

IN THE SUPREME COURT OF OHIO

MARY NISKANEN, etc. : Case No. 2008-0895
: :
Appellee : On Appeal from the
: : Summit County Court of Appeals,
vs. : : Ninth Appellate District
: :
GIANT EAGLE, INC. : Court of Appeals
: : Case No. 23445
Appellant : :

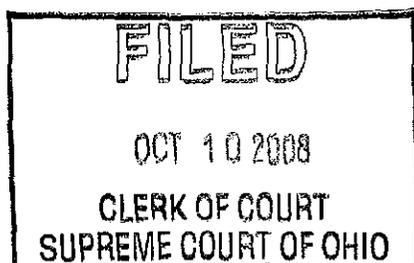
AMICUS CURIAE BRIEF OF
THE OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS
URGING REVERSAL ON BEHALF OF APPELLANT
GIANT EAGLE, INC.

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¹The wording of the Propositions of Law are taken from the Memorandum in Support of Jurisdiction of Appellant Giant Eagle, Inc.

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STATEMENT OF THE CASE AND FACTS

A. INTRODUCTION

The Ohio Association of Civil Trial Attorneys (“OACTA”) is an organization of over 800 attorneys, corporate executives and managers who devote a substantial portion of time to the defense of civil lawsuits and the management of claims against individuals, corporations and governmental entities. For nearly half a century, OACTA’s mission has been to provide a forum where such professionals can work together on common problems and promote and improve the administration of justice in Ohio. In furtherance of this mission, OACTA maintains a robust amicus curiae program by which it can provide expert legal services to support suitable litigation efforts of its constituents. These amicus curiae efforts are limited to those cases addressing legal principles that may impact the fair and efficient administration of justice in Ohio. This case is such a case.

There are two overriding legal principles implicated by the three Propositions of Law submitted by Appellant Giant Eagle, Inc. (“Giant Eagle”). First, there is no right to punitive damages in the absence of legal liability. Consequently, a plaintiff who is barred from recovery because of his own negligence cannot appeal such judgment on the basis that he or she was denied the opportunity to seek punitive damages. Second, self-defense and/or legal detention pursuant to R.C. §2935.041, if proven, are a complete defense to claims seeking damages due to bodily injury or harm because they establish that the defendant’s actions were reasonable and lawful. It is axiomatic that a plaintiff cannot suffer a legally cognizable injury from the lawful actions of a defendant.

For the reasons that follow, and for all the reasons provided by Giant Eagle and the other defense amicus briefs, the Ninth Appellate District's shabby treatment of these overriding legal principles should be reversed and the original verdict of the jury, and consequent judgment of the Trial Court for Giant Eagle, should be reinstated by this Court.

B. STATEMENT OF THE FACTS AND CASE

As explained in Giant Eagle's Merit Brief, this sad case arises from Paul Niskanen's ("Niskanen") death following a struggle during his apparent attempt to steal nearly \$300 in groceries from Giant Eagle in Rootstown, Ohio. After being presented with *all* the facts and arguments surrounding Niskanen's death, a Summit County jury determined that Niskanen's own negligence caused his death and that Giant Eagle's employees had acted in self-defense. Accordingly, Giant Eagle was not legally responsible for Niskanen's death.

On appeal, however, the Ninth Appellate District reversed the Trial Court's judgment for Giant Eagle and ordered a second jury trial for two primary reasons:

- (1) it believed that Niskanen's punitive damages claim could shield his negligence claims from the defense of comparative negligence-- "Because punitive damages require proof that the defendant acted with a greater level of culpability than mere negligence, the negligence of the plaintiff does not serve to set off damages." *Niskanen v. Giant Eagle, Inc.*, 9th Dist. No. 23445, 2008-Ohio-1385, at ¶16.

- (2) it believed that Giant Eagle’s affirmative defenses should not be applicable to claims of negligence.² In this regard, it offered that self-defense “was not an appropriate defense in Niskanen’s negligence claims” because “torts of negligence and recklessness are not subject to such defenses, because the plaintiff does not establish a prima facie tort in the first place if the defendant has such a reasonable explanation of his actions.” *Id.*, at ¶¶21-22. It did not explain why R. C. 2935.041 was not applicable, but instead appeared to treat the statute as the source of a separate cause of action—which it is not. *Id.*, at ¶39.

