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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 U.S. Southern District Court of Ohio
vs.	:	
		Trial Court Case No. 3:15-CV-96
University of Dayton, et al.	:	
Petitioners/Respondents.	:	

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STATEMENT OF THE FACTS

In the early morning hours of March 14, 2013, plaintiffs/respondents Andrew Foley ("Andrew"), Evan Foley ("Evan"), and Michael Fagans ("Michael"), knocked on the door of a townhouse located on the University of Dayton's campus, mistakenly believing that it was the home of their friend. (Federal Court Order Certifying Questions of Law at appx. pg. 6.) The home actually belonged to defendants/petitioners Dylan Parfitt ("Parfitt") and Michael ("Groff"). (*Id.*) Groff answered the door and informed respondents that they were at the wrong home. (*Id.*) Groff then allegedly slammed the door in respondents' faces, 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. (*Id.*)

As the respondents started to leave, Groff reopened his front door and informed them that he had contacted the University of Dayton Police Department. (*Id.*) Shortly thereafter, Evan was stopped by defendant University of Dayton Police Sergeant Thomas Ryan ("Sgt. Ryan"). (*Id.*) Michael and Andrew, however, were not stopped and continued walking. (*Id.*) When Sgt. Ryan asked Evan if he knew why he was being stopped, Evan responded "of course" and acknowledged that Groff had called the police. (*Id.*) Sgt. Ryan informed Evan that he was being arrested for burglary and placed him under arrest. (*Id.*)

After Evan was arrested and taken to jail, Sgt. Ryan spoke with Parfitt and Groff regarding the potential criminal nature of respondents' actions. (*Id.*) The next day, Andrew and Michael were also arrested for burglary. (*Id.*) The criminal cases against Andrew and Michael were eventually dismissed, and the criminal charge against Evan was otherwise resolved. (*Id.*)

On March 13, 2015, almost two full years after the incident had occurred, respondents 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. (*Id.* at appx. pg. 7.) Respondents also brought a single claim against Parfitt and Groff for "negligent misidentification" under Ohio law, alleging that Parfitt and Groff had negligently identified them as being responsible for a crime by reporting to the police that respondents had refused to leave their property after being asked to do so. (*Id.*)

Parfitt and Groff moved for judgment on the pleadings or, in the alternative, certification to this Court of unresolved questions of law pertaining to the defense of absolute privilege and the tort of negligent misidentification. (*Id.*) On December 7, 2015, Federal District Court Judge Walter Rice, recognizing that there were potentially dispositive unresolved questions of law that needed to be decided in order to determine the validity of respondents' claims, granted the request for certification to this Court and stayed the underlying federal litigation pending a determination of the certification issues. (*Id.* at appx. pgs. 5-24.) On February 24, 2016, after preliminary briefing, this Court accepted review of the following three questions of law:

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?

ARGUMENTS

I. THE FIRST ARGUMENT – STATUTE OF LIMITATIONS

The First Certified Question of Law

What is the statute of limitations of negligent misidentification?

The first certified question asks the Court to determine the statute of limitations in Ohio for the tort of negligent misidentification. It is undisputed that respondents filed their claim more

than one year after Parfitt and Groff allegedly communicated false information to the police, and there is no disagreement that respondents' claims against Parfitt and Groff would be barred if the one year statute of limitations in R.C. 2305.11(A) is found to be applicable to negligent misidentification claims. Thus, as Judge Rice found, this issue is appropriately before the Court since it is a potentially dispositive question this Court has never answered and for which there is no clear consensus among the Ohio District Courts of Appeals.

The First Proposition of Law

In Ohio, the statute of limitations for a negligent identification/misidentification claim is one year per R.C. 2305.11(A).

"In determining which statute of limitations should be applied to a particular cause of action, this court has held that 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.**" *Lawyers Coop. Publishing Co. v. Muething*, 65 Ohio St.3d 273, 277-278 (1992) (emphasis added). "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. Thus, in keeping with the guidance provided by this Court, Ohio courts have consistently recognized that there is a one year statute of limitations for claims premised upon an allegedly false communication to others regardless of how such claims are classified by the plaintiff in the complaint. *Fourtounis v. Verginis*, 8th Dist. No. 102025, 2015-Ohio-2518, ¶ 30; *Cromartie v. Goolsby*, 8th Dist. No. 93438, 2010-Ohio-2604, ¶ 25-30; *Waters v. Allied Machine & Eng. Corp.*, 5th Dist. No. 02AP040032, 2003-Ohio-2293, ¶ 97 (recognizing that the one year statute

of limitations for defamation applies to an intentional infliction of emotional distress claim premised on fabricated statements accusing the plaintiff of engaging in immoral conduct and prostitution); *Breno v. City of Mentor*, 8th Dist. No. 81861, 2003-Ohio-4051, ¶ 9-13; *Singh v. ABA Pub./Am. Bar Ass'n*, 10th Dist. No. 02AP-1125, 2003-Ohio-2314, ¶ 27 (finding that an invasion of privacy claim based on the circulation of allegedly false information is subject to the one year statute of limitations for defamation claims); *Worpenberg v. The Kroger Co.*, 1st Dist. No. C-010381, 2002-Ohio-1030, 2002 WL 362855, at *5-*6 (holding that negligence claims arising out of false accusations of theft are "disguised defamation" claims and have a one year statute of limitations).

Moreover, courts have specifically recognized that claims based on statements made to law enforcement officers implicating the plaintiff in criminal activity are subject to the one year statute of limitations for defamation claims. *Fourtounis* at ¶ 30; *Cromartie* at ¶ 27-30; *Breno* at ¶ 9-13 (holding that allegations the defendant negligently provided false information to the police accusing plaintiff of possessing child pornography is a defamation claim with a one year statute of limitations since "[t]he providing of information is a communication that forms the basis of the claim"). In fact, in *Cromartie* the Eighth District specifically rejected plaintiff's attempt to avoid the one year statute of limitations by re-framing his defamation claim as a claim for negligent identification. *Cromartie* at ¶ 27-30.

The General Assembly has expressly limited the availability of defamation claims by instituting a brief filing period for such claims. Therefore, it would be unfair and contrary to both law and public policy, to allow a plaintiff to bring a claim sounding in defamation under the guise of negligence. *Breno* at ¶ 12 (quoting *Lusby v. Cincinnati Monthly Publishing Corp.*, 904 F.2d 707, 1990 WL 75242, at *4 (6th Cir. 1990)). "[W]here a claim is expressly premised upon

a 'communication' of false information, it is properly characterized as a 'disguised defamation' claim" and is thus subject to a one year statute of limitations. *Breno* at ¶ 12.

Respondents do not challenge the fact that their claim against Parfitt and Groff is based on allegedly false information communicated to police officers. Even the case law cited by respondents in support of their argument that a cause of action exists for negligent identification/misidentification[1] holds that the tort is based on "**giving false information** which results in the arrest and imprisonment of another". *Walls v. Columbus*, 10 Ohio App.3d 180, 182-83, (10th Dist. 1983) (emphasis added). Thus, because one of the elements of a negligent misidentification claim is proving that the defendant **communicated false information** regarding the criminal nature of the plaintiff's actions, the actual nature of the claim, regardless of the title given to it, sounds in defamation and it should be subject to the one year statute of limitations in R.C. 2305.11(A). *Fourtounis* at ¶ 30; *Cromartie* at 25-30; *Waters* at ¶ 97; *Breno* at ¶ 9-13; *Singh* at ¶ 27; *Worpenberg*, 2002 WL 362855, at *5-*6.

