

IN THE SUPREME COURT OF OHIO

MARY NISKANEN, Individually and as	)	Supreme Court Case No. 2008-0895
Administratrix of the Estate of Paul J.	)	
Niskanen,	)	
	)	On Appeal from the Summit County Court of
Appellee,	)	Appeals, Ninth Appellate District
	)	
v.	)	Court of Appeals Case No. 23445
	)	
GIANT EAGLE, INC., <i>et al.</i> ,	)	
	)	
Appellant.	)	

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**APPELLEE’S MEMORANDUM IN RESPONSE TO JURISDICTION**

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<p><b>FILED</b></p> <p>JUN 06 2008</p> <p>CLERK OF COURT          SUPREME COURT OF OHIO</p>
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**EXPLANATION WHY THIS CASE IS NOT OF  
PUBLIC OR GREAT GENERAL INTEREST**

Defendant-Appellant Giant Eagle, Inc. (“Giant Eagle”) intentionally and maliciously failed to train its employees on the proper method to pursue a suspected shoplifter. That intentional misconduct led in this case to a bizarre and unusual tragedy: the violent death of a Giant Eagle customer, Paul Niskanen (“Paul”). Giant Eagle employees used such significant force to restrain Paul—including a dangerous chokehold—that they strangled him to death even as worried on-lookers watched in dismay. Even if Paul was a shoplifter, and even if he initially reacted combatively when first confronted in the store parking lot by the Giant Eagle employees who failed to identify themselves, those employees had no right to use a deadly chokehold—and certainly had no right to maintain that chokehold for 5-10 minutes while Paul was completely subdued and unable to breathe. Giant Eagle set in motion the entire chain of events that led to Paul’s death by its intentional failure to train its employees properly. On these extraordinary facts, the Ninth District’s decision raises no issue of public or great general interest.

In their zeal to convince the Court to accept discretionary jurisdiction, Giant Eagle and its amici erroneously suggest that the Ninth District’s Opinion<sup>1</sup> relaxes the standard for assessing punitive damages, eliminates self-defense as a defense to all negligence actions, and opens a floodgate of potential lawsuits by suspected shoplifters against retail merchants that detain them. The decision below will supposedly have “poisonous effects on Ohio’s merchants and their customers.” (See OCRM Mem.<sup>2</sup> at 3; see, also, GE Mem.<sup>3</sup> at 2 (claiming the Opinion will “discourage business from locating to Ohio, and encourage existing Ohio businesses to leave”).)

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<sup>1</sup> “Opinion” refers to *Niskanen v. Giant Eagle, Inc.*, 9th Dist. No. 23445, 2008-Ohio-1385.

<sup>2</sup> “OCRM Mem.” refers to Amicus Curiae Brief of The Ohio Council of Retail Merchants and The Ohio Grocers Association, filed May 12, 2008.

<sup>3</sup> “GE Mem.” refers to Memorandum in Support of Jurisdiction of Appellant Giant Eagle, Inc., filed May 7, 2008.

But retail commerce in Ohio is not about to come to a screeching halt, and the sky is not falling. Under the transparent veneer of this contrived hysteria lies the simple truth that the Ninth District properly applied long-standing precedent to the genuinely unique facts of this case, and none of the challenged holdings warrants this Court's intervention.

First, the Ninth District did *not* hold that “[p]unitive damages are recoverable without an award of compensatory damages.” (Cf. *id.* at 1.) What the Ninth District held was that the same conduct that gives rise to punitive damages—actual malice under the “conscious disregard” standard<sup>4</sup>—*also* defeats a defense of comparative negligence, thus permitting even a negligent plaintiff to recover *compensatory* damages when the defendant's conduct is sufficiently egregious. That holding fully comports with this Court's decisions in *Schellhouse v. Norfolk & W. Ry. Co.* (1991), 61 Ohio St.3d 520, 525, 576 N.E.2d 453, and *Wightman v. Consol. Rail Corp.*, 86 Ohio St.3d 431, 436, 1999-Ohio-119, 714 N.E.2d 546. And, importantly, Giant Eagle does not challenge the Ninth District's holding that truly relates to punitive damages—that Plaintiff-Appellee Mary Niskanen (“Niskanen”) presented sufficient evidence to support an assessment of punitive damages against Giant Eagle in this case. See Opinion at ¶39.

