

IN THE SUPREME COURT OF OHIO

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

REPLY BRIEF OF PETITIONER DYLAN PARFITT

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

COUNSEL FOR PETITIONER DYLAN PARFITT

Timothy P. Heather (0002776) (COUNSEL OF RECORD)
Benjamin, Yocum & Heather
300 Pike Street, Suite 500
Cincinnati, Ohio 45202
Tele. 513.721.5672
Fax 513.562.4388
tpheather@byhlaw.com

COUNSEL FOR PETITIONER MICHAEL R. GROFF

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

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

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ARGUMENTS

I. **The one year statute of limitations for defamation claims in R.C. 2305.11(A) is applicable to negligent misidentification claims because the essential character of a negligent misidentification claim is an alleged false communication**

Respondents argue that the tort of negligent misidentification must necessarily have a different statute of limitations than defamation because it is “separate and distinct” and has different elements. (Respondents’ Merit Brief at 7-14.) This argument improperly focuses on the form of the claim and ignores the underlying nature and grounds of such a claim. “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).

Indeed, it is well recognized that even “separate and distinct” torts, such as intentional infliction of emotional distress, negligent infliction of emotional distress, and false-light invasion of privacy, are subject to the one year statute of limitations for defamation claims when those torts are based on allegedly false communications. *Murray v. Moyers*, Case No. 2:14-CV-02334, 2015 WL 5626509, at *2-*4 (S.D. Ohio Sept. 24, 2015); *Fourtounis v. Verginis*, 8th Dist. No. 102025, 2015-Ohio-2518, ¶ 28-30; *Grover v. Bartsch*, 170 Ohio App.3d 188, 2006-Ohio-6115, ¶ 51-53; *Waters v. Allied Machine & Eng. Corp.*, 5th Dist. No. 02AP040032, 2003-Ohio-2293, ¶ 97; *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; *Worpenberg v. The Kroger Co.*, 1st Dist. No. C-010381, 2002-Ohio-1030, 2002 WL 362855, at *5-*8; *Lusby v. Cincinnati Monthly Pub. Corp.*, 904 F.2d 707, 1990 WL 75242, at *3-*4 (6th Cir.1990); *see also Doe v. First United Methodist Church*, 68 Ohio St.3d 531, 536, 1994-Ohio-531 (recognizing that the separate and distinct claims of battery, negligence, and intentional infliction of emotional

distress were all subject to the same one year statute of limitations in R.C. 2305.11(A) since all of the claims were based on an alleged offensive touching).

There is no basis in the law for Respondents' argument that negligent misidentification is not subject to the one year statute for defamation claims simply because it is a "separate and distinct" claim. Indeed, both of the other "separate and distinct" torts that Respondents acknowledge also overlap with defamation (invasion of privacy and negligent infliction of emotional distress) have been specifically found to be subject to the one year statute of limitations in R.C. 2305.11(A) when those claims are based on allegedly false communications. *Murray*, 2015 WL 5626509, at *2-*4; *Fourtounis* at ¶ 28-30; *Grover* at ¶ 51-53; *Waters* at ¶ 97; *Breno* at ¶ 9-13; *Singh* at ¶ 27; *Worpenberg*, 2002 WL 362855 at *5-*8; *Lusby*, 1990 WL 75242 at *3-*4. Ohio case law on this issue is clear; R.C. 2305.11(A) is the applicable statute of limitations for **any claim** based on the alleged communication of false information, regardless of the form under which the claim is pled. *Id.*; *Montgomery v. Ohio State Univ.*, 10th Dist. No. 11AP-1024, 2012-Ohio-5489, ¶ 13-17; *Cromartie v. Goolsby*, 8th Dist. No. 93438, 2010-Ohio-2604, ¶ 25-30.