In an attempt to avoid this conclusion, respondents rely on a single case decided by the Sixth District over twenty years ago, *Wigfall v. Soc. Natl. Bank*, 107 Ohio App.3d 667 (1995). While the *Wigfall* decision admittedly held that the general four year statute of limitations in R.C. 2305.09(D) should apply to claims of negligent identification, that decision does not contain any substantive discussion whatsoever concerning the test established by this Court for determining the correct statute of limitations. Specifically, there is no discussion within *Wigfall* regarding an analysis of the underlying nature of a negligent identification claim. *Id.* at 671-73. The only analysis conducted in *Wigfall* was a review of two other previous cases recognizing a cause of action where a party communicates false information implicating another person in

[1] The terms negligent identification and negligent misidentification are used interchangeably in the case law when referring to the tort based on improperly identifying another individual as being responsible for a crime.

criminal activity. *Id.* However, neither of those two prior cases had in any manner discussed what the applicable statute of limitations is for a negligent identification/misidentification claim. *See Mouse v Central Sav. & Trust Co.*, 120 Ohio St. 599, 602-611 (1929); and *Walls*, 10 Ohio App.3d at 182.[2] The court in *Wigfall* did exactly what this Court has consistently and repeatedly instructed courts not to do, and it relied solely on the form of the claim being brought without any consideration of the underlying nature and substance of the claim. *Wigfall*, 107 Ohio App.3d at 671-73. Simply recognizing that a cause of action exists and has the word negligence within its title is not sufficient for determining the applicable statute of limitations for the cause of action. *Lawyers Coop.*, 65 Ohio St.3d at 277-78. Therefore, not only is *Wigfall* not binding on this Court, it is not even persuasive authority as to the question of what is the appropriate statute of limitations for negligent identification/misidentification claims in Ohio.

Irrespective of how respondents' claim against Parfitt and Groff is captioned, the nature of the claim involves damages arising out of allegedly false information communicated to the police. Therefore, the appropriate statute of limitations for that claim is the one year statute for defamation in R.C. 2305.11(A). To hold otherwise and adopt a four year statute of limitations for negligent misidentification claims would create a back door to the one year statute of limitations for defamation claims set by the General Assembly and allow a party to avoid the application of the one year statute, as respondents are attempting to do in this case, merely by including negligence within the caption of their claim. Such an outcome would also unfairly create two distinct and unequal categories of plaintiffs, with persons against whom false accusations of criminal activity are made receiving greater rights and a longer statute than

[2] The *Mouse* and *Walls* cases both predate the concept of absolute privilege as recognized by this Court in *M.J. DiCorpo, Inc. v. Sweeney*, 69 Ohio St.3d 497 (1994) and absolute privilege was neither raised nor addressed in the *Wigall* decision. Thus, none of these three cases are in any manner relevant to the question of whether statements reporting potential criminal activity to police officers are absolutely privileged.

persons against whom any other false accusation is made. This would also require courts to finely parse the allegations in a complaint to determine which involve allegations relating to criminal activity and which do not, with the former enjoying a four year statute of limitations period and the latter being subject to a one year statute. Respondents' argument that claims of negligent misidentification should not be subject to the one year statute of limitations for defamation claims is not only directly contrary to law, it is also contrary to the public policy underlying the statute of limitations and basic notions of equity and judicial economy.

Put simply, because the tort of negligent misidentification requires proving that the defendant communicated false information to another person, its nature is that of a defamation claim, and it should be subject to the one year statute of limitations for such claims. Thus, Parfitt respectfully requests that the Court answer the first certified question by adopting the following proposition of law:

> **In Ohio, the statute of limitations for a negligent identification/misidentification claim is one year per R.C. 2305.11(A).**

II. THE SECOND ARGUMENT – ABSOLUTE PRIVILEGE

<u>The Second Certified Question of Law</u>

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?

The second certified question of law, which is only necessary to address if the Court does not find that negligent misidentification claims are subject to a one year statute of limitations, is a compound question presenting two issues: (1) is the doctrine of absolute privilege only applicable to defamation claims; and (2) does absolute privilege extend to statements made to police officers implicating another person in potential criminal activity. As Judge Rice properly recognized, the answer to these questions are potentially dispositive of respondents' claim

against Parfitt and Groff, since that claim is based on allegedly false statements Parfitt and Groff made to Sgt. Ryan as part of his investigation into whether respondents had engaged in criminal activity during their interaction at Parfitt and Groff's home. (Order Certifying Questions of Law, at appx. pgs 14-20.)

The Second Proposition of Law

The doctrine of absolute privilege is not limited as a defense to only defamation claims and, when it is applicable, the doctrine shields individuals from any and all civil liability regardless of the form of the claim.

The first part of the second certified question misconstrues Parfitt's arguments regarding the application of the absolute privilege doctrine to the claim brought against him. Parfitt is not arguing that the doctrine of absolute privilege should apply to **all** negligent misidentification claims **per se**. Rather, Parfitt is arguing that there is an absolute privilege from any civil liability **regardless of the tort** for statements made to police officers reporting the actual or possible commission of a crime and that bear some reasonable relation to the activity being reported. Thus, while the doctrine of absolute privilege may not be applicable to **every** negligent misidentification claim, it is applicable to negligent misidentification claims based on allegedly false information being communicated to the police, which is the basis for the claim being brought against Parfitt in this case.

Respondents' argument that the doctrine of absolute privilege does not apply to their claim against Parfitt and Groff again seeks to put form over substance. While many of the cases discussing the doctrine of absolute privilege involve defamation claims, that is obviously a function of the fact that defamation is the most common claim that will be brought where an allegedly false statement has been made. There is not, however, any indication that the absolute privilege doctrine is limited as a defense to defamation only.

To the contrary, respondents' argument that the absolute privilege doctrine is limited to the context of a specific tort has been specifically considered and rejected. *Haller v. Borror*, 10th Dist. No. 95APE01-16, 1995 WL 479424 *2-*4 (Aug. 8, 1995) *discretionary appeal not allowed* 74 Ohio St.3d 1500 (1996). In *Haller*, which involved claims of false arrest, false imprisonment, abuse of process, and malicious prosecution, the Tenth District addressed the same argument raised herein by respondents 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.

Haller, 1995 WL 479424, at *2.

Likewise, other courts have recognized that "[t]he 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 v. Cincinnati Enquirer*, 246 F.Supp.2d 876, 882-84 (S.D. Ohio 2003) (emphasis added) *aff'd* 396 F.3d 784 (6th Cir. 2005). Indeed, the absolute privilege recognized in *DiCorpo* has been extended to situations involving a multitude of claims other than defamation. *See Lasater v. Vidahl*, 9th Dist. No. 26242, 2012-Ohio-4918, ¶ 7-13 (false light); *Brunswick v. City of Cincinnati*, No. 1:10-CV-617, 2011 WL 4482373, at *9 (S.D. Ohio Sept. 27, 2011) (malicious

prosecution); *Fair v. Litel Communication, Inc.*, 10th Dist. No. 97APE06-804, 1998 WL 107350, at *3-*6 (Mar. 12, 1998) (malicious prosecution and infliction of emotional distress); *Brown v. Chesser*, 4th Dist. No. 97 CA 510, 1998 WL 28264, at *3-*5 (Jan. 28, 1998) (invasion of privacy); *Haller*,1995 WL 479424, at *2-*4 (false arrest, false imprisonment, abuse of process and malicious prosecution).

