

IN THE SUPREME COURT OF OHIO

ANDREW FOLEY, et al.,

Plaintiffs,

-vs-

UNIVERSITY OF DAYTON, et al.,

Defendants.

Case No. 2015-2032

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

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

**REPLY BRIEF OF PETITIONER/DEFENDANT MICHAEL R. GROFF
ADDRESSING CERTIFIED QUESTIONS OF STATE LAW**

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

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

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

TABLE OF CONTENTS

Table of Authorities ii

STATEMENT OF FACTS1

ARGUMENT.....1

First Certified Question1

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

Second Certified Question4

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?

Third Certified Question14

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

CONCLUSION.....16

PROOF OF SERVICE.....17

APPENDIX

Appendix Page

 R.C. 2917.32(A)(3)1

 R.C. 2921.22(A)(1)2

TABLE OF AUTHORITIES

CASES:

Atkinson v. Stop-N-Go Foods, Inc., 83 Ohio App. 3d 132, 614 N.E.2d 784 (2d Dist. 1992).....14

Brown v. Chesser, 4th Dist. Vinton No. 97 CA 510, 1998 WL 28264 (Jan. 28, 1998).....11, 12

Brunswick v. City of Cincinnati, S.D. Ohio No. 1:10-cv-617, 2011 WL 4482373
(Sept. 27, 2011).....8, 9

Correllas v. Viveiros, 572 N.E.2d 7, 410 Mass. 314 (Mass. 1991) 15

Cromartie v. Goolsby, 8th Dist. Cuyahoga No. 93438, 2010-Ohio-26041, 2

Dehlendorf v. City of Gahanna, Ohio, 786 F.Supp.2d 1358 (S.D. Ohio 2011)..... 14

Fair v. Litel Comm. Inc., 10th Dist. Franklin No. 97APE06-804, 1998 WL 107350
(Mar. 12, 1998)11

Flynn v. Higham, 149 Cal.App.3d 677, 197 Cal.Rptr. 145 (Cal. App. 1984)15

Fourtounis v. Verginis, 8th Dist. Cuyahoga No. 102025, 2015-Ohio-2518.....3, 4

Haller v. Borrer, 10th Dist. Franklin No. 95APE01-16, 1995 WL 479424
(Aug. 8, 1995).....6, 7, 11

Hambleton v. R.G. Barry Corp., 12 Ohio St.3d 179, 465 N.E.2d 1298 (1984).....1

Hartunge-Teter v. McKnight, 3d Dist. Defiance No. 4-91-2, 1991 WL 117274
(June 16, 1991).....14

Hecht v. Levin, 66 Ohio St.3d 458, 613 N.E.2d 585 (1993)..... 5

Kelly v. Accountancy Bd. of Ohio, 88 Ohio App.3d 453, 624 N.E.2d 453
(10th Dist. 1993)..... 13

Lasater v. Vidahl, 2012-Ohio-4918, 979 N.E.2d 828 (9th Dist.) 9

Lee v. City of Upper Arlington, 10th Dist. Franklin No. 03AP-132, 2003-Ohio-71576, 11

Love v. City of Port Clinton, 37 Ohio.St.3d 98, 524 N.E.2d 166 (1988)..... 3

McGuinness v. Smith, 2d. Dist. Greene No. 94-CA-52, 1995 WL 63679
(Feb. 15, 1995)..... 15

<i>Mettke v. Mouser</i> , 10th Dist. Franklin No. 12AP-1083, 2013-Ohio-2781	11
<i>M.J. DiCorpo, Inc. v. Sweeney</i> , 66 Ohio St.3d 497, 634 N.E.2d 203 (1994)	5, 6, 8
<i>Morgan v. Cmty. Health Partners</i> , 9th Dist. Lorain No. 12CA010242, 2013-Ohio-2259	11
<i>Motorists Mut. Ins. Co. v. Huron Rd. Hosp.</i> , 73 Ohio St. 3d 391, 653 N.E.2d 235 (1995).....	1
<i>Paramount Supply Co. v. Sherlin Corp.</i> , 16 Ohio App.3d 176, 475 N.E.2d 197 (8th Dist. 1984)	14
<i>Popke v. Hoffman</i> , 21 Ohio App. 454, 153 N.E. 248 (6th Dist. 1926).....	14
<i>Savoy v. Univ. of Akron</i> , 2014-Ohio-3043, 15 N.E.3d 430 (10th Dist.).....	9
<i>Scott v. Patterson</i> , 8th Dist. Cuyahoga No. 81872, 2003 WL 21469363 at *1 (June 26, 2003).	10, 11
<i>Stokes v. Meimaris</i> , 111 Ohio App.3d 176, 675 N.E.2d 1289 (8th Dist. 1996).....	14
<i>Tillimon v. Sullivan</i> , 6th Dist. Lucas No. L-87-308, 1988 WL 69163 (June 30, 1988).....	14
<i>Ventura v. The Cincinnati Enquirer</i> , 246 F.Supp.2d 876 (S.D. Ohio 2003).....	9
<i>Worpenberg v. The Kroger Co.</i> , 1st Dist. Hamilton No. C-010381, 2002 WL 362855 (Mar. 8, 2002)	1, 2
 <u>STATUTES:</u>	
R.C. 2917.32(A)(3)	13
R.C. 2921.22(A)(1)	12

