer injury as a result of the wrongful identification.”); *Hersey v. House of Ins.*, 6th Dist. No. L-00-1131, 2001 WL 173080, at *2 (Feb. 23, 2001) (setting forth elements of claim for negligent misidentification); *Barilla v. Patella*, 144 Ohio App.3d 524, 534, 760 N.E.2d 898, 905 (8th Dist. 2001) (“The elements for the cause of action [of negligent identification] exist for persons who are negligently improperly identified as being responsible for committing a violation of law and who suffer injury as a result of the wrongful identification.”) (alteration added).

With respect to negligent misidentification, the question is always whether the defendant used due care when providing information to law enforcement. While claims for negligent misidentification and defamation frequently overlap because they often involve speech and the reporting of information, they are separate causes of action. An Ohio plaintiff is not required to plead a defamation claim. In *Breno* at ¶ 19, the Eighth District Court of Appeals explained:

We also note that under Ohio law, there is a tort cause of action, separate from defamation, which exists “for persons who are negligently improperly identified as being responsible for committing a violation of the law and who suffer injury as a result of the wrongful identification. As with any cause of action sounding in negligence, there must be a showing of a duty, a breach of duty, proximate cause and injury before the person improperly identified for committing a crime can establish a valid claim.” *Barilla v. Patella* (2001), 144 Ohio App.3d 524, 534, 760 N.E.2d 898, quoting *Wigfall*, 107 Ohio App.3d at 673, 669 N.E.2d 313; citing *Mouse v. The Central Savings & Trust Co.* (1929), 120 Ohio St. 599, 167 N.E. 868; *Walls v. City of Columbus* (1983), 10 Ohio App.3d 180, 461 N.E.2d 13; *Hersey v. The House of Insurance* (Feb. 23, 2001), Lucas App. No. L-00-1131. **This tort includes providing false information to authorities that another has committed a crime.** *Walls*, 10 Ohio App.3d 180, 461 N.E.2d 13. **As courts have recognized, a person owes a duty to use due care when providing information to the authorities which indicates a person has committed a crime.** *Wigfall*, 107 Ohio App.3d at 674, 669 N.E.2d 313; *Walls*, 10 Ohio App.3d at 182-183, 461 N.E.2d 13. As stated in *Wigfall*: “[w]e acknowledge that public policy does encourage citizens to cooperate with investigating authorities to identify perpetrators of crime. However, we are unwilling to extend public policy to such an extent that due care need not be used when information is supplied to investigating authorities. The serious consequences which accompany an individual being identified as a suspected criminal require the imposition of a duty

to use due care on those who give information to assist investigating authorities.”
Wigfall, 107 Ohio App.3d at 675, 669 N.E.2d 313 (emphasis added).²

Distinct causes of action can and frequently do overlap and co-exist. *Wigfall* at 667, is instructive on this issue. In *Wigfall*, a customer of a bank filed a lawsuit against the bank and various bank employees after he was incorrectly implicated as a suspect in a bank robbery leading to his picture being published in the media and reports that he was a suspect in a bank robbery. The plaintiff brought claims for, among others, negligent identification and defamation. The trial court dismissed the plaintiff’s claim for negligent identification on the basis that it sounded in defamation and therefore was untimely. On appeal, the Sixth Appellate District reversed the trial court’s determination. The appellate court explained its reasoning as follows.

Our careful reading of the *Mouse* case and of the *Walls* case leads us to the conclusion that there is a tort cause of action, separate from defamation, which exists in Ohio for persons who are negligently improperly identified as being responsible for committing a violation of the law, and who suffer injury as a result of the wrongful identification. As with any cause of action sounding in negligence, there must be a showing of a duty, a breach of duty, proximate cause and injury before the person improperly identified for committing a crime can establish a valid claim.

Id. at 316-17.

The defendants in *Wigfall* argued that no duty of care was owed to the plaintiff. *Id.* at 317. The court rejected this argument, however, stating, “[a]s to the argument that no duty was owed, we find that pursuant to the tort cause of action created in the *Mouse* case, the security company and its agent, the security guard, owed a duty to use due care when providing information to the FBI regarding the identity of the bank robber.” *Id.* Indeed, in *Barilla*, 144 Ohio App.3d at 534, 760 N.E.2d 898, the court explained that:

² In *Breno*, however, the plaintiff failed to bring a claim for negligent identification. The court noted that because the plaintiff brought only defamation claims and failed to plead a claim for negligent identification, which would have been appropriate, the claim was governed by the one-year limitation period for defamation claims.