In *Lee v. City of Upper Arlington*, 10th Dist. No. 03AP-132, 2003-Ohio-7157, the plaintiff sought to recover for negligence, malice, intentional and fraudulent misrepresentation, abuse of process, malicious prosecution, false arrest, false imprisonment, and defamation. *Id.* at ¶ 5. All of those claims were, however, predicated on allegedly false statements the defendant made to the police implicating plaintiff in criminal activity. *Id.* at ¶ 19. As such, the court found that the absolute privilege recognized in *DiCorpo* was applicable to **all** of the plaintiffs' claims, not just the defamation claim. *Id.*

Additionally, in *DiCorpo*, this Court declined an 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. Such language indicates that this Court has recognized that the absolute privilege in *DiCorpo* is applicable to any claim seeking to impose civil liability and is not, as respondents argue, limited to defamation claims. *Id.*

Moreover, respondents cannot cite a single case holding either that the doctrine of absolute privilege is only applicable to defamation claims or that the tort of negligent misidentification is for some reason impervious to this doctrine. In fact, the *Mouse* case, which is the case respondents claim first established the tort of negligent misidentification, was issued

sixty five years before the *DiCorpo* decision, and none of the subsequent cases recognizing the tort of negligent identification/misidentification, even those issued after *DiCorpo*, make any reference at all to the issue of absolute privilege. There is no case law whatsoever holding that the absolute privilege recognized in *DiCorpo* does not apply to a negligent misidentification claim, but there is a plethora of case law, as cited above, holding that the doctrine is applicable regardless of the nature of the claim being brought.

Put simply, "[a]bsolute privilege applies to shield individuals from **civil liability** for statements made to prosecutors or police reporting possible criminal activity." *Savoy v. Univ. of Akron*, 10th Dist. No. 13AP-696, 2014-Ohio-3043, ¶ 20 (emphasis added). Respondents' contention that the doctrine does not apply to a claim of negligent misidentification is contrary to law, logic, and public policy. There is no sense in holding that statements are absolutely privileged from all manner of civil liability, except for one isolated tort. Such an outcome would allow parties to avoid the application of absolute privilege simply through the name of the tort being alleged and would undermine the purpose of the doctrine, which is to encourage citizens to cooperate with the police and provide information without fear of incurring civil liability. Accordingly, Parfitt respectfully requests the Court to answer the first part of the second certified question by adopting the following proposition of law:

> **The doctrine of absolute privilege is not limited as a defense to only defamation claims and, when it is applicable, the doctrine shields individuals from any and all civil liability regardless of the form of the claim.**

<u>The Third Proposition of Law</u>

The absolute privilege from civil liability recognized in *M.J. DiCorpo, Inc. v. Sweeney*, 69 Ohio St.3d 497 (1994) extends to statements made to police officers.

The second part of the second certified question of law pertains to the issue of whether the absolute privilege in *DiCorpo* extends to statements made to police officers. As stated

above, an answer to this question is potentially dispositive because the lone claim against Parfitt and Groff is based solely on statements they provided to Sgt. Ryan allegedly falsely implicating respondents in criminal activity during Sgt. Ryan's investigation into the nature of respondents' actions at Parfitt and Groff's home. (Order Certifying Questions of Law, at appx. pgs 6-7.)

This Court has recognized that absolute privilege protects statements 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. This absolute privilege applies to even statements that are knowingly false, made with actual malice, or in bad faith. *Id.* at 505-06.

The majority of the courts, both state and federal, that have considered the breadth of *DiCorpo* have found that the absolute privilege recognized therein extends to statements made to police officers. *Savoy* at ¶ 20 ("Absolute privilege applies to shield individuals from civil liability for statements made to prosecutors or police reporting possible criminal activity."); *Morgan v. Cmty. Health Partners*, 9th Dist. No. 12CA010242, 2013-Ohio-2259, ¶ 30-40; *Lasater* at ¶ 7-13; *Lee* at ¶ 14-19; *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."); *Lee* at ¶ 14-19; *Fair*, 1998 WL 107350, at *3-*6 (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*, 1998 WL 28264, at *3-*5; *Haller*, 1995 WL 479424, *2-*4 (recognizing absolute privilege for statements to the police concerning the plaintiff's possible commission of a crime); *see also 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).

Several other states have gone even further and refused to even recognize a claim at all for negligent identification of a criminal suspect. *See Jaindl v. Mohr*, 541 PA. 163, 167 (1995) (finding that "the public interest in investigation of crime outweighs the recognition of a negligence action for negligent identification of a suspect" and joining "the ranks of other jurisdictions who have addressed this matter and have refused to recognize a cause of action for negligent identification.") (citing *Campbell v. City of San Antonio*, 43 F.3d 973 (5th Cir. 1995); *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"); *LaFontaine v. Family Drug Stores, Inc.*, 33 Conn. Sup. 66, 76 (1976) (quoting Restatement 3 Torts § 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"); *Manis v. Miller*, 327 So.2d 117 (Fla. 1976); *Shires v. Cobb & Mayfair Market*, 271 Or. 769 (1975)); *Jones v. Autry*, 105 F.Supp.2d 559, 561-562 (S.D. Miss. 2000) (declining to recognize a claim for negligent misidentification); *see also Haberg v. Cal. Fed. Bank FSB,* 32 Cal.4th 350, 360-366 (2004) (holding that an absolute privilege applies to statements made in connection with official proceedings).

There are admittedly two outlier decisions from Ohio courts of appeals finding that the absolute privilege in *DiCorpo* does not extend to statements made to police officers. *Olsen v. Wynn*, 11th Dist. No. 95-A-0078, 1997 WL 286181 (May 23, 1997); *Scott v. Patterson*, 8th Dist. No. 81872, 2003-Ohio-3353. However, neither of those cases provided the sort of in depth analysis of the *DiCorpo* decision as was set forth in many of the cases cited above finding otherwise.

In *Olsen*, the trial court held that the absolute privilege recognized in *DiCorpo* applies to statements made to the police as well as prosecutors. *Olsen*, 1997 WL 286181, at *5. The Eleventh District overturned that decision on the basis that the situation in *Olsen* was "distinguishable" from the situation in *DiCorpo* since the statements in *Olsen* were made to law enforcement rather than the prosecutor. *Id.* There was not, however, any substantive discussion of the underlying public policy set forth in *DiCorpo*, nor any discussion of the *Haller* decision, which had been issued by the Tenth District two years earlier and had extended the application of the absolute privilege in *DiCorpo* to statements made to law enforcement officers. *Id.*

As in *Olsen*, the trial court in *Scott* found that the defendant's statements to the police allegedly accusing plaintiff of criminal activity were protected by absolute privilege pursuant to *DiCorpo*. *Scott* at ¶ 1. Reversing that decision, the Eighth District drew a bright line between

giving a statement to the police and giving a statement to a prosecutor based on a federal court decision from the Sixth Circuit holding that a person could only be held liable under Ohio law for malicious prosecution if they provided false information. *Id.* at ¶ 12. The Eighth District somehow extrapolated from this point of law that the investigation of a crime is not part of the judicial proceedings, and thus *DiCorpo* does not apply to statements made to the police. *Id.* The court recognized that its decision was in direct conflict with the Tenth District's decisions in *Haller* and *Fair*, but it did not provide any analysis as to why those decisions were incorrect, nor did it engage in any analysis regarding the public policy set forth in *DiCorpo*. *Id.*

The absolute privilege recognized in *DiCorpo*, "extends to every step in the proceeding, from beginning to end." *Brunswick*, 2011 WL 4482373, at *9 (citing *DiCorpo*, 69 Ohio St.3d at 506). If the beginning of the judicial process includes statements made to a prosecutor implicating another person in a crime, as this Court found in *DiCorpo*, then it logically should also include such statements made to a police officer. It would be anomalous to recognize an absolute privilege from civil liability for statements made to a prosecutor accusing another of a crime, but denying such protection to persons making the same statements to a police officer, which occurs more frequently and regularly. *Lasater* at ¶ 10. As noted by Judge Dlott, "[t]he 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." *Brunswick*, 2011 WL 4482373, at *9 n.5.

