

IN THE SUPREME COURT OF OHIO

08-0895

MARY NISKANEN, Individually and as  
Administratrix of the Estate of Paul J.  
Niskanen,

Appellee,

v.

GIANT EAGLE, INC.,

Appellant.

Case No. \_\_\_\_\_

On Appeal from the Summit County Court of  
Appeals, Ninth Appellate District

Court of Appeals

Case No. 23445

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MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT GIANT EAGLE, INC.

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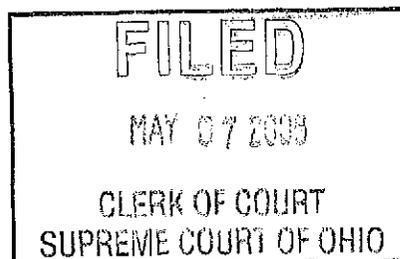


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**EXPLANATION OF WHY THIS CASE IS  
ONE OF PUBLIC OR GREAT GENERAL INTEREST**

This case presents several issues for review that profoundly impact every retail business in Ohio—including their employees and customers. Significant holdings of the Ninth District relating to these issues include:

- (1) Punitive damages are recoverable without an award of compensatory damages.
- (2) Retail businesses, their employees, and their customers may not assert self-defense against a negligence claim even when they have been assaulted without provocation.
- (3) Retail businesses may not assert self-defense to defeat a claim for undue restraint under the shopkeeper's privilege statute, R.C. 2935.041 (the "shopkeeper's privilege"), even when their employees have been assaulted without provocation.

This case arises out of Paul Niskanen's ("Niskanen") unprovoked attack against two Giant Eagle, Inc. ("Giant Eagle") employees at its store in Rootstown, Ohio. Niskanen died when Giant Eagle's employees, with the aid of two customers, tried to immobilize him while they were defending themselves against his attack.

Having decided that "the jury lost sight of the entire gist of Niskanen's claims" because Giant Eagle asserted self-defense, Opinion, ¶26, a split panel of the Ninth District Court of Appeals vacated a defense verdict based on its mistaken resolution of the issues Giant Eagle asks this Court to review. First, the Ninth District held that a plaintiff who has asserted only a negligence claim may recover punitive damages even where, as here, he recovered no compensatory damages due to an adverse finding on comparative fault. Second, the Ninth District held that through strategic pleading a plaintiff, despite being the attacker, can preclude a defendant from being able to assert self-defense. Third, the Ninth District held that self-defense can never be asserted to defeat a claim of undue restraint under R.C. 2934.041.

## **Punitive Damages**

As reflected by the many statutory revisions to punitive damages in Ohio, the subject of punitive damages is a major public policy concern in this state. While punitive damages serve important public policy goals, if not limited to the attainment of these goals, they can dramatically increase the cost of goods and services, discourage businesses from locating in Ohio, and encourage existing Ohio businesses to leave. All these harms from the unprincipled award of punitive damages will occur unless this Court corrects the Ninth District's mistaken reading of Ohio Supreme Court precedent on this important subject.

The Ninth District's holding that a jury may consider punitive damages in a negligence action even where a finding of comparative fault precludes an award of compensatory damages directly conflicts with *Malone v. Courtyard By Marriott, L.P.*, 74 Ohio St.3d 440, 1996-Ohio-311, 659 N.E.2d 1242 and its precursor—*Bishop v. Grdina* (1985), 20 Ohio St.3d 26, 485 N.E.2d 704. It also conflicts with the Tenth District's decision in *Burwell v. American Edward Labs.* (1989), 62 Ohio App.3d 73, 574 N.E.2d 1094. All these decisions hold that, because an award of compensatory damages is a condition precedent to an award of punitive damages, an adverse finding on comparative fault in a negligence action precludes a jury from considering punitive damages.

This rule—once thought to be straightforward—has been called into question by the Ninth District's decision. For businesses located throughout Ohio, they face an increased risk of punitive damages in the aftermath of the Ninth District's decision.

## **Self-Defense**

The Ninth District's decision greatly undermines the right of store employees and customers to defend themselves—a right even Plaintiff's security expert acknowledged they have. 7 Tr. 821. According to the Ninth District, a defendant cannot assert self-defense if

plaintiff has strategically sued him under only a negligence theory, even though he harmed plaintiff only while defending against an unprovoked attack. This holding will impact not only store employees and customers, but any Ohio citizen who may someday have to defend himself against an unprovoked attack. In the wake of the Ninth District's decision, Ohio citizens must fear for more than their safety when being attacked—they must fear liability to their attacker even if they can establish all the elements of self-defense as Giant Eagle did here.

For its unprecedented holding, the Ninth District relied on the rule in criminal cases that a "defendant cannot defend on the basis that he acted negligently and, at the same time, raise the defense of self-defense because the two theories are inconsistent." Opinion, ¶23. But even if this reasoning had some validity in the criminal context, Giant Eagle's defense was consistent – it denied having been negligent but, if it were found negligent, self-defense provided a complete defense.

Even more troubling for victims of physical assault, the Ninth District's decision permits a plaintiff, who attacks another person—here Giant Eagle's employees—with the clear intent to cause harm, to avoid the defense of self-defense by pleading only negligence. The attacker avoids this often relied-upon defense even though he has undeniably committed an *intentional* assault and battery against the defendant who, in the course of defending himself, only *unintentionally* caused harm to his attacker. Under the Ninth District decision, the jury must, in effect, pretend that, despite all the evidence to the contrary, the defendant was not forced to defend himself against an unprovoked attack.

Equally significant, the Ninth District's decision fails to heed the message this Court sent in *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 1997-Ohio-401, 679 N.E.2d 1099, that self-defense may be asserted in a negligence action. It also ignores prior Ninth District authority and

decisions by the highest courts from other states. To avoid chilling the right to self-defense, this Court must reaffirm its holding in *Goldfuss* that a defendant may rely on that defense in a negligence action.

### **Shopkeeper's Privilege Statute**

The Ninth District's interpretation of R.C. 2935.041 thwarts the legislative intent to grant retail merchants a privilege to detain suspected shoplifters "in a reasonable manner and for a reasonable length of time." If the statute's threshold requirements have been met, the merchant has an affirmative defense against any claim that may be asserted against him by a suspected shoplifter. Ignoring R.C. 2935.041's goal to expand defenses available to merchants, the Ninth District eliminated a common defense previously available to them by holding that self-defense cannot be asserted to defeat an undue restraint claim under R.C. 2935.041 (assuming, as the Ninth District apparently did, that such a claim exists). Unable to rely on self-defense, if the Ninth District decision stands, merchants will no longer be able to defend themselves against an unprovoked attack without the fear of incurring significant liability to their attacker under R.C. 2935.041.

The Ninth District's decision, in short, turns a statute enacted to limit the liability of merchants into one that greatly expands their liability by eliminating a significant defense—a result plainly contrary to the public policy concerns that led to R.C. 2935.041. Not only does the Ninth District's interpretation of R.C. 2935.041 adversely affect thousands of merchants in Ohio by expanding their potential liability to shoplifters, it also adversely affects all Ohio citizens by the higher prices merchants may charge as a result of their increased liability risk.

