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. 08-0895

On Appeal from the Court of Appeals of Summit County, Ohio, Ninth Appellate District (No. 23445)

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Introduction

This appeal arises from Paul Niskanen's ("Niskanen") unprovoked attack against two individuals employed by Appellant Giant Eagle, Inc. ("Giant Eagle") at its Rootstown, Ohio store. Niskanen died when Giant Eagle's employees, with the aid of two customers, tried to hold him down while they waited for the police to arrive. The jury not only found against Appellee Mary Niskanen ("Mrs. Niskanen") on all her claims, but also against her on Giant Eagle's affirmative defense that its employees lawfully exercised their right to self-defense.

Venturing into uncharted jurisprudence, the Ninth District Court of Appeals vacated this jury verdict based on several fundamentally mistaken propositions of law:

(1) Punitive damages are recoverable when compensatory damages are not awarded due to comparative fault;

(2) Self-defense may never be asserted to defeat a negligence claim; and

(3) The shopkeeper's privilege statute, R.C. 2935.041 (the "shopkeeper's privilege"), creates a cause of action that cannot be defeated by the lawful exercise of the right to self-defense.

Propositions (1) and (2) ignore controlling constitutional principles and defy this Court's longstanding jurisprudence on punitive damages and self-defense. Proposition (3) turns the legislative intent behind R.C. 2935.041 on its head by limiting, rather than expanding, the defenses available to a merchant against claims arising from a shoplifting incident.

Punitive Damages

With little explanation, the Ninth District found that the jury should have considered punitive damages, even though Niskanen's comparative fault (60 percent) precluded an award of compensatory damages. Reaching this result, the Ninth District failed to heed this Court's admonition that a request for punitive damages does not constitute "a cause of action in and of itself." *Bishop v. Grdina* (1985), 20 Ohio St.3d 26, 28, 485 N.E.2d 704. That admonition,

coupled with this Court's recognition "time and again [that] punitive damages may not be awarded when a jury fails to award compensatory damages," cannot be reconciled with the Ninth District's holding on punitive damages. *Malone v. Courtyard by Marriott, L.P.*, 74 Ohio St.3d 440, 1996-Ohio-311, 659 N.E.2d 1242.

To overcome these long recognized principles regarding punitive damages, the Ninth District relies on flawed reasoning:

(1) a plaintiff's comparative negligence is not a defense to an intentional tort;

(2) the scienter needed for punitive damages is similar to the scienter needed for an intentional tort; and

(3) therefore, if the jury found in Mrs. Niskanen's favor on punitive damages, her son's comparative fault would not bar her negligence claims and, as such, the jury could award her compensatory damages.

But *Marriott* rejected precisely the same flawed reasoning used in that case to try to overcome comparative fault exceeding 50%. The Ninth District's reasoning, as *Marriott* points out, rests on the mistaken premise that a request for punitive damages constitutes a separate cognizable intentional tort claim because only success on such a claim can trump an adverse comparative fault finding. Mrs. Niskanen never satisfied this condition since she pursued only negligence claims and succeeded on none.

Self-Defense

The Ninth District also stripped Giant Eagle and its employees of their right to defend themselves against a vicious unprovoked attack—a right firmly embedded in the Ohio and United States Constitutions. It held that self-defense can never be asserted to defeat a negligence claim even where, as here, ample evidence supports each element of that defense. Not only did the Ninth District offer no support for this startling proposition but, even more troubling, it failed to address this Court's approval of self-defense against a negligence claim in *Goldfuss v.*

Davidson, 79 Ohio St.3d 116, 1997-Ohio-401, 679 N.E.2d 1099. The Ninth District also failed to mention, let alone address, its own approval of self-defense to defeat a negligence claim in *Ashford v. Betleyoun*, No. 22930, 2006 WL 1409793 (Ohio Ct. App. May 24, 2006), 2006-Ohio-2554. These decisions reflect the common law rule, as recognized long ago by the United States Supreme Court in *New Orleans & E.R. Co. v. Jopes* (1891), 142 U.S. 18, 24, 12 S.Ct. 109, that self-defense precludes any liability "for damages in a civil action"—including those asserting merely negligence.

Apart from these decisions, the Ninth District's refusal to permit a defendant to raise self-defense against a negligence claim raises troubling due process concerns. If due process means anything, it precludes courts from depriving a defendant of any defense whose elements can be established from evidence admitted at trial. The Ninth District's decision tramples on Giant Eagle's due process rights.

Shopkeeper's Privilege

The Ninth District's interpretation of R.C. 2935.041 thwarts the legislative intent to grant retail merchants a privilege to detain suspected shoplifters "in a reasonable manner and for a reasonable length of time." If the statute's threshold requirements have been met, the merchant has an affirmative defense against any claim that may be asserted against him by a suspected shoplifter due to the detention. Ignoring R.C. 2935.041's goal to protect merchants when detaining a shoplifter, the Ninth District's decision exposes them to increased liability from litigious shoplifters seeking to profit from their thwarted thievery. The Ninth District turned a statutory privilege from liability into a new cause of action against merchants and then exacerbated that error by holding that self-defense cannot be asserted to defeat such a claim under R.C. 2935.041. Unable to rely on self-defense, if the Ninth District decision stands,

merchants will no longer be able to defend themselves against an unprovoked attack without the fear of incurring significant newly-created liability to their attacker under R.C. 2935.041.

Statement of the Case

On January 31, 2004, Niskanen, a shoplifter, attacked two Giant Eagle employees when they approached him outside the Rootstown Giant Eagle store. Niskanen died while Giant Eagle's employees, with the help of two customers, held him down until the police arrived. As a result of his death, Niskanen's mother, Mrs. Niskanen, as Administratrix of her son's estate, brought a wrongful death and survival action in the Summit County Court of Common Pleas on August 5, 2004.

With her amended complaint, Mrs. Niskanen sued not only Giant Eagle and its employees, John M. Maczko ("Maczko"), Jonathan A. Stress ("Stress") and Paul K. Taylor ("Taylor"), but also David L. Alexoff ("Alexoff")—one of the customers who helped thwart Niskanen's attack. (Supp. 1-18). Mrs. Niskanen asserted claims for assault and battery, negligence, false imprisonment, unlawful restraint in violation of R.C. 2935.041, and spoliation of evidence. *Id.* On May 25, 2006, the trial court granted Giant Eagle's employees summary judgment on Mrs. Niskanen's request for punitive damages because

> [n]either this Court nor a jury could find that the Defendants' combined acts in restraining Niskanen contained a positive element of conscious wrongdoing or a great probability/high foreseeability that their restraint would cause Mr. Niskanen's death.

(Appx. 45). Finding factual issues that required submission to a jury, however, the trial court denied the Giant Eagle Defendants' motion for summary judgment on Mrs. Niskanen's remaining claims—including her request for punitive damages against Giant Eagle. (Appx. 32-48).

On the morning of trial on June 19, 2006, Mrs. Niskanen dismissed her claims against all the individual Defendants—Alexoff, Maczko, Stress, and Taylor. (Supp. 19-21, 23-24; 1 Tr. 2-

3). She also dismissed her claims for assault and battery and false imprisonment against the remaining Defendant—Giant Eagle. *Id.* Thus, as the Ninth District observed, Mrs. Niskanen pursued only a negligence theory at trial. (At trial, "[t]here were no longer any claims that Giant Eagle or any of its employees had intentionally harmed Niskanen."). (Appx. 14, ¶26). After nearly a three-week trial, Mrs. Niskanen's claims for negligence, undue restraint, and spoliation of evidence were submitted to the jury along with Giant Eagle's affirmative defense that its employees acted in self-defense. (Supp. 692-731; 14 Tr. 1789-1828).

During deliberations, the jury posed a question reflecting their intent to find for Giant Eagle:

> we found the percentage of negligence attributable to the Plaintiff to be 60 percent. Therefore, are both the damages in 3-A and 3-B negated? And, if so, then our assumption is that our verdict is indeed for the Defendant.

(Supp. 768; 15 Tr. 1864). Consistent with their intent to enter a general verdict for Giant Eagle, the jury, through special interrogatories, made dispositive findings that:

(1) Giant Eagle acted in self-defense;

(2) Niskanen and Giant Eagle were negligent, but Niskanen's negligence exceeded Giant Eagle's;

(3) Giant Eagle did not use undue restraint under R.C. 2935.041; and

(4) Giant Eagle did not engage in the spoliation of any evidence.

(Supp. 807-836; 1117-1123; 15 Tr. 1903-32). Based on these findings, the trial court entered a general verdict in favor of Giant Eagle pursuant to Ohio R. Civ. P. 49 and 58 on all claims—including Mrs. Niskanen's request for punitive damages. (Supp. 835-839; 15 Tr. 1931-35); (Appx. 31).[1]

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[1] The jury also asked if Niskanen's negligence exceeded Giant Eagle's should they "fix damages in the sum of zero dollars for negligence and unlawful restraint?" (Supp. 782; 15 Tr. 1878). The

On October 19, 2006, Niskanen filed her notice of appeal seeking a new trial. Giant Eagle then filed a protective cross-appeal seeking reversal of the trial court's failure to grant its motion for a directed verdict. On March 26, 2008, a split panel of the Ninth District vacated Giant Eagle's jury verdict based on its mistaken view of Ohio law. First, the Ninth District held that a plaintiff who asserts only a negligence claim may recover punitive damages even where, as here, he recovers no compensatory damages due to an adverse finding on comparative fault. Second, the Ninth District held that by strategic pleading a plaintiff, despite being the attacker, can preclude a defendant from being able to assert self-defense. Third, the Ninth District held that R.C. 2935.041 creates a statutory cause of action for undue restraint that cannot be defeated by a merchant's exercise of its right to self-defense.

Though he joined the majority on punitive damages, Judge Slaby dissented from the rest of their decision—including stripping Giant Eagle of its right to self-defense. As Judge Slaby explained, the majority failed to recognize that Niskanen's unprovoked attack forced Giant Eagle's employees to defend themselves:

> it was [Niskanen] who became the aggressor. [But] [o]nce [Niskanen] became the aggressor, the employees were no longer trying to apprehend a shoplifter. . . . The jury could have found, and they apparently did, that they were either attempting to restrain an aggressor for the police or defending themselves from further attack.

(Appx. 24-25, ¶49). Thus, according to Judge Slaby, self-defense was properly presented to the jury.

Giant Eagle moved for reconsideration and, in the alternative, for a rehearing *en banc*. Taking issue with the Ninth District's unprecedented restriction of a merchant's rights, Giant

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trial court, in response, informed the jury that they must determine the proper amount of damages "disregarding any calculation for percentage of negligence attributed to each party." (Supp. 782-783; 15 Tr.1878-79). Taking this additional instruction to heart, the jury then filled-in an amount for damages.

Eagle appealed to this Court on May 7, 2008. A majority of the Ninth District's panel denied Giant Eagle's motion for reconsideration, but this Court accepted review on August 6, 2008. *Niskanen v. Giant Eagle, Inc.*, 119 Ohio St.3d 1407, 2008-Ohio-3880, 891 N.E.2d 768 (Table).

Statement of the Facts

On January 31, 2004, Niskanen arrived at the Giant Eagle Rootstown store with no wallet, no identification, and no means to pay for his groceries. (Supp. 334-335; 8 Tr. 892-93); (Supp. 355; 9 Tr. 1061); (Supp. 420-424; 10 Tr. 1271-75). While there, Niskanen loaded his cart with nearly $300 worth of groceries and left the store without paying for them. (Supp. 422-423, 425, 431, 437, 445; 10 Tr. 1273-74, 1277, 1285, 1305, 1318). A cashier reported to the store co-manager, John M. Maczko, that Niskanen did not pay for his groceries before leaving the store. (Supp. 449; 10 Tr. 1342).

A. Niskanen's Attack

Immediately after learning that Niskanen had left, Maczko tried to approach him to demand that he return the groceries or pay for them. (Supp. 450-451, 472; 10 Tr. 1343-44, 1383); (Supp. 333; 8 Tr. 891). Once outside, Maczko saw Niskanen loading the stolen groceries into the trunk of his car which he had pulled into the fire lane. (Supp. 451; 10 Tr. 1344); (Supp. 333; 8 Tr. 891). Just then, another Giant Eagle employee, Jonathan Stress, who was gathering carts in the parking lot, heard Maczko yell "stop." (Supp. 497-498; 11 Tr. 1452-53). Stress responded by also approaching Niskanen. (Supp. 498; 11 Tr. 1453).