Furthermore, the same public policies acknowledged 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 ("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; *Ventura*, 246 F.Supp.2d at 882 ("The Ohio appellate courts have subsequently interpreted the absolute privilege set forth in *DiCorpo* broadly and have applied it in circumstances other than those presented in that case.") The difficulty police officers already experience in obtaining information from witnesses to a crime would be exponentially increased if the threat of a civil law suit was added to other pressures and concerns witnesses and victims of crime already endure. Additionally, an absolute privilege for statements made to the police regarding potential criminal activity is in keeping with the mantra of this era of domestic and global terrorism; "if you see something, say something." This is particularly true when considering the notorious unreliability of eye witness testimony. Without the protections of an absolute privilege, citizens will be much more hesitant to "say something" for fear of getting sued should they provide inaccurate or incorrect information.

The absolute privilege in *DiCorpo* should be extended to statements made to police officers. Thus, Parfitt respectfully requests that the Court answer the second part of the second certified question by adopting the following proposition of law:

> **The absolute privilege from civil liability recognized in M.J. DiCorpo, Inc. v. Sweeney, 69 Ohio St.3d 497 (1994) extends to statements made to police officers.**

III. THE THIRD ARGUMENT – QUALIFIED PRIVILEGE

The Third Certified Question of Law

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

If the Court finds either that negligent misidentification has a one year statute of limitations or that the absolute privilege in *DiCorpo* applies to police officers, then the third certified question of law becomes moot and need not be answered. However, if the Court were

to hold otherwise as to the first two questions, then it is Parfitt's position that, at the very least, he is entitled raise the defense of qualified privilege as to the claim against him.

The Fourth Proposition of Law

Claims for negligent identification/misidentification based on statements made to police officers implicating another person in potential criminal activity are entitled to a qualified privilege.

Prior to *DiCorpo*, Ohio Courts recognized that statements made to a police officer implicating another in criminal activity were protected by at least a qualified privilege. *Popke v. Hoffman*, 21 Ohio App. 454, 456 (6th Dist. 1926), *Stokes v. Meimaris*, 111 Ohio App.3d 176, 189-90 (8th Dist. 1996); *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); *Hartunge-Teter v. McKnight*, 3d Dist. No. 4-91-2, 1991 WL 117274, at *1 (June 26, 1991); *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) (court endorsed a trial court's statement that information given to a police officer is protected under a qualified privilege). 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 qualified privilege. *Dehlendorf v. City of Gahanna, Ohio*, 786 F.Supp.2d 1358, 1363-1365 (S.D. Ohio 2011).

Respondents' argument that the defense of qualified privilege is not applicable to a negligent misidentification claim continues to seek to promote the form of this claim over its substance. As with the doctrine of absolute privilege, the doctrine of qualified privilege applies

to all claims for civil liability based on allegedly providing false information to the police, regardless of the name given to the claim by the plaintiff.

Thus, if the Court finds that that claims of negligent misidentification are not subject to a one year statute of limitations and that absolute privilege is not applicable to the claim against Parfitt, then Parfitt respectfully requests the Court to adopt the following proposition of law:

> **Claims for negligent identification/misidentification based on statements made to police officers implicating another person in potential criminal activity are entitled to a qualified privilege.**

IV. CONCLUSION

Respondents' negligent misidentification claim requires proving that Parfitt and Groff communicated false information to another person implicating them in criminal activity. Thus, the underlying nature of that claim, although couched as a negligence claim, sounds in defamation and the first certified question should be answered as follows:

In Ohio, the statute of limitations for a negligent identification/misidentification claim is one year per R.C. 2305.11(A).

Additionally, the doctrine of absolute privilege protects a defendant from any and all civil liability regardless of the form of the claim under which the plaintiff seeks to recover. Accordingly, the doctrine is applicable to claims of negligent misidentification and the first part of the second certified question should be answered as follows:

The doctrine of absolute privilege is not limited as a defense to only defamation claims and, when it is applicable, the doctrine shields individuals from any and all civil liability regardless of the form of the claim.

Furthermore, the absolute privilege recognized by this Court in *DiCorpo* for statements made to prosecutors reporting potential criminal activity should be extended to statements made to police officers. Such a finding is in keeping with the majority of the Courts that have considered the issue and interpreted *DiCorpo*. It is also in keeping with the public policy

concerns underlying the *DiCorpo* decision, which include encouraging citizens to report potential criminal activity to the police and aiding in the investigation of potential criminal activity. Therefore, the second part of the second certified question should be answered as follows:

The absolute privilege from civil liability recognized in M.J. DiCorpo, Inc. v. Sweeney, 69 Ohio St.3d 497 (1994) extends to statements made to police officers.

Finally, at the very least, there is a qualified privilege for statements made to police officers implicating persons in potential criminal activity. As such, in the event the Court does not agree that negligent identification/misidentification claims are subject to a one year statute of limitations and does not find that the doctrine of absolute privileged applies to statements made to police officers, then the third certified question must be addressed and it should be answered as follows:

Claims for negligent identification/misidentification based on statements made to police officers implicating another person in potential criminal activity are entitled to a qualified privilege.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served via regular mail upon the following on the 1st day of April 2016: **Michael A. Hill**, 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 issue before this Court regarding the certified questions of law: **Mary Ann Poirier**, general counsel for defendant University of Dayton; **Caroline H. Gentry**, co-counsel for defendants University of Dayton; and **Thomas Burlrhardt; 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 A. WAGNER
JARED A. WAGNER

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ANDREW FOLEY, *et al.*, Plaintiffs,	:	
v.	:	Case No. 3:15-cv-96 JUDGE WALTER H. RICE
UNIVERSITY OF DAYTON, *et al.*, Defendants.	:	

CERTIFICATION OF QUESTIONS OF STATE LAW
TO SUPREME COURT OF OHIO

Pursuant to Rule 9.01 of the Rules of Practice of the Supreme Court of Ohio, the Court certifies three questions of state law to the Supreme Court of Ohio.

I. Factual Background, Procedural History, and Reasons for Certification

The relevant factual background and procedural history of this case, along with the reasons for certification, are set forth in this Court's Decision and Entry Sustaining in Part Defendant Dylan Parfitt's and Defendant Michael R. Groff's Motions for Judgment on the Pleadings or, in the Alternative, to Certify Questions of Law to the Ohio Supreme Court. A copy of said Decision and Entry is attached to this Order.

II. Questions Certified

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. Designation of Moving Party

The Court designates Defendants Dylan Parfitt and Michael R. Groff as the moving parties.