### **STATEMENT OF THE CASE AND FACTS**

Immediately after learning that Niskanen left the store without paying for his groceries, Maczko, a store manager, approached him while he was loading the stolen groceries into his car.

10 Tr. 1343-44; 8 Tr. 891. At that moment, another Giant Eagle employee, Jonathan Stress, heard Maczko yell "stop," and he responded by also approaching Niskanen. 11 Tr. 1452-53. Before Stress could say or do anything, Niskanen "took a step towards [him] and he punched [him]" which knocked Stress to the ground. Hoping to protect Stress, Maczko tried to grab Niskanen to no avail. 10 Tr. 1345. Niskanen "turned around" and punched Maczko "in the face twice." *Id.*

Maczko "was hurt pretty bad" and he soon was on the ground with Niskanen "straddled" over him. 10 Tr. 1346; 6 Tr. 712-13. While in this position, Niskanen was "inflicting many punches" on Maczko who remembers getting hit "seven or eight times" in the chest and stomach. 10 Tr. 1346; 6 Tr. 712-13. Still on his back, Stress could see Niskanen "pummeling" Maczko and so, despite his fear, he jumped on Niskanen's back to try to get him off his injured co-worker—Maczko. 11 Tr. 1454-55. Maczko "was afraid for [his] life." 10 Tr. 1346.

Unable to fend off Niskanen's attack, Maczko yelled "[h]elp, help, somebody please help me." 6 Tr. 711, 730. A customer, David L. Alexoff, who was leaving the store just then, heard this cry and thought it came from a person

in grave distress like somebody that got caught in a piece of machinery or like they were in a bear trap or something. They had that sound in their voice that they were desperate.

*Id.* at 711-12. Alexoff came to his aid and, when asked why, he explained

[i]ts like the Good Samaritan stopped and helped the man that was beaten and you are actually—you are able to stop this from happening, you have to do something, and your wife says, 'Hurry Dave' so it was almost compelling for me to do the right thing, I thought, to protect somebody.

*Id.* at 732. Alexoff grabbed Niskanen "to pull him off and keep him from doing any more damage to the manager." *Id.* at 733. But despite Alexoff's efforts, Niskanen kept punching Maczko who remained defenseless. *Id.* at 730, 734.

A moment later, as they struggled to hold Niskanen down, a fourth person, Roger Dishong, came to their aid when he thought he saw Niskanen reaching in his pocket for "something" like a "knife." 11 Tr. 1473-74. Only then were they able to hold Niskanen down as others offered to help. 11 Tr. 1594; 6 Tr. 735. But even then Niskanen kept "yelling," "struggling," "kicking," and "thrashing." 5 Tr. 629, 654; 6 Tr. 723; 11 Tr. 1595, 1601. None of the defenders to Niskanen's attack ever felt like they had Niskanen under control. 5 Tr. 629; 6 Tr. 718-19; 10 Tr. 1348-49. Several men told Alexoff not to let Niskanen up

which [he] thought was wise . . . because [he] knew if [he] let him up being [his] age [Niskanen] probably would have attacked [him]. So . . . control would be when the police got there . . . .

6 Tr. 719. As he was being held down, Niskanen never appeared to be "giving up the fight." 11 Tr. 1458. During this time, everyone defending themselves was "worried he was going to get back up" and hurt someone. 5 Tr. 620; 6 Tr. 700.

Eyewitnesses confirmed that the actions of Maczko and his rescuers were, at all times, purely defensive. 6 Tr. 698-00; 11 Tr. 1599. They were only trying to hold Niskanen down. 6 Tr. 700; 10 Tr. 1348; 11 Tr. 1471, 1476. Nobody was trying to hurt Niskanen. 6 Tr. 699; 11 Tr. 1457-59. Nobody hit Niskanen. 6 Tr. 698; 11 Tr. 1458, 1471, 1476, 1593-94, 1599. Never confident that Niskanen would not resume his attack, the four men held him down until the police arrived. 6 Tr. 700; 10 Tr. 1348. While they waited for the police, however, nobody thought they were causing Niskanen any harm. 10 Tr. 1350; 11 Tr. 1459, 1477, 1599. When the police arrived, however, Niskanen was found unresponsive and, accordingly, he was taken to the hospital where he was pronounced dead. 8 Tr. 881.

On August 5, 2004, Niskanen's mother, Mary Niskanen, as Administratrix of her son's estate, filed a wrongful death and survival action in the Summit County Court of Common Pleas. In her amended complaint, Mrs. Niskanen sued not only Giant Eagle and its employees, John M.

Maczko ("Maczko"), Jonathan A. Stress ("Stress") and Paul K. Taylor ("Taylor"), but also David L. Alexoff ("Alexoff")—one of two customers who helped thwart her son's attack. Mrs. Niskanen asserted claims for assault and battery, negligence, false imprisonment, unlawful restraint in violation of R.C. 2935.041, and spoliation of evidence. On May 25, 2006, the trial court granted summary judgment in favor of Giant Eagle's employees on punitive damages. May 25, 2006 Order, at 14 (No. 138). Finding factual issues, however, the trial court denied the Giant Eagle Defendants' motion for summary judgment on Mrs. Niskanen's remaining claims—including her request for punitive damages against Giant Eagle. *Id.* at 16.

On the morning of trial, Mrs. Niskanen dismissed her claims against all the individual Defendants—Alexoff, Maczko, Stress, and Taylor—and all her intentional tort claims against the remaining Defendant—Giant Eagle. 1 Tr. 2-3. After a two-week trial, the jury made the following dispositive findings in favor of Giant Eagle:

- (1) that Giant Eagle acted in self-defense;
- (2) that Niskanen was 60 percent negligent and Giant Eagle was 40 percent negligent;
- (3) that Giant Eagle did not use undue restraint under R.C. 2935.041; and
- (4) that Giant Eagle did not engage in the spoliation of any evidence.

Jury Interrogatories (July 14, 2006) (No. 221); 15 Tr. 1903-32. The trial court then entered a general verdict in favor of Giant Eagle pursuant to Ohio R. Civ. P. 49 and 58 on all claims—including Mrs. Niskanen's request for punitive damages. 15 Tr. 1931-35; Order of July 17, 2006 (No. 223).

On March 26, 2008, a split panel of the Ninth District reversed the judgment in favor of Giant Eagle and remanded for a new trial on all claims (except spoliation) and on all defenses (except Giant Eagle could not raise self-defense). Relevant here, the Ninth District held that (1) punitive damages may be awarded even where only a negligence claim has been asserted and no

compensatory damages have been awarded due to an adverse finding on comparative fault; (2) self-defense can never be asserted in a negligence action even when punitive damages have been requested; and (3) a retail business cannot assert self-defense against a "claim" for undue restraint under R.C. 2935.041, even assuming, as the Ninth District did, that such a claim exists.

