

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. CA-23445

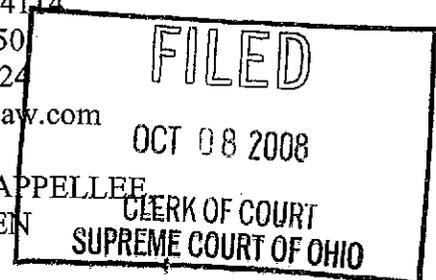
AMICUS CURIAE BRIEF OF THE OHIO COUNCIL OF RETAIL
MERCHANTS AND THE OHIO GROCERS ASSOCIATION URGING REVERSAL
ON BEHALF OF APPELLANT GIANT EAGLE, INC.

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INTRODUCTION

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 succeeding on an underlying claim and that a defendant may not rebut negligence claims by asserting self-defense. Both propositions lack support in Ohio law and both endanger fair litigation in Ohio. This Court should reverse and rein in the Ninth District's unsupportable rewriting of tort law.

The Ninth District upended punitive damages law by declaring that a jury can consider punitive damages even when the jury has concluded that the plaintiff cannot succeed on the underlying claim. By unchaining punitive damages from success on the merits, the Ninth District announced an unprecedented expansion of liability.

While the Court's punitive damages decision represents a risk to fair civil litigation at the endgame, the Ninth District's decision also threatens fair litigation in the opening gambits by eroding the self-defense justification in negligence suits. In a startling 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 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 Court should reverse both of these holdings to ensure that Ohio law is fair and anchored to well-established principles of fault.

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 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 established authority in and out of Ohio requiring success on a predicate claim before a court may award punitive damages. Second, the Ninth District eliminates the right of self-defense in negligence actions. This second proposition is particularly troubling here because the self-defense arose from a merchant's privileged act of reasonably confronting a suspected shoplifter.

Both propositions will have toxic effects on Ohio's merchants and their customers if uncorrected by this Court because each proposition invites frivolous suits.

Beyond the danger posed by its incorrect legal analysis, the Ninth District's decision is startling because it reversed a jury verdict premised on proper jury instructions. The trial court's instruction to the jury regarding punitive damages recognized that punitive damages are unavailable without compensatory damages. "If you do not find actual damages, you cannot consider punitive damages." [Supp. 715] The court's instruction regarding self-defense signaled the jury that the defense was unavailable if it was unreasonable, including admonitions, (1) that Giant Eagle would lose the defense unless its employees were "not at fault in creating" the confrontation, (2) that they had a "reasonable" belief they were in immediate danger, and (3) that their use of force was "not likely to cause death or great bodily harm." [Supp. 721-22]

Proposition of Law I: Punitive damages are unavailable if a litigant does not prevail on a predicate claim.

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 ¶17.¹ The court's erroneous conclusion derives from three faulty premises, (1) that punitive damages are an independent claim for relief, (2) that comparative fault eliminates the rule that punitive damages require success on an underlying claim, and (3) that conduct justifying punitive

¹ 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).

damages eliminates comparative fault. The Ninth District is wrong about each premise, and therefore wrong in its conclusion that the jury should have considered punitive damages in this case.

A. Punitive damages are not an independent claim; success on an underlying claim is a prerequisite.

The Ninth District treated punitive damages as if they are a separate claim. “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.” *Id.* Punitive damages—however—are entirely parasitic on an underlying claim. If there is no underlying claim, there can be no punitive damages. This Court explained the relationship between punitive damages and an underlying action in *Moskovitz v. Mt. Sinai Med. Ctr.*, stating that, “[I]n “Ohio, no civil action may be maintained simply for punitive damages.” (1994), 69 Ohio St.3d 638, 650, 635 N.E.2d 331. Rather, the Court continued, “punitive damages are awarded as a mere incident of the cause of action in which they are sought.” *Id.* (emphasis added). Drawing the obvious conclusion, the Court proclaimed that “compensable harm stemming from a cognizable cause of action must be shown to exist before punitive damages can be considered.” *Id.* (emphasis added); see also *Malone v. Courtyard by Marriott* (1996), 74 Ohio St.3d 440, 447, 659 N.E.2d 1242 (“even if punitive damages were warranted in this case, [plaintiff] could not recover them because the jury did not award her compensatory damages.”).