STATEMENT OF FACTS

Petitioner Michael Groff (“Michael”) hereby rests on the Statement of Facts presented in his Preliminary Memorandum and Merit Brief. To the extent that those facts are cited in the following Argument, they are hereby incorporated into this Statement of Facts and this Reply Brief as if fully set forth herein.

ARGUMENT

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

Respondents devote an entire section of their Merit Brief driving home that defamation and negligent misidentification are made up of distinct elements. This misses the point. Of course, every cause of action contains elements that are different from all others. However, Respondents give only short shrift to the 300 pound gorilla in the room: longstanding precedent from this Court that, when applying a statute of limitations, it is the substance of the facts underlying a cause of action which matters, not the form of the cause of action itself.

Michael’s Merit Brief cites a long line of cases outlining this principal. Where there is no specifically enumerated statute of limitation for a cause of action, “...the substance of the subject matter of a case is determinative, not the form under which a party chooses to bring it.” *Motorists Mut. Ins. Co. v. Huron Rd. Hosp.*, 73 Ohio St. 3d 391, 394, 653 N.E.2d 235 (1995). While Respondents cited to a host of cases that interpreted the “malpractice” portion of R.C. 2305.11, in his Merit brief, Michael cited to a case that dealt directly with negligent misidentification. In the 8th District’s *Cromartie v. Goolsby*, the plaintiff filed a complaint alleging libel, slander, and malicious prosecution based upon statements that the defendant made about plaintiff to police. *Cromartie v. Goolsby*, 8th Dist. Cuyahoga No. 93438, 2010-Ohio-2604, ¶¶ 5-6. After the defendant moved to dismiss those allegations based upon the one year statute of limitations, the

plaintiff amended the complaint, relabeling those allegations as, among other causes of action, “negligent identification.” *Id.* at ¶ 27. The Eighth Appellate District ultimately found that, “[t]hese claims were based on the same grounds he alleged for libel, slander, and malicious prosecution in the original complaint. [Plaintiff] cannot circumvent the statute of limitations period by reclassifying his claims.” *Id.* at ¶ 28.

Respondents would have this Court distinguish this nearly identical case based upon a small difference in facts, namely that in *Cromartie*, the plaintiff amended his complaint to make a claim for negligent identification, whereas here, Respondents made the claim from the beginning. However, this distinction makes no difference under Ohio law. The key consideration for this Court is the *substance* of the underlying claim. *Motorists* at 394. Yet, Respondents again rely upon the form of their pleadings and ignore the substance of the underlying facts, arguing that because they chose to disguise their claims as negligence from the start, they should be insulated from the one year statute of limitations. However, this is simply improper under this Court’s longstanding precedent. *See Hambleton v. R.G. Barry Corp.*, 12 Ohio St.3d 179, 183, 465 N.E.2d 1298 (1984) (“The grounds for bringing the action are the determinative factors, the form is immaterial.”).

The unmistakable conclusion is that *Cromartie* is directly on point. In addition, other Ohio cases, drawing clear parallels to the case at bar, have reached the conclusion that the one year limitation is applicable to all claims premised upon a communication to another, regardless of how those claims are classified by the plaintiff in the complaint. *See e.g. Worpenberg v. The Kroger Co.*, 1st Dist. No. C-010381, 2002 WL 362855, *5-6 (Mar. 8, 2002). In *Worpenberg*, the plaintiff, an ex-employee of the defendant grocery store, alleged that her reputation was negligently damaged after she was accused of stealing from the store. *Id.* Upon analyzing the plaintiff’s

allegations, the First Appellate District found that her negligence claim, based upon an allegedly improper or wrongful communication, was essentially a “disguised defamation claim” and subject to the one year statute of limitations. *Id.* With regard to the plaintiff’s negligence claim, the Court explained its rationale:

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

Id. at *6.

As in *Worpenberg*, to accept Respondents’ argument here would expose defendants throughout Ohio to two distinct torts for the exact same statement made to a law enforcement officer: negligent misidentification and defamation. This Court has soundly rejected such arguments in the past. *See Love v. City of Port Clinton*, 37 Ohio.St.3d 98, 99, 524 N.E.2d 166 (1988) (police officer could not “negligently” physically subdue a suspect since the contact was intentional, and thus constituted a battery). It should reject that logic here, as well.

