

**THE SUPREME COURT OF OHIO**

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

CASE NO. 2008-0895

Appellee, )

v. )

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

GIANT EAGLE, INC., )

Court of Appeals )  
Case No. CA-23445 )

Appellants. )

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**AMICUS CURIAE BRIEF OF THE OHIO COUNCIL OF RETAIL  
MERCHANTS AND THE OHIO GROCERS ASSOCIATION**

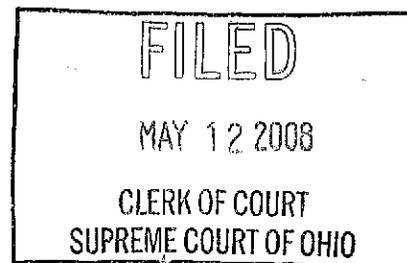
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## TABLE OF CONTENTS

	<u>PAGE</u>
EXPLANATION OF WHY THIS IS A CASE OF PUBLIC AND GREAT GENERAL INTEREST .....	1
STATEMENT OF AMICI CURIAE INTEREST .....	3
STATEMENT OF THE CASE AND FACTS .....	3
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....	3
<u>Proposition of Law I: Punitive damages are unavailable     without an award of compensatory damages</u> .....	4
<u>Proposition of Law II: When proven, self defense     prevents a plaintiff from establishing a prima-facie     negligence claim</u> .....	6
A. The Ninth District’s holding inverts the protections of R.C. 2935.041 .....	8
B. The Ninth District’s holding as to self-defense exacerbates its dangerous precedent as to punitive damages .....	9
CONCLUSION.....	10
CERTIFICATE OF SERVICE .....	12

## **EXPLANATION OF WHY THIS IS A CASE OF PUBLIC AND GREAT GENERAL INTEREST**

The appellate opinion below undermines the fairness of Ohio's civil litigation system by announcing two self-minted propositions—that a plaintiff may recover punitive damages without recovering compensatory damages and that a defendant may not rebut negligence claims by asserting self-defense. Both propositions endanger fair civil litigation in Ohio, and this Court should accept jurisdiction to rein in the Ninth District's unsupportable rewriting of tort law.

The Ninth District reversed the course of punitive damages law that has been recently shaped by the United States Supreme Court and Ohio's General Assembly. The decision below allows punitive damages even if the jury awards no compensatory damages because the plaintiff did not prevail. By unchaining punitive damages from success on the merits, the Ninth District announced an unprecedented expansion of liability.

Punitive damages have been a hot topic in this Court and the United States Supreme Court. Both courts have delivered the message that unrestrained punitive damages reduce the fairness of civil litigation. In *State Farm Mut. Ins. Co. v. Campbell* (2003), 538 U.S. 408, 425, 123 S.Ct. 1513, the Court indicated that punitive awards beyond a certain multiple of compensatory damages may violate the federal Due Process Clause. In *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, this Court concluded that a statute tethering punitive damages to compensatory damages was constitutional.

This appeal presents another aspect of the role punitive damages play in a fair civil litigation system. Here, the Ninth District's announced rule permits a plaintiff to recover punitive damages even if they cannot recover any compensatory damages. Like the issues in *Campbell* and *Arbino*, the Ninth District's expansion of punitive-damage liability is a matter

of public and great general interest because it affects the fairness of civil justice in Ohio. Therefore, the Court should review the Ninth District's broad punitive-damage holding.

While punitive damages represent a risk to fair civil litigation at the endgame, the Ninth District's decision also threatens fair litigation in the opening gambits by eliminating the self-defense justification. In a stunning holding, the Ninth District reversed a jury and held that anyone defending against a negligence tort cannot raise self-defense to rebut the plaintiff's allegations.

The Ninth District ventured into uncharted territory by reversing a jury's sensible resolution of disputed facts and misapplying a rule of criminal law when it declared that a defendant to a negligence tort **cannot** claim they acted in self-defense. The immediate effect of this ruling is that many innocent defendants will face negligence liability for which they are not liable under established Ohio law. The ripple effect of the Ninth District's ruling could reach even criminal defendants charged with negligent homicide. For all defendants, the Ninth District's peculiar rule about self-defense raises due process concerns. The Ninth District's holding as to self-defense requires this Court's oversight to ensure that Ohio law is fair and anchored to well-established principles of fault.

The Ninth's District's holding is no limited appellate error, it is a matter of statewide concern because it announces a rule that leaves defendants powerless to prove that their actions were justified as an act of self-defense. If the Ninth District's decision stands, civil and criminal defendants in Ohio will face a litigation atmosphere far more frightening and unfair than that faced by litigants before the recent reining in of punitive damages. That prospect merits the Court's involvement in this appeal.