The lesson of *Moskovitz* echoes other statements of this Court. For example, in *Hitchings v. Weese*, the Court dismissed an appeal as improvidently granted precisely because a lower-court ruling as to punitive damages was not severable from the underlying claim. (1997), 77 Ohio St.3d 390, 391, 674 N.E.2d 688. Justice Resnick

justified the Court's sua-sponte dismissal with the rule enunciated in *Moskovitz*: "No civil cause of action in this state may be maintained simply for punitive damages." *Id.* (Resnick, J., joined by Douglas, Fr. Sweeney, Cook, and Lundberg Stratton, JJ.). More recently, this Court again reaffirmed the foundational relationship between a cognizable cause of action and punitive damages. "Notably, the board's request for punitive damages is not a separate claim in itself but rather an issue in the overall claim for damages." *State ex rel. Bd. of State Teachers Retirement Sys. of Oh. v. Davis*, 113 Ohio St.3d 410, 2007-Ohio-2205, 865 N.E.2d 1289, at ¶46 (internal punctuation omitted).

Taking the measure of these cases a few months before the Ninth District's decision, the Sixth District declared "well-settled" the proposition that, "before a plaintiff is entitled to punitive damages, there must be proof of an underlying independent compensatory damage claim." *Watson v. Ford Motor Co.*, 6th Dist. No. E-06-074, 2007-Ohio-6374, at ¶73.

Leading torts commentators agree with this assessment—there is no independent claim for punitive damages. The Restatement says "[i]t is essential * * * that facts be established that, apart from punitive damages, are sufficient to maintain a cause of action." Restatement (Second) of Torts (1979), Section 908, cmt. c. Professors Kircher and Wiseman agree. "[T]here is no independent cause of action for punitive damages. * * * Thus, if the plaintiff cannot establish the requisites of the underlying cause of action, the inability to supply that proof also destroys the support needed to recover punitive damages." Kircher and Wiseman, *Punitive Damages: Law and Practice* (2d ed. 2000), § 5:21. Put another way, "[i]t is generally accepted that punitive damages do not broaden the field of actionable wrongs." *Id.* The nation's leading tort scholars concur that

punitive damages are only available if the plaintiff secures some relief. See 4 Gray, Harper, James, and Gray on Torts (3d ed. 2007), Section 25.5A.

Other authorities go even further and limit punitive damages to cases where the plaintiff has recovered actual damages. Indeed, in “most jurisdictions[,] an award of compensatory damages is a prerequisite to punitive damages.” *Id.*; see also, Schlueter, *Punitive Damages* (5th Ed. 2005 & Supp. 2007), Section 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 an actual compensatory award); *Garnes v. Fleming Landfill, Inc.* (W.Va. 1991), 413 S.E.2d 897 (“Therefore, we overrule * * * *Wells* to the extent that it stands for the proposition that a jury may return an award for punitive damages without finding *any* compensatory damages.”); (emphasis in original). *Oliver v. Raymark Industries, Inc.* (C.A.3 1986), 799 F.2d 95, 98 (“We believe that * * * in a strict products liability action—as in a negligence action—punitive damages cannot be awarded without compensatory damages.”) (collecting authorities); *Tucker v. Marcus* (Wis.1988), 418 N.W.2d 818, 823 (“A general and perhaps almost universally accepted rule is that punitive damages cannot be awarded in the absence of actual damage.”) (collecting authorities).

Recent changes in Ohio law draw on this collective wisdom and make explicit that punitive damages must be prefaced by successfully prosecuting an underlying claim. The Ohio pattern jury instructions treat compensatory damages as a gatekeeper for punitive damages: “Because you found that the plaintiff is entitled to compensatory damages against the defendant, you may now consider whether you will separately award punitive damages.” 1 Ohio Jury Instructions (2006 & Supp. 2008), Section 23.71

(emphasis added).² Similarly, the General Assembly has recently linked compensatory and punitive damages in a way prefaced by *Moskovitz*. For example, Revised Code 2315.21(C)(2) limits punitive damages to instances where the jury returns a verdict for compensatory damages. Revised Code 2315.21(B)(1)(b) bifurcates the compensatory and punitive phases of a trial, and makes punitive damages dependent on compensatory damages. Finally, Revised Code 2315.21(D)(2)(a) ties punitive damages to the amount of compensatory damages.

More broadly, the Ninth District's novel rule of punitive damages undermines the driving force behind these reforms—restoring fairness to Ohio's civil litigation system. In the General Assembly's 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. No. 80 § 3(A)(3). In the general and the specific, Ohio statutes reject the Ninth District's holding.

² The new jury instructions did not apply to Niskanen's case because the cause of action arose before April 7, 2005, but the predecessor instruction made the same point. See *id.* ("You will also decide whether the defendant shall be liable for punitive damages in addition to any other damages that you award to the plaintiff.") (emphasis added).

B. Contrary to the Ninth District’s reasoning, the shift from contributory to comparative fault did not alter the basic rule that punitive damages are only available if a plaintiff succeeds on an underlying claim.