Before Stress could say anything, Niskanen "took a step towards [him] and he punched [him]." *Id.; see also* (Supp. 451; 10 Tr. 1344). The force of Niskanen's blow knocked Stress to the ground. (Supp. 499; 11 Tr. 1454). Hoping to protect Stress, Maczko tried to grab Niskanen to no avail. (Supp. 452; 10 Tr. 1345). Niskanen "turned around" and punched Maczko "in the face twice." *Id.*

Maczko "was hurt pretty bad" and he soon was on the ground with Niskanen "straddled" over him. (Supp. 453; 10 Tr. 1346); (Supp. 263-264; 6 Tr. 712-13). While in this position, Niskanen was "inflicting many punches" on Maczko who remembers getting hit "seven or eight times" in the chest and stomach. (Supp. 453; 10 Tr. 1346); (Supp. 263-264; 6 Tr. 712-13). Still on his back, Stress could see Niskanen "pummeling" Maczko and so, despite his fear, he jumped on Niskanen's back to try to get him off his injured co-worker—Maczko. (Supp. 499-500; 11 Tr. 1454-55). Barely 5' 7" and 150 pounds, Stress could not stop Niskanen's attack. (Supp. 500-501; 11 Tr. 1455-56). Maczko "was afraid for [his] life." (Supp. 453; 10 Tr. 1346).

1. "Good Samaritan" Customers Intervene

Unable to fend off Niskanen's attack, Maczko yelled "'[h]elp, help, somebody please help me.'" (Supp. 262, 281; 6 Tr. 711, 730). A customer, Alexoff, who was leaving the store just then, heard this cry and thought it came from a person

> in grave distress like somebody that got caught in a piece of machinery or like they were in a bear trap or something. They had that sound in their voice that they were desperate.

(Supp. 262-263; 6 Tr. 711-12). Maczko's desperate plea did not go unanswered. Alexoff came to his aid and, when asked why, he explained

> [i]ts like the Good Samaritan stopped and helped the man that was beaten and you are actually—you are able to stop this from happening, you have to do something, and your wife says, 'Hurry Dave' so it was almost compelling for me to do the right thing, I thought, to protect somebody.

(Supp. 283; 6 Tr. at 732). Alexoff grabbed Niskanen "to pull him off and keep him from doing any more damage to the manager." (Supp. 284; 6 Tr. at 733). But despite Alexoff's efforts, Niskanen kept punching Maczko who remained defenseless. (Supp. 281, 285; 6 Tr. at 730, 734).

A moment later, Niskanen, Alexoff, and Stress all fell to the ground, landing on Maczko. (Supp. 264-265, 285; 6 Tr. 713-14, 734). Maczko could not get out until two men "drug him out

from underneath of the whole [group of men]." (Supp. 265; 6 Tr. 714). As Alexoff, Maczko and Stress struggled to hold Niskanen down, a fourth person, Roger Dishong, came to their aid when he thought he saw Niskanen reaching in his pocket for "something" like a "knife." (Supp. 508-509; 11 Tr. 1473-74). Only then were they able to hold Niskanen down as others offered to help. (Supp. 556; 11 Tr. 1594); (Supp. 286; 6 Tr. 735).

2. Nobody Tried to Hurt Niskanen

While Niskanen was on the ground, Stress tried desperately to get control of him. (Supp. 502-503; 11 Tr. 1457-58); (Supp. 267; 6 Tr. 716). Alexoff held Niskanen's right arm while straddling him with another customer helping by putting weight on Alexoff's back. (Supp. 267-269; 6 Tr. 716-18). Maczko held Niskanen's left leg while Dishong held an arm. (Supp. 455; 10 Tr. 1348); (Supp. 511, 513; 11 Tr. 1476, 1490). But Niskanen would not give up. He kept "yelling," "struggling," "kicking," and "thrashing." (Supp. 233, 245; 5 Tr. 629, 654); (Supp. 274; 6 Tr. 723); (Supp. 557, 559; 11 Tr. 1595, 1601). Sometimes Niskanen would stop briefly, but then "he would take off again" and lift Stress "off the ground with just his neck." (Supp. 503; 11 Tr. 1458). Nobody ever felt like they had Niskanen under control. (Supp. 233; 5 Tr. 629); (Supp. 269-270; 6 Tr. 718-19); (Supp. 455-456; 10 Tr. 1348-49). Several men told Alexoff not to let Niskanen up

> which [he] thought was wise . . . because [he] knew if [he] let him up being [his] age [Niskanen] probably would have attacked [him]. So . . . control would be when the police got there . . . .

(Supp. 270; 6 Tr. 719). As he was being held down, Niskanen never said he was "giving up the fight." (Supp. 503; 11 Tr. 1458). During this time, everyone was "worried he was going to get back up." (Supp. 260; 6 Tr. 700).[2]

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[2] Despite being outnumbered, Niskanen "almost got away from these four gentlemen about two or three times" while he was being held on the ground. (Supp. 554; 11 Tr. 1590).

Alexoff tried to make sure that Stress "wasn't in any fashion restricting [Niskanen] from breathing." (Supp. 276; 6 Tr. 725). Numerous witnesses testified that the actions of Maczko and his rescuers were, at all times, purely defensive. (Supp. 258-260; 6 Tr. 698-00); (Supp. 558; 11 Tr. 1599). They were only trying to hold Niskanen down. (Supp. 260; 6 Tr. 700); (Supp. 455; 10 Tr. 1348); (Supp. 506, 511; 11 Tr. 1471, 1476). Nobody was trying to hurt Niskanen. (Supp. 259; 6 Tr. 699); (Supp. 502-504; 11 Tr. 1457-59). Nobody hit Niskanen. (Supp. 258; 6 Tr. 698); Supp. 503, 506, 511, 555, 556, 558; 11 Tr. 1458, 1471, 1476, 1593-94, 1599). Rather, when one customer offered to ram Niskanen's head with her cart, Stress told her no to protect him. (Supp. 512; 11 Tr. 1477).

3. The Police Arrive

Fearful that Niskanen would resume his attack, the four men held him down until the police arrived. (Supp. 260; 6 Tr. 700); (Supp. 455; 10 Tr. 1348). While they tried to restrain Niskanen, however, nobody thought they were causing him any harm. (Supp. 457; 10 Tr. 1350); (Supp. 504, 512, 550; 11 Tr. 1459, 1477, 1599). When the police arrived, Niskanen was taken to the hospital where he was pronounced dead.[3]

B. Giant Eagle's Shoplifting Policies Did Not Apply To Self-Defense In Accordance With Industry Practice

Niskanen's security expert, John R. Roberts, conceded that Giant Eagle's shoplifting policies—including the prohibition on the use of force—"are good policies." (Supp. 304, 310; 7 Tr. 801, 810). But these policies, as Giant Eagle's Vice President of Loss Prevention and Safety made clear, did not apply to Niskanen's suspected shoplifting because

[3] Giant Eagle's employees were injured during the attack. They suffered cuts and bruises and Maczko, who got the worst of it, sustained a fractured rib. (Supp. 354; 9 Tr. 1054); (Supp. 457-460; 10 Tr. 1350-53). Stress' glasses were destroyed. (Supp. 505; 11 Tr. 1470).

> we had . . . an attack on our employees, nothing that they precipitated and they were immediately . . . put in the position of having to defend themselves from the attack . . . .

(Supp. 486; 10 Tr. 1403); *see also* (Supp. 322-323; 7 Tr. 831-32). Once Niskanen attacked, as Roberts acknowledged, Giant Eagle's employees had a right to defend themselves. (Supp. 315-316; 7 Tr. 821-22). Giant Eagle's store manager, in fact, had an "obligation" to protect his employees by defending them against Niskanen's attack. (Supp. 316; 7 Tr. 822). Giant Eagle's shoplifting policies do not address self-defense because merchants, in accordance with industry practice, train their employees not to use force whenever possible. (Supp. 304, 310; 7 Tr. 801, 810).[4]

Standard of Review

The Ninth District erred by ruling that as a matter of law that (1) a jury must consider punitive damages even where no compensatory damages can be awarded due to comparative fault; (2) self-defense can never defeat a negligence claim; and (3) R.C. 2935.041 creates a statutory cause of action for undue restraint that cannot be defeated by self-defense. Legal errors, such as these, are reviewed *de novo* by this Court. *Village of Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241 ("This Court has complete and independent power of review as to all questions of law").

Argument

> **Proposition of Law No. 1**: A jury may not consider punitive damages where plaintiff has asserted only negligence and his comparative fault exceeds 50 percent thereby precluding an award of compensatory damages.

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[4] Roberts further conceded that retailers, like Giant Eagle, do not train employees on self-defense because of the industry practice to avoid the use of force, if possible, when confronting a suspected shoplifter. (Supp. 320-321; 7 Tr. 828-29).

Mrs. Niskanen tried her case under two negligence theories – (1) Giant Eagle negligently trained its employees how to confront shoplifters and (2) Giant Eagle negligently exercised undue restraint over Niskanen. Appellant's [Niskanen's] Br. Opposing Reconsideration 12; (Appx. 14, ¶26). The trial court instructed the jury not to consider punitive damages unless Mrs. Niskanen prevailed on one of her claims and they awarded her "actual damages." (Supp. 715; 15 Tr. 1812). The trial court's instruction on punitive damages follows this Court's repeated refrain that, because a request for punitive damages is not "a cause of action in and of itself," *Bishop*, 20 Ohio St.3d at 28, "punitive damages may not be awarded when a jury fails to award compensatory damages." *Marriott* 74 Ohio St.3d at 447. Having failed to satisfy this condition precedent, the jury could not consider Mrs. Niskanen's request for punitive damages. Under this rule, a plaintiff must succeed on an underlying tort and obtain an award of compensatory damages before a jury may consider punitive damages.[5]

To avoid this result, the Ninth District relies on the unrelated proposition that comparative negligence "will not defeat or diminish the recovery of damages" where the defendant has committed an "intentional tort [that] proximately caused the [plaintiff's] injury." *Schellhouse v. Norfolk & Western Ry. Co.* (1991), 61 Ohio St.3d 520, 525, 575 N.E.2d 453. Stretching this proposition too far, the Ninth District held that the necessary predicate for an award of punitive damages—*i.e.*, an award of compensatory damages—does not apply when the jury fails to award compensatory damages only because the plaintiff's comparative fault exceeds 50 percent. (Appx. 9-10, ¶¶16-17). Under that scenario, according to the Ninth District, the trial court should still allow "the jury to consider the punitive damages issue" because a finding of

[5] Niskanen also pursued a spoliation of evidence claim at trial. But the jury found against her on spoliation and the Ninth District affirmed this portion of the verdict by finding that Giant Eagle should have been given a directed verdict on this claim. (Appx. 20, ¶¶40-42).

"actual malice" needed to support an award of punitive damages "would . . . negate[] any potential set-off for damages under Ohio's comparative negligence law." (Appx. 10, ¶17).

But the Ninth District's reasoning has a fatal flaw—it makes punitive damages a stand alone intentional tort claim. While intentional torts and punitive damages have similar scienter requirements, their similarity ends there. This Court has made clear that a request for punitive damages does not constitute a stand alone claim and, as such, "[i]n Ohio . . . no civil action may be maintained simply for punitive damages." *Moskovitz v. Mt. Sinai Med. Center*, 69 Ohio St.3d 638, 649-50, 1994-Ohio-324, 635 N.E.2d 331; *accord Bishop*, 20 Ohio St.3d at 28. The Ninth District's reasoning cannot be reconciled with this "age-old" precedent. *Moskovitz*, 69 Ohio St.3d at 649.[6]

Nor can the Ninth District's reasoning be reconciled with the version of R.C. 2315.32 in effect when Mrs. Niskanen filed this action. That provision statutorily mandated that

> [t]he contributory fault of the plaintiff may be asserted as an affirmative defense to [any] tort claim . . . except that the contributory fault of the plaintiff may not be asserted as an affirmative defense to an *intentional tort claim.*

Id. reported in 2002 Ohio Laws File 240 (S.B. 120) (emphasis added) (Appx. 59-60). Former R.C. 2315.32, in other words, permitted the defendant to assert contributory fault to defeat *any* claim except an intentional tort claim. But, as *Bishop* and its progeny have "held time and again," a demand for punitive damages is not, by definition, a stand alone claim. *Marriott,* 74 Ohio St.3d at 447; *Bishop,* 20 Ohio St.3d at 28.