## **STATEMENT OF AMICI CURIAE INTEREST**

The Ohio Council of Retail Merchants is an alliance of leading trade associations representing the spectrum of business in Ohio. Members of the Council include thousands of individual businesses ranging from food franchises to retail banks. The Council has an interest in keeping punitive damage awards fair and in making sure that merchants do not face unjustified liability when they act in self-defense while investigating a shoplifting.

The Ohio Grocers Association represents thousands of grocers across Ohio and is committed to the well-being and progress of the Ohio food industry and its members. The Association has an interest in ensuring that punitive damages in shoplifting cases are awarded only when there is underlying liability. The Association also has an interest in preserving the purpose of R.C. 2935.041, a statute enacted to protect merchants from overly litigious shoplifters.

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

The Ohio Council of Retail Merchants and the Ohio Grocers Association adopt the statement of facts and statement of the case in appellant's jurisdictional brief.

## **ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

The Ninth District's decision contains two far-reaching—and erroneous—propositions of law. First, the Ninth District breaks from overwhelming authority in and out of Ohio requiring a compensatory award before a court may award punitive damages. Second, the Ninth District eliminates the right of self-defense in negligence actions, even when the self-defense arises from a merchant's privileged act of reasonably detaining a suspected shoplifter. Both propositions will have poisonous effects on Ohio's merchants and their customers if uncorrected by this Court because each proposition invites frivolous suits.

**Proposition of Law I: Punitive damages are unavailable without an award of compensatory damages.**

The Ninth District reversed a jury verdict for the merchant in this case because it believed that the trial court should have allowed the jury to consider punitive damages even though the jury found against the plaintiff on liability. *Niskanen v. Giant Eagle, Inc.*, \_\_ Ohio App.3d \_\_, 2008-Ohio-1385, \_\_ N.E.2d \_\_, at ¶17.<sup>1</sup>

The Ninth District's startling proposition of law is inconsistent with statements of this Court. It is inconsistent with the suggestion in *Malone v. Courtyard by Marriott* (1996), 74 Ohio St.3d 440, 447, 659 N.E.2d 1242 that "even if punitive damages were warranted in this case, [plaintiff] could not recover them because the jury did not award her compensatory damages." The holding further butts up against this Court's observation in *Schellhouse v. Norfolk & W. Ry. Co.* (1991), 61 Ohio St.3d 520, 524, 575 N.E.2d 453, that a jury finding of malice and a jury finding that the defendant was only 35% at fault for an injury were "impossible to reconcile."<sup>2</sup> Finally, the Ninth's District's decision cuts against authority holding that compensatory damages are a prerequisite to punitive damages. See Schlueter, *Punitive Damages* (5<sup>th</sup> Ed. 2005 & Supp. 2007), § 6.1(D)(3)(c) n.103 (citing cases in more than 30 states and 4 federal circuits for the proposition that punitive damages are unavailable without actual compensatory award).

Beyond its incompatibility with decisions of this Court and other state supreme courts,

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<sup>1</sup> The jury's no-damage finding was based on comparative-fault principles because—as the Ninth District noted—the jury was faced only with negligence allegations. *Id.* at ¶26. ("[t]here were no longer any claims [defendants] \* \* \* had intentionally harmed" the plaintiff).

<sup>2</sup> Oddly, the Ninth District cited *Schellhouse* to support its holding. The Ninth District also cited the appellate opinion in *Wightman*. But, as this Court noted in a subsequent appeal of that case, "[l]iability and actual malice \* \* \* had already been determined at an earlier trial" in that matter. *Wightman v. Consolidated Rail Corp.* (1999), 86 Ohio St.3d 431, 436, 715 N.E.2d 546, 551.

the Ninth District’s novel rule of punitive damages undermines the General Assembly’s decades-long goal of restoring fairness to Ohio’s civil litigation system. In their words, “This state has a rational and legitimate state interest in making certain that Ohio has a fair, predictable system of civil justice that preserves the rights of those who have been harmed by negligent behavior, while curbing the number of frivolous lawsuits, which increases the cost of doing business, threatens Ohio jobs, drives up costs to consumers, and may stifle innovation.” 2004 Am.Sub.S.B. 80 § 3(A)(3).