Only the Ninth District's holding on punitive damages was unanimous. Judge Slaby dissented from the rest of the majority's opinion because

[o]nce the individual [Niskanen] became the aggressor, [Giant Eagle's] employees were no longer trying to apprehend a shoplifter. The store employees and the passerby did not have an opportunity to disengage per the store policy. The jury could have found, and they apparently did, that they were either attempting to restrain an aggressor for the police or defending themselves from further attack.

Dissenting Opinion, ¶49. On April 4, 2008, Giant Eagle moved for reconsideration or, in the alternative, for rehearing en banc. This motion remains pending.

### ARGUMENT

**Proposition of Law No. I: A jury may not consider punitive damages where plaintiff asserts only a negligence claim and they find against him on comparative fault.**

The Ninth District observed that, because Mrs. Niskanen dismissed her intentional tort claims before trial, "[t]here were no longer any claims that Giant Eagle or any of its employees had intentionally harmed Niskanen." Opinion, ¶26. This meant that Mrs. Niskanen had to succeed on her remaining negligence and undue restraint claims to be eligible for punitive damages because, as this Court has "held time and again, punitive damages may not be awarded when a jury fails to award compensatory damages." *Marriott*, 74 Ohio St.3d at 447; *accord Bishop*, 20 Ohio St.3d at 27. But the jury found no undue restraint and against Mrs. Niskanen on comparative fault and, as a result, she recovered no compensatory damages.

Under *Marriott* and *Bishop* then, Mrs. Niskanen should be barred from recovering punitive damages. The Ninth District avoids this result by holding that the condition precedent to an award of punitive damages—*i.e.*, an award of compensatory damages—can be dispensed with when plaintiff's comparative fault was the only reason such damages were not awarded. According to the Ninth District, a finding of malice needed for punitive damages can, in effect, "bootstrap" a negligence claim into an intentional tort which, of course, then eliminates comparative fault as a defense. Yet this Court rejected precisely the same argument in *Marriott*. 74 Ohio St.3d at 440.

In *Marriott*, the jury found that the losing plaintiff was 51 percent at fault and, as a consequence, she received no compensatory damages. *Id.* at 444. Although the trial court had directed a verdict against the losing plaintiff on punitive damages, this Court held

that even if punitive damages were warranted in this case, [plaintiff] could not recover them because the jury did not award her compensatory damages.

*Id.* at 447. This holding is directly contrary to the Ninth District's determination that the jury should have considered punitive damages even though comparative fault barred Mrs. Niskanen from recovering compensatory damages.

*Marriott* rejected precisely the same reasoning that the Ninth District relied on here to "resurrect" Mrs. Niskanen's defeated negligence claims with punitive damages:

[Plaintiff] attempt[s] to circumvent [the no compensatory damages] bar to [her] recovery of punitive damages by pointing out that [she] failed to recover compensatory damages under the negligence theory only because the jury found that she had been fifty-one percent comparatively negligent. Since comparative negligence is not available as an affirmative defense for an action based on recklessness, [plaintiff] theorize[s] that she could have recovered compensatory damages on a recklessness theory. Such an award would also allow [plaintiff] to overcome the bar to punitive damages that was articulated in *Bishop* and elsewhere.

*Marriott*, at 447. But this reasoning, as this Court held, "is flawed in one vital respect: there is absolutely *no* indication . . . that [plaintiff] ever pursued a compensatory damages claim based on recklessness." *Id.* The same flaw is present here.

As the Ninth District observed, Mrs. Niskanen only asserted negligence claims at trial (except for spoliation) after having made the strategic decision to dismiss her intentional tort claims. It is not enough under *Marriott* merely to add punitive damage-type allegations to a negligence claim—plaintiff must separately plead a compensatory damage claim asserting intentional misconduct. While she sprinkled allegations relating to punitive damages throughout much of her amended complaint, Mrs. Niskanen did not pursue a separate intentional tort claim at trial.<sup>1</sup>

Not only does the Ninth District's decision on punitive damages conflict with *Marriott*, it also conflicts with the nearly universal rule elsewhere that

[w]here the state has adopted a modified comparative negligence system which establishes a 50 percent cutoff for liability, a plaintiff whose comparative negligence reaches the prescribed statutory cutoff and thereby recovers no compensatory damages is also disabled from recovering punitive damages. This principle is predicated on the rule that some actual harm or damage is a prerequisite to any liability for punitive damages. Since there is no tort of 'punitive damages' . . . , liability for punitive damages requires that the plaintiff first establish an underlying tort liability, which by definition is destroyed if his or her negligence exceeds the statutory limit.

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<sup>1</sup> This Court found these same punitive damage-type allegations insufficient in *Marriott* to state a separate intentional tort claim:

[A]lthough plaintiff alleged that Marriott had engaged in 'willful, wanton, and reckless' behavior . . . and had shown 'conscious disregard for the safety and well being of [plaintiff] when, a great probability of harm existed,' . . . [i]n no reasonable way can [plaintiff's] complaint be read, as advancing a claim for compensatory damages based on recklessness.

74 Ohio St. 3d at 447. These allegations mirror Mrs. Niskanen's allegation, in her negligence cause of action, that Giant Eagle's conduct was "willful, intentional and/or grossly negligent." Am. Compl. at ¶42.

1 Stein On Personal Injury Damages Treatise §4:43 (3d ed. 2007); accord *Tucker v. Marcus*, 142 Wis.2d 425, 418 N.W.2d 818 (Wis. 1988) (jury could not consider punitive damages where plaintiff was 70 percent negligent); *While v. Hansen*, 837 P.2d 1229 (Colo. 1992) (plaintiff could not recover punitive damages where her fault exceeded 50 percent); *Wisker v. Hart*, 244 Kan. 36, 766 P.2d 168 (1988) (alleged error in failing to instruct on punitive damages mooted by jury's finding that plaintiff was 60 percent at fault); *Williams v. Carr*, 263 Ark. 326, 565 S.W.2d 400 (1978) (where plaintiff was found to be 50 percent at fault she could not recover actual damages and therefore there could be no recovery for punitive damages). To avoid punitive damages awards when they are not warranted under the common law, this Court should follow the collective wisdom of these decisions by reaffirming *Marriott*.

**Proposition of Law No. II: Self-defense is a valid defense in a negligence action.**

As a matter of law, according to the Ninth District, Giant Eagle's "defense of self-defense was completely irrelevant" to Mrs. Niskanen's negligence claims. Opinion, ¶28. The Ninth District embraced this mistaken proposition of law because it "found no Ohio authority for recognizing self-defense as a defense in a negligence action." *Id.*, ¶25. But there is ample Ohio authority holding that self-defense may be asserted to defeat a negligence claim—including *Goldfuss*, 79 Ohio St.3d 116 and *Ashford v. Betleyoun*, No. 22930, 2006 WL 1409793 (Ohio Ct. App., Ninth Dist. May 24, 2006), 2006-Ohio-2554—that controls the outcome here.