The elements for the cause of action [for negligent identification] exist for persons who are negligently improperly identified as being responsible for committing a violation of law and who suffer injury as a result of the wrongful identification. As with any cause of action sounding in negligence, there must be a showing of a duty, breach of that duty, proximate cause and injury before the person improperly identified for committing a crime can establish a valid claim.

In *Barilla*, however, the court held that summary judgment was appropriate because “[i]n the present action, [plaintiff] was not reported to law enforcement authorities as having committed a crime, was not arrested or imprisoned, and suffered no injury from actions taken by law enforcement authorities. Instead, the actions of which [plaintiff] complains were entirely within the private sector. Accordingly, the cause of action is not applicable . . . *Id.* at 534 (alteration added). There is an actionable claim for negligent improper identification. Moreover, that claim requires that the identification be made to law enforcement. *Id.*

2. *The Elements of Proof and Policy Behind the Cause of Action for Negligent Identification and Defamation Are Distinct.*

Ohio courts and federal courts interpreting Ohio law have established the elements necessary to prove negligent improper identification: (1) a duty, (2) a breach of duty, (3) which causes, (4) an injury, (5) due to improper identification, (6) for committing a crime. *Barilla v.* at 534. *See also Wigfall* at 316-317; *Hersey v. House of Ins.*, 6th Dist Lucas No. L-00-1131, 2001 WL 173080, *2 (Feb. 23, 2001); *Cummerlander v. Patriot Preparatory Acad. Inc.*, 86 F.Supp.3d 808, 826 (S.D. Ohio 2015), *appeal dismissed* (May 27, 2015) (“To make a claim for the tort of negligent identification, or misidentification, Plaintiffs must show that a person was negligently improperly identified as being responsible for committing a violation of law, and suffered injury as a result of the wrongful identification.”) Accordingly, this is a common law negligence claim and not one for defamation.

In contrast to the tort of negligent improper identification, defamation has separate elements: “(1) that a false statement of fact was made, (2) that the statement was defamatory, (3) that the statement was published, (4) that the plaintiff suffered injury as a proximate result of the publication, and (5) that the defendant acted with the requisite degree of fault in publishing the statement.” *Am. Chem. Soc. v. Leadscope, Inc.* (2012), 133 Ohio St.3d 366, 389, 2012-Ohio-4193, 978 N.E.2d 832, 852, ¶77. Because Respondents’ claims sound in negligence, they are governed by the two or four-year limitation periods applicable to negligence claims.

3. *Claims for Negligent Improper Identification Are Governed By A Four-Year or Two-Year Statute of Limitation, As Opposed to the One-Year Limitation Period that Concerns Defamation Claims.*

Negligent misidentification differs from defamation and is predicated on negligence. It, therefore, receives a four-year statute of limitations under Ohio Rev. Code § 2305.09 or two-year limitation period under § 2305.10(A), rather than the one-year statute of limitations under Ohio Rev. Code § 2305.11(A). Unless otherwise provided by statute, claims sounding in negligence have a two-year or four-year limitation period. *See* O.R.C. § 2305.10(A); O.R.C. § 2305.09; *Smith v. A.B. Bonded Locksmith, Inc.*, 143 Ohio App.3d 321, 330-31, 757 N.E.2d 1242, 1249 (1st Dist. 2001) (four-year limitation period applies to abuse of process and invasion of privacy claims). Ohio Rev. Code § 2305.11(A), however, is a specific statute that sets forth a one-year limitation period for distinct causes of action. It states:

(A) An action for *libel, slander, malicious prosecution, or false imprisonment, an action for malpractice other than an action upon a medical, dental, optometric, or chiropractic claim, or an action upon a statute for a penalty or forfeiture* shall be commenced within one year after the cause of action accrued, provided that an action by an employee for the payment of unpaid minimum wages, unpaid overtime compensation, or liquidated damages by reason of the nonpayment of minimum wages or overtime compensation shall be commenced within two years after the cause of action accrued.

Accordingly, this statute applies to particular causes of action included in the statute. It has no application to causes of action that are not included within the statute. Had the legislature intended to restrict claims for negligent misidentification to a one-year limitation, it would have expressed this intention by including it within R.C. 2305.11(A) or other statutory provision. this negligence claim.