This appeal followed.

OACTA otherwise adopts the Statement of the Facts and Statement of the Case set forth by Giant Eagle in its Merit Brief.

LAW & ARGUMENT

PROPOSITION OF LAW NO. 1: A jury may not consider punitive damages where plaintiff asserts only a negligence claim and they find against him on comparative fault.

At all times pertinent to this case, Niskanen’s negligence claims were subject to the defense of contributory fault. R. C. 2315.32(B)(eff. 4-9-2003); *Niskanen*, ¶¶30-31. The defense could serve Giant Eagle in two ways. First, if Niskanen’s contributory fault was less than Giant Eagle’s negligence, it would reduce compensatory damages. R. C. 2315.35 (eff. 4-9-2003). Second, if Niskanen’s contributory fault exceeded Giant Eagle’s negligence, it would be a complete bar to

²The Trial Court instructed the jury on three claims: negligence, undue restraint and spoliation. The spoliation was resolved favorably for Giant Eagle and is not a part of this appeal. It is not clear from the record or Niskanen’s arguments whether there is any difference between the negligence claim and the undue restraint claim. Undue restraint would seem to be an intentional tort claim. *See* R. C. 2905.03(A) (defining a violation of criminal undue restraint as follows: “No person, without privilege to do so, shall knowingly restrain another of this liberty”). If this is correct, the entire foundation of the Ninth Appellate District’s second reason for reversal crumbles because it is axiomatic that self-defense and R. C. 2935.041 are valid defenses to such a claim. Accordingly, this Amicus Brief treats the undue restraint claim as an extension of Niskanen’s negligence claim. Otherwise, summary reversal on this issued would appear appropriate.

liability. *Id.* As the jury found that Niskanen's contributory fault exceeded Giant Eagle's negligence (60% to 40%), the Trial Court was obligated to enter judgment for Giant Eagle—which it did. Simply put, Giant Eagle was not legally responsible for Niskanen's death.

This should have been the end of this saga. However, the Ninth Appellate District reversed--pronouncing that Niskanen's request for punitive damages somehow shielded his negligence claim from the defense of contributory fault. ***No court anywhere, at anytime, has ever made the same pronouncement.*** Why? Because it runs counter to the purpose and nature of punitive damages as explained in hundreds of years of Anglo-American jurisprudence.

At this late date, it should be beyond dispute that common law requires proof of actual damages in an underlying cause of action as a necessary predicate for an award of punitive damages. *Malone v. Courtyard by Marriott Ltd. Partnership*, 74 Ohio St.3d 440, 447, 1996-Ohio-311; *Moskovitz v. Mt. Sinai Medical Ctr.*, 69 Ohio St.3d 638, 649-650, 1994-Ohio-324; *Cabe v. Lunich*, 70 Ohio St.3d 598, 601, 1994-Ohio-4; *Shimola v. Nationwide Ins. Co.* (1986), 25 Ohio St.3d 84, 86, 495 N.E.2d 391; *Bishop v. Grdina* (1985), 20 Ohio St.3d 26, 27-28, 485 N.E.2d 704; *Richard v. Hunter* (1949), 151 Ohio St. 185, 187-192, 85 N.E.2d 109; *Roberts v. Mason* (1859), 10 Ohio St. 277, 279-280; *Simpson v. McCaffrey* (1844), 13 Ohio St. 508, 522-523.

This rule is not unique to Ohio but is considered "universal" in American jurisprudence. Annotation, *Sufficiency of Showing of Actual Damages to Support Award of Punitive Damages—Modern Cases*, 40 A.L.R.4th 11 (1985), at §2[a] ("The general rule that punitive damages may not be awarded unless the party seeking them has sustained actual damage is accepted universally"); 30 Ohio Jur.3d *Damages* §124 (2008) ("Punitive damages may not be awarded in absence of actual damages"); Restatement (Second) of Torts §908, comment c (1979)(for punitive

damages to be awarded “a cause of action for the particular tort must exist, at least for nominal damages”); *see also* Amicus Curiae Brief of The Ohio Council of Retail Merchants and the Grocers Association, p. 6. Indeed, it is a concept that appears to predate the American Republic.