The reality of the situation is that Respondents have attempted to take what would most properly be categorized as allegedly defamatory statements made by Michael to the police and state a cause of action for negligence. Indeed, the underlying grounds of Respondents’ sole claim against Michael are “statements” allegedly made to law enforcement “negligently improperly identifying [Respondents] as being responsible for a criminal act.” (Am. Com. at ¶¶ 1, 54-57, 154).

In *Fourtounis v. Verginis*, the 8th District applied the one year statute of limitations set forth in R.C. 2305.11 to claims founded on statements made to a parole officer implicating another in a crime. *Fourtounis v. Verginis*, 8th Dist. Cuyahoga No. 102025, 2015-Ohio-2518. In this instance, the pled cause of action was intentional infliction of emotional distress. *Id.* at ¶ 30.

Rather than look to the technical form of the cause of action, the 8th District properly looked to the underlying substance of the claim, ruling that "...if indeed Verginis's statements to the probation officer were false, the underlying claim would be slander, which has a one-year statute of limitations. *Id.*

Like in *Fourtounis*, Respondents claim that Michael made false statements about them. Under any traditional understanding of Ohio law, false statements about another, with nothing more, amount to slander. Here, Respondents claim that Michael falsely accused them of committing a burglary. If proven, those statements are slander, not negligent misidentification. Accordingly, because the substance of the allegations are grounded in slander and defamation, the one year statute of limitations for slander and defamation applies.

Finally, contrary to Respondents' dire predictions, correctly applying the one year statute of limitations to negligent misidentification claims will not "...mean there is no longer a negligent misrepresentation [*sic*] claim." (Resp. Brief at 10). Rather, it simply means that negligent misidentification claims must be timely brought within one year or be barred. This is not unreasonable. Respondents' fears are unfounded.

Based upon the longstanding principal that the application of a statute of limitations depends upon the substance, not the form, of a cause of action, this Court should find that the one year statute of limitations contained in R.C. 2305.11 applies to negligent misidentification.

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

This Court's seminal decision in *M.J. DiCorpo, Inc. v. Sweeney* sets the basis for application of the absolute privilege in the context of reporting a crime. In *Sweeney*, the issue was whether statements contained in an affidavit filed with the county prosecutor accusing another person of criminal activity were absolutely privileged. In holding that such statements were

absolutely privileged, this Court explained:

[T]he filing of an affidavit, **information or other statement** with a prosecuting attorney **may potentially set the process in motion for the investigation of a crime and the possible prosecution of those suspected of criminal activity**. In our judgment, it would be anomalous to recognize an absolute privilege against civil liability for statements made in a complaint filed with a local bar association, while denying the protections of that privilege to one who files an affidavit with the prosecutor's office reporting that a crime has been committed. Granting an absolute privilege under the circumstances of this case is merely a logical extension of this court's holding in *Hecht, supra*.

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

In its purest form, *Sweeney* stands for the proposition that not every statement tied to a judicial proceeding takes place inside of a courtroom. Thus, in the context of criminal complaints, the focus is not *where* the speech takes place, but *why* the speech takes place. *Sweeney* also recognizes that statements to authorities regarding crimes “...**may potentially** set the process in motion for the investigation of a crime and **possible prosecution** of those suspected of criminal activity.” *Id.* (emphasis added). The Court’s embrace of such qualifying language indicates that the standard for imposition of the absolute privilege is much more forgiving than Respondents suggest. In fact, *Sweeney* itself was a “logical extension” of *Hecht v. Levin*, which held that a grievance filed with a local bar association fell within the context of a judicial proceeding and was, therefore, entitled to absolute immunity. *Hecht v. Levin*, 66 Ohio St.3d 458, 613 N.E.2d 585 (1993), paragraphs one and two of the syllabus.

Extending the absolute privilege to citizen statements to police officers serves the essential purpose of *Sweeney*. Like giving a statement to a county prosecutor, giving a statement to police “...**may potentially** set the process in motion for the investigation of a crime and **possible prosecution** of those suspected of criminal activity.” *Sweeney*, 66 Ohio St.3d at 506 (emphasis added). There is no functional difference between a citizen reporting a crime to the county prosecutor or first going to the police. Under Respondents’ proposed regime, those citizens who choose to report crimes directly

to the county prosecutor will be immune from civil liability, while those that decide to go to police will be left without protection from civil liability. This distinction is arbitrary, unreasonable, and unfair to those citizens that may not have the time, knowledge, or means to first report a crime to the county prosecutor. Thus, both the letter and the spirit of *Sweeney* point toward protection from civil liability for citizens who perform their civic duty and report crimes to law enforcement. Respondents' proposed limits on *Sweeney* is arbitrary and serves no public policy purpose.