In *Goldfuss*, a trespasser's estate brought a wrongful death action claiming only negligence against the defendant homeowner who shot and killed the trespasser. Before addressing whether there was sufficient evidence to support a self-defense instruction, this Court recognized that "a defendant may be relieved of liability for tortious conduct [including negligence] by proving that such conduct was in self-defense." *Id.* at 124 (*citing* 1 Restatement

Torts §63 *et seq.*). Facing only negligence claims in *Ashford*, the Ninth District followed

*Goldfuss*:

The Ohio Supreme Court has recognized that ‘a defendant may be relieved of liability for tortious conduct by proving that such conduct was in self-defense.’

*Ashford*, at \*2 (quoting *Goldfuss*, 79 Ohio St.3d at 124); accord *Estate of Daniels v. City of Cleveland*, No. 87-3017, 1989 WL 903, at \*5 (6<sup>th</sup> Cir. Jan. 11, 1989) (approving self-defense instruction where police alleged to have negligently failed to follow police procedures in apprehending suspect). Courts from outside Ohio also permit self-defense to be asserted in a negligence action. *Brown v. Robishaw*, 282 Conn. 628, 642, 922 A.2d 1086 (2007) (holding that self-defense may be asserted where only negligence is pled); *Herold v. Shagnasty’s Inc.*, No. 03-0894, 2004 WL 2002433, at \*1-3 (Iowa Ct. App. Sept. 9, 2004) (reversible error not to give self-defense instruction in negligence case); *Blackburn v. Johnson*, 187 Ill. App.3d 557, 561-62, 543 N.E.2d 583 (1989) (finding that self-defense can involve “an intentional act . . . performed negligently”). The Ninth District cited no contrary authority to support its position—nor is there any such authority.

Precluding self-defense in negligence actions even raises serious due process concerns. Niskanen’s death occurred while Giant Eagle’s employees and customers were defending themselves. This fact is not only undisputed – it is indisputably a part of this case. Yet the Ninth District, by removing self-defense from the case, would preclude Giant Eagle from telling the jury *why* it took the actions that ultimately, unintentionally, and tragically contributed to Niskanen’s death. A plaintiff, like Mrs. Niskanen here, cannot control what defenses a defendant may raise by artful pleading or, in this case, strategic dismissal of certain claims on the eve of trial. It was this concern that led the Connecticut Supreme Court in *Brown* to conclude that

basic tenets of fairness dictate that the defendant be permitted to raise a defense of self-defense. A contrary conclusion would permit the plaintiff essentially to

dictate the defendant's defense strategy by styling claims in his pleadings to preclude the use of certain defenses that otherwise might be appropriate given the facts of a particular case. . . .we decline to endorse the notion that a plaintiff, in pleading his case, may force a defendant to defend himself exclusively within the framework chosen by the plaintiff.

282 Conn. 628, 642. Here, Giant Eagle, like the defendant in *Brown*, was entitled to assert self-defense to explain its intentional actions – *i.e.* holding Niskanen down until the police arrived.<sup>2</sup>

**Proposition of Law No. III: Assuming a cause of action exists under R.C. 2935.041 for undue restraint, a retail business must be able to assert self-defense to a claim under that statute.**

The Ninth District held that a store can never assert self-defense to defeat a claim by a suspected shoplifter for undue restraint under R.C. 2935.041. That holding is directly contrary to the public policy underlying R.C. 2935.041's goal of protecting retail businesses when they must confront a shoplifter. The Ninth District's view of R.C. 2935.041 has no support in Ohio case law.

R.C. 2935.041 creates a privilege for a merchant to detain a suspected shoplifter. As long as probable cause exists and the merchant detains the suspect in a "reasonable manner" and for a reasonable period, R.C. 2935.041 immunizes the merchant from potential liability. R.C.

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<sup>2</sup> It would be manifestly unfair to preclude Giant Eagle from asserting self-defense while, at the same time, allowing Mrs. Niskanen to tell the jury that Giant Eagle intentionally killed her son for the purpose of recovering punitive damages—a tactic she repeatedly employed during trial. Despite the trial court's finding, in granting partial summary judgment, that Giant Eagle's employees did not act with malice in restraining her son, Mrs. Niskanen told the jury that Giant Eagle used a "deadly choke hold" on her son and that her medical expert will testify that Giant Eagle "strangled [him] to death." 2 Tr. 204, 214. Mrs. Niskanen repeatedly claimed during her questioning of witnesses that Giant Eagle strangled her son to death. 3 Tr. 323 ("do you admit [Niskanen] was strangled"); 4 Tr. 435 ("after [Niskanen] had been strangled"); 11 Tr. 1566 (alleging "prolonged strangulation"). In their closing, Mrs. Niskanen's counsel replayed their theme, telling the jury that Giant Eagle stands behind employees "strangling with excessive force." 13 Tr. 1717. As a matter of law, at a minimum, self-defense had to be relevant to punitive damages. *Bailey v. Bevilacqua*, 158 Ohio App.3d 382, 2004-Ohio-4392, 815 N.E.2d 1136, ¶49 (if defendant "acted in self-defense, his actions could not be found to be malicious" for purpose of punitive damages).

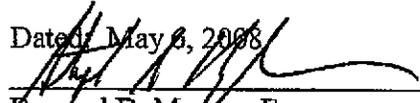
2935.041 is, by all measures, an affirmative defense available to a merchant against claims arising from the detention of a suspected shoplifter. *See Goldfuss*, at 124 ("A privileged act is one which ordinarily would be tortious but which, under the circumstances, does not subject the actor to liability.") (citations omitted).

The Ninth District not only interpreted R.C. 2935.041 to create a cause of action (rather than an affirmative defense) but, more important, it took self-defense away from merchants when sued under that statute. Even assuming that R.C. 2935.041 creates a separate cause of action for undue restraint, as the Ninth District appears to have done, nothing in the language or legislative history of that statute suggests a legislative intent to curtail self-defense. The legislature intended R.C. 2935.041 to protect merchants—not to strip away defenses that have always been available to them.

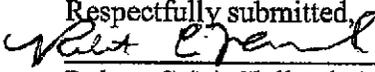
### CONCLUSION

Under the Ninth District's decision, Ohio juries will be required to consider punitive damages even when they awarded no compensatory damages after finding, as the jury did here, that plaintiff's negligence exceeded defendant's. And when retail businesses are sued by a shoplifter, Ohio juries will no longer be able to consider self-defense even when the elements of that defense are undeniably present. To avoid these undesirable consequences for Ohio citizens, Giant Eagle asks this Court to intervene to correct the Ninth District's decision.

Date: May 6, 2008

  
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Respectfully submitted,

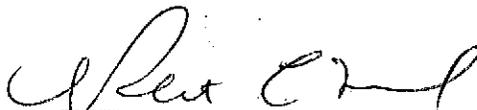
  
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CERTIFICATE OF SERVICE

A copy of the foregoing MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT, GIANT EAGLE, INC. has been forwarded by U.S. Mail and electronic mail  
this 6<sup>th</sup> day of May, 2008, to the following:

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\_\_\_\_\_  
Counsel for Appellant, Giant Eagle, Inc.