For nearly a quarter of a century, this requirement has been codified in the Ohio Revised Code. *See* R. C. 2315.21(B)(2)(eff. Jan. 5, 1988)(“punitive or exemplary damages are not recoverable . . . unless . . . the plaintiff in question has adduced proof of actual damages”); R. C. 2315.21(C)(2)(eff. Apr. 7, 2005)(“punitive or exemplary damages are not recoverable . . . unless . . . the trier of fact has returned a verdict” for the plaintiff and awarded “compensatory damages”). Thus, the common law rule has been legislatively adopted as the public policy of Ohio, and any substantive change to it (short of a constitutional challenge) must emanate from the legislature lest it trigger separation of powers problems. Since the time the Ohio General Assembly adopted the rule, Ohio courts have debated many issues related to punitive damages, but none, until now, has ever questioned that proof of actual damages in an underlying cause of action is a necessary predicate for an award of punitive damages.

So deep is the rule ingrained in this nation, that in more recent decades, it has also become a significant component of constitutional due process. Historically, a corollary to the common law rule was a common law limitation that punitive damages could not be unreasonably disproportionate to compensatory damages. *See Richard*, 151 Ohio St. at 191-192. Thus, the common law rule was: “in absence of an award of compensatory damages, an award of punitive damages may be taken as an indication that the jury was actuated by passion, prejudice and improper motives in making such a finding” as to require reversal of any such award. *Id.* This corollary was deemed so fundamental that it has been incorporated into the concept of federal due process. *Barnes v. University Hosp. of*

Cleveland, 119 Ohio St.3d 173, 2008-Ohio-3344, at ¶¶30-34 (explaining that judicial review of the constitutionality of an award of punitive damages for excessiveness requires an analysis of the ration of punitive damages to the actual harm inflicted by the defendant). Today, states are constitutionally required to “avoid *any* procedure that unnecessarily deprives juries of proper legal guidance” on the limitations of punitive damages. *Philip Morris USA v. Williams* (2007), — U.S. —, 127 S.Ct. 1057, 1064, 166 L.Ed.2d 940 (Emphasis added). Thus, for example, states are constitutionally prohibited from imposing punitive damages to punish a defendant for injury that it allegedly inflicts upon nonparties because: “[a] defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing, for example, in a case such as this, that the other victim was not entitled to damages.” 127 S.Ct. at 1063. Decoupling punitive damages from compensatory damages would constitute the type of procedure constitutionally prohibited by *Philip Morris* because, among other things, it would not allow a comparison of compensatory and punitive damages.

An examination of the history and rationale of punitive damages explains why this rule has been universally accepted and incorporated into our constitutional law. Nearly 60 years ago, in *Richard v. Hunter*, this Court explained:

. . . [A]ccording to the weight of authority, exemplary damages or punitive damages are not recoverable in the absence of proof of actual damages. The reason given for this rule is that punitive damages are mere incidents to the causes of action.

* * *

It will be recalled that the principal reason given in support of the general rule requiring actual damage as a predicate for the recovery of exemplary damages is that a private action cannot be maintained merely to inflict punishment upon the wrongdoer, a number of cases, supporting the rule that a verdict for punitive damages may be supported even where the actual

damages are merely nominal take the position that if a cause of action is made out which shows an infraction of a legal right, the cause is complete and may be maintained and exemplary damages may be recovered in proper cases despite the fact that the injury gives rise to no substantial pecuniary damage or to a loss incapable of exact measurement in money; in other words, that there is something to which exemplary damages may attach, small in amount though it may be. (Emphasis added).

151 Ohio St. at 187-189 (quoting 15 Am. Jur. 706-707, §§270-271). Still earlier, in *Western Union Tel. Co. v. Smith* (1901), 64 Ohio St. 106, 116, 59 N.E. 890, this Court explained:

Such damages, being punitive in their nature, are an exception to the general rules that in private actions the injured party is to be made whole, and that acts deemed worthy of punishment are prosecuted by the state. With respect to the recovery of damages of that character in private actions . . . [t]he requisites of their recovery in this state were described in *Simpson v. McCaffrey* [1844], 13 Ohio, 522: “The principle of permitting damages in certain cases to go beyond naked compensation is for example, and the punishment of the guilty party for the wicked, corrupt and malignant motive and design which prompted him to the wrongful act . . .” (Emphasis added).