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

Sweeney does not just apply to defamation, as Respondents claim. *Sweeney* teaches that the absolute privilege protects against "...civil liability for statements made which bear some reasonable relation to the activity reported." *Id.* at paragraph one of the syllabus (Emphasis added). By use of the term "civil liability," instead of "defamation," the *Sweeney* Court intended that the absolute privilege applies to *civil claims* including, but not limited to, defamation. One of those civil claims is negligent misidentification, the very premise of which is inextricably tied to communication to law enforcement about the possible criminal activity of another. Had this Court wished to limit its holding only to defamation claims, it certainly could have done so. Yet, recognizing that a clever attorney could simply plead around such a limited holding, as is the case here, this Court wisely chose not to limit its holding only to defamation claims.

In line with this Court's reference to "civil liability," and not just civil liability for defamation, the Tenth Appellate District has twice applied the *Sweeney* absolute privilege doctrine to bar claims other than defamation. *Haller v. Borrer*, 10th Dist. Franklin No. 95APE01-16, 1995 WL 479424 (Aug. 8, 1995) (malicious prosecution claim based upon citizen's statements to police barred by doctrine of absolute privilege); *Lee v. City of Upper Arlington*, 10th Dist. Franklin No. 03AP-132, 2003-Ohio-7157 (absolute privilege shielded bank from claims of malicious prosecution and

defamation for statements made to police and/or prosecutor about customer). The *Haller* court framed the issue perfectly:

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.

Haller at *2.

However, the Tenth District declined to take the bait and, instead, offered a reasoned rebuttal of the distinction urged by the appellant:

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.**

Id. (Emphasis added).

Here, as in *Haller*, there is no reason to distinguish the applicability of absolute immunity based upon the way in which Respondents chose to style their pleadings. To hold otherwise would entirely eviscerate the protections afforded to witnesses of potential crimes under *Sweeney*. The only result that is in harmony with *Sweeney* is one in which the absolute judicial privilege attaches regardless of the pled cause(s) of action. Thus, *Sweeney* not only applies to claims pled as defamation, but also to other civil causes of action. As a result, the first portion of the certified question should be answered in the affirmative; the absolute privilege does apply to negligent misidentification.

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

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

Here, with the events giving rise to this case having occurred in the early morning hours, a call to the prosecuting attorney’s office would have almost undoubtedly gone unanswered. Thus, Michael’s only realistic option in reporting the possible commission of a crime and having the perpetrators, whom he did not know or recognize, investigated rested with the University of Dayton Police Department. The absolute privilege must extend to statements made not just to the prosecuting attorney, but also to law enforcement. To hold otherwise would lead to absurd and uneven results based upon a citizen’s choice between reporting a possible crime to the police or reporting a possible crime to the prosecuting attorney. Considering that, many times, victims or witnesses of crimes have

just experienced a traumatic event, it makes little sense to draw such an arbitrary and impractical distinction that could subject an ordinary citizen to civil liability simply for choosing incorrectly.

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

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

Id.

Indeed, a strong majority of Ohio Appellate Districts, as well as two of the three federal District Courts that have spoken on the issue, have recognized that “[t]he level of immunity afforded to complainants...should not turn on whether [citizens] decide to go straight to a prosecutor or talk to a police officer first.” *Brunswick*, 2011 WL 4482373 at fn. 5; *see also Ventura v. The Cincinnati Enquirer*, 246 F.Supp.2d 876, 882 (S.D. Ohio 2003).

In a case strikingly similar to the one at bar, a student at the University of Akron sued the university after the student was arrested by university police after becoming “belligerent” during an argument with a university administrator. *Savoy v. Univ. of Akron*, 2014-Ohio-3043, 15 N.E.3d 430 (10th Dist.). In upholding summary judgment on the student’s defamation claim, the Tenth District held that an “[a]bsolute privilege applies to shield individuals from civil liability for statements to prosecutors **or police** reporting possible criminal activity.” (Emphasis added.) *Id.* at ¶ 20.

In their Merit Brief, Respondents seize upon the outlier case of *Scott v. Patterson* to support

the proposition that Michael's statements to police did not bear a reasonable relation to the activity reported, and are, therefore, not absolutely privileged. In the unreported Eighth District opinion, the defendant, Ruben Patterson, falsely reported to police that Melvin Scott had assaulted another person, Kevin Lewis, when Mr. Patterson actually assaulted Mr. Lewis. *Scott v. Patterson*, 8th Dist. Cuyahoga No. 81872, 2003 WL 21469363 at *1 (June 26, 2003). The court held that because Patterson actually intended to thwart law enforcement by intentionally framing Scott, the absolute privilege did not apply. *Id.* at *4.