Despite its finding that Niskanen presented sufficient evidence of actual malice, the trial court erroneously failed to permit *the jury* to decide whether Giant Eagle's conduct met the *Schellhouse/Wightman* test. As a result, Niskanen lost her right to overcome the finding of comparative negligence and to recover a judgment for the \$1,000,000 in *compensatory* damages that the jury awarded. By restoring that right through the grant of a new trial, the Ninth District did no more than apply this Court's precedents properly; it neither deviated from nor modified

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<sup>4</sup> “Actual malice, necessary for an award of punitive damages, is \* \* \* (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.” See *Preston v. Murty* (1987), 32 Ohio St.3d 334, 512 N.E.2d 1174, syllabus.

them. Punitive damages in other contexts may be a “hot topic” (see OCRM Mem. at 1), but that does not convert the issues in this case to the level of public or great general interest.

Because the trial court’s error necessitates a new trial, Giant Eagle’s second proposition of law, which focuses on the relevance of self-defense in this unique case, raises no issues of public or great general interest. And contrary to Giant Eagle’s and its amici’s suggestion (cf. GE Mem. at 1), the Ninth District’s Opinion creates no global rule prohibiting the assertion of self-defense in response to a negligence claim, nor does it authorize plaintiffs to use “strategic pleading” to avoid the defense. Instead, the Ninth District simply held that self-defense had no place *in this case*. Giant Eagle steadfastly *denied* that its employees intentionally used a deadly chokehold, but self-defense applies only when the defendant uses “deadly force *intentionally*.” *State v. Clardy*, 1st Dist. No. C-060527, 2007-Ohio-4193, at ¶17, quoting *State v. King* (1984), 20 Ohio App.3d 62, 64, 20 OBR 66, 484 N.E.2d 234 (emphasis in original). Furthermore, self-defense was immaterial to Niskanen’s failure-to-train claim, because Giant Eagle’s tortious conduct in failing to train its employees was not a response to Paul’s alleged aggression. “Focusing on [Paul’s] violent response as a justification of the acts of the \* \* \* *employees* took the focus away from the real issue: \* \* \* whether *Giant Eagle’s* failure to train its employees” long before the altercation “caused [Paul’s] death.” Opinion at ¶28 (emphasis added).

Finally, Giant Eagle and its amici suggest that the Ninth District created a new cause of action for violation of the shopkeeper statute, R.C. 2935.041(A), and then wrongly held that self-defense is irrelevant to it. (See GE Mem. at 13-14; see, also, OCC Mem.<sup>5</sup> at 7-9.) But these arguments also raise no issue of public or great general interest. The Ninth District assumed that a violation of R.C. 2935.041(A) gave rise to a cause of action because Giant Eagle *never argued*

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<sup>5</sup> “OCC Mem.” refers to Memorandum in Support of Jurisdiction of Amicus Curiae Ohio Chamber of Commerce, filed May 12, 2008.

*otherwise*—and, in fact, conceded below that Niskanen *could bring* a “statutory undue restraint claim.” (See Brief of Cross-Appellant Giant Eagle, Inc., filed April 16, 2007, at 18.) Furthermore, there is no public or great general interest in determining whether self-defense can defeat liability for violation of this statute, because the ultimate question for liability under the statute—with or without such an additional defense—is whether a shopkeeper’s manner and duration of detaining a customer are “reasonable.” See R.C. 2935.041(A); *State v. Ray*, 12th Dist. No. CA2001-06-154, 2003-Ohio-193, at ¶17 (self-defense applies only if defendant uses “reasonable force”).

