

**IN THE SUPREME COURT OF OHIO**

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

Appellee,

v.

GIANT EAGLE, INC.,

Appellant.

Case No. 2008-0895

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

Court of Appeals

Case No. 23445

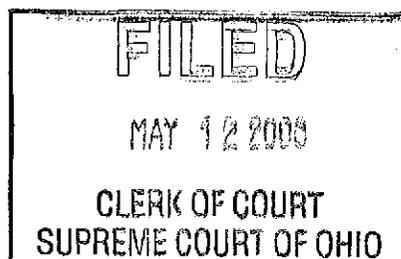
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**MEMORANDUM IN SUPPORT OF JURISDICTION  
OF AMICUS CURIAE OHIO CHAMBER OF COMMERCE**

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## **I. EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST**

Amicus Curiae, the Ohio Chamber of Commerce (“the Chamber”), was founded in 1893 and is Ohio’s largest and most diverse statewide business advocacy organization. The Chamber represents companies doing business in the state that range in size from small owner-operators to large multi-national corporations, and that reflect every major industry category from manufacturing, insurance and health care to finance, transportation, and retail.

The Chamber works to promote and protect the interests of its 4,000 business members while building a more favorable Ohio business climate. As an independent and informed point of contact for government and business leaders, the Chamber is a respected participant in the public policy arena. Through its member-driven standing committees and the Ohio Small Business Council, the Chamber formulates policy positions on issues as diverse as education funding, taxation, public finance, health care, environmental regulation, workers’ compensation and campaign finance. The advocacy efforts of the Chamber are dedicated to the creation of a strong pro-jobs environment – an Ohio business climate responsive to expansion and growth.

This case will undoubtedly – and negatively – affect the business climate in Ohio if the decision of the Court of Appeals stands. This case arises out of the unfortunate death of Plaintiff’s decedent, Paul J. Niskanen (“Niskanen”), outside the Giant Eagle grocery store in Rootstown, Ohio. However tragic his death, the undisputed facts, and those accepted by the jury as evidenced by its ultimate findings, established that Niskanen left the Giant Eagle store without paying for approximately \$300 worth of groceries and then initiated a physical attack on two Giant Eagle employees who approached him outside the store as he was loading the stolen groceries into the trunk of his car. Eyewitnesses (who were also customers) who observed Niskanen pummeling the Giant Eagle store manager felt compelled to join the fray and assist in

holding Niskanen while anxiously waiting for the police to arrive and take control of the volatile situation.

The jury found that Niskanen's negligence exceeded the negligence of Giant Eagle and, therefore, the trial court instructed the jury not to consider punitive damages. The jury also found that the conduct of the Giant Eagle employees was in self-defense and did not constitute undue restraint within the meaning of R.C. §2935.041. Despite these separate and independent findings that alone support the verdict for Giant Eagle, the Court of Appeals reversed and remanded for a new trial on the grounds that the trial court erred in instructing the jury not to consider punitive damages and further because, according to the Court of Appeals, "the jury lost sight of the entire gist of Niskanen's claims[]" because Giant Eagle asserted that its employees' actions were done in self-defense. *See* Opinion, ¶ 26.

This is a case of public or great general interest for several reasons. First, the finding by the Court of Appeals that the jury should have been permitted to consider punitive damages on Mrs. Niskanen's negligence claim even though Niskanen's comparative fault exceeded Giant Eagle's will have the practical effect of eliminating comparative fault findings and requiring a consideration of punitive damages in every civil action in which such damages are sought. The financial risk and associated burden on businesses – large and small – in the wake of the decision of the Court of Appeals is self-evident. Further, in so holding, the Court of Appeals ignored established precedent which holds that in order for the jury to consider punitive damages on a negligence claim, the plaintiff must have prevailed on comparative fault and been awarded compensatory damages. Businesses have a right to know whether they are at risk from such a dramatic change in Ohio law.