In *Worpenberg*, the First District agreed with Plaintiff's contention that there is a separate and distinct tort for invasion of privacy under Ohio law and that such a tort is generally subject to a four year statute of limitations. *Worpenberg*, 2002 WL 362855 at *5-*8. Nevertheless, the court determined that the one year statute of limitations for defamation claims in R.C. 2305.11(A) applied to all of the claims in that case, including the invasion of privacy claim, because the predominate gravamen of the complaint was allegedly false information circulated by the defendant to third parties accusing the plaintiff of theft. *Id.*

In *Breno* the plaintiff sought to bring claims for negligent and intentional infliction of emotional distress based on information the defendant provided to the police falsely accusing plaintiff of possessing child pornography. *Breno*, at ¶ 11. The court recognized that it would be unfair to permit a plaintiff to recover under an emotional distress claim based on an allegedly false communication since the Ohio General Assembly has elected to limit the period of recovery for claims based on such allegations to one year. *Id.* at 12. “Thus, where a claim is expressly premised upon a ‘communication’ of false information, it is properly characterized as a ‘disguised defamation’ claim. Moreover, **although a claim for emotional distress is recognized as a separate tort under Ohio law**, if the claim sounds in defamation it is subject to the one-year statute of limitations for defamation.” *Id.* (emphasis added, internal citations omitted).

Respondents aver that *Breno* actually supports their position since the decision acknowledges the existence of the tort of negligent misidentification as being separate from a defamation claim. (Respondents’ Merit Brief at 12-13.) However, the portion of the *Breno* decision Respondents rely on is superfluous dicta and has no legal or binding effect. *Heisler v. Mallard Mechanical Co.*, 10th Dist. No. 09AP-1143, 2010-Ohio-5549, ¶ 12-14. Moreover, the decision in *Breno* does not address whether a negligent misidentification claim would have been subject to a one year statute of limitations if it had been raised in that case, and it would have been improper for the court to do so since any comment on the issue would have been purely advisory in nature. Put simply, the only actual holding in *Breno* that is relevant to this case is the recognition by the Eighth District that even separate and distinct torts, such as negligent and intentional infliction of emotional distress, are subject to the one year statute of limitations in R.C. 2305.11(A) when the claims are based on an alleged false communication.

In *Murray*, the plaintiff brought a false-light invasion of privacy claim, which, unlike the tort of negligent misidentification, has been specially recognized by this Court as a tort separate and distinct from defamation. *Murray*, 2015 WL 5626509, at *2-*4. The basis for the claim in *Murray* was alleged false statements that had caused damage to the plaintiff's reputation. *Id.* The court recognized that even though the tort of false-light invasion of privacy could potentially exist under circumstances that would not support a defamation claim, the two torts overlapped and when a false-light claim was based on allegations that would support a defamation claim (allegations of an allegedly false communication), the one year statute of limitations in R.C. 2305.11(A) would be applicable to the false-light claim. *Id.*

In this case, Respondents admit that there is an overlap between the torts of negligent misidentification and defamation, but argue that R.C. 2305.11(A) is not applicable to a negligent misidentification claim because defamation may exist in circumstances under which negligent misidentification would not. (Respondents' Merit Brief at 11-12.) The applicable question, however, is not, as Respondents have framed it, whether defamation may exist without negligent misidentification, but rather, as addressed by the Court in *Murray*, whether negligent misidentification may exist without defamation. Because it cannot, the one year statute of limitations for defamation claims should apply to negligent misidentification claims.

Respondents also argue that R.C. 2305.11(A) cannot apply to a claim of negligent misidentification because that claim is not specifically enumerated in the statute. (Respondent's Brief at 14-15.) That argument relies upon an inapplicable line of cases addressing the issue of whether certain vocations, such as optometrists (*Whitt v. Columbus Co-op. Enterprises*, 64 Ohio St.2d 355 (1980)), pharmacists (*Reese v. K-Mart Corp.*, 3 Ohio App.3d 123 (10th Dist.1981)), and counselors (*Doe v. White*, 97 Ohio App.3d 585 (2d Dist.1994)) fall within the common law