### STATEMENT OF THE CASE AND FACTS

#### **A. Giant Eagle’s Intentional and Malicious Failure to Train Its Employees.**

A high-ranking Giant Eagle officer and the company’s “security expert” testified that there is a known risk of serious injury or death when employees use force to apprehend a suspected shoplifter. (3 Tr. 383:2-388:15; 7 Tr. 796:2-14.) Because of that risk, Giant Eagle developed a series of policies governing its employees’ conduct in dealing with suspected shoplifters and conceded that the standard of care demanded that Giant Eagle train its employees to follow them.<sup>6</sup> (9 Tr. 1086:13-18.) Four of the key policies were: (1) that a store manager should never rely solely on the word of another in accusing a suspected shoplifter; (2) that a store employee approaching a suspected shoplifter should always identify himself or herself; (3) that a store manager should never pursue a suspected shoplifter who flees the store after being confronted; and (4) that an employee should disengage from any physical confrontation at the earliest opportunity.

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<sup>6</sup> The Ohio Chamber of Commerce, in urging that “[c]ompany rules do not establish the standard of care” (see OCC Mem. at 7), ignores Giant Eagle’s admission that its policies represented the standard of care for dealing with suspected shoplifters.

But Giant Eagle provided *no* training on these policies to its managerial or lower level employees. And at the Rootstown, Ohio store where Paul was killed, the managerial employees were charged with enforcing Giant Eagle's shoplifting policies 90% of the time, when security was not on duty. (3 Tr. 340:12-16.)

**B. Paul's Death by Strangulation at the Hands of Untrained Giant Eagle Employees.**

On the evening of January 21, 2004, Paul entered the Giant Eagle in Rootstown, spent 22 minutes choosing groceries (Trial Ex. 23A-2, 23A-5, 9), proceeded to the checkout aisle, and placed his items on the conveyor belt. (4 Tr. 467:21-25; 10 Tr. 1273:2-6.) When asked whether he had his Giant Eagle Advantage Card, Paul replied that he "would have to go out to the car to get his wallet." (10 Tr. 1273:10-15, 1274:2-3.) While Paul was outside, the cashier bagged Paul's groceries and placed them in the cart at the end of the aisle. (Id. at 1277:21-1278:4.)

Paul did not find his Advantage Card in his car, so he returned inside the store and received a temporary card at the customer-service desk. (Id. at 1278:5-24, 1309:17-18.) After shopping for a few additional items, he returned to the checkout aisle and found that the cashier was now busy with another customer. (4 Tr. 520:6-9; 10 Tr. 1280:14-16, 1284:19-21.) Paul put the additional items on the belt and took his cart of bagged groceries outside. (10 Tr. 1285:4-5.)

The cashier believed that Paul was "stealing" the groceries and informed store manager John Maczko ("Maczko"). (Id. at 1285:12-14.) Based solely on the cashier's word (which violated one Giant Eagle policy), Maczko ran outside the store to pursue, confront, and detain Paul (which violated a second Giant Eagle policy). (4 Tr. 522:19-24; 523:4-11; 5 Tr. 533:24-534:2; 6 Tr. 708:6.) Outside the store, Maczko saw Paul loading a bag of groceries into the trunk of his car. (5 Tr. 531:1-532:18.) Although Maczko was in charge and much closer to Paul, he yelled across the parking lot to a 23-year-old untrained stockboy, Jonathan Stress ("Stress"), to

“stop the shoplifter” (which violated a third Giant Eagle policy by causing rather than disengaging from a physical conflict). (Id. at 533:10-19, 542:2-4, 543:19-21, 640:16-18.) Stress ran toward Paul from behind without identifying himself (which violated a fourth Giant Eagle policy), and at that point Stress claims that Paul turned and punched him in the shoulder. (Id. at 556:1-10, 642:10-17, 643:13-21.)