Because of its unique facts, *Scott* is an aberration among the other Ohio cases that have, with near uniformity, applied the absolute privilege to statements made to police officers. In *Scott*, Patterson committed a crime by assaulting Lewis. *Id.* When the police showed up and spoke to Patterson, he simply picked Scott out of a crowd and implicated him in an effort to get away with his crime. *Id.* As a result of Mr. Patterson's statement, Mr. Scott was arrested and charged with assault. *Id.* In the words of the court, Patterson "framed" Scott, who had absolutely nothing to do with punching Lewis. *Id.*

Aside from the fact that here, unlike in *Scott*, Michael did not commit a crime or try to "frame" anyone, the *Scott* case actually contradicts Respondents' position in two ways. First, the *Scott* court noted:

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 [sic] of the case, and it **does not have the indicia of false or mistaken information contemplated in DiCorpo.**

Id. at *3.

Here, by the very act of making a *negligent* misidentification claim, Respondents tacitly acknowledge that, unlike *Scott*, this case embodies the "indicia of false or mistaken information

contemplated in *DiCorpo*.” *Id.* Despite Respondents’ thinly-veiled references otherwise, Respondents have made no allegation that Michael intentionally, purposefully, or knowingly lied to the police about Respondents. This is unsurprising since alleging an intentional act would essentially defeat Respondents’ own claim for *negligent* misidentification. Thus, this case is not like *Scott* precisely because it involves, at the most, an honest case of mistaken information.

The *Scott* case further contradicts Respondents’ position because it specifically rejects Respondents’ suggestion that absolute privilege applies only to defamation. *Id.* at *3 (“We also decline to foster a distinction between *Dicorpo* and this case by advancing the theory that a difference exists between malicious prosecution and defamation actions...”). Thus, as much as Respondents wish that *Scott* could be their salvation, it is not.

Outside of *Scott*, Ohio courts are nearly unanimous in finding that an absolute privilege applies to statements made to the police. *Metke v. Mouser*, 10th Dist. No. 12AP-1083, 2013-Ohio-2781 (statements made in police report and petition for civil protective order were absolutely privileged); *Morgan v. Cmty. Health Partners*, 9th Dist. No. 12CA010242, 2013-Ohio-2259 (nurse’s statements to police regarding possible domestic violence against a patient were absolutely privileged); *Lee v. City of Upper Arlington*, 10th Dist. Franklin No. 03AP-132, 2003-Ohio-7157 (absolute privilege shielded bank from claims of malicious prosecution and defamation for statements made to police and/or prosecutor about customer); *Fair v. Litel Comm. Inc.*, 10th Dist. Franklin No. 97APE06-804, 1998 WL 107350, *3-6 (Mar. 12, 1998) (absolute privilege shields citizens from civil liability in reporting a possible felony to police detectives even if the information was erroneous); *Brown v. Chesser*, 4th Dist. Vinton No. 97 CA 510, 1998 WL 28264, *3-5 (Jan. 28, 1998) (citizen’s report of possible criminal activity to police absolutely privileged); *Haller*, 1995 WL 479424 at *2-4 (malicious prosecution claim based upon citizen’s statements to

police barred by doctrine of absolute privilege). Thus, Ohio law is abundantly clear that the absolute privilege extends to statements made to law enforcement implicating another person in a crime, provided that those statements comport with the other requirements of *Sweeney*.

C. Public Policy Supports the Absolute Privilege.

Much like reporting a crime to the county prosecutor's office, Michael's call to law enforcement set the process in motion for the investigation of an alleged crime and the possible initiation of criminal proceedings. That Michael may have ultimately been mistaken in what he saw or perceived on the night of the incident should not expose him to civil liability. Citizens must be encouraged to report criminal activity without fear of reprisals in the form of civil liability. *Brown*, 1998 WL 28264 at *4. That idea is central to the public policy behind *Sweeney* and its progeny. Michael simply reported what he thought to be crime. That report should be absolutely privileged whether made to a county prosecutor or a police officer.

Without the law on their side, Respondents attempt to twist the public policy behind the absolute privilege for their benefit. Their argument truly is remarkable. According to Respondents, recognizing an absolute privilege for statements made to police officers would cause an epidemic of citizens turning on each other with false allegations to the police, thereby making law enforcement's job more difficult. This argument is contrived nonsense.

First, Ohio courts have universally held that the citizens should be encouraged to report criminal activity to law enforcement. *Id.* Second, the Ohio Revised Code places an affirmative duty on citizens to report felonies to law enforcement:

(A)

(1) Except as provided in division (A)(2) of this section, no person, knowing that a felony has been or is being committed, shall knowingly fail to report such information to law enforcement authorities.

R.C. 2921.22(A)(1).

Given that Respondents were charged with a felony, if Respondents had their way, Michael would be presented with a legal catch-22 in which he could be civilly liable for (incorrectly) reporting what he saw, or, criminally penalized if he did not report what he saw at all. This result is absurd and, quite simply, backward in a society that encourages citizens to report criminal activity, especially felonies. *See Kelly v. Accountancy Bd. of Ohio*, 88 Ohio App.3d 453, 460, 624 N.E.2d 453 (10th Dist. 1993) (“The public's interest in having felonies reported is best served by ensuring that accountants can disclose information reasonably related to the reporting of a felony without fear that they will be subjected to the loss of a professional license.”).