This pronouncement followed even earlier cases which explained the interaction between the common law right to compensatory damages and punitive damages as follows:

[J]ustice requires that the injured party should be made whole; but justice to him requires nothing more . . . True, the law permits an award of damages in excess of this rule of compensation, when the wrongful act was wanton or otherwise aggravated. But this is permitted by way of punishing the wrong-doer, and for example’s sake. It is not a matter of legal right in the injured party. For every wrong done, if it can be redressed in damages, the rule is that the injured party shall have compensatory damages, and if the wrongful act was willful, wanton or malicious, punitive damages may also be awarded. (Emphasis added).

Lake Shine & M.S. Ry. Co. v. Hutchins (1881), 37 Ohio St. 282, 294; *Smith v. The Pittsburg, Fort Wayne & Chicago Railway Co.* (1872), 23 Ohio St. 10, 13 (“Compensation is limited to direct pecuniary loss and costs of suit only . . . it is only where either of the elements of fraud, malice, or willful oppression, enter into the controversy, that the law gives punitive, vindictive, or exemplary

damages”); *Roberts*, 10 Ohio St. at 280 (“[I]f any thing can be settled by judicial decision and long and general practice, this doctrine must be regarded as thus settled . . . if an alteration of the rule were deemed desirable, therefore, it would come more properly from the legislature than from us”).

Thus, historically and philosophically, punishment of wrongdoers has been relegated to the state. Punitive damages have been permitted in private actions—but only as a limited extension of the ordinary common law remedy of compensatory damages; and then, only to the extent that punitive damages are not disproportionate to compensatory damages. Thus, the ability to seek punitive damages is not a right in and of itself, but is instead an “incident” of the plaintiff’s right to recover compensatory damages. Without compensatory damages, punitive damages cannot follow. Otherwise, plaintiffs would become prosecutors and the courts would become inundated with common law suits seeking to punish offenses that have not injured anyone. It is difficult to conceive of a more arbitrary, unreasonable or unconscionable outcome—rife with the opportunity for abuse and constitutionally infirm with respect to due process.

In this case, the jury found that Giant Eagle was 40% responsible for Niskanen’s death while Niskanen was 60% responsible for his own death. This finding fully activated Giant Eagle’s contributory fault affirmative defense—rendering any negligence by Giant Eagle irrelevant. Thus, as a matter of law, Giant Eagle has no legal responsibility for Niskanen’s death, and therefore no compensatory damages could be awarded. *Schellhouse v. Norfolk & Western Railway Co.* (1991), 61 Ohio St.3d 520, 524-525, 575 N.E.2d 453; *Malone*, 74 Ohio St.3d at 444. Because no compensatory damages could be awarded, no punitive damages could be awarded. *Malone*, 74 Ohio St.3d at 447. This result is required by the common law, statutory law and constitutional law.

The foregoing demonstrates that the Ninth Appellate District's attempt to use Niskanen's prayer for punitive damages as a foil against Giant Eagle's contributory fault defense was clearly wrong. Simply stated, it "put the cart before the horse." There cannot be punitive damages without compensatory damages, and there cannot be compensatory damages without legal liability. This remains true under modern comparative negligence principles where juries are asked to determine the percentage of the parties' responsibilities for a claimed injury before it is determined whether the defendant has any legal liability.³ This was well-explained in *Malone*, where this Court rejected arguments (identical to those relied upon by the Ninth Appellate District) from a plaintiff whose negligence claim, like Niskanen's, was barred by comparative negligence, explaining:

It is significant to note that even if punitive damages were warranted in this case, Malone could not recover them because the jury did not award her compensatory damages. As we have held time and time again, punitive damages may not be awarded when a jury fails to award compensatory damages. *Bishop v. Grdina* (1985), 20 Ohio St.3d 26, 27, 20 OBR 213, 214, 485 N.E.2d 704, 705.