Maczko and Stress scuffled to restrain Paul, and Maczko asked other customers to help. (Id. at 559:4-560:25, 564:9-24, 649:15-650:2.) With the assistance of two “good Samaritans,” the Giant Eagle employees used physical force to detain Paul, and everything was “under control” within 63 seconds. (6 Tr. 750:9-21, 756:4-7.) At that point Paul was “tabled” face-down on the pavement (id. at 722:4-10, 739:23-740:5), “covered top to bottom” by Maczko, Stress and the bystanders. (Id. at 672:17-18.) Once restrained on the pavement, Paul made no aggressive moves; all he did was “flinch.” (5 Tr. 572:20-23, 575:25-576:3, 598:22-25; 6 Tr. 674:9-11, 688:16-17; 11 Tr. 1601:5-10.) During the entire period of restraint, Stress had his arm around Paul’s head/neck area. (5 Tr. 651:22; 11 Tr. 1458:12-15.) Numerous bystanders repeatedly asked whether Stress was choking Paul and whether Paul could breathe. (6 Tr. 675:15-23, 676:3-6, 684:18-21, 692:7-20, 724:16-25, 725:9-12, 726:15-17.) Stress admitted that he never checked. (Id. at 665:24-666:1.)

After 10 minutes of forcible restraint (Trial Ex. 23A-22), the Portage County Sheriff’s Officers arrived, and only after the Giant Eagle employees finally disengaged and removed the headlock around Paul’s neck, did they find that Paul was dead. (9 Tr. 1050:7-12, 1062:2-3.) The Portage County Coroner certified Paul’s death as a homicide. (3 Tr. 285:7-14.) A forensic pathologist testified Paul’s death resulted from “primarily \* \* \* homicidal strangulation” caused

by “both a bar arm or choke hold and a sleeper or carotid hold.” (Id. at 311:2-22; Docket 7/29/06, Notice of Filing of Dr. Wecht Trial Depo., Ex. A at 16-17, 71:8-11; 90:4-15.)

**C. The Proceedings Below.**

Niskanen brought a wrongful-death and survival action in the Summit County Court of Common Pleas on August 5, 2004. She sought compensatory and punitive damages premised on various tort theories, including gross negligence/intentional tort, unlawful restraint in violation of R.C. 2935.041(A), spoliation of evidence, and wrongful death, as well as other tort claims that she dismissed before trial. Trial began on June 19, 2006, and the jury received the case on July 6, 2006. On July 12, after five days of deliberation, the jury completed interrogatories reflecting the following findings:

1. That Giant Eagle was negligent and that its negligence was a direct and proximate cause of Paul’s death and injuries. (Jury Interrog. 1-A, B.)
2. That Paul’s own negligence was also a direct and proximate cause of his injuries (Jury Interrog. 1-C, D.)
3. That Giant Eagle was 40% negligent and Paul was 60% negligent. (Jury Interrog. 4.)
4. That Niskanen was entitled to \$500,000 in compensatory damages on her survival claims and \$500,000 in compensatory damages on her wrongful-death claim, for a total damage award of \$1,000,000. (Jury Interrog. 3A, B.)

The trial court erroneously instructed the jury, if it found that Paul’s comparative negligence exceeded 50%, not to answer another interrogatory asking whether Giant Eagle acted with actual malice. (Jury Interrog. 7-A, B.) The trial court then entered judgment in favor of Giant Eagle based on the comparative-negligence finding. (7/17/06 Order.)

Niskanen filed an appeal on October 19, 2006. On March 26, 2008, the Ninth District reversed and remanded for a new trial on all claims except the spoliation claim. Giant Eagle filed an application for reconsideration with the Ninth District or, in the alternative, for rehearing en banc. The Ninth District denied that application on May 20, 2008.

### **ARGUMENT IN OPPOSITION TO PROPOSITIONS OF LAW**

**Giant Eagle's Proposition of Law No. 1: A jury may not consider punitive damages where plaintiff asserts only a negligence claim and they [sic] find against him on comparative fault.**

The Ninth District granted Niskanen a new trial so that a jury can evaluate Giant Eagle's liability with the benefit of a finding concerning Niskanen's allegations of intentional and malicious misconduct. The trial court's failure to "allow[] the jury to consider" those allegations was prejudicial, because a finding that Giant Eagle engaged in conduct sufficient to justify an award of punitive damages would have "negated any potential set-off for damages under Ohio's comparative negligence law." Opinion at ¶17, citing *Schellhouse*, 61 Ohio St.3d at 525, and *Wightman v. Consol. Rail Corp.* (1994), 94 Ohio App.3d 389, 398, 640 N.E.2d 1160.