While *Bishop* and R.C. 2315.32 preclude Mrs. Niskanen from sidestepping the comparative fault bar, that is not the only basis for rejecting the unwarranted expansion of

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[6] Before this appeal, even the Ninth District recognized "that a punitive damages claim may not stand alone." *Atkinson v. Akron Bd. of Educ.,* No. 22805, 2006 WL 551551, at *8 (Ohio Ct. App. Mar. 8, 2006), 2006-Ohio-1032. The Ninth District did not address *Atkinson* when it treated punitive damages as a stand alone claim below.

punitive damages liability that the Ninth District's decision portends. First, in *Marriott*, this Court confronted and rejected the same reasoning used by the Ninth District to overcome the bar to punitive damages when no compensatory damages have been awarded. Second, the Ninth District's reliance on *Schellhouse* and *Wightman v. Consolidated Rail Corp.* (1994), 94 Ohio App.3d 389, 640 N.E.2d 1160 is misplaced—these decisions actually support Giant Eagle's position on punitive damages. Third, the practice of some Ohio courts to bifurcate punitive damages (which is now mandatory under R.C. 2315.21(B)(1)) would make no sense if, as the Ninth District held, punitive damages must be considered even when the plaintiff receives no compensatory damages. Fourth, an instruction requiring the jury to consider punitive damages, even when the plaintiff's comparative fault exceeds 50 percent, would almost certainly lead to jury confusion. Fifth, the Ninth District's position permitting an award of punitive damages when no compensatory damages have been awarded would, by definition, be constitutionally excessive under *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003), 538 U.S. 408, 425, 123 S.Ct. 1513.

I. *MARRIOTT* REJECTED THE NINTH DISTRICT'S VIEW THAT COMPARATIVE FAULT CANNOT BAR A JURY FROM CONSIDERING PUNITIVE DAMAGES

Marriott rejected the Ninth District's rationale for overcoming the comparative fault bar to an award of punitive damages. In *Marriott,* the jury found that the plaintiff was 51 percent at fault and, as a consequence, she received no compensatory damages. 74 Ohio St.3d at 444. Although the trial court had directed a verdict against the plaintiff on punitive damages, this Court held

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

Id. at 447. This holding directly conflicts with the Ninth District's determination that the jury should have considered punitive damages even though comparative fault prevented Mrs. Niskanen from recovering compensatory damages.

The plaintiff in *Marriott*, like Mrs. Niskanen, asked this Court to embrace the Ninth District's reasoning on punitive damages:

> [Plaintiff] attempt[s] to circumvent [the no compensatory damages] bar to [her] recovery of punitive damages by pointing out that [she] 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, [plaintiff] theorize[s] that she could have recovered compensatory damages on a recklessness theory. Such an award would also allow [plaintiff] to overcome the bar to punitive damages that was articulated in *Bishop* and elsewhere.

Marriott, at 447. But this reasoning, as this Court held, "is flawed in one vital respect: there is absolutely *no* indication . . . that [plaintiff] ever pursued a compensatory damages claim based on recklessness." *Id.* Precisely the same flaw is present here.

As the Ninth District observed, Mrs. Niskanen only asserted negligence claims at trial (except for spoliation) after having made the strategic decision to dismiss her intentional tort claims. (Appx. 12, ¶21). It is not enough under *Marriott* merely to add punitive damage-type allegations to a negligence claim—plaintiff must separately plead and ultimately prevail on a compensatory damage claim asserting intentional misconduct.[7]

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[7] While Mrs. Niskanen sprinkled allegations relating to punitive damages throughout much of her amended complaint, this Court found these same allegations insufficient in *Marriott* to state a separate intentional tort claim:

> [A]lthough plaintiff alleged that Marriott had engaged in 'willful, wanton, and reckless' behavior... and had shown 'conscious disregard for the safety and well being of [plaintiff] when, a great probability of harm existed,'... [i]n no reasonable way can [plaintiff's] complaint be read, as advancing a claim for compensatory damages based on recklessness.

A. The Decisions Relied On By The Ninth District – *Schellhouse* and *Wightman* – Support *Marriott's* Holding That The Comparative Fault Bar Precludes An Award Of Punitive Damages

The Ninth District's reliance on *Schellhouse* and *Wightman* is misplaced. These decisions support *Marriott's* holding that the jury's failure to award compensatory damages—whether due to comparative fault or some other failure of proof – precludes an award of punitive damages.

In *Schellhouse*, the jury, in answering special interrogatories, concluded that the plaintiff was 65 percent negligent and that the defendant railroad's actions constituted actual malice. 61 Ohio St.3d at 523. This Court, not surprisingly, found these findings incompatible but, because no general verdict was rendered, it could not determine what outcome the jury intended. Facing these incompatible findings, this Court merely reaffirmed the straight-forward proposition that a plaintiff's success on his separately pled "intentional tort" claim permits the jury to consider punitive damages even where he receives no compensatory damages on his negligence claim due to an adverse finding on comparative fault. *Id.* at 524.[8]

By prevailing on his intentional tort claim, the plaintiff does, in fact, recover compensatory damages which, in turn, permits an award of punitive damages under *Bishop* and its progeny. Under *Schellhouse*, as with *Marriott*, there must be a *separate* and successful intentional tort claim because a demand for punitive damages, standing alone, is not a legally cognizable claim. 61 Ohio St.3d at 524-25 (observing that the jury "did [not] specifically find that defendant's acts constituted an intentional tort"); *accord Avery v. Rossford, Ohio Transp.*

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74 Ohio St.3d at 447. These allegations mirror Mrs. Niskanen's claim, in her negligence cause of action, that Giant Eagle's conduct was "willful, intentional and/or grossly negligent." (Supp. 8, ¶42).

[8] *Schellhouse* did not hold that a finding of malice alone can overcome comparative fault. This Court, rather, in *Schellhouse*, repeatedly emphasized that only "an intentional tort with malice" or "defendant's intentional tort, committed with actual malice" may overcome comparative fault. 61 Ohio St.3d at 524-25. To overcome the comparative fault bar, a finding of malice must be accompanied by success on a separate intentional tort claim that includes an award of compensatory damages.

Improvement Dist. (2001), 145 Ohio App.3d 155, 166, 762 N.E.2d 388 ("it is axiomatic that punitive damages cannot be awarded absent an award of actual damages" because "punitive damages cannot stand alone"). It boils down to whether the jury finds that the defendant committed a *separate* intentional tort:

> If the railroad did not commit an intentional tort, [and] was only thirty-five percent negligent, then the plaintiff is not entitled to damages and a verdict for defendant should have been entered. R.C. 2315.19(c) [despite the demand for punitive damages].

Schellhouse, 61 Ohio St.3d at 524. This Court remanded for a new trial in *Schellhouse* only because it could not determine whether the jury intended to find that the railroad committed an intentional tort.

No such guesswork is needed here. As the Ninth District observed, Mrs. Niskanen neither pursued nor prevailed on any intentional tort claim. (Appx. 12, ¶21). Her focus was on negligence at trial. *Id.* Thus, Giant Eagle did not commit an intentional tort and, in accordance with *Schellhouse*, because the jury only found Giant Eagle 40 percent negligent, Mrs. Niskanen "is not entitled to damages and a verdict for defendant [Giant Eagle] should have been entered." *Schellhouse,* 61 Ohio St.3d at 524.

Wightman merely followed *Schellhouse* under different facts. 94 Ohio App.3d at 395. In *Wightman*, the plaintiffs prevailed not only on their intentional tort claim, but also on their negligence claim because their comparative fault was less than 50 percent. *Id.* at 394-95; 397-98. Because the plaintiffs in *Wightman* recovered compensatory damages on their negligence and intentional tort claims, the jury could award them punitive damages. *Id.* at 395. But here, Mrs. Niskanen did not pursue any intentional tort claims, nor did she prevail on her negligence claims because her son's comparative fault exceeded 50 percent. *Wightman* and *Schellhouse* hold only that " 'the defendant's intentional tort, committed with actual malice,' " not punitive

damages standing alone, can overcome an adverse finding on comparative fault. *Wightman*, 94 Ohio App.3d at 398 (*quoting Schellhouse*, 61 Ohio St.3d at 525).

B. *Marriott* Follows The Universal Rule That Comparative Fault Exceeding 50 Percent Precludes Punitive Damages

The rule articulated in *Marriott*—*i.e.*, that an adverse finding on comparative fault precludes jury consideration of punitive damages where only negligence claims have been asserted—is firmly rooted in tort law. As one personal injury treatise has explained:

> 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' . . ., 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 ON PERSONAL INJURY DAMAGES §4:43 (3d ed. 2007). State courts from other jurisdictions have universally followed this rule. *Tucker v. Marcus* (1988), 142 Wis.2d 425, 418 N.W.2d 818 (jury could not consider punitive damages where plaintiff was 70 percent negligent); *White v. Hansen* (1992), 837 P.2d 1229 (Colo.) (plaintiff could not recover punitive damages where her fault exceeded 50 percent); *Wisker v. Hart* (1988), 244 Kan. 36, 766 P.2d 168 (alleged error in failing to instruct on punitive damages mooted by jury's finding that plaintiff was 60 percent at fault); *Williams v. Carr* (1978), 263 Ark. 326, 565 S.W.2d 400 (where plaintiff was found to be 50 percent at fault she could not recover actual damages and therefore there could be no recovery for punitive damages).

As these decisions reveal, even proof of injury is not enough—the plaintiff must obtain an award of compensatory damages to become eligible for punitive damages. By definition, however, the term "award"

> 'means a remedy recoverable in accordance with an order of judgment, not the compensatory damages initially determined by the jury.'

White, 837 P.2d at 1237 (*quoting Lira v. Davis* (1992), 832 P.2d 240, 245 (Colo.)). Thus, the rule in Ohio and elsewhere is "that there must be an underlying judgment for actual damages to support the award of [punitive] damages." *Id.* A precondition Mrs. Niskanen never satisfied.

II. THE NINTH DISTRICT'S VIEW ON PUNITIVE DAMAGES WILL PRECLUDE BIFURCATION WHILE LEADING TO JURY CONFUSION AND INCONSISTENT VERDICTS

By statute, Ohio courts must bifurcate the compensatory and punitive phases of a trial. R.C. 2315.21(B)(1)(b) (Appx. 52-58); *Mastellone v. Lighting Rod Mut. Ins. Co.,* 175 Ohio App.3d 23, 2008-Ohio-311, 884 N.E.2d 1130, ¶¶ 12-16. While bifurcation was only discretionary when Mrs. Niskanen filed this action, *see Mastellone,* 175 Ohio App.3d at ¶ 26 (noting that before bifurcation became mandatory courts had discretion to bifurcate under Ohio Civil Rule 42(B)), the Ninth District's view on punitive damages, if adopted, would eliminate bifurcation as an option in any negligence action.

Under the Ninth District's view, bifurcation could affect a plaintiff's substantive rights where, as here, the jury fails to award compensatory damages only because his comparative fault exceeds 50 percent. Where the plaintiff alleges negligence then, the jury must proceed to punitive damages even when the plaintiff's comparative fault exceeds 50 percent because, as the Ninth District argues, a finding of actual malice would override the comparative fault finding. Since the parties would have to proceed to the punitive damages phase whenever the plaintiff

alleges negligence, it would make no sense to bifurcate—an outcome contrary to the clear intent of the Ohio legislature and the former practice of many Ohio courts.

That is not the only adverse consequence from the Ninth District's view on punitive damages. Telling juries they must consider punitive damages, despite finding the plaintiff more culpable than the defendant, will confuse them and likely increase the risk of inconsistent judgments. In *Schellhouse*, this Court recognized that a finding of actual malice needed for punitive damages was "impossible to reconcile" with a finding that plaintiff's comparative fault exceeds 50 percent. 61 Ohio St.3d at 524. By requiring the jury to consider punitive damages after finding the plaintiff more culpable, however, the trial court, in effect, would be telling the jury that the two findings are not "impossible to reconcile." But such an instruction defies common sense and thus it will almost certainly lead to jury confusion.