The appellees attempt to circumvent this bar to Malone's recovery of punitive damages by pointing out that Malone failed to recover compensatory damages under the negligence theory only because the jury found that she had been fifty-one percent comparatively negligent. Since comparative negligence is not available as an affirmative defense for an action based on recklessness, appellees theorize that Malone could have

³At common law, *any* contributory fault (or contributory negligence) by Niskanen would have completely barred Niskanen's negligence claim. *Schellhouse*, 61 Ohio St.3d at 524-525. Modern comparative fault principles have relaxed this rule, but not eliminated it. It may be tempting to give some significance to the jury's finding that Giant Eagle was 40% responsible for Niskanen's death. However, the only legal significance of that 40% finding is that Niskanen's negligence claim is foreclosed. It is only because of the relaxed comparative fault principles we employ today that we even ask the jury to quantify Giant Eagle's responsibility. In this case, whether Giant Eagle was 0% responsible or 49% responsible, the result would be the same—Niskanen's negligence claim fails.

recovered compensatory damages on a recklessness theory. Such an award would also allow Malone to overcome the bar to punitive damages that was articulated in Bishop and elsewhere. (Emphasis added).

74 Ohio St.3d at 447. This Court rejected the plaintiff's argument—noting that while the plaintiff's claim for punitive damages included an allegation of "recklessness," it was not a claim for compensatory damages based upon "recklessness," and therefore could not be used to overcome a comparative negligence defense. *Id.* This case is no different, and the result should be no different.

PROPOSITION OF LAW NO. 2: Self-defense is valid defense in a negligence action.

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.

Propositions of Law Nos. 2 and 3 can be analyzed together because they both address the extent to which "use of force" affirmative defenses, such as self-defense or the Shopkeeper's Privilege under R. C. 2935.041, can be utilized as an affirmative defense to a claim seeking damages due to bodily injury or harm. The Ninth Appellate District categorically rejected the application of these affirmative defenses to Niskanen's negligence claims. This rejection was wrong.

Proof of the Ninth Appellate District's error starts with an analysis of the nature of affirmative defenses generally. Ohio's legal system does not limit its consideration of a plaintiff's right to collect monetary compensation for loss or harm resulting from injury to whether the plaintiff can establish a prima facie case against the tortfeasor. Rather, the alleged tortfeasor often relies upon "affirmative defenses" to defeat liability. Civ. R. 8(C). Conceptually, an "affirmative defense":

is a new matter which, assuming a complaint to be true, constitutes a defense to it. *An affirmative defense admits the plaintiff has a claim, but asserts some legal reason why the plaintiff cannot have any recovery on the claim.* An affirmative defense is a legal defense to a claim, as opposed to a factual dispute as to an essential element of the claim. It is a defense that does not

controvert the establishment of a prima facie case, but that otherwise denies relief to the plaintiff. It is a defense of avoidance rather than a defense in denial. *Thus, an “affirmative defense” is one which seeks to defeat or avoid the plaintiff’s cause of action, and avers that even if the petition is true, the plaintiff cannot prevail because there are additional facts that permit the defendant to avoid legal responsibility.* (Emphasis added; footnotes omitted).

61A Am. Jur.2d *Pleading* §288 (2003); see also *The State ex. rel. The Plain Dealer Pub. Co. v. Cleveland* (1996), 75 Ohio St.3d 31, 33, 661 N.E.2d 17 (“An affirmative defense is any defensive matter in nature of a confession and avoidance. It admits that the plaintiff has a claim (the ‘confession’) but asserts some legal reason why the plaintiff cannot have any recovery on that claim (the ‘avoidance’”). Thus, an affirmative defense is not contingent upon the particular theory a plaintiff chooses to bring against a defendant, it is contingent upon additional facts that the defendant proves which establish that the defendant’s actions were lawful. Where the defendant prevails on an affirmative defense, there is no difference than if the plaintiff failed to prove an essential element of the claim—the legal system does not recognize the plaintiff’s right to legal recovery from the defendant. In this case, two such affirmative defenses were utilized by Giant Eagle: (1) the Shopkeeper’s Privilege under R. C. 2935.041 and (2) self-defense.