Giant Eagle and its amici now urge that this holding "directly conflicts" with this Court's decision in *Malone v. Courtyard by Marriott, L.P.*, 74 Ohio St.3d 440, 1996-Ohio-311, 659 N.E.2d 1242. (See GE Mem. at 2.) Giant Eagle's criticism of the Ninth District is curious, because Giant Eagle itself failed to cite *Malone* in its appellate briefs. In any event, Giant Eagle's argument suffers from two fatal infirmities: (1) it mischaracterizes the Ninth District's holding; and (2) it ignores the pivotal distinction between this case and *Marriott*.

The mischaracterization is the faulty premise of Giant Eagle's argument. According to Giant Eagle and its amici, the Ninth District has "dispensed with" the requirement that a plaintiff recover compensatory damages before she may recover punitive damages. (See GE Mem. at 9; see, also, OCRM Mem. at 1 (accusing the Ninth District of "unchaining punitive from success on

the merits”).) But the Opinion says nothing of the sort. Instead, the Ninth District held that the same conduct that supports the imposition of punitive damages also can “negate[]” a finding of comparative negligence, thus establishing a plaintiff’s right to recover *compensatory* damages. See Opinion at ¶17. Only then would the conduct in question justify a punitive assessment. That holding is entirely consistent with one of Giant Eagle’s principal cases, *Bishop v. Grdina* (1985), 20 Ohio St.3d 26, 28, 485 N.E.2d 704 (“No civil cause of action in this state may be maintained simply for punitive damages.”).

Nor does the Ninth District’s Opinion conflict with *Marriott*. *Marriott* recognized that a plaintiff’s comparative negligence is immaterial if the plaintiff “advanc[es] a claim for compensatory damages based on [the defendant’s] recklessness.” See 74 Ohio St.3d at 447. In that respect, *Marriott* actually *confirms* that comparative negligence “will not defeat” a plaintiff’s recovery of compensatory damages when the defendant’s conduct is sufficiently reprehensible—just as the Ninth District held. See Opinion at ¶17.

The “one vital” problem for the plaintiff in *Marriott* was that she *had not alleged* that the defendant’s intentional conduct or recklessness was a cause of her compensatory damages:

[T]here is absolutely no indication in the pleadings, including the complaint amended after the close of evidence, that [plaintiff] ever pursued a compensatory damages claim based on recklessness. \* \* \* In no reasonable way can the [plaintiff’s] complaint be read as advancing a claim for compensatory damages based on recklessness.

74 Ohio St.3d at 447. Here, by contrast, Niskanen *did* allege that her compensatory damages were caused not only by ordinary negligence, but by Giant Eagle’s “willful, intentional and/or grossly negligent” conduct:

As a direct and proximate result of [Giant Eagle’s] *willful, intentional and/or grossly negligent* violations of [its] duties of care to [Paul] Niskanen, [Paul] Niskanen *suffered injuries* and conscious pain and suffering prior to his death.

(Amended Complaint, filed 3/25/05, at ¶42 (emphasis added).) Importantly—and contrary to Giant Eagle’s representation that Niskanen “dismissed \* \* \* all her intentional tort claims” on the morning of trial (see GE Mem. at 7)—Niskanen did *not* dismiss *this* intentional-tort claim.<sup>7</sup> (See 1 Tr. at 3:15-20.) It remained in the case all the way through verdict. But the jury, having found Paul more than 50% negligent, was not permitted to consider the interrogatory that would have determined the level of Giant Eagle’s reprehensibility.