IV. Attorneys' Contact Information

Plaintiffs Andrew Foley, Evan Foley, and Michael Fagans are represented by:

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Defendant Michael R. Groff is represented by:

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The following additional defendants are not directly involved in the issues certified:

****Defendants University of Dayton and Thomas Burkhardt are represented by:***

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****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 are represented by:***

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Date: December 7, 2015

WALTER H. RICE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ANDREW FOLEY, *et al.*,	:	
Plaintiffs,		Case No. 3:15-cv-96
v.	:	JUDGE WALTER H. RICE
UNIVERSITY OF DAYTON, *et al.*,		
Defendants.	:	

DECISION AND ENTRY SUSTAINING IN PART DEFENDANT DYLAN PARFITT'S AND DEFENDANT MICHAEL R. GROFF'S MOTIONS FOR JUDGMENT ON THE PLEADINGS OR, IN THE ALTERNATIVE, TO CERTIFY QUESTIONS OF LAW TO THE OHIO SUPREME COURT (DOCS. ##26, 28); SUSTAINING DEFENDANT DYLAN PARFITT'S AND DEFENDANT MICHAEL R. GROFF'S MOTIONS FOR A STAY (DOCS. ##27, 29); STAYING PROCEEDINGS AS TO THESE TWO DEFENDANTS PENDING CERTIFICATION TO OHIO SUPREME COURT

This matter is currently before the Court on several motions filed by Defendants Dylan Parfitt and Michael R. Groff: (1) Motions for Judgment on the Pleadings or, in the Alternative, to Certify Questions of Law to the Ohio Supreme Court, Docs. ##26, 28; and (2) Motions for a Stay, Docs. ##27, 29. After reviewing the parties' briefs and the relevant case law, the Court concludes that there are several dispositive unresolved questions of state law. Accordingly, the Court sustains Defendants' alternative motions to certify those questions to the Ohio Supreme Court, and stays all proceedings with respect to Defendants Parfitt and Groff.

I. Background and Procedural History

According to the First Amended Complaint, Doc. #3, in the early morning hours of March 14, 2013, Plaintiffs Evan Foley, Andrew Foley and Michael Fagans, knocked on the door of a townhouse located on the campus of the University of Dayton ("UD"), mistakenly believing that this was where their friend lived. Defendant Michael Groff, who was allegedly intoxicated, opened the door. When Evan asked if his friend was at home, Groff allegedly became belligerent and began shouting profanities. Evan, realizing that he was at the wrong townhouse, extended his hand in an effort to apologize, but Groff allegedly slammed the door in his face. Evan knocked once more, and then he and the others turned to leave. After they began walking down the street toward Evan's apartment, Groff re-opened the door and yelled that he had contacted the UD Police Department.

Shortly thereafter, Sergeant Thomas Ryan of the UD Police Department approached Evan. Michael Fagans and Andrew Foley, who were walking slightly ahead of Evan, kept walking. Sergeant Ryan asked Evan if he knew why he was being stopped. Evan responded, "of course," and indicated that Groff said he had called the police. Ryan then handcuffed Evan and arrested him for burglary. After Evan was taken to jail, Sergeant Ryan interviewed Groff and his roommate, Defendant Dylan Parfitt. The following day, Andrew Foley and Michael Fagans were also arrested for burglary. Ultimately, the criminal charges against Andrew and Michael were dismissed, and the charges against Evan were resolved.

On March 13, 2015, Evan Foley, Andrew Foley and Michael Fagans filed suit against UD and eleven UD Police Department employees, seeking relief under 42 U.S.C. § 1983 for violations of their constitutional rights, and asserting state law claims of false arrest, false imprisonment, malicious prosecution, assault, battery, negligence, negligent hiring, supervision, training and retention, and intentional infliction of emotional distress.

Plaintiffs also asserted claims of "negligent misidentification" against Michael Groff and Dylan Parfitt. Plaintiffs allege that: (1) Groff and Parfitt owed them a duty of care when providing information to law enforcement authorities regarding their involvement in the commission of a crime; (2) Groff and Parfitt reported to UD law enforcement authorities that Plaintiffs had been involved in a criminal act, namely, the refusal to leave their property after being asked to do so, inferred an intent to cause harm, and claimed that they had been involved in a robbery or an attempted robbery; (3) Groff and Parfitt breached their duty of care to Plaintiffs by negligently, improperly identifying them as being responsible for a criminal act; and (4) because of this improper, negligent misidentification, Plaintiffs suffered economic and non-economic damages. Doc. #3, PageID##121-22.

Defendants Groff and Parfitt have each filed Motions for Judgment on the Pleadings or, in the alternative, to Certify Questions of Law to the Ohio Supreme Court. Docs. ##26, 28. They have also asked the Court to stay all proceedings pending resolution of those motions. Docs. ##27, 29.

II. Motions for Judgment on the Pleadings or, in the alternative, to Certify Questions of Law to the Ohio Supreme Court (Docs. ##26, 28)

A. Federal Rule of Civil Procedure 12(c)

Motions for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) are analyzed under the same standard as motions to dismiss under Federal Rule of Civil Procedure 12(b)(6). *See Warrior Sports, Inc. v. National Collegiate Athletic Ass'n*, 623 F.3d 281, 284 (6th Cir. 2010). "For purposes of a motion for judgment on the pleadings, all well-pleaded material allegations of the pleadings of the opposing party must be taken as true, and the motion may be granted only if the moving party is nevertheless clearly entitled to judgment." *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 582 (6th Cir. 2007) (internal citation and quotation marks omitted). However, the court need not accept as true legal conclusions or unwarranted factual inferences. *Id.* (citing *Mixon v. Ohio*, 193 F.3d 389, 400 (6th Cir. 1999)).

To withstand a Rule 12(c) motion for judgment on the pleadings, "a complaint must contain direct or inferential allegations respecting all the material elements under some viable legal theory." *Commercial Money Ctr., Inc. v. Illinois Union Ins. Co.*, 508 F.3d 327, 336 (6th Cir. 2007). "The factual allegations in the complaint need to be sufficient to give notice to the defendant as to what claims are alleged, and the plaintiff must plead 'sufficient factual matter' to render the legal claim plausible, *i.e.*, more than merely possible." *Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 722 (6th Cir. 2010) (quoting *Ashcroft v. Iqbal*, 556 U.S.

662 (2009)). A "legal conclusion couched as a factual allegation" need not be accepted as true, nor are recitations of the elements of a cause of action sufficient. *Hensley Mfg. v. ProPride, Inc.*, 579 F.3d 603, 609 (6th Cir. 2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

B. Summary of Parties' Arguments

Defendants Groff and Parfitt argue that the negligent misidentification claim is subject to dismissal under Rule 12(c) because: (1) statements made to a police officer implicating a third person in a crime are absolutely privileged; (2) the negligent misidentification claim is really a defamation claim in disguise, and is therefore time-barred; and (3) at the very least, their statements to UD police officers are subject to a qualified privilege, and Plaintiffs have failed to allege that those statements were made with actual malice.

In the alternative, Defendants argue that, because the law in this area is unsettled, the Court should certify several questions to the Supreme Court of Ohio, pursuant to Supreme Court Practice Rule 9.01(A), which permits a federal court to certify questions of law to the Ohio Supreme Court if "there is a question of Ohio law that may be determinative of the proceeding and for which there is no controlling precedent in the decisions of [the] Supreme Court." Defendants propose the following questions for certification:

> (1) Does the absolute privilege recognized in *M.J. DiCorpo, Inc. v. Sweeney*, 69 Ohio St. 3d 497 (1994) extend to statements made to law enforcement officers?;

(2) Are statements to law enforcement officers implicating another person in criminal activity entitled to an absolute privilege against civil liability?;

(3) Is the doctrine of absolute privilege applicable to claims of negligent misidentification?; and

(4) What is the statute of limitations for claims of negligent identification/misidentification?