The appellate holding is also incompatible with R.C. 2315.21(C)(2), which limits punitive damages to instances where the jury returns a verdict for compensatory damages. The Ninth District’s holding is also in tension with other aspects of the General Assembly’s reforms. R.C. 2315.21(D)(2)(a) ties punitive damages to the amount of compensatory damages. R.C. 2315.21(B)(1)(b) bifurcates the compensatory and punitive phases of a trial, and makes punitive damages dependent on compensatory damages: “If the jury determines in the initial stage of the trial that the plaintiff is entitled to recover compensatory damages \* \* \*, evidence may be presented \* \* \* with respect to whether the plaintiff **additionally** is entitled to recover punitive or exemplary damages for the injury or loss to person or property \* \* \* .” *Id.* (emphasis added).

Instead of taking a cue from these recent legislative changes to punitive damage law, the Ninth District apparently equated the evolution from contributory to comparative fault as erasing the longstanding rule that “[e]xemplary or punitive damages may not be awarded in the absence of proof of actual damages.” *Richard v. Hunter* (1949), 151 Ohio St. 185, 85 N.E.2d 109, paragraph 1 of the syllabus. Indeed, the evolution from contributory to comparative fault has made it **more** important to limit punitive damages to cases where the

plaintiff recovers compensatory damages. Comparative fault means more plaintiffs will recover damages as compared to contributory negligence since it takes 51% instead of 1% fault to bar recovery. Therefore more plaintiffs will bring suit. If plaintiffs are further induced to sue by the possibility of recovering punitive damages even when they cannot recover compensatory damages, the “fair, predictable system of civil justice” the General Assembly envisioned will be a distant dream. 2004 Am.Sub.S.B. 80 § 3(A)(3).

By permitting punitive damages in the absence of compensatory damages, the Ninth District’s decision will also foster, rather than retard, “frivolous” lawsuits—the opposite effect the General Assembly intended when it passed S.B. 80. If a plaintiff, who is 51-99% at fault for her injuries can still recover punitive damages, the incentives to sue are magnified. The criminal whose injuries may be only 1-2% the fault of negligent police work, or the product user whose misuse of the product is 98-99% the cause of her injuries would not often sue under the law as understood before the Ninth District’s reconfiguration. But under the Ninth District’s version of tort law, those plaintiffs will have an incentive to enter Ohio’s courthouses. That would certainly “increase[] the cost of doing business, threaten[] Ohio jobs, drive[] up costs to consumers, and \* \* \* stifle innovation.” 2004 Am.Sub.S.B. 80 § 3(A)(3).

The Ninth District’s decision is incompatible with this Court’s statements about punitive damages and the General Assembly’s efforts to make Ohio’s civil litigation system fair so that Ohio is competitive with other states.

**Proposition of Law II: When proven, self defense prevents a plaintiff from establishing a prima-facie negligence claim.**

As puzzling as the Ninth District’s punitive damages holding is, the holding as to self-defense is perhaps harder to grasp and more detrimental to Ohio’s businesses, especially its

retailers. Borrowing from what it perceived to be an analogous rule of criminal law, the Ninth District held that a defendant facing negligence claims cannot raise self-defense to defend those claims. The Ninth District misapplied the criminal law rule and even the commentary allegedly supporting its holding.

In criminal law, it is widely accepted that a defendant may not ask for a negligent homicide instruction and also plead self-defense. See, e.g., *State v. Champion* (1924), 109 Ohio St.3d 281, 286-87, 142 N.E. 141. As the Third District put it, the defendant “cannot claim in one breath that his smashing the glass in the victim’s face was an unintentional accident, and then claim in another breath that he intended to commit the assault, but was justified in so doing.” *State v. Barnd* (1993), 85 Ohio App.3d 254, 260, 619 N.E. 2d 518.

Here, Giant Eagle is not claiming inconsistent mental states for the acts of those who restrained Niskanen. Giant Eagle claims that its employees acted intentionally, but justifiably, in preventing further harm from the unpredictably violent acts of Niskanen. Only Niskanen claims that the employees acted negligently, and even that claim is a product of trial strategy, not a fact about the employee’s true mental states. As the Ninth District noted, Niskanen dismissed “all intentional tort claims” before trial. 2008-Ohio-1385, at ¶8. There is simply no parallel between a criminal defendant simultaneously asserting both that she acted accidentally and intentionally and Giant Eagle’s claim that it was not negligent because its employees intentionally restrained Niskanen to protect themselves and others.

There is nothing **inconsistent** about a defendant in a negligence action rebutting the allegations by claiming she acted intentionally. Indeed, self-defense is built in to the structure of negligence. The article the Ninth District quoted explains how self-defense fits into the structure of negligence: “[T]orts of negligence and recklessness are not subject to [self-

defense] 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, 554 n.309 (emphasis added).