III. PERMITTING AN AWARD OF PUNITIVE DAMAGES WHEN NO COMPENSATORY DAMAGES HAVE BEEN AWARDED VIOLATES A DEFENDANT'S DUE PROCESS RIGHTS

To determine whether an award of punitive damages is constitutionally excessive, the courts require "that exemplary damages . . . bear a 'reasonable relationship' to compensatory damages." *BMW of North Am., Inc. v. Gore* (1996), 517 U.S. 559, 580, 116 S.Ct. 1589. "[A] comparison between the compensatory award and a punitive award" thus becomes central to the due process inquiry. *Id.* at 581. While not imposing strict mathematical limits, the United States Supreme Court has held that "[s]ingle digit multipliers are more likely to comport with due process." *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003), 538 U.S. 408, 425, 123 S.Ct. 1513. Implicit in such a comparison, however, is the premise that the plaintiff has been awarded at least some compensatory damages.

Yet Mrs. Niskanen recovered no compensatory damages. It is axiomatic that no "punitive award can bear a reasonable relationship to a zero compensatory award." *Sulecki v.*

Southeast Nat. Bank (1986), 358 Pa.Super. 132, 136, 516 A.2d 1217; *accord Tucker*, 418 N.W.2d at 827. Any award of punitive damages seems excessive when compared to a recovery of zero compensatory damages. So too would any award of punitive damages in favor of Mrs. Niskanen given her recovery of zero compensatory damages.

The Ninth District's decision also unconstitutionally deprives Giant Eagle of a valid defense to punitive damages—*i.e.*, comparative fault. It strips Giant Eagle of that defense by refusing to acknowledge that Niskanen committed an intentional tort when he attacked Giant Eagle's employees without provocation. While the rule that comparative fault is no defense to an intentional tort makes sense when such fault constitutes mere negligence, the justification for that rule goes away where, as here, the plaintiff's comparative fault also indisputably involves an intentional tort. *Cf.* R.C. 2307.011(B) (defining "contributory fault" to include "contributory negligence" and "other contributory tortious conduct") (Appx. 49); RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY §3 cmt. a (2000) ("Plaintiff's comparative negligence can include conduct that is reckless, grossly negligent, or intentional"). Fundamental fairness dictates that where, as here, the plaintiff's scienter is at least equal to, if not greater than, the defendant's, the jury must be permitted to consider comparative fault as a potential bar to punitive damages.

Another due process concern arises from Giant Eagle's successful assertion of self-defense to defeat Mrs. Niskanen's claims. Even if comparative fault cannot bar a jury from considering punitive damages, as the Ninth District held, the jury's finding that Giant Eagle acted in self-defense should still bar such damages. As a complete defense to Mrs. Niskanen's claims, self-defense precludes any award of compensatory damages which, in turn, precludes any award of punitive damages.

When self-defense applies, the law considers the defendant's conduct "lawful" which "wholly relieve[s] [him] from responsibility for its consequences." *New Orleans & N.E.R. Co. v. Jopes*, 142 U.S. at 23. Because the jury found Giant Eagle's conduct to be "lawful," due process precludes the imposition of punitive damages to punish such conduct. As the United States Supreme Court has held, "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *Bordenkircher v. Hayes* (1978), 434 U.S. 357, 363, 98 S.Ct. 663. The Ninth District's decision unconstitutionally deprives Giant Eagle of the right to assert self-defense to defeat Mrs. Niskanen's request for punitive damages.[9]

> **Proposition of Law No. 2**: A defendant's assertion of self-defense, if proved, immunizes his actions from all forms of civil liability—including negligence.

A more basic right than self-defense can hardly be imagined. As Blackstone proclaimed, "'[t]he right to self-defense is the first law of nature.'" *District of Columbia v. Heller* (2008), ___ U.S. ___, 128 S.Ct. 2783, 2805 (*quoting* 2 TUCKER'S BLACKSTONE 143, n.D); *see also* BLACKSTONE'S COMMENTARIES 126 (1803) (describing a self-defense as one of the "absolute rights of the individual"). The English poet John Dryden likewise observed that "self-defense is nature's eldest law." JOHN DRYDEN, ABSALOM AND ACHITOPHEL I (1682). The right of self-defense, as Americans have always understood, permits "a citizen to 'repe[l] force by force' when the intervention of society on his behalf may be too late to prevent an injury.' " *Heller*, 128 S.Ct. at 2799 (*quoting* 1 BLACKSTONE'S COMMENTARIES 145-46, n.42 (1803)).[10]

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[9] While the Ninth District also held, as discussed below, that self-defense cannot be asserted to defeat a negligence claim, Mrs. Niskanen's request for punitive damages requires proof of actual malice—a level of scienter similar to that required for an intentional tort. Surely self-defense must be a permissible defense to punitive damages even under the Ninth District's discredited reasoning.

[10] Even Mrs. Niskanen's security expert acknowledged that Giant Eagle had a right to defend itself. (Supp. 315-316; 7 Tr. 821-22).

From their inception, the Ohio and United States Constitutions expressly guaranteed the right to self-defense. T. WALKER, INTRODUCTION TO AMERICAN LAW 157, 198 (1837) (comparing Second Amendment to similar provision in the Ohio Constitution and recognizing that "the right to self-defense [is] guaranteed by the [Ohio] Constitution"); OHIO CONST. art. I, § 4 (Appx. 64-65). Recognizing the constitutionally protected status of self-defense, Ohio courts have explained that "the state may not require and does not intend that an individual succumb to his attacker and possibly forfeit his life rather than act in self-defense." *State v. Hardy* (1978), 60 Ohio App.2d 325, 328-29, 397 N.E.2d 773. To this description of the right to self-defense, the Ninth District has created a new exception—unless the plaintiff pursues an intentional tort rather than negligence. (Appx.14-16, ¶¶25-29).[11]

Based on this previously unrecognized exception to the right to self-defense, the Ninth District remanded for a new trial because, in its view, the jury should not have been instructed on this defense. *Id.* A new trial was necessary, according to the Ninth District, because Giant Eagle's "defense of self-defense was completely irrelevant" to Mrs. Niskanen's negligence claims. *Id.* at ¶28. The Ninth District forged this new restriction on self-defense by:

(1) finding "no Ohio authority for recognizing self-defense as a defense in a negligence action;" *Id.* at ¶25;

(2) overlooking the United States Supreme Court's decision in *Jopes* and other authorities holding that self-defense is a complete defense to all forms of civil liability—including negligence;

[11] As United States Supreme Court recently recognized, the Second Amendment's right to keep and bear arms must imply "the right to use them if necessary in self-defense" because "without this right to use the guaranty would have hardly been worth the paper it consumed." *Heller*, 128 S.Ct. at 2807 (*quoting* A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY, 117-18 (1849)). The Ohio Constitution is more explicit—it gives Ohio citizens "the right to bear arms for *their defense* and security." OHIO CONST. art. I, § 4 (emphasis added) (Appx. 64-65). Reaffirming this right, the General Assembly has recognized "[t]he inalienable and fundamental right of an individual to defend the individual's person." *Id.*

(3) treating civil and criminal defendants the same with respect to self-defense by precluding a civil defendant from denying tort liability while also claiming self-defense; and

(4) failing to give any weight to the significant due process concerns raised by refusing to permit Giant Eagle to assert self-defense, even though the record undeniably establishes that Niskanen died while Giant Eagle's employees were defending themselves against his unprovoked attack.

None of the Ninth District's justifications for removing self-defense from this case has merit. Ohio courts—including this Court in *Goldfuss*—have recognized that self-defense may defeat a negligence claim. Other courts too, at least as far back as 1891, have recognized that self-defense is a complete defense to all civil liability—including negligence. Unlike the criminal defendant who asserts self-defense while denying the underlying crime, Giant Eagle did not pursue inconsistent defenses. But even if Giant Eagle had done so, Ohio Civil Rule 8(E)(2) expressly permits a defendant to plead inconsistent defenses. Due process precludes a plaintiff, through his pleading choices, from taking a constitutionally-protected defense away from a civil defendant when the record fully supports the assertion of that defense.

I. OHIO COURTS RECOGNIZE THAT SELF-DEFENSE MAY BE ASSERTED TO DEFEAT A NEGLIGENCE CLAIM

To find authority permitting self-defense in a negligence action, this Court need look no further than *Goldfuss* and its Ninth District offspring—*Ashford*. Both approved self-defense where the plaintiff asserted only negligence claims.[12]

Goldfuss could not be more on point. A trespasser's estate brought a wrongful death action claiming only negligence against the defendant homeowner who shot and killed the trespasser. 79 Ohio St.3d 116. Before addressing whether the evidence supported a self-defense

[12] Ironically, Mrs. Niskanen relied heavily on *Goldfuss* in her original appeal for another proposition—that a plaintiff may recover in a civil action despite being guilty of criminal misconduct. Neither party analyzed *Goldfuss* regarding its adoption of self-defense to defeat a negligence claim because Mrs. Niskanen never asserted on appeal that such a defense was unavailable in a negligence action as a matter of law.

instruction, this Court recognized that "a defendant may be relieved of liability for tortious conduct [including negligence] by proving that such conduct was in self-defense." 79 Ohio St.3d at 124 (*citing* RESTATEMENT (FIRST) OF TORTS §63).

Ashford also supports the assertion of self-defense to defeat a negligence claim. *Ashford* involved a wrongful death action brought by the estate of an assailant who was fatally shot by a security guard when he displayed a toy gun. 2006-Ohio-2554, ¶ 4. The plaintiff asserted only negligence claims—including a negligent training claim like the one Mrs. Niskanen asserted against Giant Eagle. *Id.* Following *Goldfuss,* the Ninth District affirmed the trial court's grant of summary judgment for the security guard on self-defense.

The plaintiff's decision to pursue only a negligence theory, held *Ashford*, did not preclude the defendant's reliance on self-defense because

> the Ohio Supreme Court has recognized that 'a defendant may be relieved of liability for tortious conduct [including negligence] by proving that such conduct was in self-defense.'

Id. at ¶ 11 (*quoting Goldfuss*, 79 Ohio St.3d at 124). The Ninth District tries to limit *Goldfuss* and *Ashford* by suggesting that they "recognize [only] that self-defense can be raised as a 'tort' defense"—not a negligence defense. (Appx. 27). But nothing in these decisions supports such a narrow reading. Negligence is, as a general matter, the quintessential "tort" and, more important, the courts in *Goldfuss* and *Ashford* must have intended to include negligence in their reference to "tort" since both involved only negligence claims.

II. THE UNITED STATES SUPREME COURT AND OTHER AUTHORITIES HAVE LONG HELD THAT SELF-DEFENSE MAY DEFEAT A NEGLIGENCE CLAIM

Ohio is not alone in recognizing that self-defense may defeat a negligence claim. As far back as 1891, the United States Supreme Court held that

> the same rule of immunity [resulting from proof of self-defense] extends to civil as to criminal cases. If the injury was done by the defendant in justifiable self-defense, he can neither be punished criminally, nor held responsible for damages in a civil action.

Jopes, 142 U.S. at 24; *accord Evans v. Hughes* (1955), 135 F. Supp. 555, 558 (M.D.N.C.) (self-defense "exonerate[s] [defendant] from civil liability because the act is justifiable or excusable"); *Huggins v. Metts*, No. 02-CP-32-2407, 2005 WL 6149022, at *4 (S.C. Com. Pl. June 17, 2005) (self-defense immunizes defendant from "damages in a civil action"). Self-defense, according to *Jopes*, renders a defendant "free from all civil . . . liability," not free only from liability for intentional torts, because self-defense makes the defendant's actions "lawful" and "wholly relieve[s] [him] from responsibility for [their] consequences." 142 U.S. at 24. Whether a defendant's tortious conduct was negligent or intentional does not matter because, in either event, self-defense renders such conduct "lawful." *Jopes*, 142 U.S. at 24.[13]

Time has not eroded *Jopes*. Those courts that have faced the issue have held without exception that self-defense may be asserted to defeat a negligence claim. *Brown v. Robishaw* (2007), 282 Conn. 628, 642, 922 A.2d 1086 (holding that self-defense may be asserted where only negligence is pled); *Herold v. Shagnasty's Inc.*, No. 03-0894, 2004 WL 2002433, at *1-3 (Iowa Ct. App. Sept. 9, 2004) (reversible error not to give self-defense instruction in negligence case); *Blackburn v. Johnson* (1989), 187 Ill. App.3d 557, 561-62, 543 N.E.2d 583 (finding that self-defense can involve "an intentional act . . . performed negligently"). The Ninth District offered no contrary authority to support taking self-defense out of this case—nor has Mrs. Niskanen pointed to any such authority. Only the Ninth District, it appears, holds that a civil

[13] *Jopes* held that self-defense would even immunize a defendant from liability where he negligently injures an innocent bystander while defending himself. 142 U.S. at 24. If self-defense can defeat a negligence claim asserted by a third-party, it must apply *a fortiori* to a negligence claim asserted by the aggressor.

defendant's ability to assert self-defense, although constitutionally protected, hinges on the plaintiff's pleading choices.