The claim for negligent misidentification sounds in negligence and is not included in Ohio Rev. Code § 2305.11(A) or any other statute that would alter the general two-year limitation period that attaches to negligence claims or four-year period that attaches to other torts. This is consistent with the decisions of Ohio courts that have addressed the issue. The defendants in *Wigfall* argued that the plaintiff's claims for negligent misidentification were essentially claims for defamation because they related to speech and the false implication of an individual to a criminal act and, therefore, should be controlled by the one-year limitation period that controls claims for defamation. They further argued that the one-year time period for asserting a defamation claim had expired and, thus, the plaintiff's claims were time-barred. The court, however, rejected that argument and by default applied Ohio's four-year limitation period for certain other torts. *See Wigfall*, 107 Ohio App.3d at 73, 669 N.E.2d 313. Indeed, in rejecting that argument, the court explained, "[t]he one-year statute of limitations applicable to a defamation claim is not applicable to this separate cause of action." *Id.*, fn. 4. Ohio courts have ruled that while defamation claims are subject to a one-year limitation period, claims for negligent misidentification are not. This Court need not determine whether the two-year or four-year period applies. Respondents have filed this claim well within either period.

B. IS THE DOCTRINE OF ABSOLUTE PRIVILEGE APPLICABLE TO CLAIMS OF NEGLIGENT MISIDENTIFICATION AND, IF SO, DOES IT EXTEND TO STATEMENTS MADE TO LAW ENFORCEMENT OFFICERS IMPLICATING ANOTHER PERSON IN CRIMINAL ACTIVITY?

1. *The Doctrine of Absolute Privilege Does Not Apply To Negligence Claims Because There is No Policy That Allows A Person To Negligently Provide Knowingly False and Inaccurate Information to Law Enforcement.*

Petitioners are expected to argue that because there may be a privilege that protects against certain claims for defamation in the context of a judicial proceeding, there must be a similar defense in the negligence context when a person negligently and wrongfully provides inaccurate and harm-producing information to law enforcement. This is not a defamation action, and, Ohio courts have made clear that no such defense exists in the context of a negligence claim. In *Wigfall*, the court was confronted with an identical argument, and stated:

Turning to the final argument of the bank, we acknowledge that public policy does encourage citizens to cooperate with investigating authorities to identify perpetrators of crime. However, we are unwilling to extend public policy to such an extent that due care need not be used when information is supplied to investigating authorities. The serious consequences which accompany an individual being identified as a suspected criminal require the imposition of a duty to use due care on those who give information to assist investigating authorities. The summary judgment granted to the bank for appellant's claim for negligent identification is reversed.

Id. at 318. *See also, Breno*, 2003-Ohio-4051, ¶ 19 (“This tort [negligent identification] includes providing false information to authorities that another has committed a crime. As courts have recognized, a person owes a duty to use due care when providing information to the authorities which indicates a person has committed a crime.”) (citations omitted and alteration added); *Barilla*, 144 Ohio App.3d at 534, 760 N.E.2d 898 (explaining that an actionable claim for negligent misidentification that requires that the negligent identification be made to law enforcement.) Accordingly, in the context of negligent misidentification, there is no immunity or privilege relating to the false or negligent misidentification of a person to law enforcement. In fact, for negligent misidentification claims to be actionable at all, the statements must be made to law enforcement, as discussed in more detail below.

Indeed, the only immunity that has been recognized in defense to a claim for negligent identification is one for Ohio Political Subdivision Tort Immunity pursuant to R.C. 2744.03. *See Cummerlander*, 86 F.Supp.3d at 826 (recognizing the Ohio common law tort of negligent identification but granting summary judgment because each of the involved actors were provided state law immunity as they were governmental actors carrying out a governmental function at the time the identification was made); *cf. Sampson v. Cuyahoga Metro. Hous. Auth.*, 131 Ohio St. 3d 418, 423, 2012-Ohio-570, 966 N.E.2d 247, 252, ¶ 19 (holding that employee’s claim against political subdivision for negligent misidentification could proceed under exception to political subdivision immunity exception set forth at R.C. 2744.09(B) because the facts of the claim arose from her employment relationship with the political subdivision.) Petitioners were not governmental actors and are afforded no state law immunity for their conduct.

2. *Even If Respondents Claims Were Analyzed Under A Defamation Standard, Petitioners’ Conduct Would Not Be Privileged.*

Even if the Court was to evaluate this case through the lens of a defamation analysis (which it should not do as this is a negligence action), Petitioners would not be entitled to immunity. Ohio law recognizes two types of immunity: qualified and absolute. *M.J. DiCorpo, Inc. v. Sweeney*, 69 Ohio St.3d 497, 505, 634 N.E.2d 203 (1994). Absolute immunity protects the speaker for all statements that “bears some reasonable relation to the activity reported.” *See e.g. Lasater v. Vidahl*, 2012-Ohio-4918, 979 N.E.2d 828, 831, ¶ 11. In contrast, qualified immunity is situational, depending on the relationship of the speaker to the listener, and can be defeated by a showing of malice. *See A & B-Abell Elevator Co. v. Columbus/ Cent. Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 11, 651 N.E.2d 1283, 1292 (1995).