Thus, Niskanen raised and pursued the very sort of allegations that are required under *Marriott* to defeat a finding of comparative negligence. Giant Eagle knows as much but chooses to minimize these allegations, accusing Niskanen of “sprinkl[ing]” them “throughout much of her amended complaint” as though they had no purpose other than to adorn the pleading. (See GE Mem. at 10.) Giant Eagle wants the Court to adopt a rule that a “plaintiff must *separately* plead a compensatory damage claim asserting intentional misconduct” (id. (emphasis added)), so that the inclusion of allegations of both negligence and intentional misconduct within the same cause of action will somehow strip the intentional-tort allegations of any significance and cause a plaintiff to forfeit her right to use those allegations to defeat a comparative-negligence defense. That argument exalts form over substance and runs afoul of Civ.R. 8(F), which directs that “[a]ll pleadings shall be so construed as to do substantial justice.” See, also, *MacDonald v. Bernard* (1982), 1 Ohio St.3d 85, 86, 1 OBR 122, 438 N.E.2d 410, fn. 1 (pleadings shall “be construed

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<sup>7</sup> The dismissed claims were for false imprisonment (Third Claim for Relief) and assault and battery (Fifth Claim for Relief). (See Amended Complaint, filed 3/25/05, at ¶¶52-56, 63-65; 1 Tr. at 3:22-23, 4:1.) While those dismissed claims are classically recognized as intentional torts, this Court has suggested that “negligent acts committed with malice” may be nothing “less than an intentional tort.” See *Schellhouse*, 61 Ohio St.3d at 524, fn. 1. And, indeed, in *Marriott*, mere “recklessness” would have been sufficient to overcome comparative negligence had the plaintiff pleaded and demonstrated damages as a result. See 74 Ohio St.3d at 447.

liberally in order that the substantive merits of the action may be served”).<sup>8</sup>

Giant Eagle also falsely suggests that the pleaded allegations here are similar to the pleaded allegations deemed inadequate in *Marriott*. (See *id.* at 10 fn. 1.) In fact, however, Niskanen did more than “sprinkle” a meaningless allegation into her pleading; as quoted above, she included a precise allegation tying the intentional misconduct to the damages sustained. (Amended Complaint, filed 3/25/05, at ¶42.) Niskanen alleged exactly what the plaintiff in *Marriott* failed to allege. That critical distinction establishes that the Ninth District’s decision in no way conflicts with *Marriott*.<sup>9</sup>

In short, the Ninth District’s holding correctly applies existing precedent to highly unusual facts that are unlikely soon to recur. There is nothing new, and the Court should therefore decline jurisdiction over Giant Eagle’s first proposition of law.

**Giant Eagle’s Proposition of Law No. 2: Self-defense is a valid defense in a negligence action.**

This Court should not grant jurisdiction to consider Giant Eagle’s Proposition of Law No. 2, because the labels Niskanen placed on her tort claims against Giant Eagle were not

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<sup>8</sup> Giant Eagle’s interpretation of *Marriott* also ignores that in 1999—three years after *Marriott*—the Court reaffirmed that “contributory negligence is *not available as a defense* where conduct *in conscious disregard* has been established.” See *Wightman*, 86 Ohio St.3d at 436 (emphasis added). A showing of “conscious disregard” is, of course, one of the standards for a finding of actual malice. See *Preston*, 32 Ohio St.3d 334, syllabus. Thus, under *Wightman*, there is no requirement of a separately pleaded intentional tort; a showing of negligence committed with “actual malice” is enough.

<sup>9</sup> Pleading differences aside, it also bears mention that the plaintiff in *Marriott* had produced insufficient evidence to support her claim for punitive damages. See 74 Ohio St.3d at 446. Indeed, it was the standard for assessing liability for punitive damages, and not the interplay between allegations of recklessness and comparative negligence, that served as the principal holding of *Marriott*. See *id.*, syllabus (“Absent proof of a defendant’s subjective knowledge of danger posed to another, a punitive damages claim against that defendant premised on the ‘conscious disregard’ theory of malice is not warranted.”). Here, by contrast, Giant Eagle does not challenge the Ninth District’s holding that Niskanen adduced sufficient evidence to support her claim for punitive damages. See Opinion at ¶39.

determinative of the Ninth District's holding that the affirmative defense of self-defense was irrelevant. Consistent with the Ninth District's Opinion and supported by the authorities cited by Giant Eagle, the applicability of self-defense to a plaintiff's tort claim arises not from the plaintiff's characterization of the defendant's conduct in the pleadings, but from the defendant's characterization of his conduct in attempting to invoke the affirmative defense.