Third, Respondents completely ignore that, in Ohio, it is a criminal offense for a person to make a false police report against another:

(A) No person shall do any of the following:

(3) Report to any law enforcement agency an alleged offense or other incident within its concern, knowing that such offense did not occur.

R.C. 2917.32

Thus, even some bad actors somehow looked upon civil immunity as a license to lie to law enforcement at will, they would still be subject to harsh criminal sanctions for doing so. Respondents' doom and gloom predictions are unfounded.

Ohio law encourages, and in some cases, requires citizens to report crimes to law enforcement. Ohio law also makes it a first degree misdemeanor to make a false police report. *Id.* Thus, in light of the serious criminal penalties for making a false police report, there is little risk that protecting citizens from civil liability for mistaken reports will somehow open up the floodgates to bad actors intent on making false police reports. To suggest so is cynical, at best. Michael should not be subjected to

potential civil liability for complying with Ohio law and public policy. His statements were absolutely privileged. The second certified question should be fully answered in the affirmative.

III. Third Certified Question: Is the doctrine of qualified privilege applicable to claims of negligent misidentification?

Regardless of whether statements made to a police officer implicating another in criminal activity are absolutely privileged, there is little doubt that such statements are, at the very least, protected by a qualified privilege. See *Dehlendorf*, 786 F.Supp. 2d at 1363-65 (noting a line of Ohio cases extending a qualified privilege for statements to police officers). See also *Popke v. Hoffman*, 21 Ohio App. 454, 456 (6th Dist. 1926), *Stokes v. Meimaris*, 8th Dist. No. 68818, 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); *Hartunge-Teter v. McKnight*, 3d Dist. Defiance 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. Lucas No. L-87-308, WL 69163, at *11 (June 30, 1988) (court endorsed a trial court's statement that information given to a police officer or police detective is under a qualified privilege). Respondents have even conceded as much in their Merit Brief. (Resp. Brief at 23-24)

Respondents cite no law in their Merit Brief to counter the overwhelming weight of case law holding that citizen statements to police are protected by a qualified privilege. Instead, Respondents again resort to their tired argument that the form of their pleadings are somehow dispositive of the question. Yet, negligent misidentification is not special, no matter how much Respondents want it to be. It, like all other causes of action, is subject to the qualified privilege when the underlying basis of the claim is a statement to police made for law enforcement purposes.

In *McGuinness v. Smith*, the Second Appellate District applied the doctrine of qualified

privilege to claims of intentional infliction of emotional distress, negligent infliction of emotional distress and malicious defamation arising from the defendant's allegedly "false and malicious" statements to law enforcement. *McGuinness v. Smith*, 2d. Dist. Greene No. 94-CA-52, 1995 WL 63679 (Feb. 15, 1995). Although the Second District ultimately found a fact question as to whether the statement was made with actual malice and reversed the trial court on that basis, it notably stated with regard to all causes of action asserted:

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

Id. at *3.

Thus, as the *McGuinness* court properly noted, it is the speech itself, not any specific cause of action, which is privileged. The natural conclusion to be drawn from this is that it would make little sense for this Court to hold that the qualified privilege applies only to the tort of defamation, as Respondent urges. As the Supreme Court of Massachusetts aptly noted, "[a] privilege which protected an individual from liability for defamation would be of little value if the individual were subject to liability under a different theory of tort." *Correllas v. Viveiros*, 572 N.E.2d 7, 13, 410 Mass. 314 (Mass. 1991). The California Court of Appeals also observed that "...to allow an independent cause of action for the intentional infliction of emotional distress based on the same acts which would not support a defamation action, would ... render meaningless any defense of ... privilege." *Flynn v. Higham*, 149 Cal.App.3d 677, 197 Cal.Rptr. 145 (Cal. App. 1984).

Qualified immunity applies to negligent misidentification. Respondents have presented no case, from Ohio or any other jurisdiction, indicating otherwise. Thus, this Court should answer the third certified question in the affirmative.

CONCLUSION

Despite its name, the substance of negligent misidentification lies in communication to law enforcement. Thus, under established Ohio law, it should be subject to the one year statute of limitations pursuant to R.C. 2305.11(A). In addition, Ohio law makes clear that an absolute privilege should apply to negligent misidentification and should also extend to statements made to police officers implicating another in criminal activity. Both the letter and spirit of *Sweeney* support this interpretation. Finally, both Ohio and its sister states have extended a qualified privilege to statements made to police officers, regardless of the form of the cause of action. Respondents have presented no case law to the contrary.