Plaintiffs note that, while Defendants' arguments all rest on the faulty premise that a claim of negligent misidentification is treated the same as a defamation claim, Ohio courts have long recognized the tort of negligent misidentification, separate and distinct from a claim of defamation.

Plaintiffs argue that the doctrines of absolute and qualified privilege, which are common defenses to claims of defamation, are not available to shield Groff and Parfitt from civil liability for negligent misidentification. In the alternative, Plaintiffs argue that, even if their negligent misidentification claim is construed as a defamation claim, Defendants' statements are not subject to an absolute or qualified privilege under the circumstances presented here. Plaintiffs also deny that their claim of negligent misidentification is barred by the one-year statute of limitations applicable to defamation claims. Based on the foregoing, Plaintiffs contend that there is no reason to certify any of the above questions to the Supreme Court of Ohio.

C. Negligent Misidentification vs. Defamation

There appears to be no serious dispute that Ohio recognizes the tort of negligent misidentification, separate and apart from the tort of defamation, "for

persons who are negligently[,] improperly identified as being responsible for committing a violation of the law, and who suffer injury as a result of the wrongful identification." *Wigfall v. Society Nat'l Bank*, 107 Ohio App.3d 667, 673, 669 N.E.2d 313, 316 (Ohio Ct. App. 1995). *See also Mouse v. Central Savings & Trust Co.*, 120 Ohio St. 599, 167 N.E. 868 (Ohio 1929); *Walls v. Columbus*, 10 Ohio App.3d 180, 182, 461 N.E.2d 13, 16 (Ohio Ct. App. 1983); *Barilla v. Patella*, 144 Ohio App.3d 524, 534, 760 N.E.2d 898, 905 (Ohio Ct. App. 2001); *Woods v. Summertime Sweet Treats, Inc.*, No. 08-MA-169, 2009 WL 3806179, at *5 (Ohio Ct. App. Nov. 13, 2009); *Cummerlander v. Patriot Prep. Academy, Inc.*, 86 F. Supp.3d 808, 826 (S.D. Ohio 2015); *Breno v. City of Mentor*, No. 81861, 2003 WL 21757504, at *4 (Ohio Ct. App. July 31, 2003).

Although the same set of facts could easily give rise to claims of both negligent misidentification and defamation, the elements of these two torts are completely different. To establish a claim of defamation, the plaintiff must show: "(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.*, 133 Ohio St. 3d 366, 389, 978 N.E.2d 832, 852 (quoting *Pollock v. Rashid*, 117 Ohio App.3d 361, 368, 690 N.E.2d 903 (1996)). In contrast, "[a]s with any cause of action sounding in negligence," in order to prevail on a claim of

negligent misidentification, a plaintiff must prove duty, breach of duty, proximate cause and injury. *Wigfall,* 107 Ohio App.3d at 673, 669 N.E.2d at 316.

Even though Ohio recognizes negligent misidentification as a cause of action separate and distinct from a claim of defamation, the boundary line between these two torts, in several respects, is not well-defined, as discussed in further detail below.

D. Statute of Limitations for Claims of Negligent Misidentification

Defendants argue that Plaintiffs' claim of negligent misidentification sounds in defamation and is, therefore, subject to the one-year statute of limitations for defamation claims set forth in Ohio Revised Code §2305.11(A). They further argue that, because the Complaint was filed more than one year after the incident took place, Plaintiffs' claim is time-barred.

Plaintiffs note, however, that the court in *Wigfall* specifically held that "[t]he one-year state of limitations applicable to a defamation claim is not applicable" to a claim of negligent misidentification. *Wigfall*, 107 Ohio App.3d at 673 n.4, 669 NE.2d at 316. Rather, it appears that a claim of negligent misidentification—like most negligence claims—is subject to the four-year statute of limitations set forth in Ohio Revised Code § 2305.09(D). *Id.* at 672, 669 N.E.2d at 316.[1]

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[1] In the alternative, Plaintiffs suggest that the two-year statute of limitations set forth in Ohio Revised Code § 2305.10(A) might apply. That statute, however, governs claims of product liability and actions for bodily injury or injury to personal property, and is inapplicable here.

Other cases, however, suggest that, if a cause of action involves an injury stemming from a false statement, it should be treated as a defamation claim for purposes of determining the applicable statute of limitations. In *Cromartie v. Goolsby*, No. 93438, 2010 WL 2333004, at *5 (Ohio Ct. App. June 10, 2010), defendant argued that plaintiff's claims of defamation and malicious prosecution were time-barred. In response, the plaintiff filed an amended complaint, asserting a claim of negligent misidentification. The court, however, rejected this attempt to reclassify the defamation claim as a negligent misidentification claim in order to circumvent the one-year statute of limitations, noting that the claims stemmed from the same set of facts. *See also Breno*, 2003 WL 21757504, at *3 (holding that a claim of emotional distress, which arose out of an allegedly false communication to the police, sounded in defamation, and was therefore subject to a one-year statute of limitations); *Worpenberg v. Kroger Co.*, No. C-010381, 2002 WL 362855, at **5-6 (Ohio Ct. App. Mar. 8, 2002) (holding that a claim of negligent damage to reputation, stemming from false accusations of theft by an employee, sounded in defamation and was barred by the one-year statute of limitations).

In short, it is not clear whether claims of negligent misidentification should be treated as defamation claims or as negligence claims for purposes of determining the applicable statute of limitations. Because this issue of state law is potentially dispositive in this case, the Court concludes that certification to the Ohio Supreme Court is appropriate.

E. Applicability of Privilege Doctrines to Claims of Negligent Misidentification

Certification is also appropriate because it is not clear whether the doctrines of absolute privilege or qualified privilege, commonly asserted as defenses to claims of defamation, may also be asserted as defenses to claims of negligent misidentification under Ohio law.

On certain privileged occasions, false, defamatory statements may be published without civil liability "where there is a great enough public interest in encouraging uninhibited freedom of expression to require the sacrifice of the right of the individual to protect his reputation by civil suit." *M.J. DiCorpo, Inc. v. Sweeney*, 69 Ohio St.3d 497, 505, 634 N.E.2d 203, 209 (Ohio 1994) (quoting *Bigelow v. Brumley*, 138 Ohio St. 574, 579-80, 37 N.E.2d 584, 588 (Ohio 1941)). The concept of privilege is specifically incorporated in the definition of "defamation." *See McCartney v. Oblates of St. Francis deSales*, 80 Ohio App.3d 345, 353, 609 N.E.2d 216 (Ohio Ct. App. 1992) ("Defamation is the unprivileged publication of a false and defamatory matter about another.").

A statement is *absolutely* privileged, even if made with actual malice or in bad faith with knowledge of its falsity, when made in the context of a legislative proceeding, a judicial proceeding, or another act of state. *DiCorpo,* 69 Ohio St.3d at 505, 634 N.E.2d at 209. Otherwise, a false statement may be subject to a *qualified* privilege if the defendant can show that "(1) he acted in good faith; (2) there was an interest to be upheld; (3) the statement was limited in its scope to

the purpose of upholding that interest; (4) the occasion was proper; and (5) the publication was made in a proper manner and only to proper parties." *Mosley v. Evans*, 90 Ohio App.3d 633, 636, 630 N.E.2d 75, 77 (Ohio Ct. App. 1993) (citing *Hahn v. Kotten*, 43 Ohio St.2d 237, 246, 331 N.E.2d 713, 719 (Ohio 1975)). A qualified privilege, once it is found to exist, "can be defeated only by a clear and convincing showing that the communication was made with actual malice." *A & B-Abell Elevator Co. v. Columbus/Central Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 11, 651 N.E.2d 1283, 1292 (Ohio 1995).