III. THE RULE THAT PRECLUDES CRIMINAL DEFENDANTS FROM ASSERTING SELF-DEFENSE WHILE ADMITTING GUILT OF A LESSER NEGLIGENCE OFFENSE DOES NOT APPLY TO CIVIL DEFENDANTS LIKE GIANT EAGLE

To justify eliminating self-defense in this case, the Ninth District borrowed a rule that applies only to criminal defendants. That rule, as recited by the Ninth District, prevents a criminal defendant from pleading both self-defense and unintentional homicide because such pleas are inconsistent. The Ninth District's reliance on this rule is misplaced—it does not support taking self-defense away from Giant Eagle.

A. Giant Eagle's Reliance On Self-Defense Was Not Inconsistent With Its Denial Of Any Intent To Harm Niskanen

Giant Eagle did not take inconsistent positions by asserting self-defense. While Giant Eagle admitted that its employees intentionally held Niskanen down, it denied they had any intent to harm him. (Supp. 258-260; 6 Tr. 7 698-00); (Supp. 455; 10 Tr. 1348); (Supp. 558; 11 Tr. 1599). Giant Eagle further denied that its employees were negligent in failing to realize that their defensive actions were inflicting severe harm on Niskanen. None of these defenses is inconsistent with Giant Eagle's assertion of self-defense.

In the criminal context, Ohio still adheres to the rule that a defendant cannot testify in one breath that his assault on the victim "was an unintentional accident" and then, in another breath, "that he intended to commit the assault, but was justified in so doing." *State v. Barnd* (1993), 85 Ohio App.3d 245, 260, 619 N.E.2d 518; *accord State v. Champion* (1924), 109 Ohio St. 281, 286-87, 142 N.E. 141. But that is not what Giant Eagle did here. Only Mrs. Niskanen claimed Giant Eagle employees were responsible for an "unintentional accident"—*i.e.*, they negligently caused her son's death. Giant Eagle denied that its employees were negligent when they

intentionally held Niskanen down without realizing they were harming him. That denial is not inconsistent with Giant Eagle's claim that, if its employees were negligent, no liability results from their negligence because they were lawfully engaged in self-defense. Unlike the criminal defendant who admits criminal negligence (the lesser offense) while claiming self-defense, Giant Eagle never admitted negligence to avoid an adverse verdict on an intentional tort (the greater offense). Giant Eagle never faced the dilemma that criminal defendants often confront—*i.e.* admitting a lesser offense to reduce the risk of a conviction on a greater offense—because Mrs. Niskanen proceeded only on a negligence theory.[14]

B. The Ninth District's Refusal To Permit Giant Eagle To Assert Allegedly Inconsistent Defenses Violates Ohio Civil Rule 8(E)(2)

Even if Giant Eagle's denial of negligence and reliance on self-defense were inconsistent, as the Ninth District held, in the civil context, "[a] party may . . . state as many separate . . . defenses as he has regardless of consistency." Ohio Civ. R. 8(E)(2); *accord* Ohio Jur. Pleading §169 (Rule 8 "permits the use of inconsistent defenses"). According to its commentary, "Rule 8(E)(2) permits . . . the use of inconsistent . . . defenses and in effect changes the holding of *Fuller v. Drenberg* (1965), 3 Ohio St.2d 109." Ohio Civ. R. 8 comment. While interpreting this rule in *Mathews*, the United States Supreme Court recognized that "in the civil context . . . inconsistency is expressly allowed under the Federal [counterpart to Ohio Civ. R. 8(E)(2)]." 485 U.S. at 65. The Ninth District offers no explanation why Rule 8 does not permit Giant Eagle to both deny negligence and assert self-defense. Rule 8(E)(2) has no analog in the rules of criminal

[14] This Court has not revisited whether a criminal defendant should be permitted to claim negligent homicide as self-defense since *Champion*. Since then, the United States Supreme Court has held that a court cannot preclude a defendant from denying commission of the crime while simultaneously claiming an affirmative defense, like entrapment or self-defense, without violating his right to due process. *Mathews v. United States* (1988), 485 U.S. 58, 63-65, 108 S.Ct. 883; *accord Newton v. Million* (2004), 349 F.3d 873, 878-79 (6th Cir.) (applying *Mathews* to self-defense); *Zavorski v. Cason*, No. 1:04-cv-372, 2007 WL 2363313, at *17 (W.D. Mich. June 27, 2007) (same). The validity of *Champion* after *Mathews* is unclear.

procedure, *see Mathews*, 485 U.S. at 64 (recognizing "that there is no parallel authorization [to plead inconsistent defenses] under the Federal Rules of Criminal Procedure"), but for defendants in a civil action, like Giant Eagle, it unquestionably permits them to assert inconsistent defenses. The Ninth District ignored this dispositive difference between the pleading requirements for civil and criminal defendants. This Court should not sanction the Ninth District's elimination of a basic right given defendants under the Ohio Rules of Civil Procedure—*i.e.* to plead inconsistent defenses.[15]

IV. THE NINTH DISTRICT'S ELIMINATION OF SELF-DEFENSE IN NEGLIGENCE ACTIONS RESTS ON THE FALSE PREMISE THAT SELF-DEFENSE INVOLVES ONLY INTENTIONAL BEHAVIOR

To support its position that negligence and self-defense are inherently incompatible, the Ninth District characterizes the latter as involving exclusively intentional conduct. This characterization is mistaken—especially given the precise facts presented here.

As the Connecticut Supreme Court has explained, self-defense

> incorporates negligence principles [and, as such] a party who overreacts to a perceived threat may be held liable in negligence if his actions are unreasonable in light of the circumstances.

Brown, 922 A.2d at 1093. An essential element of self-defense—*i.e.*, whether the defendant used "such force . . . as would a reasonably prudent person under the same circumstances"—is based on negligence principles. *Holdbrook v. Swabley*, No. H-95-043, 1996 WL 277679, at *3 (Ohio Ct. App. May 24, 1996). Similarly, in defining the scope of a policy exclusion for intentional acts, this Court found that self-defense does not involve purely intentional conduct. *Preferred Mut. Ins. Co. v. Thompson* (1986), 23 Ohio St.3d 78, 81, 491 N.E.2d 688 (self-defense

[15] It was a given in *Mathews* that civil defendants could plead inconsistent defenses—the only question the Court had to decide was whether due process required extending the same right to criminal defendants.

not excluded by intentional act exclusion because "[a]n act of self-defense . . . is neither anticipated nor wrongful").

Negligence principles apply with particular force to Giant Eagle's assertion of self-defense. Giant Eagle's employees did not intend to hurt Niskanen. (Supp. 259; 6 Tr. 699); (Supp. 502-504; 11 Tr. 1457-59). Their response to Niskanen's attack was purely defensive. (Supp. 258-260; 6 Tr. 698-00); (Supp. 558; 11 Tr. 1599). Unlike the defendant who uses a deadly weapon to defend himself, it was not apparent that Giant Eagle's employees and customers would cause Niskanen any harm, let alone fatal harm, by holding him down while defending themselves.

Against this background, the Ninth District's perceived disconnect between a negligence claim and self-defense is, at best, largely illusory. With Mrs. Niskanen's negligence claims and Giant Eagle's self-defense claim having overlapping elements—*i.e.*, proof that Giant Eagle acted unreasonably in response to Niskanen's attack—it cannot be, as the Ninth District found, that "self-defense was completely irrelevant" to her claims. (Appx. 15, ¶¶28-29).

V. THE NINTH DISTRICT IMPROPERLY FOCUSED ON THE SCIENTER NEEDED FOR MRS. NISKANEN'S CLAIMS BECAUSE SELF-DEFENSE APPLIES REGARDLESS OF THE LEVEL OF SCIENTER

The Ninth District's focus on scienter misperceives the nature of self-defense. In the civil context, self-defense exonerates the defendant from liability, not because no tort was committed, but rather, because the tortious conduct was not "wrongful" under the law. *Thompson*, 23 Ohio St.3d at 81 (defendant's conduct is not "wrongful" when self-defense applies and, accordingly, "any injuries suffered by the attacker are not the result of the [defendant's] misconduct"); *accord Jopes*, 142 U.S. at 24-25 (self-defense rendered tortious conduct "lawful" and, when proven, there can be "neither misconduct nor negligence"). Self-defense, in other words, is an affirmative defense "involving an excuse or justification," *State v. Jones,* No. 44983, 1983 WL

5893, at *3 (Ohio Ct. App. Mar. 31, 1983), because of the societal interest furthered by protecting persons against aggressive attack. ROBINSON, CRIMINAL LAW DEFENSES §24(a) (1984). Whether society views a person's response to an attack as justified does not – and cannot – depend on the particular level of scienter alleged. When a defendant establishes self-defense, his tortious conduct—no matter the level of scienter—is fully justified.[16]

VI. PRECLUDING GIANT EAGLE FROM ASSERTING SELF-DEFENSE VIOLATES ITS RIGHT TO DUE PROCESS

Niskanen's death occurred while Giant Eagle's employees and customers were defending themselves. This fact is not only undisputed—it is indisputably a part of this case. Yet the Ninth District, by removing self-defense from the case, would preclude Giant Eagle from telling the jury why it took the actions that ultimately and unintentionally contributed to Niskanen's death. Giant Eagle must be permitted to explain that it took these unfortunate actions only to defend itself and others. As a corollary to the right to self-defense guaranteed by the Ohio Constitution, Giant Eagle has a right to give this explanation to the jury so long as the record supports it.[17]

Due process also requires that Giant Eagle be permitted to assert self-defense. To deprive Giant Eagle of this justification defense would deny it "a fair opportunity to defend against [Mrs. Niskanen's] allegations." *Chambers v. Mississippi* (1973), 410 U.S. 284, 294, 93 S.Ct. 1038. A basic tenet of due process is that "a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews*, 485 U.S. at 63. Here, there was more than sufficient evidence for the jury to find, as it ultimately did, that Giant Eagle acted in self-defense. Even more troubling, if

[16] If anything, as a matter of logic, society should be more willing to use self-defense to pardon a defendant for his merely negligent sins rather than his intentional misdeeds.

[17] Due process is not the only constitutional right that safeguards the right to self-defense. The Ohio Constitution, as noted above, expressly gives each citizen the right to defend himself. OHIO CONST. art. I, § 4 (Appx. 64-65). The Second Amendment to the United States Constitution implicitly guarantees the same right.

precluded from considering self-defense, the next jury on remand could "punish [Giant Eagle] because it has done what the law plainly allows [it] to do" by defending itself against Niskanen's attack which, the United States Supreme Court has held, "is a due process violation of the most basic sort." *Bordenkircher,* 434 U.S. at 363.

A plaintiff cannot control what defenses a defendant may raise by artful pleading or, in this case, strategic dismissal of claims on the eve of trial. It was this concern that led the Connecticut Supreme Court in *Brown* to conclude that

> basic tenets of fairness dictate that the defendant be permitted to raise a defense of self-defense. A contrary conclusion would permit the plaintiff essentially to dictate the defendant's defense strategy by styling claims in his pleadings to preclude the use of certain defenses that otherwise might be appropriate given the facts of a particular case . . . we decline to endorse the notion that a plaintiff, in pleading his case, may force a defendant to defend himself exclusively within the framework chosen by the plaintiff.

922 A.2d 1095. Giant Eagle, like the defendant in *Brown,* was entitled to assert self-defense to explain its intentional actions – *i.e.* holding Niskanen down until the police arrived. That Mrs. Niskanen may wish to call these intentional actions mere negligence for strategic reasons cannot deprive Giant Eagle of its right to assert self-defense.

Worse yet, Mrs. Niskanen may compound these due process concerns if she uses the same script in the next trial that she did below by claiming that Giant Eagle strangled her son to death despite having dismissed her intentional tort claims (except for spoliation) before trial. Mrs. Niskanen may try again to have it both ways by asserting only negligence claims but arguing whenever she can that Giant Eagle's intentional actions caused her son's death.