# APPENDIX

COURT OF APPEALS  
DANIEL M. MORRIGAN  
STATE OF OHIO ) IN THE COURT OF APPEALS  
COUNTY OF SUMMIT ) NINTH JUDICIAL DISTRICT  
MAY 26 AM 7  
MARY NISKANEN )  
SUMMIT COUNTY  
CLERK OF COURTS SA. No. 23445

Appellant/Cross-Appellee

v.

GIANT EAGLE, INC., et al.

Appellees/Cross-Appellants

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE No. CV 2004-08-4337

DECISION AND JOURNAL ENTRY

Dated: March 26, 2008

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

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CARR, Judge.

{¶1} Appellant/Cross-Appellee, Mary Niskanen, appeals from judgment of the Summit County Court of Common Pleas in favor of Appellee/Cross-Appellant, Giant Eagle, on her wrongful death and survivorship claims against it, which stem from the death of her son, Paul Niskanen, at the Giant Eagle grocery store in Rootstown, Ohio. This Court reverses and remands for a new trial.

{¶2} The following facts were revealed through basically undisputed evidence at trial. On the evening of January 21, 2004, Paul Niskanen went to the Giant Eagle grocery store in Rootstown, Ohio, and loaded several grocery items

into a shopping cart. Niskanen took the cart of items to register number three, where Lindsay White was working. While White was ringing up the groceries, which totaled \$289.02, she asked Niskanen for his Giant Eagle Advantage Card, a customer savings card. Niskanen indicated that he could not find his Advantage Card and that he would have to go to his car and get his wallet. Niskanen left the register and went outside.

{¶3} There was considerable evidence about Niskanen's inability to find his Advantage Card and his attempt to get a temporary card at the customer service desk, and it was not clear whether Niskanen had a wallet with him that evening. Nonetheless, the evidence was undisputed that Niskanen left the register for several minutes and, while he was away, the store manager, John Maczko, came to White's register. Niskanen returned and, while he approached or was standing near the grocery cart, White alerted Maczko to her belief that Niskanen was planning to take the groceries without paying for them.

{¶4} At about the same time, Niskanen left the store with the cart of groceries and Maczko ran after him. Maczko lost sight of Niskanen and Niskanen gained a bigger lead because Maczko had to wait for the automatic doors to open. When Maczko reached the parking lot, he saw Niskanen loading the groceries into the trunk of his car. Maczko believed that Niskanen was attempting to flee with the groceries, so he yelled to Jonathon Stress, a Giant Eagle employee who was retrieving carts in the parking lot, to "stop the shoplifter," or words to that effect.

{¶5} In response to Maczko's words, Stress ran toward Niskanen. Niskanen immediately stopped loading the groceries, closed the trunk of his car, and ran around to the driver's side door. Stress reached Niskanen before he was able to get into the car. As Stress approached him, Niskanen threw a punch at Stress, knocking him to the ground. Maczko observed what happened and ran over to assist Stress. Maczko attempted to grab Niskanen in a bear hug from behind, but Niskanen broke free and began punching Maczko. In the scuffle, all three men somehow fell to the ground.

{¶6} Although his exact words are not clear, Maczko screamed for help, causing passerby David Alexoff, a customer who was exiting the store, to join in the effort to restrain Niskanen. All three men were eventually on top of Niskanen, holding him down. Maczko, who had sustained minor injuries, later got off Niskanen but was replaced by Paul Taylor, another Giant Eagle employee.

{¶7} At some point during the approximate 10 minutes that the men were restraining Niskanen, Niskanen stopped struggling. Several witnesses explained that, for approximately five minutes, Niskanen was no longer resisting and was not even moving and they heard no sounds from him. Alexoff, while helping to restrain Niskanen, as well as several other passersby questioned whether Niskanen was okay and whether he could breathe. None of the men on top of Niskanen ever verified that he was still breathing, but they instead waited for the sheriff's department to arrive. By the time the Portage County Sheriff's Department

arrived, and they told the men to get off Niskanen, Niskanen had succumbed to death by asphyxiation.

{¶8} Paul Niskanen's mother Mary, as a survivor and as the administratrix of his estate, filed this action against Giant Eagle, Maczko, Stress, Taylor, and Alexoff, alleging numerous intentional tort and negligence claims. Niskanen later dismissed all intentional tort claims and all claims against the individual defendants. The case proceeded to trial solely against Giant Eagle for negligence, undue restraint, wrongful death, and spoliation of evidence. Giant Eagle conceded that its employees, Maczko, Stress, and Taylor, were acting within the scope of their employment when Niskanen died.

{¶9} The trial focused on Niskanen's claims that Giant Eagle had negligently failed to train Maczko, Stress, and/or Taylor about its own policies pertaining to the pursuit, apprehension, and detention of suspected shoplifters. Niskanen alleged that Giant Eagle's failure to train these employees had caused Niskanen's death. Niskanen also claimed that Giant Eagle had used unreasonable force in restraining Niskanen, even if it had a legal right to pursue, detain, and restrain him as a suspected shoplifter. Niskanen also had a claim against Giant Eagle for spoliation of evidence for Giant Eagle's failure to preserve all of the store video surveillance tapes from the day of the incident. Niskanen further sought punitive damages on her claims, and attempted to establish that Giant

Eagle's negligence had risen to the level of a conscious disregard for the rights and safety of others.

{¶10} During the trial, although there were some minor inconsistencies in the testimony, the details of the incident were revealed as described above. The crux of Niskanen's failure to train claim was that Giant Eagle had a policy that its employees should not pursue a fleeing suspect, they should not rely solely on the word of others to detain a suspect, they should identify themselves when approaching a suspect, and if a suspect responds with physical aggression, they should disengage. Evidence was also presented that the primary reason for this policy was to minimize the potential for injury to the suspect, employees, and/or innocent bystanders because shoplifting suspects who are confronted, detained, or apprehended will sometimes respond with physical aggression, potentially causing injury to themselves or others.

{¶11} The evidence further revealed that Maczko, the store manager who pursued Niskanen out of the store and ordered Stress to help stop him, had never received any training about this policy and, in fact, was not aware that Giant Eagle had such a policy. The jury found that Giant Eagle's negligence had caused Niskanen's death. The jury found for Giant Eagle on all other claims.

{¶12} The trial also focused in large part on Giant Eagle's defenses, self-defense and comparative negligence. Giant Eagle's primary defense was self-defense and the trial was mainly focused on whether the Giant Eagle employees

had a legal right to defend themselves and each other against the physical force exerted by Niskanen when he was approached by Stress. This evidence included the testimony of a security expert who testified that the Giant Eagle employees were legally entitled to defend themselves and each other in this situation.