R. C. 2935.041 creates a statutory privilege to use reasonable force to detail a shoplifter. *Kalbfell v. Marc Glassman, Inc.*, 7th Dist. No. 02 CO 5, 2003-Ohio-3489, at ¶17 (“The legislature has enacted a statute to protect shopkeepers by providing a defense in certain cases”). That is, a merchant who has probable cause to believe that its goods have been unlawfully taken by a person may detain such person in a reasonable manner for a reasonable length of time to recover its property and/or have the person arrested. R. C. 2935.041(A). If proven it will defeat negligence-based claims based upon such detention. *Ashcroft v. Mt. Sinai Med. Ctr.* (8th Dist. 1990), 68 Ohio App.3d 359,

364-366, 588 N.E.2d 280 (holding that plaintiff's claim for negligent infliction of emotional distress failed, in part, because security guards had probable cause to detain her under R. C. 2935.041). It does not create a separate cause of action.

This Court has recognized self-defense as another "use of force" privilege and has looked to the Restatement (Second) of Torts (1965) for definition of that privilege. *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 124, 1997-Ohio-401 ("We recognize that a defendant may be relieved of liability for tortious conduct by proving that such conduct was in self-defense"); Restatement (Second) of Torts §890 (1965)("One who otherwise would be liable for a tort is not liable if he acts in pursuance of and within the limits of a privilege of his own or of a privilege of another that was properly delegated to him"). The Restatement makes clear that self-defense is a valid defense to negligence-based claims. *Id.*, at §64 (Self-Defense Against Negligent Conduct); *Id.*, at §66 (Self-Defense Against Negligent Conduct Threatening Death Or Serious Bodily Harm). Until the decision below, Ohio courts agreed. *See e.g. Goldfuss*, 79 Ohio St.3d at 124-125 (holding that the defense could apply to negligence claim, but defendant had failed to present sufficient evidence to warrant self-defense instruction); *Preferred Mut. Ins. Co. v. Thompson* (1986), 23 Ohio St.3d 78, 80-82, 491 N.E.2d 688 (holding that insured defendant's claim that he acted in self-defense could be a valid defense to allegation of negligent shooting and that insurer could not avoid providing defense through an "expected or intended" exclusion because "an act of self-defense . . . is neither anticipated nor wrongful from the standpoint of the insured"); *Ailiff v. Four, Four, Four, Inc.*, 7th Dist. No. 85 C.A. 59, 1986 WL 7152, at *2-4 (finding that trial court did not commit reversible error by instructing jury that self-defense and the right of a police officer to make a lawful arrest were complete defenses to an allegation of negligence made by innocent bystander injured in shootout

between police and criminals—even though there were questions about whether the evidence justified such an instruction).

Despite the foregoing, the Ninth Appellate District struggled with the idea that self-defense and R. C. 2935.041 could be applied to negligence-based claims. Even in the abstract, however, its struggle is mystifying because self-defense and R. C. 2935.041 are analytically well-suited to serve as defenses to claims that the defendant negligently caused injury or harm to the plaintiff because they focus on the “reasonableness” of the defendant’s action under the circumstances. This mirrors the analysis the trier of fact is already required to employ with respect to the plaintiff’s negligence claims. Thus, in a negligence case, a jury presented with such evidence may just as well find that the defendant did not breach any duty to the plaintiff (and therefore the defendant was not negligent) as find that the defendant acted in self-defense or justifiably detained the plaintiff pursuant to R. C. 2935.041. *See eg. Ashcroft*, 68 Ohio App.3d at 366 (finding plaintiff’s claim for negligent infliction of emotional distress fails because “the officers had probable cause to detain [plaintiff]. Their actions were not negligent”). The issues involved are complementary as opposed as antithetical. Consequently, in most cases (including this one), even if a reasonable argument could be advanced that self-defense and/or R. C. 2935.041 is not a valid defense to a negligence claim, the overlap of the legal issues should render any error in presenting such defenses harmless. *Ailiff*, at *2-4; *Hallworth v. Republic Steel Corp.* (1950), 153 Ohio St.349, 91 N.E.2d 690, at syllabus paragraph three (“Generally, in order to find that substantial justice has been done to an appellant so as to prevent reversal of a judgment for errors occurring at the trial, the reviewing court must not only weigh the prejudicial effect of those errors but also determine that, *if those errors had not occurred*,

the jury or other trier of the facts would probably have made the same decision.”)(Emphasis added).