On this point, in her opening statement, Mrs. Niskanen told the jury that Giant Eagle used a "deadly choke hold" on Niskanen and that her medical expert will testify that Giant Eagle "strangled [him] to death." (Supp. 50, 60; 2 Tr. 204, 214). Throughout trial, Mrs. Niskanen

repeatedly claimed during her questioning of witnesses that Giant Eagle strangled her son to death. (Supp. 105; 3 Tr. 323) ("do you admit [Niskanen] was strangled"); (Supp. 159; 4 Tr. 435) ("after [Niskanen] had been strangled"); (Supp. 553; 11 Tr. 1566) (alleging "prolonged strangulation"). In her closing statement, Mrs. Niskanen replayed her theme, telling the jury that Giant Eagle stands behind employees "strangling with excessive force." (Supp. 628; 13 Tr. 1717). Strangle means "[t]o kill by squeezing the throat so as to choke or suffocate." WEBSTER'S II NEW RIVERSIDE DICTIONARY 1145 (1984). To allow Mrs. Niskanen to accuse Giant Eagle of such intentional criminal acts but, at the same time, preclude it from asserting self-defense is inherently unfair and constitutes a fundamental denial of due process.

VII. THE TRIAL COURT HAD TO INSTRUCT THE JURY ON SELF DEFENSE BECAUSE, EVEN IF THE NINTH DISTRICT'S DECISION HAD MERIT, THAT DEFENSE IS UNDENIABLY RELEVANT TO PUNITIVE DAMAGES

Proof of self-defense tends to negate, if not preclude, a finding of malice needed to support punitive damages. As one Ohio court recently observed, if a jury concludes that defendant "acted in self-defense, his actions could not be found to be malicious" as "malice" is defined for the purpose of punitive damages. *Bailey v. Bevilacqua*, 158 Ohio App.3d 382, 2004-Ohio-4392, 815 N.E.2d 1136, ¶49. Similarly, in *Hopping v. Sullivan,* No. 1218, 1934 WL 2505 at *3 (Ohio Ct. App. Jan. 31, 1934), the court recognized that "the plea of self-defense would inferentionally deny [the requisite] malice" needed to support punitive damages. Self-defense also may persuade the jury to reduce punitive damages. *Traister v. Gerton* (1981), 626 P.2d 737, 738-39 (Colo. App.) ("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."). Even if the Ninth District's self-defense analysis had merit, at a minimum, an instruction on self-defense was proper and relevant to punitive damages. Thus, at least for punitive damages, the

trial court properly submitted self-defense to the jury and this Court need not remand for a new trial.

VIII. THE NINTH DISTRICT HAD NO BASIS FOR VACATING THE JURY VERDICT AGAINST MRS. NISKANEN ON HER NEGLIGENCE CLAIMS EVEN IF GIANT EAGLE SHOULD NOT HAVE BEEN ABLE TO ASSERT SELF-DEFENSE

The Ninth District found no error in the charge to the jury on Mrs. Niskanen's negligence and unreasonable restraint claims. Nor did the Ninth District find any error involving the admission or exclusion of evidence. And from their answers to the special interrogatories, it is clear that the jury found in Giant Eagle's favor on both claims. These findings provide an independent basis for affirming the jury's verdict even if self-defense should not have been submitted to the jury.

Where, as here, "the issue of negligence is correctly submitted but an error occurs in the submission of [an affirmative defense], a verdict for defendant may stand because it may rest on a finding of no negligence [or absence of another element to the claim]." *Bush v. Harvey Transfer Co.* (1946), 146 Ohio St. 657, 668, 67 N.E.2d 851. Put another way, "where a single determinative issue has been tried free from error, error in presenting another issue will be disregarded" so long as they are "independent and separate issues, neither of them being an element of or dependent on the other." *Id.* at 667. To gain reversal of a jury verdict, it is not enough for appellant to "show some error," he must also show that the error was prejudicial to him. *Wagner v. Roche Lab.* (1999), 85 Ohio St.3d 457, 460, 709 N.E.2d 162 (*quoting Smith v. Flesher* (1967), 12 Ohio St.2d 107, 110, 233 N.E.2d 137). No prejudice resulted from the self-defense instruction because, even absent that defense, the jury's entirely separate findings that Niskanen was 60 percent at fault and that there was no undue restraint fully exonerated Giant Eagle. *E.g., Phillabaum v. Kidd* (1985), 22 Ohio App.3d 149, 149-50, 489 N.E.2d 1317 (no

prejudicial errors where, although affirmative defense charges should not have been given, jury found plaintiff 60 percent negligent).

The Ninth District presumed that the allegedly erroneous self-defense instruction confused the jury by taking their "focus away from the real issue." (Appx. 15, ¶28). But it was for the jury, not an appellate court, to determine what they believed to be the "real issue" based on the evidence presented. It was reasonable for the jury to conclude, as Judge Slaby in dissent did, that Niskanen was the aggressor, that Giant Eagle's employees and customers could not safely disengage after he attacked, and that Giant Eagle's employees and customers "were either attempting to restrain an aggressor for the police or defending themselves from further attack." *Id.* at ¶ 49. Given that ample evidence supported the jury's defense verdict on Mrs. Niskanen's negligence claims, no prejudice could have occurred from the allegedly erroneous instruction on self-defense. For this reason too, the jury's verdict should be preserved.

> **Proposition of Law No. 3**: R.C. 2935.041 does not create a statutory cause of action for undue restraint but, if such a cause of action does exist, merchants may assert self-defense to defeat it.

The Ninth District held that R.C. 2935.041 creates a statutory cause of action for undue restraint that shoplifters may assert against the merchants who the statute was unmistakably intended to protect. Handcuffing merchants even further, the Ninth District also held that merchants cannot raise self-defense to defeat this newly-created cause of action. The Ninth District's reading of R.C. 2935.041 conflicts with its goal of protecting merchants when they must confront a shoplifter. This Court should reject it.

I. R.C. 2935.041 DOES NOT CREATE A CAUSE OF ACTION FOR UNDUE RESTRAINT

R.C. 2935.041 creates a privilege for a merchant to detain a suspected shoplifter. As long as probable cause exists and the merchant detains the suspect in a "reasonable manner" and for a

reasonable period, the shopkeeper's privilege created by R.C. 2935.041 immunizes the merchant from potential liability. (Appx. 62-63). R.C. 2935.041 is, by all measures, an affirmative defense available to a merchant against claims arising from the detention of a suspected shoplifter. *See Goldfuss,* 79 Ohio St.3d at 124 ("A privileged act is one which ordinarily would be tortious but which, under the circumstances, does not subject the actor to liability."); *Schultz v. Elm Beverage Shoppe* (1988), 40 Ohio St.3d 326, 327, 533 N.E.2d 349 ("A person 'who otherwise would be liable for a tort is not liable if he acts in pursuance of and within the limits of a privilege.'") (*quoting* 4 RESTATEMENT (SECOND) OF TORTS § 890 (1979)).

The Ninth District turned R.C. 2935.041 on its head by transforming that privilege into a cause of action against merchants. A privilege, by definition, "denotes the existence of circumstances that justify or excuse conduct that would ordinarily subject the actor to liability"—it does not create liability by itself. *Schultz*, 40 Ohio St.3d at 327. If the elements of R.C. 2935.041 have not been proven, the merchant loses the shopkeeper's privilege, but the absence of that privilege does not *ipso facto* render him liable for the detention. The shoplifter must still prove an underlying tort to prevail against the merchant.[18]

II. MERCHANTS MUST BE PERMITTED TO ASSERT SELF-DEFENSE IF THIS COURT READS R.C. 2935.041 TO CREATE A STATUTORY CAUSE OF ACTION FOR UNDUE RESTRAINT

Whether viewed as a claim or privilege, R.C. 2935.041 requires that a merchant use only "reasonable" force to detain a suspected shoplifter. Self-defense also requires the use of reasonable force. *Holbrook,* 1996 WL 277679, at *3. Given their overlapping elements, a statutory claim for undue restraint cannot be divorced from the self-defense inquiry. Nor can

[18] While R.C. 2905.03 makes unlawful restraint a crime, Mrs. Niskanen never pled a violation of that statute. Nor could Mrs. Niskanen have pursued such a claim since R.C. 2905.03 defines unlawful restraint as restraint "without privilege to do so." (Appx. 61).

self-defense be considered "irrelevant" to Mrs. Niskanen's undue restraint claim as the Ninth District held. (Appx. 15-16, ¶29).

Niskanen died when Giant Eagle, along with two customers, applied physical force to hold him down until the police arrived. The central issue the jury had to resolve was whether that force was reasonable. Because this issue goes to the core of self-defense, that defense "properly focused [the jury] on the issue before it" – rather than on "completely irrelevant" issues. (Appx. 15-16, ¶¶28-29). The Ninth District's speculation that self-defense distracted the jury from "the issue before it" is unfounded.[19]

Conclusion

There is no denying that this case springs from a horrible tragedy. But as the jury found after a lengthy trial, that tragedy was not Giant Eagle's fault. While ample evidence supports the jury verdict, the Ninth District overturned their findings based on several newly-created flawed legal propositions:

(1) Punitive damages may be awarded when comparative fault precludes an award of compensatory damages;

(2) Self-defense is not a defense to a negligence claim; and

(3) R.C. 2935.041 creates a statutory cause of action against merchants for undue restraint that cannot be defeated by self-defense.

No court, until the Ninth District below, had ever recognized these propositions. For good reason too. Propositions (1) and (2) conflict with controlling decisions from this Court, not to mention the right to due process, while proposition (3) conflicts with both legislative intent and common sense.

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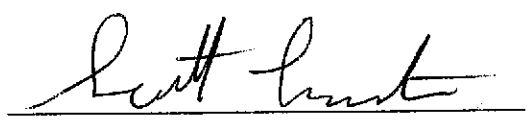
[19] Precluding a defendant from asserting self-defense to defeat a statutory undue restraint claim raises the same constitutional concerns that arise from precluding self-defense against an ordinary negligence claim.

Unless this Court intervenes, Ohio citizens will forfeit their constitutionally guaranteed right to self-defense if their attacker sues them only in negligence. Robbed of their right to self-defense, Ohio citizens will be unable to defend themselves from an unprovoked attack without the fear of civil liability if the plaintiff choses to sue them only for negligence. The Ninth District's decision leaves Ohio citizens with a Hobson's choice—incur potential liability by defending yourself or allow your attacker to inflict further harm on you. Ohio merchants face a similar choice. To make matters worse, the Ninth District's decision magnifies this risk of civil liability by permitting the jury to award punitive damages even when they find, as the jury did here, that the plaintiff is mostly at fault. This Court should not allow the Ninth District's decision to stand.

For all these reasons, Giant Eagle asks this Court to reverse the Ninth District's decision and to remand with instructions to reinstate the jury verdict.

Dated: October 9, 2008

Respectfully submitted,



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CERTIFICATE OF SERVICE

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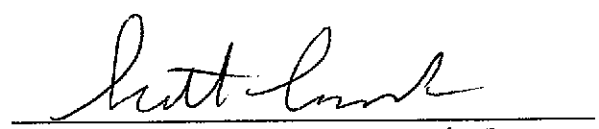

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APPENDIX
TO
MERIT BRIEF
OF APPELLANT GIANT EAGLE, INC.

COPY

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. 08-0895

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

Court of Appeals
Case No. 23445

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NOTICE OF APPEAL
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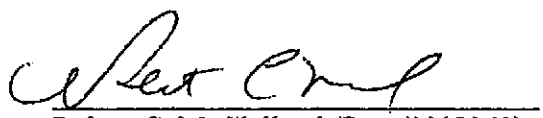
NOTICE OF APPEAL OF APPELLANT GIANT EAGLE, INC.

Appellant, Giant Eagle, Inc., hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Summit County Court of Appeals, Ninth Judicial District, entered in Court of Appeals Case No. 23445 on March 26, 2008.

This case involves questions of public or great general interest.

Dated: May 7, 2008

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this Notice of Appeal was sent by U.S. Mail and electronic mail to counsel for Appellee, Mary Niskanen, listed below on May 7, 2008:

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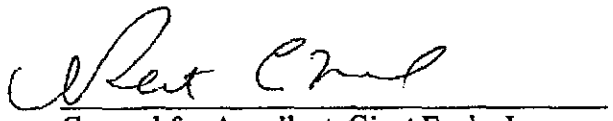

Counsel for Appellant, Giant Eagle, Inc.