Second, the holding of the Court of Appeals that self-defense does not apply to a negligence claim has a profound impact on the ability – and right – of Ohio citizens and businesses, including employees and customers, to defend themselves in the context of their employment and everyday lives. The Court of Appeals acknowledged the lack of authority for its unprecedented holding. Opinion, ¶ 25. Indeed, the Court of Appeals ignored the standard of review and substituted its judgment for that of the trial court in reaching its conclusion that “the defense of self-defense was inapplicable in this negligence case[.]” Opinion, ¶ 20. Because there is in fact case law supporting the applicability of self-defense to a negligence claim, the trial court could not have, as a matter of law, abused its discretion or committed plain error in allowing the evidence and instructing the jury on self-defense. The Court of Appeals’ holding also has serious due process concerns, as according to the Court of Appeals, the plaintiff’s claims and theories alone dictate how a defendant may defend a case, not its own theories and facts.

Third, the recognition by the Court of Appeals that a cause of action exists under R.C. § 2935.041 – but self-defense is “likewise irrelevant” to such a claim – is contrary to the intent of the legislature and public policy in granting a privilege (i.e., an affirmative defense) to merchants to detain suspected shoplifters if probable cause exists to do so. *See* Opinion, ¶ 29. This holding also ignores the jury’s separate finding that the Giant Eagle employees did not use undue restraint which alone should have acted as an absolute bar to all of Niskanen’s claims and rendered any error on the applicability of self-defense harmless as a matter of law.

Each of the foregoing holdings will have a profoundly negative impact on the business climate in Ohio. Each holding will discourage businesses from entering the state and possibly encourage other businesses to leave due to the massive financial exposure created by the decision of the Court of Appeals. Even more troubling, the public will clearly suffer from the increased

cost of doing business in Ohio. Finally, removing the right to self-defense from negligence actions exposes the citizens of Ohio, employees and customers to physical harm and civil liability where neither should result if the elements of self-defense have been met.

## II. STATEMENT OF THE CASE AND FACTS

The Chamber adopts the Statement of the Case and Facts contained in the Memorandum in Support of Jurisdiction of Appellant Giant Eagle, Inc.

## III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**Proposition of Law No. 1: If the plaintiff does not prevail on comparative fault, then the jury must not consider punitive damages on a negligence claim.**

Mrs. Niskanen sought punitive damages on her two (remaining) claims before the jury: negligence and undue restraint. Giant Eagle prevailed on the undue restraint claim. In order for the jury to have considered punitive damages on Mrs. Niskanen's negligence claim, Niskanen's negligence must not have exceeded Giant Eagle's negligence. Because the jury found that Niskanen's negligence was 60%, Mrs. Niskanen did not sustain an award of compensatory damages. Therefore, the trial court properly instructed the jury not to consider punitive damages.

The holding of the Court of Appeals would permit juries across the state to consider punitive damages in a negligence action even where a finding of comparative fault precludes an award of compensatory damages – a necessary predicate to an award of punitive damages. This decision is in direct conflict with established precedent. See *Malone v. Courtyard By Marriott, L.P.*, 74 Ohio St.3d 440, 1996-Ohio-311, 659 N.E.2d 1242; *Bishop v. Grdina* (1985), 20 Ohio St.3d 26, 485 N.E.2d 704; *Burwell v. American Edward Labs.* (1989), 62 Ohio App.3d 73, 574 N.E.2d 1094. In *Marriot*, the losing plaintiff was found to be 51% at fault and, as a consequence, she received no compensatory damages. *Marriott*, at 444. Although the trial court had directed a verdict against the losing plaintiff on punitive damages, this Court noted