The jury shared Professor Simons’s insight because it found Niskanen 60% at fault for his injuries and also found that Giant Eagle’s employees acted in self defense when they restrained Niskanen. The Ninth District undid the jury’s common-sense findings based on a rule of its own invention. The Ninth District’s holding displays low confidence in Ohio’s juries. That is not a view shared by members of this Court. “I have great faith in Ohio’s jury system; so should the members of the majority, each of whom has extensive experience working with juries, either as a judge or an attorney and, therefore, has good cause to know how diligently and seriously juries approach their task to discover the truth.” *Arbino*, at ¶207 (Pfeifer, J., dissenting). Here, the jury got it right, and the Ninth District reversed based on a mistaken view about what constitutes negligence.

**A. The Ninth District’s holding inverts the protections of R.C. 2935.041.**

The Ninth District’s decision to incapacitate merchants defending negligence claims arising from shoplifting is especially troubling in light of R.C. 2935.041. That statute, enacted in the late 1950s, is aimed at protecting merchants from overly litigious shoplifters asserting false imprisonment or similar torts. The General Assembly enacted R.C. 2935.041 to “deal with the severe problem of shoplifting in all mercantile establishments.” *State v. Stone* (Ohio Mun.Ct.1968), 16 Ohio Misc. 160, 163, 241 N.E.2d 302.

Before the statute, some courts interpreted false imprisonment expansively against merchants. For example, the court in *Lester v. Albers Super Markets*, granted a motion to strike from the merchant’s answer an allegation that the detention was only for a “reasonable

time within which to investigate.” (Ohio C.P.1951), 101 N.E.2d 731, 732. The court reasoned that, unless the merchant was a police officer, the “question of detaining [a potential shoplifter] for a reasonable time” is “not a good defense where an individual \* \* \* detains another against his or her will.” *Id.*<sup>3</sup>

R.C. 2935.041 avoids the unreasonable situation where a merchant cannot even question a suspected shoplifter for fear of being dragged to court despite acting reasonably. The Ninth District’s holding puts merchants in a **worse** position than they faced before the statute because it disables them from asserting the reasonableness defense in 2935.041 and takes away the common-law right of self-defense to a shoplifter’s tort claim.

Even 50 years ago, the General Assembly recognized the high cost shoplifting imposes on merchants and their customers. The Ninth District has upset the half-century-old policy of giving merchants a reasonable response by tying the hands of merchants who struggle to prevent the loss of revenue posed by shoplifting and the economic cost that loss has on all Ohioans.

**B. The Ninth District’s holding as to self-defense exacerbates its dangerous precedent as to punitive damages.**

The Ninth District’s erroneous prohibition on self-defense has even greater reach in cases—like this one—where the plaintiff seeks punitive damages. First, self-defense can rebut the necessary malice to secure punitive damages. See *Bailey v. Bevilacqua*, 158 Ohio App.3d 382, 388, 2004-Ohio-1136, 815 N.E.2d 1136, at ¶49. Second, courts generally recognize that self-defense assertions, even when they do not ultimately eliminate liability, are relevant to **mitigating** punitive damages. *Traister v. Gerton* (Colo.App.1981), 626 P.2d 737, 738-39 (“Provocation, while not a justification or a defense in an action for

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<sup>3</sup> Subsequent history from trial and appeal at (1952), 94 Ohio App. 313, 114 N.E.2d 529.

compensatory damages for an assault, may be considered in mitigation of exemplary damages.”); *Garrett v. Olsen* (Or.App.1984), 691 P.2d 123, 125 (Or.App.,1984) (“We conclude that the court's instruction failed to focus properly on \* \* \* *plaintiff's conduct* in mitigation of possible punitive damages.”) (reversing trial court) (emphasis in original). The Ninth District’s holding as to self-defense extends the harm of its already alarming holding as to punitive damages. This Court should review each proposition because of its individual and combined effect on civil liability for Ohio’s merchants.

### CONCLUSION

The responsibility of ensuring that Ohio is a fair place to litigate falls not only on the General Assembly, but also on this Court. Ohio statutory law goes a long way to restore fairness to civil litigation in Ohio. Until the Ninth District’s decision, the common law also promoted fairness by requiring a plaintiff to prevail on the underlying tort claim in order to also secure punitive damages. Unless this Court acts, the Ninth District’s decision will go a long way to upset that fairness by permitting punitive damages even when plaintiffs cannot recover actual damages and by handicapping defendants who have committed no tort because they acted in self-defense. In the interest of Ohio’s retail businesses, their customers, and all defendants who act in self-defense, this Court should accept jurisdiction over this appeal.

Respectfully submitted,

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