In this case, Defendants Groff and Parfitt maintain that these privilege doctrines extend to claims of negligent misidentification. They argue that their statements to the UD police officers are absolutely privileged because they are the first step in a judicial proceeding. In the alternative, they argue that the statements are protected by a qualified privilege, and that Plaintiffs' Amended Complaint fails to allege facts sufficient to support a finding of actual malice.

Defendants, however, have not identified *any* Ohio case in which either privilege doctrine has been recognized as a defense to a claim of negligent misidentification, and the Court has been unable to find one. The cases cited by Defendants involve claims of defamation and malicious prosecution.

The argument could be made that a plaintiff should not be able to circumvent these privilege doctrines by filing a claim of negligent misidentification instead of a claim of defamation. However, as Plaintiffs note, *Wigfall* could be

read as impliedly rejecting the idea that the privilege doctrines extend to claims of negligent misidentification:

> [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 at 318. This statement, combined with the fact that there appears to be no Ohio case in which the privilege doctrines have been applied to a claim of negligent misidentification, makes the Court hesitant to dismiss Plaintiffs' claims against Groff and Parfitt.

Moreover, even assuming that the privilege doctrines are available as a defense to a negligent misidentification claim, it is not clear whether either would apply to this particular set of facts, as explained in greater detail below. Because these issues are dispositive, and because there is so little guidance available, certification to the Ohio Supreme Court is warranted.

1. Absolute Privilege

Even assuming that the doctrine of absolute privilege would generally apply to claims of negligent misidentification, it is not clear whether it would apply to the statements that Groff and Parfitt made to the UD police officers.

As noted above, statements made in the course of a "judicial proceeding" are absolutely privileged, and cannot form the basis for a claim of defamation. In

DiCorpo, the court noted that this privilege extends to "every step" in the judicial proceeding, "from beginning to end." The court found that, because statements made in an informal complaint to a prosecuting attorney set in motion possible prosecution proceedings, such statements are absolutely privileged, so long as they bear "some reasonable relation to the activity reported." The court noted that, absent the threat of civil liability, individuals will be more likely to report criminal activity, which "will aid in the proper investigation of criminal activity and the prosecution of those responsible for the crime." *DiCorpo*, 69 Ohio St.3d at 505-06, 634 N.E.2d at 209-10.

Relying on *DiCorpo*, many Ohio courts have further extended the doctrine of absolute privilege to statements made to a *law enforcement officer*, implicating a third party in criminal activity. *See Savoy v. Univ. of Akron*, 2014-Ohio-3043, ¶ 20, 15 N.E.3d 430, 435 (Ohio Ct. App. 2014) ("Absolute privilege applies to shield individuals from civil liability for statement made to prosecutors or police reporting criminal activity."); *Lasater v. Vidahl*, 2012-Ohio-4918, ¶9, 979 N.E.2d 828 (Ohio Ct. App. 2012) ("an absolute privilege should apply to those who report criminal activity to police officers."). *See also Haller v. Borror*, No. 95APE01-16, 1995 WL 479424 (Ohio Ct. App. Aug. 8, 1995) (applying absolute privilege to statements made to police officers); *Fair v. Litel Commc'n, Inc.*, No. 97APE06-804, 1998 WL 107350 (Ohio Ct. App. Mar. 12, 1998) (same); *Lee v. City of Upper Arlington*, No. 03AP-132, 2003 WL 23024437 (Ohio Ct. App. Dec. 30,

2003) (same); *Morgan v. Cmty. Health Partners*, No. 12CA010242, 2013 WL 2407123 (Ohio Ct. App. June 3, 2013) (same).[2]

However, not all Ohio appellate courts have held that statements to police officers are absolutely privileged. In *Scott v. Patterson*, No. 81872, 2003 WL 21469363 (Ohio Ct. App. June 26, 2003), the plaintiff brought a malicious prosecution action against someone who gave false information to police officers, framing him for a crime. The court drew "a line between giving a statement to the police at the scene of a crime and giving a sworn affidavit to a prosecutor," and held that, because initial police work is investigatory and not part of a "judicial proceeding," the doctrine of absolute immunity did not apply. *Id.* at *2. In the alternative, the court held that the statement at issue was "designed to frame, not to aid in the proper investigations of the case," and therefore did not "bear a reasonable relation to the activity reported." *Id.* at *3. In *Olsen v. Wynn*, No. 95-A-0078, 1997 WL 286181, at **5-6 (Ohio Ct. App. May 23, 1997), a defamation case, the court held that statements made to the county sheriff were not absolutely privileged, but were instead protected by a qualified privilege.

In a similar vein, there are fractured opinions on this subject within the federal courts in this district. In *Dehlendorf v. City of Gahanna*, 786 F. Supp.2d 1358 (S.D. Ohio 2011), a defamation case, the district court reviewed the split of authority among Ohio appellate courts, and concluded that "the Supreme Court of

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[2] Notably, none of these cases involved claims of negligent misidentification.

Ohio would not consider statements made to the police part of a 'judicial proceeding' and therefore would not extend absolute immunity to statements made to the police." *Id.* at 1365. The district court noted that, among the courts that had extended an absolute privilege to statements made to police officers, there was little or no discussion of *why* this might be warranted. *Id.* at 1360-62. It found that the *Scott* decision—distinguishing between statements made to prosecutors, who make the decision whether to initiate judicial proceedings, and statements made to police officers, who simply initiate an investigation—was a "well-reasoned interpretation of the holding in *DiCorpo.*" *Id.* at 1362-64.

However, in *Brunswick v. City of Cincinnati*, No. 1:10-cv-617, 2011 WL 4482373 (S.D. Ohio Sept. 27, 2011), in analyzing a malicious prosecution claim, the court held that statements made to the investigating officer *were* absolutely privileged. It acknowledged the split of authority among state and federal courts, but concluded that "[t]he 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 talk to a police officer first." *Id.* at *9 n.5.

In short, even with respect to claims of defamation and malicious prosecution, there is no consensus, under Ohio law, concerning whether statements made to police officers, implicating someone else in criminal activity, are absolutely privileged.

Citing the alternate holding in *Scott*, Plaintiffs argue that this unsettled issue is not dispositive. They maintain that, even if such statements are considered to

be part of a "judicial proceeding," the statements made by Groff and Parfitt are not absolutely privileged because they do not bear a reasonable relation to the activity reported. As noted earlier, the *Scott* court held, in *dicta*, that statements made for the purpose of framing the plaintiff for a crime he did not commit could not be deemed to be reasonably related to the activity reported. In their memorandum in opposition, Doc. #32, Plaintiffs allege that this situation is analogous in that Groff and Parfitt made their false statements to the police in bad faith, seeking to retaliate against Plaintiffs for a perceived slight. However, as Parfitt points out, it cannot be said that a statement bears no reasonable relation to the activity reported simply because it is false or made in bad faith. The absolute privilege applies regardless of these defects. *See DiCorpo*, 69 Ohio St.3d at 505, 634 N.E.2d at 209. Here, the statements at issue were all pertinent, and bore *some* reasonable relation to the activity that Groff called to report to the police, *i.e.*, Plaintiffs' refusal to leave Defendants' property.