{¶13} The jury found that the Giant Eagle employees had acted in self-defense and that Niskanen's comparative negligence had exceeded the negligence of Giant Eagle. Consequently, the trial court entered judgment for Giant Eagle.

{¶14} Niskanen appeals and raises seven assignments of error. Giant Eagle cross-appeals and raises four assignments of error.

#### **FIRST ASSIGNMENT OF ERROR**

“THE TRIAL COURT ERRED IN REMOVING PUNITIVE DAMAGES FROM THE JURY’S CONSIDERATION BASED SOLELY ON THE JURY’S DETERMINATION THAT THE COMPARATIVE NEGLIGENCE OF PAUL NISKANEN EXCEEDED THE NEGLIGENCE OF GIANT EAGLE.”

{¶15} Niskanen challenges the trial court's interrogatories to the jury that allowed the jury to consider the issue of punitive damages only if it found that Giant Eagle's negligence exceeded any negligence on the part of Paul Niskanen. Niskanen contends that the trial court erred in removing the issue of punitive damages from the jury solely because the jury found that Paul Niskanen's negligence exceeded that of Giant Eagle. This Court agrees.

{¶16} “[The] key to the recovery of punitive damages in Ohio is a finding of malice, and a claim based on negligence can provide the basis for an award of

punitive damages if there is an adequate showing of actual malice.” *Burns v. Prudential Securities, Inc.*, 167 Ohio App.3d 809, 843, 2006-Ohio-3550, at ¶101, citing *Preston v. Murty* (1987), 32 Ohio St.3d 334, 335-336. Because punitive damages require proof that the defendant acted with a greater level of culpability than mere negligence, the negligence of the plaintiff does not serve to set off damages.

{¶17} A finding by the jury that a plaintiff was comparatively negligent will not defeat or diminish the recovery of damages where the defendant acted with actual malice. *Schellhouse v. Norfolk & Western Ry. Co.* (1991), 61 Ohio St.3d 520, 525. Had the trial court allowed the jury to consider the punitive damage issue, the jury might have found that Giant Eagle acted with actual malice, and such a finding would have negated any potential set-off for damages under Ohio’s comparative negligence law. See *Wightman v. Consol. Rail Corp.* (1994), 94 Ohio App.3d 389, 398.

{¶18} Niskanen’s first assignment of error is sustained.

#### **SECOND ASSIGNMENT OF ERROR**

“THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON NISKANEN’S NEGLIGENCE CLAIM FOR THE USE OF FORCE, WHERE SUCH CLAIM WAS SEPARATELY PLED AND EXISTS AS A DISTINCT AND SEPARATE CLAIM FROM NISKANEN’S STATUTORY CLAIM UNDER R.C. 2935.041.”

{¶19} Niskanen next asserts that the trial court erred in failing to instruct the jury on her common law claim for Giant Eagle’s use of excessive force. As

will be discussed in this Court's disposition of Niskanen's third, fourth, and fifth assignments of error, this case became improperly focused on whether the Giant Eagle employees had acted in self-defense. Because much of Niskanen's argument is intertwined with her challenges to Giant Eagle's defense of self-defense, which will be addressed below, the second assignment of error is overruled.

### **THIRD ASSIGNMENT OF ERROR**

"THE TRIAL COURT ERRED IN ALLOWING GIANT EAGLE'S PURPORTED RETAIL SECURITY EXPERT, RALPH WITHERSPOON, TO PRESENT OPINION TESTIMONY IN VIOLATION OF EVID.R. 702 AND 703."

### **FOURTH ASSIGNMENT OF ERROR**

"THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT GIANT EAGLE'S AFFIRMATIVE DEFENSES OF SELF DEFENSE AND/OR CONTRIBUTORY NEGLIGENCE APPLIED TO (1) NISKANEN'S CLAIM OF COMMON LAW NEGLIGENCE ARISING FROM GIANT EAGLE'S FAILURE TO PROPERLY TRAIN ITS EMPLOYEES, AND (2) NISKANEN'S STATUTORY CLAIM FOR UNDUE RESTRAINT UNDER R.C. 2935.041."

### **FIFTH ASSIGNMENT OF ERROR**

"THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT IT COULD NOT FIND IN FAVOR OF GIANT EAGLE ON THE AFFIRMATIVE DEFENSE OF SELF DEFENSE UNLESS GIANT EAGLE FIRST ESTABLISHED THAT ITS EMPLOYEES DID NOT VIOLATE THE DUTY TO RETREAT."

### Self-Defense

{¶20} Through three of her assignments of error, Niskanen has challenged the trial court's instruction to the jury on Giant Eagle's defense of self-defense and defense of others. Niskanen asserts many challenges to the self-defense instruction, including that such a defense was inapplicable here and that Giant Eagle's expert witness impermissibly gave ultimate legal conclusions on whether it was appropriate for Maczko to run to the defense of Stress. Because this Court agrees that the defense of self-defense was inapplicable in this negligence case, the analysis will be confined primarily to that issue.

{¶21} Although Niskanen's suit originally included claims for intentional torts such as assault and false imprisonment, Niskanen had dismissed those claims prior to trial and the case proceeded on claims sounding solely in negligence. The defense of self-defense, while arguably a legitimate defense against Niskanen's claims for assault, was not an appropriate defense to Niskanen's negligence claims, which focused on whether Giant Eagle's failure to train its employees had caused Niskanen's death and/or whether Niskanen's death had been caused by an unreasonable use of force to restrain a suspected shoplifter.

{¶22} Negligence "connotes an unintentional act;" self-defense, on the other hand, is "an intentional response to an intentional act." *Robinson v. Brown* (Feb. 21, 1989), 12th Dist. No. 88-07-052. "[A]n intentional tort is subject to such defenses as self-defense and necessity. But torts of negligence and recklessness

are not subject to such defenses, because the plaintiff does not establish a prima facie tort in the first instance if the defendant has such a reasonable explanation for his actions.” Simons, *Rethinking Mental States* (1992), 72 B.U. L. Rev. 463 at 554, fn. 309.

{¶23} In the criminal context, it has long been understood that a defendant cannot act negligently and, at the same time, raise the defense of self-defense because the two theories are inconsistent. A person claiming self-defense concedes that he or she intended to commit the act, but asserts he or she was justified in doing so. *State v. Barnd* (1993), 85 Ohio App.3d 254, 260.

{¶24} “The substance of the claim of self-defense is that the defendant was justified in using deadly force *intentionally*. The assertion of self-defense is inconsistent with the claim that the defendant is guilty, at the most, of *negligent* [conduct].” (emphasis in original) *State v. Turner* (Mar. 20, 1980), 8th Dist. No. 40159. “Self-defense presumes intentional, willful use of force to repel force or escape force. \*\*\* The defense of self-defense is factually inconsistent with the allegation that the homicide was unintentional.” See, also *State v. King* (1984), 20 Ohio App.3d 62, 64. It has also been held that a jury instruction given on negligent homicide is inconsistent with a jury instruction given on self-defense. See *State v. Grace* (1976), 50 Ohio App.2d 259; *State v. Williams* (1981), 2 Ohio App.3d 289.