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

Respectfully submitted,

BENJAMIN, YOCUM & HEATHER, LLC

s/ Timothy P. Heather

Timothy P. Heather, Esq. (0002776)

R. David Weber, Esq. (0090900)

The American Book Building

300 Pike Street, Suite 500

Cincinnati, Ohio 45202-4222

Telephone: 513-721-5672

Facsimile: 513-562-4388

Email: tpheather@byhlaw.com

Attorneys for Petitioner/Defendant,

Michael R. Groff

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing has been served via ordinary United States mail upon the following parties and/or counsel of record on this 18th day of May, 2016.

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

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

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

A true and accurate courtesy copy of the foregoing has also been sent via ordinary United States mail to following additional Defendants who are interested, but not directly involved, in the issues certified on this 18th day of May, 2016:

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

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

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

APPENDIX

2917.32 Making false alarms.

(A) No person shall do any of the following:

- (1) Initiate or circulate a report or warning of an alleged or impending fire, explosion, crime, or other catastrophe, knowing that the report or warning is false and likely to cause public inconvenience or alarm;
- (2) Knowingly cause a false alarm of fire or other emergency to be transmitted to or within any organization, public or private, for dealing with emergencies involving a risk of physical harm to persons or property;
- (3) Report to any law enforcement agency an alleged offense or other incident within its concern, knowing that such offense did not occur.

(B) This section does not apply to any person conducting an authorized fire or emergency drill.

(C)

- (1) Whoever violates this section is guilty of making false alarms.
- (2) Except as otherwise provided in division (C)(3), (4), (5), or (6) of this section, making false alarms is a misdemeanor of the first degree.
- (3) Except as otherwise provided in division (C)(4) of this section, if a violation of this section results in economic harm of one thousand dollars or more but less than seven thousand five hundred dollars, making false alarms is a felony of the fifth degree.
- (4) If a violation of this section pertains to a purported, threatened, or actual use of a weapon of mass destruction, making false alarms is a felony of the third degree.
- (5) If a violation of this section results in economic harm of seven thousand five hundred dollars or more but less than one hundred fifty thousand dollars and if division (C)(4) of this section does not apply, making false alarms is a felony of the fourth degree.
- (6) If a violation of this section results in economic harm of one hundred fifty thousand dollars or more, making false alarms is a felony of the third degree.

(D)

- (1) It is not a defense to a charge under this section that pertains to a purported or threatened use of a weapon of mass destruction that the offender did not possess or have the ability to use a weapon of mass destruction or that what was represented to be a weapon of mass destruction was not a weapon of mass destruction.
- (2) Any act that is a violation of this section and any other section of the Revised Code may be prosecuted under this section, the other section, or both sections.

(E) As used in this section, "economic harm" and "weapon of mass destruction" have the same meanings as in section 2917.31 of the Revised Code.

Amended by 129th General Assembly File No. 29, HB 86, §1, eff. 9/30/2011.

Effective Date: 09-27-2002

Related Legislative Provision: See 129th General Assembly File No. 29, HB 86, §4

2921.22 Failure to report a crime or knowledge of a death or burn injury.

(A)

(1) Except as provided in division (A)(2) of this section, no person, knowing that a felony has been or is being committed, shall knowingly fail to report such information to law enforcement authorities.

(2) No person, knowing that a violation of division (B) of section 2913.04 of the Revised Code has been, or is being committed or that the person has received information derived from such a violation, shall knowingly fail to report the violation to law enforcement authorities.

(B) Except for conditions that are within the scope of division (E) of this section, no physician, limited practitioner, nurse, or other person giving aid to a sick or injured person shall negligently fail to report to law enforcement authorities any gunshot or stab wound treated or observed by the physician, limited practitioner, nurse, or person, or any serious physical harm to persons that the physician, limited practitioner, nurse, or person knows or has reasonable cause to believe resulted from an offense of violence.

(C) No person who discovers the body or acquires the first knowledge of the death of a person shall fail to report the death immediately to a physician whom the person knows to be treating the deceased for a condition from which death at such time would not be unexpected, or to a law enforcement officer, an ambulance service, an emergency squad, or the coroner in a political subdivision in which the body is discovered, the death is believed to have occurred, or knowledge concerning the death is obtained.

(D) No person shall fail to provide upon request of the person to whom a report required by division (C) of this section was made, or to any law enforcement officer who has reasonable cause to assert the authority to investigate the circumstances surrounding the death, any facts within the person's knowledge that may have a bearing on the investigation of the death.

(E)

(1) As used in this division, "burn injury" means any of the following:

(a) Second or third degree burns;

(b) Any burns to the upper respiratory tract or laryngeal edema due to the inhalation of superheated air;

(c) Any burn injury or wound that may result in death;

(d) Any physical harm to persons caused by or as the result of the use of fireworks, novelties and trick noisemakers, and wire sparklers, as each is defined by section 3743.01 of the Revised Code.