No immunity applies to Petitioners’ conduct. Absolute immunity is inappropriate as Petitioners’ conduct does not reasonably relate to a proper purpose and was made to law

enforcement. Qualified immunity is not applicable as Petitioners acted with malice in falsely reporting criminal conduct to law enforcement.

3. *The Supreme Court of Ohio Has Never Applied Absolute Immunity to Statements Made to Law Enforcement.*

There is no absolute privilege for purposefully, knowingly, or negligently providing false information to law enforcement. Absolute privilege confers civil immunity upon the speaker even if he makes a “false, defamatory statement ... with actual malice, in bad faith and with knowledge of its falsity; whereas the presence of such circumstances will defeat the assertion of a qualified privilege.” *M.J. DiCorpo*, Ohio St.3d, at 505. Due to potential abuse, “[t]he class of occasions where the publication of defamatory [sic] matter is absolutely privileged is, however, confined within narrow limits, and the courts as a rule have steadily refused to enlarge those limits.” *Shade v. Bowers*, 93 Ohio Law Abs. 463, 199 N.E.2d 131, 134 (C.P. 1962); *see also M.J. DiCorpo*, 69 Ohio St.3d, at 505 (“[O]ccasions of absolute privilege are few and that the tendency is to limit them rather strictly to the following types of occasions: (1) [legislative proceedings]; (2) judicial proceedings in established courts of justice; (3) official acts of the chief executive officers...; and (4) [military acts]”).

In fact, this Court has never recognized that absolute privilege applies to statements made to police. *See Dehlendorf v. Gahanna*, 786 F.Supp.2d 1358, 1365 (S.D. Ohio 2011) (“**the Court believes the Supreme Court of Ohio would not consider statements made to the police part of a ‘judicial proceeding’ and therefore would not extend absolute immunity**”) (emphasis added).³

Furthermore, this Court has stressed a limited application of absolute immunity by not creating a

³ Ohio law is split concerning whether statements provided to law enforcement are subject to a common law privilege. In *Olsen v. Wynn*, 11th Dist. Ashtabula No. 95–A–0078, 1997 WL 286181 (May 23, 1997), the Eleventh District Court of Appeals rejected Kathryn Olsen's argument that the criminal allegations she and her husband reported to a sheriff were privileged. The court distinguished *Sweeney* because “the Olsens made their statements to the county sheriff and several of his detectives, not the county prosecutor.” *Id.* at *5. The Eighth District Court of Appeals drew a similar distinction in *Scott*, 2003-Ohio-3353 at ¶ 11 (“[D]raw[ing] a line between giving a statement to the police at the scene of a crime and giving a sworn affidavit to a prosecutor.”).

new category for falsehoods in affidavits, but by couching the newly recognized immunity into the previously recognized category of judicial proceedings. *DiCorpo*, 69 Ohio St.3d, at 506 (“Clearly, if the filing of a grievance with a local bar association is part of a ‘judicial proceeding,’ the same must also be true of an affidavit filed with a county prosecutor”). In sum, the doctrine of absolute immunity is limited, narrowly interpreted, rarely expanded, and not applicable to the circumstances of this case.

Moreover, Ohio courts have explicitly found that absolute immunity does not apply to falsehoods provided to law enforcement for an improper purpose. In *Scott v. Patterson*, 8th Dist. Cuyahoga No. 81872, 2003-Ohio-3353 ¶ 14-16, an unknown third-party damaged the defendant, Ruben Patterson’s vehicle. *Id.* at ¶ 4. Lewis observed the third-party that damaged the defendant’s car, but refused to identify him to Patterson. *Id.* Enraged, Patterson punched Lewis and subsequently framed Scott when the police arrived. *Id.* The police investigated Scott, arrested him, charged him with assault, and brought him to trial where a jury acquitted him. *Id.* at ¶ 5. Scott then sued Patterson for falsely implicating him in Patterson’s assault. *Id.* ¶ 6. At trial, the Cuyahoga Court of Common Pleas dismissed Scott’s claims against Patterson on the basis of absolute immunity. *Id.* On appeal, the Eighth District Court of Appeals reversed, finding that “Patterson’s statements frame Scott for the crime and cannot be said to bear a reasonable relation to the activity reported.” *Id.* at ¶ 14. Elaborating, the court wrote:

In *Bigelow*, the Supreme Court of Ohio defined what “reasonable relation to the activity reported” meant. The defamatory statement must be pertinent to the inquiry. “To be pertinent and material it (privileged statement) must tend to prove or disprove the point to be established, *and have substantial importance or influence in producing the proper result.*”

From what we can glean from the record, Patterson picked Scott out of the crowd that had gathered in the Flats and framed him for the crime. The inquiry is a reasonable relation, not an unreasonable one. Here, Patterson's statement... *is*

designed to frame, not to aid in the proper investigations of the case, and it does not have the indicia of false or mistaken information contemplated in Dicorpo.