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

*Marriott*, at 447. The Court of Appeals' determination that the trial court should have permitted the jury to consider punitive damages even though comparative fault barred Mrs. Niskanen from recovering compensatory damages on her negligence claim is directly contrary to the reasoning of *Marriott*. See also *Schellhouse v. Norfolk & Western Ry. Co.* (1991), 61 Ohio St.3d 520, 524, 575 N.E.2d 453 ("If the railroad did not commit an intentional tort, but was only thirty-five percent negligent as opposed to the sixty-five percent attributed to the plaintiff's decedent, then the plaintiff is not entitled to damages and a verdict for the defendant should have been entered.") (citing R.C. § 2315.19(C)). The Court of Appeals recognized that "[t]here were no longer any claims that Giant Eagle or any of its employees had intentionally harmed Niskanen." Opinion, ¶ 26. As such, the comparative fault finding that Mrs. Niskanen's decedent was 60% at fault barred the recovery of compensatory damages – the prerequisite to a consideration of punitive damages.

The decision of the Court of Appeals also fails to recognize the heightened standard of review for punitive damages (clear and convincing evidence) and allows plaintiffs to establish consideration of punitive damages by mere allegations of malicious conduct. See R.C. § 2315.21 (D)(4). Indeed, since punitive damages were only possible on the survival claim, logic dictates that if Niskanen was more at fault than Giant Eagle (barring compensatory damages), he cannot as a matter of law establish by clear and convincing evidence an entitlement to punitive damages. Public policy warrants that this Court accept jurisdiction and clarify the issue of punitive damages so that businesses can clearly understand and account for the risks associated with such claims.

**Proposition of Law No. 2: Self-defense must be an available defense to negligence.**

The Court of Appeals held that “the defense of self-defense was inapplicable in this negligence case.” Opinion, ¶ 20. This holding was premised on the fact that “[t]here were no longer any claims that Giant Eagle or any of its employees had intentionally harmed Niskanen” and therefore, “[t]he defense of self-defense was completely irrelevant[.]” Opinion, ¶ 26, ¶ 28.

The Court of Appeals based its decision on the mistaken premise that there is “no Ohio authority for recognizing self-defense as a defense in a negligence action.” Opinion, ¶ 25. Because there is ample authority – even from this Court – for recognizing self-defense in a negligence action, the trial court did not abuse its discretion in allowing evidence of self-defense and instructing the jury on self-defense. *See Goldfuss v. Davidson*, 79 Ohio St.3d 116, 124, 1997-Ohio-401, 679 N.E.2d 1099 (“a defendant may be relieved of liability for tortious conduct by proving that such conduct was in self-defense.”) (*citing* 1 Restatement Torts §63 *et seq.*)); *Ashford v. Betleyoun*, No. 22930, 2006 WL 1409793 (Ohio Ct. App., Ninth Dist. May 24, 2006), 2006-Ohio-2554 (“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.’”); *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). Since there is in fact case law supporting the applicability of self-defense to a negligence claim, the trial court could not have, as a matter of law, abused its discretion or committed plain error in allowing the evidence and instructing the jury on self-defense.

The Court of Appeals’ decision also turns the failure to follow a company’s policies and procedures into negligence per se. There is no authority for such an expansion of the potential

liability to companies, and in fact, the failure to comply with company rules is at most evidence of negligence, creating an issue of fact for the jury. See *Thompson v. Ohio Fuel Gas Co.* (1967), 9 Ohio St.2d 116, 118-19, 224 N.E.2d 131; *Rivers v. CSX Transp.*, No. 9-01-59, 2002 WL 533397, at \*3 (Ohio Ct. App. April 10, 2002); see also 57A AM. JUR. 2d NEGLIGENCE § 174 (“The failure to comply with a company rule does not constitute negligence per se; the jury may consider the rule, but the policy does not set forth a standard of conduct that establishes what the law requires of a reasonable person under the circumstances.”). Company rules do not establish the standard of care, which, in a negligence action, is ordinary care or reasonableness under the circumstances. In the wake of the decision of the Court of Appeals, businesses not only lose the right to self-defense, they will now be judged under a negligence per se standard for violations of their internal policies and procedures instead of common law rules of ordinary care.