definition of malpractice. None of the cases cited by Respondents in any manner hold that a claim based on an alleged false communication is not subject to R.C. 2305.11(A) merely because of the form in which the claim was brought. In fact, as demonstrated above, numerous courts have held otherwise and applied the statute to a variety of “non-enumerated claims.” Moreover, the full syllabus in *Whitt* states that “[t]he statute of limitations contained in R.C. 2305.11(A) is limited to the **areas** specifically enumerated therein and to the common-law definition of ‘malpractice.’” *Whitt*, 64 Ohio St.2d at the syllabus of the Court (emphasis added). Therefore, the holding in *Whitt* does not state that R.C. 2305.11(A) is limited in application to specific enumerated claims, and the decision is actually supportive of the proposition that the applicability of R.C. 2305.11(A) turns on whether the claim relates to an area enumerated within the statute (such as defamation) rather than the form under which the claim was brought.

Respondents admit throughout their brief that the tort of negligent misidentification requires the communication of information to law enforcement falsely accusing another of a crime. (*Id.* at 7, 10, 15, and 20.) “[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 the one year statute of limitations in R.C. 2305.11(A). *Breno* at ¶ 12; *Fourtounis* at ¶ 30; *Cromartie* at 25-30; *Waters* at ¶ 97; *Breno* at ¶ 9-13; *Singh* at ¶ 27; *Worpenberg*, 2002 WL 362855, at *5-*6. Therefore, the appropriate statute of limitations for the tort of negligent misidentification is one year per R.C. 2305.11(A), and the first certified question should be answered 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. **A finding by this Court that negligent misidentification claims are subject to a one year statute of limitations will not destroy such claims**

Respondents maintain that there will no longer be a claim for negligent misidentification in Ohio if this Court finds that the one year statute of limitations in R.C. 2305.11(A) applies to such claims. (Respondents' Brief at page 10.) However, simply because negligent misidentification must be brought within the same time frame as a defamation claim does not mean that the tort would cease to exist. Certainly, if Respondents had filed their suit against the Petitioners within a year of the allegedly false communications to the police, then this issue would not even be before the Court. A decision by this Court regarding the applicable statute of limitations for negligent misidentification claims will determine the time by which such claims must be asserted, but it will not determine the underlying validity of those claims.

III. **This Court has never recognized the tort of negligent misidentification**

Respondents claim that “[t]he Supreme Court of Ohio has recognized the tort of negligent misidentification for nearly 100 years.” (Respondents' Brief at 5.) The case relied upon by Respondents for this assertion is *Mouse v Central Sav. & Trust Co.*, 120 Ohio St. 599 (1929), in which the plaintiff had given a check to a third party, but the defendant bank had refused to honor the check when the third party presented it, informing the third party that the check was no good. *Id.* at 602-03. The third party then sought and obtained a warrant for plaintiff's arrest, and the issue before the Court, which was specifically set forth in its syllabus, was whether the bank could be considered the proximate cause of plaintiff's arrest. *Id.* at 603-611. Thus, the *Mouse* decision is better understood as a case regarding the parameters of proximate causation rather than a case creating a tort that was never even explicitly discussed within the opinion. Additionally, there have not been any cases issued by this Court in the 87 years since *Mouse* was

decided that even peripherally acknowledge the existence of negligent misidentification as a tort separate and distinct from defamation under Ohio law.

Nevertheless, over 50 years after *Mouse* was decided, the Tenth District held that “it has been recognized in Ohio through the *Mouse* case, *supra*, that giving false information which results in the arrest and imprisonment of another may be grounds for tort liability.” *Walls v. City of Columbus*, 10 Ohio App.3d 180, 182 (10th Dist. 1983). The *Walls* decision, however, does not contain any further discussion of this issue, and there is no real substantive discussion among the subsequent cases citing to *Walls* and its progeny addressing the issue of whether this tort even exists. Rather, it seems to simply be repeatedly assumed that the reading of *Mouse* by the court in *Walls* was correct, but that assumption has never been confirmed by this Court.