{¶25} This Court has found no Ohio authority for recognizing self-defense as a defense in a negligence action. Although a few courts in other jurisdictions have recognized that self-defense may be a defense to negligence in limited situations, those situations have involved a defendant who was alleged to have intentionally harmed the plaintiff, but the plaintiff's claims were couched in terms of negligence. See, e.g., *Brown v. Robishaw* (2007), 282 Conn. 628; *Blackburn v. Johnson* (1989), 187 Ill.App.3d 557. Even if this Court were inclined to follow the reasoning of those other jurisdictions, there were no similar claims or allegations in this case.

{¶26} Although the acts of the individual employees did involve the intentional use of force against Paul Niskanen, his estate had dismissed all claims for assault, battery, false imprisonment, or any intentional torts as well as all claims against the individual defendants. There were no longer any claims that Giant Eagle or any of its employees had intentionally harmed Niskanen. Because the defense, and much of the trial, improperly focused on an alleged justification for the intentional physical actions of the individual employees (Maczko, Stress, and Taylor), the jury lost sight of the entire gist of Niskanen's claims against Giant Eagle, who was the only defendant remaining in this case.

{¶27} The plaintiffs proceeded solely on claims of failure to train and unreasonable restraint. The theory of the negligent failure to train claim was that Giant Eagle's store manager never should have pursued Niskanen into the parking

lot and/or yelled at another employee to stop him because those actions of attempting to stop and/or confront a fleeing shoplifter were in violation of Giant Eagle's own policy, a policy about which the store manager had never received any training. Moreover, there was evidence that the violent response of Niskanen and his ultimate death by asphyxiation was one of the specific risks that Giant Eagle's policy was intended to avoid, and Giant Eagle was aware of similar deaths occurring at the stores of other retailers.

{¶28} The defense of self-defense was completely irrelevant to whether Giant Eagle's failure to train had caused Niskanen's death and it merely served to confuse the claim before the jury. Focusing on Niskanen's violent response as a justification of the acts of the individual employees took the focus away from the real issue: whether the employees violated Giant Eagle's own policy by confronting Niskanen in the parking lot and whether Giant Eagle's failure to train its employees about the proper procedures for the pursuit, detention, and restraint of shoplifters had caused Niskanen's death.

{¶29} Self-defense was likewise irrelevant to Niskanen's claim that the Giant Eagle employees unreasonably restrained Niskanen. The unreasonable restraint claim was premised on the legal right of Giant Eagle, under R.C. 2935.041, to pursue and detain suspected shoplifters, with recognition that their suspicion must be supported by probable cause and the detention must be in a "reasonable manner" and for a "reasonable length of time." R.C. 2935.041. The

so-called shopkeeper's privilege presupposes that Giant Eagle had a legal right to restrain Niskanen if probable cause existed that he had stolen merchandise. Again, by focusing on the irrelevant defense of self-defense, the jury was not properly focused on the issue before it: whether Giant Eagle had probable cause to believe Niskanen had stolen merchandise and whether its detention was in a reasonable manner and for a reasonable time.

### **Comparative Negligence Defense**

{¶30} Niskanen also asserts through her fourth assignment of error that the trial court erred in instructing the jury on the defense of comparative negligence. Niskanen essentially argues that, for the same reason self-defense was inapplicable to her negligence claims, the defense of comparative negligence was likewise inappropriate here. Although this Court agrees that the defense of self-defense was inapplicable here and that the trial court erred in allowing the jury to consider that defense, Niskanen has failed to cite any legal authority to support her position that comparative negligence cannot be a defense to her claims. Moreover, she has failed to convince this Court that there was no evidence to support an instruction on comparative negligence.

{¶31} Unlike the defense of self-defense, Ohio does recognize comparative negligence as a defense to a claim of negligence. See R.C. 2315.32(B). An instruction on comparative negligence is warranted where there is evidence of "any want of ordinary care on the part of the person injured, which combined and

concurrent with the defendant's negligence and contributed to the injury as a proximate cause thereof, and as an element without which the injury would not have occurred." *Brinkmoeller v. Wilson* (1975), 41 Ohio St.2d 223, 226.

{¶32} Even though Paul Niskanen's acts of throwing punches at Stress and Maczko were apparently intentional, the jury could reasonably conclude that Niskanen also had been negligent because he intentionally placed himself in a position of danger that would be apparent to an ordinary prudent person. See *Brunette v. Employers Mut. Liab. Ins. Co. of Wisconsin* (1982), 320 N.W.2d 43, 44 (holding that a traffic violator who intentionally fled from police at an excessive rate of speed, and was eventually injured in a collision with the police cruiser, had been negligent because he unreasonably placed himself at risk for injury).

{¶33} It will be for the jury on retrial to determine whether, and to what extent, Niskanen's action of responding with physical violence against some of the Giant Eagle employees may have amounted to negligence that was a contributing cause of his own death.

{¶34} Niskanen's arguments that the trial court erred in instructing the jury on self-defense are well taken and, to that extent, her third, fourth, and fifth assignments of error are sustained. Insofar as Niskanen challenges the jury instructions on comparative negligence, her fourth assignment of error is overruled.

**SIXTH ASSIGNMENT OF ERROR**

“THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT A DECEDENT’S ALLEGED COMMISSION OF FELONIOUS ACTS DOES NOT BAR HIS ESTATE FROM RECOVERING FOR THE INTENTIONAL OR NEGLIGENT ACTS OF OTHERS.”

{¶35} Niskanen asserts that the trial court erred in failing to instruct the jury that Paul Niskanen’s alleged commission of a felony did not preclude recovery in this action by his estate. This assigned error is intertwined with challenges to Giant Eagle’s defense of self-defense, and has therefore been rendered moot by this Court’s disposition of Niskanen’s third, fourth, and fifth assignments of error and this Court need not reach Niskanen’s arguments. See App.R. 12(A)(1)(c).

**SEVENTH ASSIGNMENT OF ERROR**

“THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON NISKANEN’S SPOILIATION OF EVIDENCE CLAIM THAT NISKANEN WAS ENTITLED TO A PRESUMPTION IN HER FAVOR THAT THE EVIDENCE DESTROYED WAS FAVORABLE TO NISKANEN’S CASE.”

{¶36} Niskanen’s seventh assignment of error is that the trial court erred in failing to give a requested jury instruction pertaining to her claim for spoliation of evidence. Because this assignment of error is rendered moot by this Court’s disposition of the second cross-assignment of error, it will not be addressed. See App.R. 12(A)(1)(c).

**CROSS-APPEAL****FIRST CROSS-ASSIGNMENT OF ERROR**

“THE TRIAL COURT ERRED BY FAILING TO GRANT A DIRECTED VERDICT IN FAVOR OF GIANT EAGLE ON MRS. NISKANEN’S CLAIM FOR PUNITIVE DAMAGES.”