The Ninth Appellate District lost its way by wrongly insisting that Giant Eagle limit its evidence and arguments to the elements of Niskanen’s negligence claims, rather than recognize that Giant Eagle had the right to build its defense on the theory that any injury or harm to Niskanen was lawful—regardless of whether Niskanen alleged Giant Eagle’s actions were negligent or intentional.⁴ Ohio law does not support this approach. Consequently, the Ninth Appellate District’s decision should be reversed and the jury’s verdict for Giant Eagle should be reinstated.

CONCLUSION

Every so often a case comes along with broad-reaching implications that have the potential to shake the rafters of our jurisprudence. This is such a case.

Make no mistake, affirmance of the Ninth Appellate District’s decision below will, in one fell swoop: (1) undermine comparative fault principles by allowing plaintiffs to shield negligence

⁴Interestingly, the Ninth Appellate District did not feel constrained to impose the same limitation on Niskanen, but instead felt that he should be able to argue that his obviously intentional acts might instead be simple negligence. In this regard, the court of appeals explained:

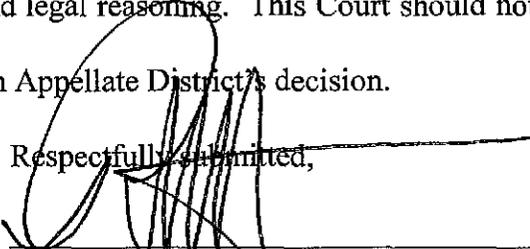
Even though Paul Niskanen’s acts of throwing punches . . . were apparently intentional, the jury could reasonably conclude Niskanen also had been negligent because he intentionally placed himself in a position of danger . . . It will be for the jury on retrial to determine whether, and to what extent, Niskanen’s action of responding with physical violence against some of the Giant Eagle employees may have amounted to negligence that was a contributing cause of his own death.

Niskanen, at ¶¶32-33. Of course, the jury already considered this issue and found that Niskanen’s contributory fault was 60% of the cause of the injury in this case. Accordingly, there was no reason to order a retrial.

claims by artfully pleading of punitive damages claims; (2) turn civil lawsuits into criminal prosecutions by allowing plaintiffs who have not suffered legal harm to maintain punitive actions against defendants; (3) interject constitutional infirmities into Ohio's civil justice system by decoupling punitive damages from compensatory damages; and (4) allow plaintiffs' lawyers to use artful pleadings to restrict the right of individuals and businesses to defend themselves from legal liability through the use of affirmative defenses. These are not small changes—they are monumental. To make these changes, this Court must disavow hundreds of years of Anglo-American jurisprudence and fundamental tenets to our civil justice system. Frankly, no explanation has been provided for why this should occur.

Niskanen's death was tragic. But his estate was not denied the right to seek a remedy. His estate was given its day in court before a jury. That jury considered all of the evidence and argument and decided that Giant Eagle was not legally responsible for his death. That decision should stand absent clear, reversible error. Instead, it has been sidestepped by a questionable legal decision that trammels on centuries of legal precedent and legal reasoning. This Court should not allow such things to occur, and should reverse the Ninth Appellate District's decision.

Respectfully submitted,


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CERTIFICATE OF SERVICE

A copy of the foregoing has been forwarded by regular U.S. Mail upon the following on this

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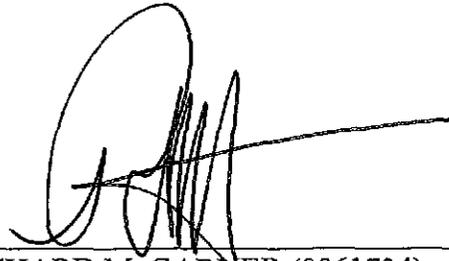
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A handwritten signature in black ink, appearing to read 'R. Garner', is written over a horizontal line. The signature is stylized and somewhat abstract.

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