In fact, at least one important difference exists between the *Mouse* case and the tort of negligent misidentification as recognized by appellate courts and propounded by Respondents. Respondents emphasize the fact that negligent misidentification requires the defendant to have provided false information **to law enforcement**. (Respondents’ Brief at 7, 10-12.) In *Mouse*, however, the defendant did not provide any information to law enforcement and had presented the allegedly false information to a private third party. *Mouse*, 120 Ohio St. at 603-611. Thus, it does not appear that there could have been a negligent misidentification claim brought in *Mouse* under the elements for that tort as stated by Respondents.

Notably, several other states have refused to recognize a claim for negligent misidentification 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.”); *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, 773-74 (1975) (declining to recognize a cause of action for negligent misidentification); *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).

It is within this Court’s province to address the issue of whether the tort of negligent misidentification exists under Ohio law as a prerequisite for addressing the certified questions of law. Obviously, if no such tort exists, then the certified questions would be moot since that tort is the only basis upon which Respondents seek to recover from Petitioners.

IV. **The determinative factor for whether a defendant is entitled to absolute privilege is the nature and grounds of the claim rather than the form of the claim**

In *M.J. DiCorpo, Inc. v. Sweeney*, 69 Ohio St.3d 497 (1994), this Court recognized that the doctrine of absolute privilege extends to statements made to a prosecutor reporting a possible

crime. *DiCorpo*, 69 Ohio St.3d at the syllabus of the Court. Respondents argue that this doctrine is only applicable to defamation claims, once again improperly putting form over substance and misconstruing the applicable law.

In *DiCorpo*, this Court specifically declined to address the issue of whether Ohio recognizes a false light invasion of privacy tort, indicating that it was unnecessary, and thus improper, to do so in that case given that the doctrine of absolute privilege barred recovery under any theory of tort. *Id.* at 507. Indeed, the notion that the absolute privilege recognized in *DiCorpo* applies only to defamation claims has been specifically considered and rejected. *Haller v. Borrer*, 10th Dist. No. 95APE01-16, 1995 WL 479424, at *2 (Aug. 8, 1995) (“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.”).

Furthermore, the doctrine of absolute privilege recognized in *DiCorpo* has been extended claims based on statements made to police officers in 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); *Lee v. City of Upper Arlington*, 10th Dist. No. 03AP-132, 2003-Ohio-7157, ¶ 19 (negligence, malice, intentional and fraudulent misrepresentation, abuse of process, malicious prosecution, false arrest, and false imprisonment); *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); see also *Becker v. Becker*, 5th Dist. No. 15-COA-006, 2015-Ohio-3992, ¶ 3, 26-27 (applying the doctrine of absolute privilege to claims of wrongful incarceration, kidnapping, abuse of process, invasion of privacy, excessive bond, the loss of the use and enjoyment of property, assault and battery, attorney's fees, fraud, and punitive damages).

Respondents have not cited a single case holding either that the doctrine of absolute privilege is limited in application to defamation claims or that the tort of negligent misidentification is impervious to this doctrine. (Respondents' Brief at 19-21.) Respondents rely on *Wigfall v. Soc. Natl. Bank*, 107 Ohio App.3d 667 (6th Dist. 1995), but that case does not even peripherally stand for the proposition that absolute privilege is not applicable to negligence claims. *Wigfall* merely acknowledges the existence of negligent misidentification as a separate and distinct tort and does not in any manner reference the doctrine of absolute privilege let alone address whether that privilege is limited in application to defamation claims or applies to negligent misidentification claims. *Wigfall*, 107 Ohio App.3d at 672-673.

"Absolute 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). Thus, the first part of the second certified question should be answered 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.