{¶37} Through its first cross-assignment of error, Giant Eagle maintains that the trial court should have granted a directed verdict on Niskanen’s claim for punitive damages. Civ.R. 50(A)(4) requires a trial court to grant a properly filed motion for directed verdict if “after construing the evidence most strongly in favor of the party against whom the motion is directed, [it] finds that \*\*\* reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party[.]”

{¶38} An award of punitive damages in a tort case may be made only upon a finding of actual malice on the part of the defendant. *Calmes v. Goodyear Tire & Rubber Co.* (1991), 61 Ohio St.3d 470, 473. The Ohio Supreme Court has defined actual malice for purposes of punitive damages to include “a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.” *Preston v. Murty* (1987), 32 Ohio St.3d 334, syllabus.

{¶39} Giant Eagle essentially argues that there was no merit to Niskanen’s negligence claims and that, consequently, her claims for punitive damages must likewise fail. Even with the confusion of legal issues created by the improper evidence and legal instruction on self-defense, the jury found that Giant Eagle’s

negligence had caused the death of Paul Niskanen. Because reasonable minds could differ as to whether Giant Eagle's alleged negligence rose to the level of a conscious disregard for the rights and safety of others, the trial court did not err in denying Giant's Eagle's motion for a directed verdict on Niskanen's claim for punitive damages. The first cross-assignment of error is overruled.

### SECOND CROSS-ASSIGNMENT OF ERROR

“THE TRIAL COURT ERRED BY FAILING TO GRANT A DIRECTED VERDICT IN FAVOR OF GIANT EAGLE ON MRS. NISKANEN'S CLAIM FOR SPOILIATION OF EVIDENCE.”

{¶40} Giant Eagle contends that it should have been granted a directed verdict on Niskanen's claim for spoliation of evidence. This Court agrees.

{¶41} To establish a claim for spoliation or destruction of evidence, a plaintiff must establish the following elements:

“(1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts[.]” *Smith v. Howard Johnson Co., Inc.* (1993), 67 Ohio St.3d 28, 29.

{¶42} The term “willful,” as used in “willful destruction of evidence by defendant designed to disrupt the plaintiff's case,” “necessarily contemplates more than mere negligence or failure to conform to standards of practice, but instead anticipates an intentional, wrongful act.” *White v. Ford Motor Co.* (2001), 142 Ohio App.3d 384, 387-88, citing *Drawl v. Cornicelli* (1997), 124 Ohio App.3d 562.

{¶43} No one disputes that Niskanen could establish the first two elements of a spoliation of evidence claim: that there was pending or probable litigation by Niskanen and that Giant Eagle was aware that litigation was probable. This claim hinged on whether Niskanen could establish that Giant Eagle willfully destroyed evidence in an effort to disrupt her case and that her case was in fact harmed by the loss of that evidence. Niskanen contended that Giant Eagle willfully destroyed evidence by preserving only portions of the videotaped footage from the eleven video surveillance cameras that were operating in the store on January 21, 2004. Although Niskanen was able to establish that Giant Eagle preserved only select portions of the video surveillance footage, and that it destroyed the rest, she failed to make any showing that Giant Eagle destroyed any relevant footage.

{¶44} Giant Eagle witnesses testified that they preserved all video footage from January 21, 2004 that included any images of Niskanen in the store that evening. Witnesses explained that, due to the placement of cameras in the store, Niskanen could only be seen on certain cameras and there were gaps as he moved through the store out of the range of any cameras. The evidence also demonstrated that, due to the limited placement of cameras in and near the store, there never was any surveillance footage at register number three and the area near the door where Niskanen took the cart of groceries, nor were there cameras outside the store where the restraint and ultimate death of Niskanen occurred. Niskanen presented nothing to dispute any of this evidence.

{¶45} Giant Eagle had destroyed some video footage, but there was no evidence to even suggest that any of that any of the destroyed footage would have been helpful to Niskanen's case. There was no evidence upon which reasonable minds could conclude that Giant Eagle had willfully destroyed evidence in an effort to disrupt Niskanen's case or that her case was disrupted. Consequently, the trial court should have granted Giant Eagle a directed verdict on this claim. The second cross-assignment of error is sustained.

### **THIRD CROSS-ASSIGNMENT OF ERROR**

"THE TRIAL COURT ERRED BY FAILING TO GRANT A DIRECTED VERDICT IN FAVOR OF GIANT EAGLE ON MRS. NISKANEN'S CLAIM FOR NEGLIGENCE."

### **FOURTH CROSS-ASSIGNMENT OF ERROR**

"THE TRIAL COURT ERRED BY FAILING TO GRANT A DIRECTED VERDICT IN FAVOR OF GIANT EAGLE ON MRS. NISKANEN'S CLAIM FOR UNDUE RESTRAINT."

{¶46} Through its third and fourth cross-assignments of error, Giant Eagle asserts that the trial court erred in failing to grant it a directed verdict on Niskanen's claims for negligence and undue restraint because all of the actions of Giant Eagle's employees were justified by self-defense. Because this Court determined through its disposition of Niskanen's third, fourth, and fifth assignments of error that the defense of self-defense was inapplicable in this case, the third and fourth cross-assignments of error are overruled.

**SUMMARY**

{¶47} Niskanen's first assignment of error is sustained. Her third, fourth, and fifth assignments of error are sustained insofar as they challenge the jury's consideration of the defense of self-defense. Niskanen's second assignment of error is overruled and her remaining assignments of error were not addressed because they have been rendered moot. Giant Eagle's second cross-assignment of error is sustained and its remaining cross-assignments of error are overruled. The cause is reversed and remanded for a new trial on Niskanen's claims, absent her claim for spoliation of evidence.

Judgment reversed  
and cause remanded

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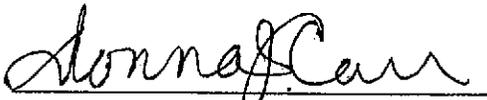
The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of

Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellee/cross-appellant.

  
DONNA J. CARR  
FOR THE COURT

MOORE, J.  
CONCURS

SLABY, P. J.  
CONCURS IN PART, AND DISSENTS IN PART, SAYING:

{¶48} I agree with the decision of the majority to reverse the trial court's judgment on Appellant's first assignment of error. However, I would overrule Appellant's third, fourth and fifth assignments of error.

{¶49} The majority characterizes the trial, by both sides, as improperly focusing on an alleged justification for the intentional physical actions of the individual employees. This would have been correct if the store employees had been the aggressors in apprehending a shoplifter. The initial acts of the employees were to confront a shoplifter. This would not have been against store policy. Once verbal confrontation was made, it was the individual who became the aggressor. Once the individual became the aggressor, the employees were no longer trying to apprehend a shoplifter. The store employees and the passerby did not have an

opportunity to disengage per the store policy. The jury could have found, and they apparently did, that they were either attempting to restrain an aggressor for the police or defending themselves from further attack.

APPEARANCES:

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