Given that Ohio law is unclear concerning the applicability of the doctrine of absolute privilege to statements made to police officers, implicating a third person in criminal activity, and that this issue is potentially dispositive, certification is warranted.

2. Qualified Privilege

Finally, Defendants argue that, regardless of whether their statements are absolutely privileged, the statements are, at the very least, qualifiedly privileged. They cite to numerous cases, involving claims of defamation and malicious

prosecution, in which statements made to police officers, implicating a third party in criminal activity, have been found to be protected by a qualified privilege. *See, e.g., Atkinson v. Stop-N-Go Foods, Inc.*, 83 Ohio App.3d 132, 136, 614 N.E.2d 784, 787 (Ohio Ct. App. 1992); *Stokes v. Meimaris*, 111 Ohio App.3d 176, 189-90, 675 N.E.2d 1289, 1298 (Ohio Ct. App. 1996); *Dehlendorf*, 786 F. Supp.2d at 1363-64 (collecting cases).

Plaintiffs, however, note that Defendants have not cited to any case recognizing the doctrine of qualified privilege as a defense to a claim of negligent misidentification. Citing *Wigfall*, 107 Ohio App.3d at 675, 669 N.E.2d at 318, Plaintiffs again argue that, because of the serious consequences of being misidentified as a criminal suspect, this defense is not applicable to this particular tort.

In *A & B-Abell Elevator Co.,* the Ohio Supreme Court held that, once a qualified privilege is found to exist, the "actual malice" standard applies not only to the defamation claim, but to derivative tort claims as well. 73 Ohio St.3d at 15, 651 N.E.2d at 1295. Here, however, because the law is unsettled, it is not clear whether the statements at issue are qualifiedly privileged. Moreover, Plaintiffs have not asserted a defamation claim in this case. Given that they have asserted only a single claim of negligent misidentification, it cannot be deemed a "derivative" tort claim.

Assuming that the statements are qualifiedly privileged, that privilege "can be defeated only by a clear and convincing showing that the communication was

made with actual malice." *Id.* at 11, 651 N.E.2d at 1292. Defendants argue that, because Plaintiffs' Complaint alleges only *negligent* conduct, and fails to allege any facts supporting a finding of actual malice, the claim must be dismissed. The Court disagrees. "Actual malice" exists if the statements were made "with knowledge that the statements are false or with reckless disregard of whether they were false or not." *Hahn*, 43 Ohio St.2d 237, 331 N.E.2d 713, syl. ¶2 (Ohio 1975).

Here, the Amended Complaint alleges that Groff and Parfitt had no reason to believe that Plaintiffs were attempting to steal anything or to enter Defendants' residence without permission, and had no reason to be afraid. Doc. #3, PageID#97. Yet Defendants allegedly told Sergeant Ryan that Plaintiffs refused to leave the property, intended to cause harm, and attempted to rob them. *Id.* at PageID#121. Viewing these allegations in the light most favorable to Plaintiffs, actual malice could be inferred. Accordingly, even assuming that the statements are qualifiedly privileged, dismissal is not warranted on this basis.

Given that there are several issues of Ohio law that may be dispositive, and for which there is no controlling precedent, the Court certifies the following questions to the Supreme Court of Ohio:

(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?; and

(3) Is the doctrine of qualified privilege applicable to claims of negligent misidentification?

III. Motions for a Stay (Docs. ##27, 29)

Defendants Parfitt and Groff have also moved to stay all proceedings pending resolution of these unresolved, controlling issues of state law by the Ohio Supreme Court. Docs. ##27, 29. As the Sixth Circuit held in *Gray v. Bush*, 628 F.3d 779, 784 (6th Cir. 2010), under the *Burford* abstention doctrine, a district court should typically stay federal proceedings until the state court resolves difficult questions of state law.

Accordingly, the Court SUSTAINS Defendants' Motions for a Stay, Docs. ##27 and 29, and STAYS all proceedings as to Defendants Parfitt and Groff pending further action by the Ohio Supreme Court. At the conference call scheduled for December 7, 2015, at 5:00 p.m., the Court will discuss whether this stay should be extended to the other Defendants as well.

IV. Conclusion

For the reasons set forth above, the Court SUSTAINS Defendants Dylan Parfitt and Michael R. Groff's alternative Motions to Certify Questions of Law to the Ohio Supreme Court, Docs. ##26, 28. The Court also SUSTAINS Defendants' Motions for a Stay, Docs. ##27, 29, and STAYS all proceedings with respect to Defendants Parfitt and Groff pending further action by the Ohio Supreme Court.

The Clerk of Court is directed to attach a copy of this Decision and Entry to the Certification Order, which shall be filed contemporaneously.

Date: December 7, 2015

WALTER H. RICE
UNITED STATES DISTRICT JUDGE

APPENDIX B

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or Preempted **Prior Version Held Unconstitutional by** State ex rel. Ohio Academy of Trial Lawyers v. Sheward, Ohio, Aug. 16, 1999

KeyCite Yellow Flag - Negative Treatment Proposed Legislation

Baldwin's Ohio Revised Code Annotated
Title XXIII. Courts--Common Pleas
Chapter 2305. Jurisdiction; Limitation of Actions (Refs & Annos)
Limitations--Miscellaneous

R.C. § 2305.11

2305.11 Time limitations for bringing certain actions

Effective: October 20, 2011
Currentness

(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.

(B) A civil action for unlawful abortion pursuant to section 2919.12 of the Revised Code, a civil action authorized by division (H) of section 2317.56 of the Revised Code, a civil action pursuant to division (B)(1) or (2) of section 2307.51 of the Revised Code for performing a dilation and extraction procedure or attempting to perform a dilation and extraction procedure in violation of section 2919.15 of the Revised Code, and a civil action pursuant to division (B) of section 2307.52 of the Revised Code for terminating or attempting to terminate a human pregnancy after viability in violation of division (A) of section 2919.17 of the Revised Code shall be commenced within one year after the performance or inducement of the abortion, within one year after the attempt to perform or induce the abortion in violation of division (A) of section 2919.17 of the Revised Code, within one year after the performance of the dilation and extraction procedure, or, in the case of a civil action pursuant to division (B)(2) of section 2307.51 of the Revised Code, within one year after the attempt to perform the dilation and extraction procedure.

(C) As used in this section, "medical claim," "dental claim," "optometric claim," and "chiropractic claim" have the same meanings as in section 2305.113 of the Revised Code.

CREDIT(S)

(2011 H 78, eff. 10-20-11; 2002 S 281, eff. 4-11-03; 2002 H 412, eff. 11-7-02; 2001 S 108, § 2.01, eff. 7-6-01; 2001 S 108, § 2.02, eff. 7-6-01; 1996 H 350, eff. 1-27-97 (*State, ex rel. Ohio Academy of Trial Lawyers, v. Sheward* (1999)); 1995 H 135, eff. 11-15-95; 1992 S 124, eff. 4-16-93; 1991 H 108; 1990 S 125, S 80; 1987 H 327; 1985 H 319; 1984 S 183; 1981 H 243; 1976 H 1426; 1975 H 682; 1974 H 989; 1953 H 1; GC 11225)

Notes of Decisions (1116)

R.C. § 2305.11, OH ST § 2305.11

APPENDIX 25

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APPENDIX 26