V. **The absolute privilege from civil liability recognized in *DiCorpo* extends to statements made to police officers**

As noted in Petitioner's initial merit brief, a 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; *Morgan v. Cmty. Health Partners*, 9th Dist. No. 12CA010242, 2013-Ohio-2259, ¶ 30-40; *Lasater* at ¶ 7-13; *Lee* at ¶ 14-19; *Brunswick*, 2011 WL 4482373, at *9; *Rodojev v. Sound Com Corp.*, No. 1:10CV1535, 2010 WL 5811886, at *3 (N.D. Ohio Dec. 30, 2010); *Fair*, 1998 WL 107350, at *3-*6; *Brown*, 1998 WL 28264, at *3-*5; *Haller*, 1995 WL 479424, *2-*4; *Slye v. London Police Dep't*, 12th Dist. No. CA2009-12-027, 2010-Ohio-2824, ¶ 10-15, 46.

These decisions are in keeping with the reasoning underlying the *DiCorpo* decision. In *DiCorpo*, this Court held that statements made to a prosecutor accusing another person of a crime are part of the judicial process and thus entitled to absolute privilege because such statements “may **potentially** set the process in motion for the investigation of a crime and the **possible** prosecution of those suspected of criminal activity.” *DiCorpo*, 69 Ohio St.3d at 506 (emphasis added). If statements made to a prosecutor regarding potential criminal activity before there is a criminal action or even an investigation pending are entitled to absolute privilege, then reason dictates that the same privilege should also extend to statements made to a police officer. The police and prosecutors are both part of the executive branch and both are tasked with enforcing the law. There is no logical reason for determining that the same statements made to one are absolutely privileged but made to the other are actionable in tort.

Additionally, the same public policies recognized in *DiCorpo* such as encouraging reporting of criminal activity, aiding proper investigation of criminal activity, and prosecuting those responsible for the crime, are even more affected by a determination of whether statements made to police officers are entitled to absolute privilege. Without such a privilege, police officers would be hindered in their everyday investigation of crime by a citizenry that is fearful of cooperating at the risk of exposure to potential civil suit. A failure to affirm that the absolute

privilege recognized in *DiCorpo* also extends to police officers would hinder the public policies underling that decision.

Furthermore, the decisions cited above, in which courts have held that absolute privilege extends to statements made to police officers, represent a third of the state law appellate courts and both of the federal trial courts in Ohio. Indeed, absolute privilege has been held to extend to statements made to police officers in the Tenth District since 1995 when *Haller* was decided only a year after *DiCorpo*. Respondents urge the Court not to adopt the majority position, claiming that to do so would create “new law with uncertain consequences,” opening “the floodgates of immunity defenses for statements made to law enforcement” and sowing seeds of chaos that “can only be imagined.” (Respondents Brief at 1, 23-26.) Respondents’ apocalyptic warnings are, however, disproven by the fact that a majority of the state already recognizes the privilege at issue in this case. In fact, it is Respondents who are seeking to change the law as it is currently being applied throughout the majority of the state, and despite the dire consequences predicted by Respondents, Columbus appears to have somehow survived the more than twenty years since *Haller* was issued without a rash of false criminal allegations being levied by persons seeking refuge under the auspices of absolute privilege.

Respondents cite to seven different cases for the proposition that Ohio Courts have held statements made to police officers are entitled to qualified privilege at most. (Respondents’ Brief at 23-24.) However, the majority of those cases predate *DiCorpo*, and none of the cases address the issue of whether absolute privilege applies to statements made to police officers. In fact, only one of the seven cases even addresses the issue of absolute privilege at all, stating in a footnote, “[h]aving concluded that defendants are entitled to summary judgment on this claim based on the Bexley Police Report, the Court will not address whether or not defendants are also

entitled to absolute immunity in making police reports.” *Mason v. Bexley City School Dist.*, No. CIV 2:07-CV-654, 2010 WL 987047, *30, n. 33 (S.D. Ohio Mar. 15, 2010). The cases Respondents rely upon are simply inapplicable to the issue of whether the absolute privilege in *DiCorpo* extends to statements made to police officers.