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. Instead, the evolution from contributory to comparative fault has made it more important to limit punitive damages to cases where the plaintiff succeeds on an underlying claim. 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. No. 80 § 3(A)(3).

By permitting punitive damages without success on an underlying claim, the Ninth District’s decision will undermine fairness by fostering, rather than retarding, “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. No. 80 § 3(A)(3).

Commentary and caselaw also contradict the Ninth District’s premise that the legislative shift to comparative fault abrogated the rule that punitive damages are not a stand-alone tort.

Where 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’ or ‘malicious or reckless conduct,’ 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.

1 Stein, *Stein on Personal Injury Damages* (3d ed. 2008), Section 4:43. A thorough exploration of the intersection of comparative fault and punitive damages is the Wisconsin Supreme Court’s decision in *Tucker v. Marcus*. “More recently, * * * we reaffirmed our commitment to the legislative adoption of a system of modified comparative negligence. We again decline the request to act in derogation of legislative intent. The intent of the legislature was not to create the anomalous result of allowing an award of punitive damages where conduct, although ‘outrageous,’ was not * * * a legally cognizable cause of the harm. Such a result is unpalatable and would render defendants the insurers of any who chose to commence an action * * *.” *Tucker*, 418 N.W.2d 818, 824 (emphasis added). Therefore, the court reasoned, “It is not enough that actual damages may have been ‘suffered’ or ‘sustained’ in order for punitive damages to be awarded.” *Id.* at 823. Comparative fault has not altered the fundamental rule that punitive damages are unrecoverable if a plaintiff’s merits claims fail.

C. The Ninth District’s holding rests on the faulty premise that conduct justifying punitive damages eliminates comparative fault.

The appellate court’s final erroneous premise is its contention that conduct severe enough to justify punitive damages eliminates comparative fault principles. Breaking from sound reasoning of cases and commentary, the Ninth District held that, “[b]ecause 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.” *Niskanen*, 2008-Ohio-1385, at ¶16.³ The Ninth District’s conclusion does not follow its premise. Although punitive damages require a showing of conduct more serious than negligence, that conduct does not always eliminate comparative fault.

First, the statute in effect during the *Niskanen* altercation only eliminated comparative fault for intentional torts. The statute specifically retained comparative fault for “negligence claim[s]” and tort claims “other than” negligence that are not intentional torts. See 2002 S.B. No. 120 version of R.C. 2315.32(B). As the Ninth District recognized, *Niskanen* had dismissed “all intentional tort claims” before trial. 2008-Ohio-1385, at ¶8. Therefore, comparative negligence governed the trial, and the jury’s finding that *Niskanen* was more than 50% responsible for his injuries barred compensatory and punitive damages. See 2002 S.B. 120 version of R.C. 2315.35.

Second, punitive damages are available—so long as there is a recovery of compensatory damages—even if a defendant is merely negligent, because the conduct supporting the punitive damage award need not be the same as that supporting the negligence finding. For example, in *Moskovitz*, the Court held that punitive damages

³ Appellee took the same position in the memorandum opposing jurisdiction. “[T]he same conduct that gives rise to punitive damages * * * also defeats a defense of comparative negligence * * *.” [Mem. Opp. Jurisd. (June 6, 2008), at 2 (emphasis omitted)].

were available for intentionally destroying evidence in a negligence action for medical malpractice. In reaching that holding, the court observed that “it would make no sense for this court to establish a rule requiring that malicious conduct giving rise to a claim for punitive damages must independently cause compensable harm before punitive damages may be awarded.” 69 Ohio St.3d 638, 651. Similarly, this Court commented in *Cappara v. Schibley* that a defendant’s intentional decision to flee a car accident caused by his negligence could support punitive damages. (1999), 85 Ohio St.3d 403, 407, 709 N.E.2d 117, 120 (dictum). Further divorcing punitive damages from the underlying tort (but not the underlying culpability), the Revised Code authorizes punitive damages when the defendant’s underlying conduct in a product-liability case is less than negligent, because it rests on principles of strict liability. See R.C. 2307.80(A).

The Ninth District’s mistaken view about the relationship between punitive damages and underlying liability and its errors regarding the effect of comparative fault led it to the wrong conclusion. 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. The Court should reverse.

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. Moreover, the announced rule undermines the shopkeepers' privilege statute and exacerbates the error regarding punitive damages.

A. The Ninth District mistakenly analogized to criminal law when it decided that Giant Eagle could not argue self-defense in response to Niskanen's negligence claims.