**Proposition of Law No. 3: If a merchant does not use undue restraint under R.C. § 2935.041, a plaintiff must be barred from recovery on all claims.**

Recognizing the public policy concerns and benefits of protecting merchants from liability for claims arising out of shoplifting incidents, the Legislature enacted R.C. § 2935.041, the “so-called shopkeeper’s privilege.” Opinion, ¶ 29. Under the statute, a merchant who has probable cause to believe that items have been unlawfully taken is privileged to detain a person in a reasonable manner for a reasonable length of time within the mercantile establishment or its immediate vicinity. R.C. § 2935.041(A). The merchant must not use undue restraint upon the person being detained. *Id.* (E). The Court of Appeals turned this privilege of the merchant into a cause of action in favor of shoplifters. The Court of Appeals cited no authority for recognizing such a cause of action under this statute and erroneously held that self-defense was “likewise irrelevant” to such a claim. Opinion, ¶ 29.

In fact, this Court has recognized that "[a] privileged act is one which ordinarily would be tortious but which, under the circumstances, does not subject the actor to liability." See *Goldfuss*, at 124 (citations omitted). Further, the Revised Code provides that "privilege" means "an immunity, license, or right conferred by law, bestowed by express or implied grant, arising out of status, position, office, or relationship, or growing out of necessity." R.C. § 2901.01 (A)(12). The Court of Appeals has taken a privilege (i.e., an affirmative defense) and turned it into a cause of action when there is nothing in the statute or case law to support such an interpretation.

If there is such a cause of action, then evidence that establishes the elements of self-defense would clearly be relevant to whether the detention was in a reasonable manner under the circumstances. But the Court of Appeals reasoned,

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.

Opinion, ¶ 29. This holding fails to recognize that the jury was instructed that Mrs. Niskanen had asserted a *claim* of undue restraint and was further instructed on the elements of such a *claim*— separate and apart from Giant Eagle's defense of self-defense (which, incidentally, requires the same consideration of reasonableness under the circumstances).

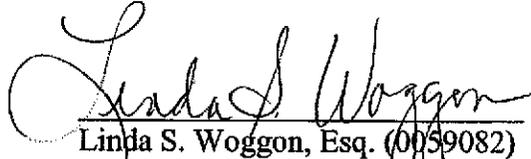
In other words, this holding ignores the jury's separate and independent finding that the Giant Eagle employees did not use undue restraint which should have acted as an absolute bar to all of Niskanen's claims and rendered any error on the applicability of self-defense harmless as a matter of law. The Court of Appeals' interpretation of R.C. § 2935.041, the "so-called shopkeeper's privilege," Opinion, ¶ 29, will adversely affect every merchant in Ohio by eliminating a defense while at the same time expanding their potential for liability. Citizens will

suffer from the increased cost of doing business in Ohio— from increased cost of goods to the loss of jobs if companies leave the state to avoid the massive exposure created by the decision of the Court of Appeals.

#### IV. CONCLUSION

For the foregoing reasons, this case involves matters of public and great general interest and as such, amicus curiae Ohio Chamber of Commerce respectfully requests that this Court grant the jurisdictional memoranda, hear this matter on the merits, reverse the judgment of the Court of Appeals and reinstate the jury verdict in favor of Giant Eagle, Inc.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Memorandum in Support of Jurisdiction of Amicus Curiae Ohio Chamber of Commerce was sent via regular mail to counsel of record listed below this 12<sup>th</sup> day of May, 2008:

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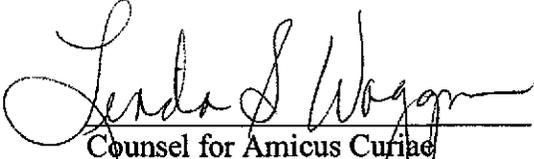
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