The Ninth District followed existing Ohio precedent holding that self-defense is available as an affirmative defense only when the defendant *acknowledges* having engaged in “an *intentional response*” to aggression; otherwise self-defense is “inapplicable.” See Opinion at ¶20, 22 (emphasis added), quoting *Robinson v. Brown* (Feb. 21, 1989), 12th Dist. No. 88-07-052, 1989 Ohio App. LEXIS 595, at \*4; see, also, Opinion at ¶24. Self-defense requires a showing that the defendant's “only means of escape from \* \* \* danger was in the use of such force,” which by definition establishes that the defendant used force by design, not accidentally. See, e.g., *State v. Robbins* (1979), 58 Ohio St.2d 74, 12 O.O.3d 84, 388 N.E.2d 755, paragraph two of the syllabus. Accordingly, the Ninth District correctly reasoned that Giant Eagle could have asserted self-defense—that is, that its employees were “justified” in applying a chokehold to Paul—only by first *conceding* that they “intended” to use and did use that level of force to protect themselves. See *id.*

But Giant Eagle has never conceded that its employees intentionally placed Paul in a chokehold, much less that doing so was “an intentional response” to Niskanen's conduct. To the contrary, Giant Eagle steadfastly insisted at trial that there was “nothing, nothing, nothing in the record[] to suggest any intentional conduct \* \* \* in causing this incident to occur.” (13 Tr. at 1767:20-24.) Accordingly, Giant Eagle failed to assert the predicate basis for invoking the privilege of self-defense.

Giant Eagle's argument is not supported by *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 1997-Ohio-401, 679 N.E.2d 1099, or by *Ashford v. Betleyoun*, 9th Dist. No. 22930, 2006-Ohio-2554. In *Goldfuss*, the defendant intentionally fired a warning shot at intruders breaking into his barn, accidentally shooting the plaintiff, but self-defense was unavailable because there was no evidence that the defendant was in fear for his safety. See 79 Ohio St.3d at 117, 124. Although *Goldfuss* is inapposite, it does implicitly illustrate that a defendant must acknowledge the intentional use of force in order to assert self-defense.

*Ashford* illustrates more directly that it is the defendant's characterization of his own actions, rather than the plaintiff's pleading, that determines whether self-defense is an available defense. The defendant in *Ashford* was a security guard who acknowledged that he intentionally pulled out a gun and shot the plaintiff's decedent because the plaintiff's decedent had pointed a gun at the defendant's face while trying to rob him. *Ashford* at ¶13-19. Thus, unlike Giant Eagle, the defendant in *Ashford* acknowledged that the conduct giving rise to the plaintiff's lawsuit was, in fact, intentional and, so acknowledging, was permitted to argue that the conduct was justified even though the cause of action sounded in negligence.

In addition, even if Giant Eagle had acknowledged its intention to place Paul in a deadly chokehold, the Ninth District properly concluded that the defense was also irrelevant to Niskanen's failure-to train claim for a second, independent reason. The focus of that claim was not on the level of force used in responding to Paul's alleged aggression. Instead, the claim involved *entirely different conduct*: that Giant Eagle negligently and/or intentionally breached its duty to train its employees not to "attempt[] to stop and/or confront a fleeing shoplifter" in accordance with Giant Eagle's "own policy." See Opinion at ¶27. The challenged conduct occurred long before the "unprovoked attack." (See GE Mem. at 1.) As a result, the evidence

and instructions on self-defense “merely served to confuse the claim[s] before the jury.” Opinion at ¶28. Giant Eagle’s employees’ right to defend themselves “in this situation” did not exonerate Giant Eagle from failing to train them *long before the incident*, in accordance with a standard of care intended to prevent the very tragedy that occurred. See id. at ¶27-28.