The absolute privilege in *DiCorpo* should be recognized as extending to statements made to police officers, and the Court should 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.

VI. **The reasonable relation prong of the absolute privilege doctrine is irrelevant to a determination of any of the certified questions of law**

Respondents claim that “Ohio courts have explicitly found that absolute privilege does not apply to falsehoods provided to law enforcement for an improper purpose,” relying on the discussion of the reasonable relation prong of absolute privilege in the case of *Scott v. Patterson*, 8th Dist. No. 81872, 2003-Ohio-3353. (Respondents’ Brief at 24-26.) In *Scott*, the defendant, an NBA player, committed assault outside of a nightclub, but then identified the plaintiff as the assailant to the police, even though the plaintiff was not in any manner involved with the altercation and was simply a third party bystander. *Scott* at ¶ 1-6. The defendant had simply picked the plaintiff out of a crowd of people and accused him of a crime. *Id.* at ¶ 16.

The Eighth District drew a bright line distinction between giving a statement to the police and giving a statement to a prosecutor and found that the absolute privilege recognized in *DiCorpo* was not available to the defendant on that basis. *Id.* at ¶ 12. The court recognized that its decision was in direct conflict with the Tenth District’s decisions in *Haller* and *Fair*, which

had extended the *DiCorpo* absolute privilege to statements made to police officers, but it made no attempt to distinguish those decisions or justify its decision to the contrary. *Id.* at ¶ 15.

The court then went on to find that “[a]ssuming arguendo that informing the police is the same as informing the prosecution and thus a part of a judicial proceeding, we nonetheless conclude that the second prong of *DiCorpo* has not been met because [the defendant’s] statements to the police must bear some reasonable relation to the activity reported.” *Id.* at ¶ 13. Thus, the actual holding in *Scott* was based on a rejection of the extension of the absolute privilege in *DiCorpo* to statements made to police officers, and the discussion of the reasonable relation aspect of the test was dicta. *Id.* As such, that portion of the decision, which is the portion of the decision relied upon by Respondents in their merit brief, has no precedential force. *Cosgrove v. Williamsburg of Cincinnati Mgt. Co.*, 70 Ohio St.3d 281, 284, 1994-Ohio-295; *State ex rel. DiFranco v. S. Euclid*, 138 Ohio St.3d 367, 2014-Ohio-538, ¶ 24.

Moreover, the second certified question of law before this Court is the legal question of whether absolute privilege applies to statements made to police officers generally and does not involve the question of whether the privilege applies to the facts in this specific action, which is the question raised by Respondents in addressing the reasonable relation prong of the *DiCorpo* test. Respondents have confused the issues and raised a point of law that is irrelevant to the certified questions.

Additionally, the District Court has already rejected this argument and ruled that the alleged false accusations Petitioners made to the police were reasonably related to their encounter with Respondents. (Fed. Court Order, at Parfitt Merit Brief Appx. pages 19-20.) As recognized by the District Court, *Scott* is factually distinguishable because Respondents admit they were not wholly unrelated third parties that were not in any manner involved with

Petitioners, as was the case in *Scott*. (*Id.*) Respondents admit that they twice knocked on the front door of Petitioners' house in the early morning hours and engaged in a discussion with Petitioner Groff. (Am. Com., at ¶ 25-26, 33-38.) Respondents also admit that Petitioner Parfitt's statements to the police were made after Respondent Evan Foley had already been arrested and were in response to the police officer's investigation of the potential criminal activity of Respondents related to their earlier interaction with Groff. (*Id.* at ¶ 43-57.)