This Court has long accepted the proposition 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. 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. Instead, Giant Eagle claims that its employees acted intentionally, but justifiably, in preventing further harm from Niskanen's unpredictably violent acts. Only Niskanen claims that the employees acted negligently, and even that claim is a product of trial strategy, not a fact about the employees' 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 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.⁴ Indeed, self-defense is built in to the fabric 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, 553 n.309 (emphasis added). The leading torts treatise approaches the problem from the other direction, recognizing that self-defense incorporates the reasonableness standard of negligence. That is, an actor defending a negligence tort could forfeit the self-defense privilege by acting unreasonably (i.e., negligently) and be liable. 1 Gray, Harper, James, and Gray on Torts, Section 3.11 (the privilege of self-defense exists “only where the person purporting to exercise it reasonably believes that he is in danger of an intended or negligent invasion of his interests in personality”) (emphasis added). The jury shared this scholarly 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, reasoning that self-defense had no role in this case because it was “irrelevant” to Niskanen’s allegations that Giant Eagle used excessive force or negligently trained its employees. *Niskanen*, 2008-Ohio-1385, at ¶¶28, 29; see also, Mem. Opp. Jurisd. at 3. The Ninth District erred because self-defense is relevant to both.

⁴ Moreover, even in the criminal context, it is possible to act intentionally and not negligently. See, e.g., *State v. Lovejoy*, (C.P. 1976), 48 Ohio Misc. 20, 357 N.E.2d 424 (defendant not guilty of negligent homicide where he intentionally retrieved pistol to defend home, but accidentally discharged it in ensuing struggle).

As to excessive force, the Ninth District apparently reasons as follows: (1) Niskanen asserted only negligence claims, (2) self-defense is only a justification for intentional conduct, and therefore (3) the self-defense instruction was improper. See *Niskanen*, 2008-Ohio-1385, at ¶26. As shown above, it is possible to act intentionally and not negligently. That is, Giant Eagle was entitled to defend the negligence claims by proving that its employees intentionally restrained Niskanen, and did so without committing negligence. Plenty of negligence cases involve a finding that the defendant's intentional choices were not negligent. See, e.g., *Coulter v. Stutzman*, 10th Dist. No. 07AP-1081, 2008-Ohio-4184 (doctor's choice to perform carpal tunnel surgery not negligent); *Nails v. Asphalt*, 9th Dist. No. 07CA0010-M, 2007-Ohio-6147 (jury found construction company that chose not to warn approaching drivers of an accident at its worksite not negligent). Giant Eagle's employees did not intentionally kill Mr. Niskanen. They did, however, intentionally restrain him. That intentional choice was not negligent because it was a reasonable response in self-defense.

The Ninth District similarly misapprehends the relationship between intentional and non-negligent conduct regarding Niskanen's negligent-training allegation. The Ninth District reasoned that self-defense has no bearing on this claim because the alleged acts (failure to train) were not provoked by Niskanen's violence in the parking lot. *Niskanen*, 2008-Ohio-1385, at ¶28. That reasoning erroneously treats negligent training as a cause of action severable from the underlying harm to Mr. Niskanen. But negligent training is not a tort unless it results in damages. Negligent training is derivative of the underlying tort. Cf. *Browning v. Burt* (1993), 66 Ohio St.3d 544, 566, 613 N.E.2d 993 (negligent credentialing claim against hospital and malpractice claim against doctor were

“interdependent”) (Moyer, C.J., concurring and dissenting). Without Niskanen’s injury, there could be no recovery for negligent training. Because the injury is part of the prima-facie negligence case, defenses to that injury are relevant to the negligent training allegation. Again, Giant Eagle employees acted intentionally in restraining Niskanen, but were not negligent in how they restrained him because they were acting in reasonable self-defense.

The jury concluded that Niskanen was more responsible for his own injuries than Giant Eagle. That finding requires a defense verdict regardless of the acts that Niskanen claims were negligent.

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

The Ninth District’s decision undoing a jury verdict hinders merchants defending negligence claims arising from shoplifting. This 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 General Assembly enacted 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.⁵ Revised Code 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. Contrary to the statutory evolution, 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, and passed R.C. 2935.041. 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 revenue loss posed by shoplifting and the economic cost that loss has on all Ohioans.

C. 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 compensatory damages for an assault, may be considered in mitigation of exemplary damages.”); *Garrett v. Olsen* (Or.App.1984), 691 P.2d 123, 125

⁵ Subsequent history from trial and appeal at (1952), 94 Ohio App. 313, 114 N.E.2d 529.

(“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.

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. The Ninth District’s decision upsets that fairness by permitting punitive damages even when plaintiffs do not succeed on an underlying claim 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 reverse.

Respectfully submitted,

A handwritten signature in cursive script that reads "Richard D. Schuster". The signature is written in black ink and is positioned above the typed name and contact information.

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CERTIFICATE OF SERVICE

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