Finally, Giant Eagle raises a due-process argument that ignores the actual evidence in the case. It depends on the factual conclusion that Paul’s “death occurred *while* Giant Eagle’s employees \* \* \* were defending themselves.” (See GE Mem. at 12 (emphasis added).) But it is undisputed that Paul was “no longer resisting and was not even moving”—in short, he was passive, subdued, and lying on the ground—“for approximately five minutes” before he was strangled to death. See Opinion at ¶7.

Furthermore, Giant Eagle is incorrect in suggesting that the Ninth District barred Giant Eagle from explaining at the retrial “why it took the actions” that led to Paul’s death. (Cf. GE Mem. at 12.) For one thing, the court explained that Giant Eagle could offer its allegedly “reasonable explanation for [its] actions” without resorting to confusing and inapposite evidence and instructions involving self-defense. See Opinion at ¶22, quoting Simons, *Rethinking Mental States* (1992), 72 *Boston Univ.L.Rev.* 463, 554, fn. 309. The court also clarified that such evidence will be admissible because Paul’s conduct in “throwing punches” was relevant to Giant Eagle’s assertion of a comparative negligence defense. See id. at ¶32.<sup>10</sup>

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<sup>10</sup> Giant Eagle and its amici also urge that under *Bailey v. Bevilacqua*, 158 Ohio App.3d 382, 388, 2004-Ohio-4392, 815 N.E.2d 1136, “self-defense had to be relevant to punitive damages.” (See GE Mem. at 13, fn.2; OCRM Mem. at 9-10.) While *Bailey* held that a defendant who properly established self-defense “could not be found to be malicious,” id. at ¶49, that decision does not suggest that an otherwise-inapposite assertion of self-defense becomes apposite merely because the plaintiff has asserted a claim for punitive damages.

**Giant Eagle’s Proposition of Law No. 3: 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.**

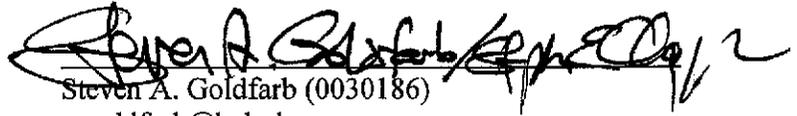
There is likewise no reason for the Court to accept jurisdiction over Giant Eagle’s Proposition of Law No. 3. First, the suggestion of error in recognizing a cause of action for violation of R.C. 2935.041(A) is improper, because Giant Eagle never raised that issue at any prior stage of the litigation. In any event, “[i]t is settled law that ‘[w]here a legislative enactment imposes upon any person a specific duty for the protection of others,’ the failure to perform that duty is negligence per se.” *Marich v. Bob Bennett Constr. Co.*, 116 Ohio St.3d 553, 2008-Ohio-92, 880 N.E.2d 906, at ¶38, quoting *Eisenhuth v. Moneyhon* (1954), 161 Ohio St. 367, 53 O.O. 274, 119 N.E.2d 440, paragraph two of the syllabus.

Nor is self-defense a proper defense to a claim under R.C. 2935.041(A). Niskanen’s burden, in proving a violation of the statute, is to establish that Giant Eagle failed to “detain [Paul] in a reasonable manner for a reasonable length of time.” See *id.* By definition, then, the jury would have to find that Giant Eagle used unreasonable force in order to find in Niskanen’s favor. Such a finding, in turn, would automatically defeat self-defense, which must also involve only “reasonable force.” See *Ray* at ¶17. Self-defense would therefore add nothing to the equation other than to confuse the jury into believing that Giant Eagle could somehow be justified in using deadly force to continue to subdue a suspected shoplifter who was already lying face-down on the ground, barely flinching and noticeably unable to breathe.

**CONCLUSION**

The Court should decline to exercise its discretionary jurisdiction over this appeal.

Respectfully submitted,



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I certify that a true and accurate copy of *Appellee's Memorandum in Response to Jurisdiction* was served this 6<sup>th</sup> day of June, 2008, by regular U.S. Mail, upon the following:

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