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STATE OF OHIO)ss: COUNTY OF SUMMIT)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
MARY NISKANEN Appellant/Cross-Appellee v. GIANT EAGLE, INC., et al. Appellees/Cross-Appellants	C.A. No. 23445 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2004-08-4337

DECISION AND JOURNAL ENTRY

Dated: March 26, 2008

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

CARR, Judge.

{¶1} Appellant/Cross-Appellee, Mary Niskanen, appeals from judgment of the Summit County Court of Common Pleas in favor of Appellee/Cross-Appellant, Giant Eagle, on her wrongful death and survivorship claims against it, which stem from the death of her son, Paul Niskanen, at the Giant Eagle grocery store in Rootstown, Ohio. This Court reverses and remands for a new trial.

{¶2} The following facts were revealed through basically undisputed evidence at trial. On the evening of January 21, 2004, Paul Niskanen went to the Giant Eagle grocery store in Rootstown, Ohio, and loaded several grocery items

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into a shopping cart. Niskanen took the cart of items to register number three, where Lindsay White was working. While White was ringing up the groceries, which totaled $289.02, she asked Niskanen for his Giant Eagle Advantage Card, a customer savings card. Niskanen indicated that he could not find his Advantage Card and that he would have to go to his car and get his wallet. Niskanen left the register and went outside.

{¶3} There was considerable evidence about Niskanen's inability to find his Advantage Card and his attempt to get a temporary card at the customer service desk, and it was not clear whether Niskanen had a wallet with him that evening. Nonetheless, the evidence was undisputed that Niskanen left the register for several minutes and, while he was away, the store manager, John Maczko, came to White's register. Niskanen returned and, while he approached or was standing near the grocery cart, White alerted Maczko to her belief that Niskanen was planning to take the groceries without paying for them.

{¶4} At about the same time, Niskanen left the store with the cart of groceries and Maczko ran after him. Maczko lost sight of Niskanen and Niskanen gained a bigger lead because Maczko had to wait for the automatic doors to open. When Maczko reached the parking lot, he saw Niskanen loading the groceries into the trunk of his car. Maczko believed that Niskanen was attempting to flee with the groceries, so he yelled to Jonathon Stress, a Giant Eagle employee who was retrieving carts in the parking lot, to "stop the shoplifter," or words to that effect.

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{¶5} In response to Maczko's words, Stress ran toward Niskanen. Niskanen immediately stopped loading the groceries, closed the trunk of his car, and ran around to the driver's side door. Stress reached Niskanen before he was able to get into the car. As Stress approached him, Niskanen threw a punch at Stress, knocking him to the ground. Maczko observed what happened and ran over to assist Stress. Maczko attempted to grab Niskanen in a bear hug from behind, but Niskanen broke free and began punching Maczko. In the scuffle, all three men somehow fell to the ground.

{¶6} Although his exact words are not clear, Maczko screamed for help, causing passerby David Alexoff, a customer who was exiting the store, to join in the effort to restrain Niskanen. All three men were eventually on top of Niskanen, holding him down. Maczko, who had sustained minor injuries, later got off Niskanen but was replaced by Paul Taylor, another Giant Eagle employee.

{¶7} At some point during the approximate 10 minutes that the men were restraining Niskanen, Niskanen stopped struggling. Several witnesses explained that, for approximately five minutes, Niskanen was no longer resisting and was not even moving and they heard no sounds from him. Alexoff, while helping to restrain Niskanen, as well as several other passersby questioned whether Niskanen was okay and whether he could breathe. None of the men on top of Niskanen ever verified that he was still breathing, but they instead waited for the sheriff's department to arrive. By the time the Portage County Sheriff's Department

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arrived, and they told the men to get off Niskanen, Niskanen had succumbed to death by asphyxiation.

{¶8} Paul Niskanen's mother Mary, as a survivor and as the administratrix of his estate, filed this action against Giant Eagle, Maczko, Stress, Taylor, and Alexoff, alleging numerous intentional tort and negligence claims. Niskanen later dismissed all intentional tort claims and all claims against the individual defendants. The case proceeded to trial solely against Giant Eagle for negligence, undue restraint, wrongful death, and spoliation of evidence. Giant Eagle conceded that its employees, Maczko, Stress, and Taylor, were acting within the scope of their employment when Niskanen died.

{¶9} The trial focused on Niskanen's claims that Giant Eagle had negligently failed to train Maczko, Stress, and/or Taylor about its own policies pertaining to the pursuit, apprehension, and detention of suspected shoplifters. Niskanen alleged that Giant Eagle's failure to train these employees had caused Niskanen's death. Niskanen also claimed that Giant Eagle had used unreasonable force in restraining Niskanen, even if it had a legal right to pursue, detain, and restrain him as a suspected shoplifter. Niskanen also had a claim against Giant Eagle for spoliation of evidence for Giant Eagle's failure to preserve all of the store video surveillance tapes from the day of the incident. Niskanen further sought punitive damages on her claims, and attempted to establish that Giant

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Eagle's negligence had risen to the level of a conscious disregard for the rights and safety of others.

{¶10} During the trial, although there were some minor inconsistencies in the testimony, the details of the incident were revealed as described above. The crux of Niskanen's failure to train claim was that Giant Eagle had a policy that its employees should not pursue a fleeing suspect, they should not rely solely on the word of others to detain a suspect, they should identify themselves when approaching a suspect, and if a suspect responds with physical aggression, they should disengage. Evidence was also presented that the primary reason for this policy was to minimize the potential for injury to the suspect, employees, and/or innocent bystanders because shoplifting suspects who are confronted, detained, or apprehended will sometimes respond with physical aggression, potentially causing injury to themselves or others.

{¶11} The evidence further revealed that Maczko, the store manager who pursued Niskanen out of the store and ordered Stress to help stop him, had never received any training about this policy and, in fact, was not aware that Giant Eagle had such a policy. The jury found that Giant Eagle's negligence had caused Niskanen's death. The jury found for Giant Eagle on all other claims.

{¶12} The trial also focused in large part on Giant Eagle's defenses, self-defense and comparative negligence. Giant Eagle's primary defense was self-defense and the trial was mainly focused on whether the Giant Eagle employees

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had a legal right to defend themselves and each other against the physical force exerted by Niskanen when he was approached by Stress. This evidence included the testimony of a security expert who testified that the Giant Eagle employees were legally entitled to defend themselves and each other in this situation.

{¶13} The jury found that the Giant Eagle employees had acted in self-defense and that Niskanen's comparative negligence had exceeded the negligence of Giant Eagle. Consequently, the trial court entered judgment for Giant Eagle.

{¶14} Niskanen appeals and raises seven assignments of error. Giant Eagle cross-appeals and raises four assignments of error.

FIRST ASSIGNMENT OF ERROR

> "THE TRIAL COURT ERRED IN REMOVING PUNITIVE DAMAGES FROM THE JURY'S CONSIDERATION BASED SOLELY ON THE JURY'S DETERMINATION THAT THE COMPARATIVE NEGLIGENCE OF PAUL NISKANEN EXCEEDED THE NEGLIGENCE OF GIANT EAGLE."

{¶15} Niskanen challenges the trial court's interrogatories to the jury that allowed the jury to consider the issue of punitive damages only if it found that Giant Eagle's negligence exceeded any negligence on the part of Paul Niskanen. Niskanen contends that the trial court erred in removing the issue of punitive damages from the jury solely because the jury found that Paul Niskanen's negligence exceeded that of Giant Eagle. This Court agrees.

{¶16} "[The] key to the recovery of punitive damages in Ohio is a finding of malice, and a claim based on negligence can provide the basis for an award of

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punitive damages if there is an adequate showing of actual malice." *Burns v. Prudential Securities, Inc.*, 167 Ohio App.3d 809, 843, 2006-Ohio-3550, at ¶101, citing *Preston v. Murty* (1987), 32 Ohio St.3d 334, 335-336. 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.

{¶17} A finding by the jury that a plaintiff was comparatively negligent will not defeat or diminish the recovery of damages where the defendant acted with actual malice. *Schellhouse v. Norfolk & Western Ry.* Co. (1991), 61 Ohio St.3d 520, 525. 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, and such a finding would have negated any potential set-off for damages under Ohio's comparative negligence law. See *Wightman v. Consol. Rail Corp.* (1994), 94 Ohio App.3d 389, 398.

{¶18} Niskanen's first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON NISKANEN'S NEGLIGENCE CLAIM FOR THE USE OF FORCE, WHERE SUCH CLAIM WAS SEPARATELY PLED AND EXISTS AS A DISTINCT AND SEPARATE CLAIM FROM NISKANEN'S STATUTORY CLAIM UNDER R.C. 2935.041."

{¶19} Niskanen next asserts that the trial court erred in failing to instruct the jury on her common law claim for Giant Eagle's use of excessive force. As

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will be discussed in this Court's disposition of Niskanen's third, fourth, and fifth assignments of error, this case became improperly focused on whether the Giant Eagle employees had acted in self-defense. Because much of Niskanen's argument is intertwined with her challenges to Giant Eagle's defense of self-defense, which will be addressed below, the second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED IN ALLOWING GIANT EAGLE'S PURPORTED RETAIL SECURITY EXPERT, RALPH WITHERSPOON, TO PRESENT OPINION TESTIMONY IN VIOLATION OF EVID.R. 702 AND 703."

FOURTH ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT GIANT EAGLE'S AFFIRMATIVE DEFENSES OF SELF DEFENSE AND/OR CONTRIBUTORY NEGLIGENCE APPLIED TO (1) NISKANEN'S CLAIM OF COMMON LAW NEGLIGENCE ARISING FROM GIANT EAGLE'S FAILURE TO PROPERLY TRAIN ITS EMPLOYEES, AND (2) NISKANEN'S STATUTORY CLAIM FOR UNDUE RESTRAINT UNDER R.C. 2935.041."

FIFTH ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT IT COULD NOT FIND IN FAVOR OF GIANT EAGLE ON THE AFFIRMATIVE DEFENSE OF SELF DEFENSE UNLESS GIANT EAGLE FIRST ESTABLISHED THAT ITS EMPLOYEES DID NOT VIOLATE THE DUTY TO RETREAT."

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Self-Defense

{¶20} Through three of her assignments of error, Niskanen has challenged the trial court's instruction to the jury on Giant Eagle's defense of self-defense and defense of others. Niskanen asserts many challenges to the self-defense instruction, including that such a defense was inapplicable here and that Giant Eagle's expert witness impermissibly gave ultimate legal conclusions on whether it was appropriate for Maczko to run to the defense of Stress. Because this Court agrees that the defense of self-defense was inapplicable in this negligence case, the analysis will be confined primarily to that issue.

{¶21} Although Niskanen's suit originally included claims for intentional torts such as assault and false imprisonment, Niskanen had dismissed those claims prior to trial and the case proceeded on claims sounding solely in negligence. The defense of self-defense, while arguably a legitimate defense against Niskanen's claims for assault, was not an appropriate defense to Niskanen's negligence claims, which focused on whether Giant Eagle's failure to train its employees had caused Niskanen's death and/or whether Niskanen's death had been caused by an unreasonable use of force to restrain a suspected shoplifter.

{¶22} Negligence "connotes an unintentional act;" self-defense, on the other hand, is "an intentional response to an intentional act." *Robinson v. Brown* (Feb. 21, 1989), 12th Dist. No. 88-07-052. "[A]n intentional tort is subject to such defenses as self-defense and necessity. But torts of negligence and recklessness

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are not subject to such 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 at 554, fn. 309.

{¶23} In the criminal context, it has long been understood that a defendant cannot act negligently and, at the same time, raise the defense of self-defense because the two theories are inconsistent. A person claiming self-defense concedes that he or she intended to commit the act, but asserts he or she was justified in doing so. *State v. Barnd* (1993), 85 Ohio App.3d 254, 260.

{¶24} "The substance of the claim of self-defense is that the defendant was justified in using deadly force *intentionally*. The assertion of self-defense is inconsistent with the claim that the defendant is guilty, at the most, of *negligent* [conduct]." (emphasis in original) *State v. Turner* (Mar. 20, 1980), 8th Dist. No. 40159. "Self-defense presumes intentional, willful use of force to repel force or escape force. *** The defense of self-defense is factually inconsistent with the allegation that the homicide was unintentional." See, also *State v. King* (1984), 20 Ohio App.3d 62, 64. It has also been held that a jury instruction given on negligent homicide is inconsistent with a jury instruction given on self-defense. See *State v. Grace* (1976), 50 Ohio App.2d 259; *State v. Williams* (1981), 2 Ohio App.3d 289.