(2) No physician, nurse, or limited practitioner who, outside a hospital, sanitarium, or other medical facility, attends or treats a person who has sustained a burn injury that is inflicted by an explosion or other incendiary device or that shows evidence of having been inflicted in a violent, malicious, or criminal manner shall fail to report the burn injury immediately to the local arson, or fire and explosion investigation, bureau, if there is a bureau of this type in the jurisdiction in which the person is attended or treated, or otherwise to local law enforcement authorities.

(3) No manager, superintendent, or other person in charge of a hospital, sanitarium, or other medical facility in which a person is attended or treated for any burn injury that is inflicted by an explosion or other incendiary device or that shows evidence of having been inflicted in a violent, malicious, or criminal manner

shall fail to report the burn injury immediately to the local arson, or fire and explosion investigation, bureau, if there is a bureau of this type in the jurisdiction in which the person is attended or treated, or otherwise to local law enforcement authorities.

(4) No person who is required to report any burn injury under division (E)(2) or (3) of this section shall fail to file, within three working days after attending or treating the victim, a written report of the burn injury with the office of the state fire marshal. The report shall comply with the uniform standard developed by the state fire marshal pursuant to division (A)(15) of section 3737.22 of the Revised Code.

(5) Anyone participating in the making of reports under division (E) of this section or anyone participating in a judicial proceeding resulting from the reports is immune from any civil or criminal liability that otherwise might be incurred or imposed as a result of such actions. Notwithstanding section 4731.22 of the Revised Code, the physician-patient relationship is not a ground for excluding evidence regarding a person's burn injury or the cause of the burn injury in any judicial proceeding resulting from a report submitted under division (E) of this section.

(F)

(1) Any doctor of medicine or osteopathic medicine, hospital intern or resident, registered or licensed practical nurse, psychologist, social worker, independent social worker, social work assistant, licensed professional clinical counselor, licensed professional counselor, independent marriage and family therapist, or marriage and family therapist who knows or has reasonable cause to believe that a patient or client has been the victim of domestic violence, as defined in section 3113.31 of the Revised Code, shall note that knowledge or belief and the basis for it in the patient's or client's records.

(2) Notwithstanding section 4731.22 of the Revised Code, the doctor-patient privilege shall not be a ground for excluding any information regarding the report containing the knowledge or belief noted under division (F)(1) of this section, and the information may be admitted as evidence in accordance with the Rules of Evidence.

(G) Divisions (A) and (D) of this section do not require disclosure of information, when any of the following applies:

(1) The information is privileged by reason of the relationship between attorney and client; doctor and patient; licensed psychologist or licensed school psychologist and client; licensed professional clinical counselor, licensed professional counselor, independent social worker, social worker, independent marriage and family therapist, or marriage and family therapist and client; member of the clergy, rabbi, minister, or priest and any person communicating information confidentially to the member of the clergy, rabbi, minister, or priest for a religious counseling purpose of a professional character; husband and wife; or a communications assistant and those who are a party to a telecommunications relay service call.

(2) The information would tend to incriminate a member of the actor's immediate family.

(3) Disclosure of the information would amount to revealing a news source, privileged under section 2739.04 or 2739.12 of the Revised Code.

(4) Disclosure of the information would amount to disclosure by a member of the ordained clergy of an organized religious body of a confidential communication made to that member of the clergy in that member's capacity as a member of the clergy by a person seeking the aid or counsel of that member of the clergy.

(5) Disclosure would amount to revealing information acquired by the actor in the course of the actor's duties in connection with a bona fide program of treatment or services for drug dependent persons or persons in danger of drug dependence, which program is maintained or conducted by a hospital, clinic,

person, agency, or services provider certified pursuant to section 5119.36 of the Revised Code.

(6) Disclosure would amount to revealing information acquired by the actor in the course of the actor's duties in connection with a bona fide program for providing counseling services to victims of crimes that are violations of section 2907.02 or 2907.05 of the Revised Code or to victims of felonious sexual penetration in violation of former section 2907.12 of the Revised Code. As used in this division, "counseling services" include services provided in an informal setting by a person who, by education or experience, is competent to provide those services.

(H) No disclosure of information pursuant to this section gives rise to any liability or recrimination for a breach of privilege or confidence.

(I) Whoever violates division (A) or (B) of this section is guilty of failure to report a crime. Violation of division (A)(1) of this section is a misdemeanor of the fourth degree. Violation of division (A)(2) or (B) of this section is a misdemeanor of the second degree.

(J) Whoever violates division (C) or (D) of this section is guilty of failure to report knowledge of a death, a misdemeanor of the fourth degree.

(K)

(1) Whoever negligently violates division (E) of this section is guilty of a minor misdemeanor.

(2) Whoever knowingly violates division (E) of this section is guilty of a misdemeanor of the second degree.

Amended by 130th General Assembly File No. TBD, HB 232, §1, eff. 7/10/2014.

Amended by 130th General Assembly File No. 25, HB 59, §101.01, eff. 9/29/2013.

Effective Date: 03-19-2003; 2008 SB248 04-07-2009