Respondents do not claim that they were misidentified or that they were not in any manner involved with Groff at Petitioners' home. Furthermore, Respondents do not maintain that they were innocently walking down the street and randomly targeted as being responsible for a crime as occurred in *Scott*. Rather, Respondents allege that Petitioners' misrepresented the nature of Respondents' actions during their admitted interaction with Groff at Petitioners' home. (*Id.* at ¶ 54-57, 152-155.) Accordingly, as Judge Rice has already found, the holding in *Scott* is not applicable to the claims raised in this case since Petitioners' alleged statements at "bear **some** reasonable relation to the activity reported." *DiCorpo*, 69 Ohio St.3d at the syllabus of the Court (emphasis added).

Furthermore, the absolute privilege in *DiCorpo* applies even to statements that are knowingly false, made with actual malice, or in bad faith. *DiCorpo*, 69 Ohio St.3d at 505-06. Respondents argue that Petitioners' statements to the police were not reasonably related under *DiCorpo* because those statements were untruthful and made in bad faith to retaliate against them. If this argument is accepted, then the second prong of the absolute privilege test would swallow the entire rule, and parties would be able to avoid absolute privilege merely by alleging that the defendant had made statements to the police that were knowingly untrue or made in bad

faith. This is directly contrary to the express language used by this Court in *DiCorpo* to describe the breadth of absolute privilege and was also specifically rejected by Judge Rice.

VII. **At the very least, the doctrine of qualified privilege is available as a defense to negligent misidentification**

As noted above, Respondents admit that Ohio Courts have recognized that statements made to a police officer implicating another in criminal activity are protected by at least a qualified privilege. (Respondents' Brief at 23-24.); *see 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); *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); *see also Dehlendorf v. City of Gahanna, Ohio*, 786 F.Supp.2d 1358, 1363-1365 (S.D. Ohio 2011) (rejecting the application of the absolute privilege in *DiCorpo* to statements made to police officers, but recognizing that such statements would at least still be entitled to qualified privilege).

Respondents' argument that the defense of qualified privilege is not applicable to a negligent misidentification claim continues to improperly rely on the form of their claim and ignore its substance. (Respondents' Brief at 26-27.) Respondents do not cite to any law in support of their proposition that the doctrine of qualified privilege is applicable only to defamation claims. However, "Ohio courts have recognized that the qualified privilege defense is applicable to actions for intentional infliction of emotional distress." *Smith v. Ameriflora 1992, Inc.*, 96 Ohio App.3d 179, 189 (10th Dist.1994). As is the case with the doctrine of absolute privilege, the doctrine of qualified privilege is applicable to any claim seeking to impose civil liability based on allegedly providing false information to the police, regardless of

the name given to the claim by the plaintiff, and the Court should adopt the following proposition of law in answer to the third certified question:

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.

CONCLUSION

A negligent misidentification claim, to the extent that such a claim even exists in Ohio, requires proof that the defendant communicated false information to a police officer accusing the plaintiff of a crime. As such, the essential nature of the claim is an alleged false communication and it is subject to the one year statute of limitations in R.C. 2305.11(A).

Additionally, the doctrine of absolute privilege is applicable to claims of negligent misidentification and extends to statements made to police officers. Alternatively, at the very least, the doctrine of qualified privilege is available as a defense to a claim of negligent misidentification.

Respectfully submitted,

/s/ JARED A. WAGNER

JANE M. LYNCH (0012180)

JARED A. WAGNER (0076674)

GREEN & GREEN, Lawyers

800 Performance Place, Suite 109

Dayton, Ohio 45402

Tel. 937.224.3333

Fax. 937-224-4311

jmlynch@green-law.com

jawagner@green-law.com

Counsel for Petitioner Dylan Parfitt

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served via regular mail upon the following on the 20th day of May 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 Burlhardt; Todd M. Raskin and David M. Smith**, counsel for defendants Bruce Burt, Harry Sweigart, Sgt. Thomas Ryan, Officer Kevin Bernhardt, Officer Robert Babal, Officer Eric Roth, Officer Jonathan Mccoy, Sgt. Michael Sipes, Sgt. Bradley Swank, and Lt. Joseph Cairo.

/s/ JARED A. WAGNER

JARED A. WAGNER