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

C. IS THE DOCTRINE OF QUALIFIED PRIVILEGE APPLICABLE TO CLAIMS OF NEGLIGENT MISIDENTIFICATION?

1. The Doctrine Of Qualified Privilege Does Not Apply To Negligence Claims And Affords No Protection For Petitioners' Negligent Acts.

As stated previously, the qualified privilege analysis applies only to defamation claims and has no application to Respondents' negligence claims. This is due to the different elements of proof, measure of damages, and policy concerns that distinguish negligence from defamation claims. In the defamation context, however, only qualified privilege is available for statements made to law enforcement, and claims of qualified privilege can be defeated by a showing of malice.

Ohio Courts have generally held that in the defamation context statements made to police, at the most, are entitled to a qualified privilege analysis. *Mason v. Bexley City School District*, 2010 WL 987047, *29 (S.D. Ohio 2010) ("Assuming that plaintiff has established a *prima facie* case of defamation [regarding statements made to law enforcement] ..., the question becomes whether or not Defendants ... are entitled to qualified immunity"); *Tourlakis v. Beverage Distributors, Inc.*, 8th Dist. No. 81222, 2002-Ohio-7252, at ¶18 ("Because the qualified privilege applies to the alleged defamatory information that Beverage Distributors supplied to the authorities, plaintiffs must make these additional showings."); *Popke v. Hoffman*, 21 Ohio App. 454, 456, 153 N.E. 248 (6th Dist. 1926); *Stokes v. Meimaris*, 111 Ohio App.3d

176, 675 N.E.2d 1289 (8th Dist. 1996); *Hartung–Teter v. McKnight*, 3rd. Dist. No. 4–91–2, 1991 WL 117274, at *1 (June 26, 1991); *Paramount Supply Co. v. Sherlin Corp.*, 16 Ohio App.3d 176, 475 N.E.2d 197 (8th Dist. 1984) (applying qualified immunity in statements made to customs agents); *Tillimon v. Sullivan*, 6th Dist. No. L–87–308, 1988 WL 69163 (June 20, 1988).

In sum, negligence claims are distinct from defamation claims. They represent different policy considerations, elements of proof, and provide for potentially different measures of damages than defamation claims. As it is a negligence claim, the applicable statute of limitations for a negligent misidentification claims is either two or four years, but that issue need not be decided by this Court as Respondents’ claims were filed within two years of the alleged misconduct. Furthermore, because Respondents have brought only a negligence claim, the Court need not analyze the various privileges that may be applicable in certain settings for defamation claims. If, however, the Court sees fit to analyze these various privileges, it should conclude that under no circumstances are false statements provided to law enforcement and made outside the confines of a courtroom absolutely privileged. An absolute privilege over such communications would essentially insulate all speakers for actions and communications that are made for the improper purpose of framing an individual by falsely implicating him or her in a criminal activity. Similarly, because this is a negligence action, there is no qualified privilege. If the Court believes, however, that qualified privilege applies to negligence actions such as this, as opposed to defamation claims which is the context in which it has previously been applied, then Petitioners are not entitled to qualified immunity on the facts of this case as qualified immunity can be defeated by a showing of malice.

IV. CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Court decline to answer the certified questions of law.

Respectfully submitted,

/s/Michael Hill

MICHAEL A. HILL (0088130)

DENNIS R. LANSDOWNE

SPANGENBERG SHIBLEY & LIBER LLP

1001 Lakeside Avenue East, Suite 1700

Cleveland, Ohio 44114

(216) 696-3232

(216) 696-3924 (FAX)

mhill@spanglaw.com

dlansdowne@spanglaw.com

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

CERTIFICATE OF SERVICE

I hereby certify on this 6th day of January 2016, a true and correct copy of the foregoing was sent via regular U.S. Mail, postage prepaid, to:

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

Counsel for Petitioner Dylan Parfitt

Counsel for Petitioner Michael Groff

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

/s/Michael Hill

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

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