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{¶25} This Court has found no Ohio authority for recognizing self-defense as a defense in a negligence action. Although a few courts in other jurisdictions have recognized that self-defense may be a defense to negligence in limited situations, those situations have involved a defendant who was alleged to have intentionally harmed the plaintiff, but the plaintiff's claims were couched in terms of negligence. See, e.g., *Brown v. Robishaw* (2007), 282 Conn. 628; *Blackburn v. Johnson* (1989), 187 Ill.App.3d 557. Even if this Court were inclined to follow the reasoning of those other jurisdictions, there were no similar claims or allegations in this case.

{¶26} Although the acts of the individual employees did involve the intentional use of force against Paul Niskanen, his estate had dismissed all claims for assault, battery, false imprisonment, or any intentional torts as well as all claims against the individual defendants. There were no longer any claims that Giant Eagle or any of its employees had intentionally harmed Niskanen. Because the defense, and much of the trial, improperly focused on an alleged justification for the intentional physical actions of the individual employees (Maczko, Stress, and Taylor), the jury lost sight of the entire gist of Niskanen's claims against Giant Eagle, who was the only defendant remaining in this case.

{¶27} The plaintiffs proceeded solely on claims of failure to train and unreasonable restraint. The theory of the negligent failure to train claim was that Giant Eagle's store manager never should have pursued Niskanen into the parking

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lot and/or yelled at another employee to stop him because those actions of attempting to stop and/or confront a fleeing shoplifter were in violation of Giant Eagle's own policy, a policy about which the store manager had never received any training. Moreover, there was evidence that the violent response of Niskanen and his ultimate death by asphyxiation was one of the specific risks that Giant Eagle's policy was intended to avoid, and Giant Eagle was aware of similar deaths occurring at the stores of other retailers.

{¶28} The defense of self-defense was completely irrelevant to whether Giant Eagle's failure to train had caused Niskanen's death and it merely served to confuse the claim before the jury. Focusing on Niskanen's violent response as a justification of the acts of the individual employees took the focus away from the real issue: whether the employees violated Giant Eagle's own policy by confronting Niskanen in the parking lot and whether Giant Eagle's failure to train its employees about the proper procedures for the pursuit, detention, and restraint of shoplifters had caused Niskanen's death.

{¶29} Self-defense was likewise irrelevant to Niskanen's claim that the Giant Eagle employees unreasonably restrained Niskanen. The unreasonable restraint claim was premised on the legal right of Giant Eagle, under R.C. 2935.041, to pursue and detain suspected shoplifters, with recognition that their suspicion must be supported by probable cause and the detention must be in a "reasonable manner" and for a "reasonable length of time." R.C. 2935.041. The

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so-called shopkeeper's privilege presupposes that Giant Eagle had a legal right to restrain Niskanen if probable cause existed that he had stolen merchandise. Again, by focusing on the irrelevant defense of self-defense, the jury was not properly focused on the issue before it: whether Giant Eagle had probable cause to believe Niskanen had stolen merchandise and whether its detention was in a reasonable manner and for a reasonable time.

Comparative Negligence Defense

{¶30} Niskanen also asserts through her fourth assignment of error that the trial court erred in instructing the jury on the defense of comparative negligence. Niskanen essentially argues that, for the same reason self-defense was inapplicable to her negligence claims, the defense of comparative negligence was likewise inappropriate here. Although this Court agrees that the defense of self-defense was inapplicable here and that the trial court erred in allowing the jury to consider that defense, Niskanen has failed to cite any legal authority to support her position that comparative negligence cannot be a defense to her claims. Moreover, she has failed to convince this Court that there was no evidence to support an instruction on comparative negligence.

{¶31} Unlike the defense of self-defense, Ohio does recognize comparative negligence as a defense to a claim of negligence. See R.C. 2315.32(B). An instruction on comparative negligence is warranted where there is evidence of "any want of ordinary care on the part of the person injured, which combined and

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concurred with the defendant's negligence and contributed to the injury as a proximate cause thereof, and as an element without which the injury would not have occurred." *Brinkmoeller v. Wilson* (1975), 41 Ohio St.2d 223, 226.

{¶32} Even though Paul Niskanen's acts of throwing punches at Stress and Maczko were apparently intentional, the jury could reasonably conclude that Niskanen also had been negligent because he intentionally placed himself in a position of danger that would be apparent to an ordinary prudent person. See *Brunette v. Employers Mut. Liab. Ins. Co. of Wisconsin* (1982), 320 N.W.2d 43, 44 (holding that a traffic violator who intentionally fled from police at an excessive rate of speed, and was eventually injured in a collision with the police cruiser, had been negligent because he unreasonably placed himself at risk for injury).

{¶33} 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.

{¶34} Niskanen's arguments that the trial court erred in instructing the jury on self-defense are well taken and, to that extent, her third, fourth, and fifth assignments of error are sustained. Insofar as Niskanen challenges the jury instructions on comparative negligence, her fourth assignment of error is overruled.

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SIXTH ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT A DECEDENT'S ALLEGED COMMISSION OF FELONIOUS ACTS DOES NOT BAR HIS ESTATE FROM RECOVERING FOR THE INTENTIONAL OR NEGLIGENT ACTS OF OTHERS."

{¶35} Niskanen asserts that the trial court erred in failing to instruct the jury that Paul Niskanen's alleged commission of a felony did not preclude recovery in this action by his estate. This assigned error is intertwined with challenges to Giant Eagle's defense of self-defense, and has therefore been rendered moot by this Court's disposition of Niskanen's third, fourth, and fifth assignments of error and this Court need not reach Niskanen's arguments. See App.R. 12(A)(1)(c).

SEVENTH ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON NISKANEN'S SPOLIATION OF EVIDENCE CLAIM THAT NISKANEN WAS ENTITLED TO A PRESUMPTION IN HER FAVOR THAT THE EVIDENCE DESTROYED WAS FAVORABLE TO NISKANEN'S CASE."

{¶36} Niskanen's seventh assignment of error is that the trial court erred in failing to give a requested jury instruction pertaining to her claim for spoliation of evidence. Because this assignment of error is rendered moot by this Court's disposition of the second cross-assignment of error, it will not be addressed. See App.R. 12(A)(1)(c).

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CROSS-APPEAL

FIRST CROSS-ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED BY FAILING TO GRANT A DIRECTED VERDICT IN FAVOR OF GIANT EAGLE ON MRS. NISKANEN'S CLAIM FOR PUNITIVE DAMAGES."

{¶37} Through its first cross-assignment of error, Giant Eagle maintains that the trial court should have granted a directed verdict on Niskanen's claim for punitive damages. Civ.R. 50(A)(4) requires a trial court to grant a properly filed motion for directed verdict if "after construing the evidence most strongly in favor of the party against whom the motion is directed, [it] finds that *** reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party[.]"

{¶38} An award of punitive damages in a tort case may be made only upon a finding of actual malice on the part of the defendant. *Calmes v. Goodyear Tire & Rubber Co.* (1991), 61 Ohio St.3d 470, 473. The Ohio Supreme Court has defined actual malice for purposes of punitive damages to include "a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." *Preston v. Murty* (1987), 32 Ohio St.3d 334, syllabus.

{¶39} Giant Eagle essentially argues that there was no merit to Niskanen's negligence claims and that, consequently, her claims for punitive damages must likewise fail. Even with the confusion of legal issues created by the improper evidence and legal instruction on self-defense, the jury found that Giant Eagle's

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negligence had caused the death of Paul Niskanen. Because reasonable minds could differ as to whether Giant Eagle's alleged negligence rose to the level of a conscious disregard for the rights and safety of others, the trial court did not err in denying Giant's Eagle's motion for a directed verdict on Niskanen's claim for punitive damages. The first cross-assignment of error is overruled.

SECOND CROSS-ASSIGNMENT OF ERROR

> "THE TRIAL COURT ERRED BY FAILING TO GRANT A DIRECTED VERDICT IN FAVOR OF GIANT EAGLE ON MRS. NISKANEN'S CLAIM FOR SPOLIATION OF EVIDENCE."

{¶40} Giant Eagle contends that it should have been granted a directed verdict on Niskanen's claim for spoliation of evidence. This Court agrees.

{¶41} To establish a claim for spoliation or destruction of evidence, a plaintiff must establish the following elements:

> "(1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts[.]" *Smith v. Howard Johnson Co., Inc.*(1993), 67 Ohio St.3d 28, 29.

{¶42} The term "willful," as used in "willful destruction of evidence by defendant designed to disrupt the plaintiff's case," "necessarily contemplates more than mere negligence or failure to conform to standards of practice, but instead anticipates an intentional, wrongful act." *White v. Ford Motor Co.* (2001), 142 Ohio App.3d 384, 387-88, citing *Drawl v. Cornicelli* (1997), 124 Ohio App.3d 562.

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{¶43} No one disputes that Niskanen could establish the first two elements of a spoliation of evidence claim: that there was pending or probable litigation by Niskanen and that Giant Eagle was aware that litigation was probable. This claim hinged on whether Niskanen could establish that Giant Eagle willfully destroyed evidence in an effort to disrupt her case and that her case was in fact harmed by the loss of that evidence. Niskanen contended that Giant Eagle willfully destroyed evidence by preserving only portions of the videotaped footage from the eleven video surveillance cameras that were operating in the store on January 21, 2004. Although Niskanen was able to establish that Giant Eagle preserved only select portions of the video surveillance footage, and that it destroyed the rest, she failed to make any showing that Giant Eagle destroyed any relevant footage.

{¶44} Giant Eagle witnesses testified that they preserved all video footage from January 21, 2004 that included any images of Niskanen in the store that evening. Witnesses explained that, due to the placement of cameras in the store, Niskanen could only be seen on certain cameras and there were gaps as he moved through the store out of the range of any cameras. The evidence also demonstrated that, due to the limited placement of cameras in and near the store, there never was any surveillance footage at register number three and the area near the door where Niskanen took the cart of groceries, nor were there cameras outside the store where the restraint and ultimate death of Niskanen occurred. Niskanen presented nothing to dispute any of this evidence.

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{¶45} Giant Eagle had destroyed some video footage, but there was no evidence to even suggest that any of that any of the destroyed footage would have been helpful to Niskanen's case. There was no evidence upon which reasonable minds could conclude that Giant Eagle had willfully destroyed evidence in an effort to disrupt Niskanen's case or that her case was disrupted. Consequently, the trial court should have granted Giant Eagle a directed verdict on this claim. The second cross-assignment of error is sustained.

THIRD CROSS-ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED BY FAILING TO GRANT A DIRECTED VERDICT IN FAVOR OF GIANT EAGLE ON MRS. NISKANEN'S CLAIM FOR NEGLIGENCE."

FOURTH CROSS-ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED BY FAILING TO GRANT A DIRECTED VERDICT IN FAVOR OF GIANT EAGLE ON MRS. NISKANEN'S CLAIM FOR UNDUE RESTRAINT."

{¶46} Through its third and fourth cross-assignments of error, Giant Eagle asserts that the trial court erred in failing to grant it a directed verdict on Niskanen's claims for negligence and undue restraint because all of the actions of Giant Eagle's employees were justified by self-defense. Because this Court determined through its disposition of Niskanen's third, fourth, and fifth assignments of error that the defense of self-defense was inapplicable in this case, the third and fourth cross-assignments of error are overruled.

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SUMMARY

{¶47} Niskanen's first assignment of error is sustained. Her third, fourth, and fifth assignments of error are sustained insofar as they challenge the jury's consideration of the defense of self-defense. Niskanen's second assignment of error is overruled and her remaining assignments of error were not addressed because they have been rendered moot. Giant Eagle's second cross-assignment of error is sustained and its remaining cross-assignments of error are overruled. The cause is reversed and remanded for a new trial on Niskanen's claims, absent her claim for spoliation of evidence.

Judgment reversed
and cause remanded

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of

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Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellee/cross-appellant.

DONNA J. CARR
FOR THE COURT

MOORE, J.
CONCURS

SLABY, P. J.
CONCURS IN PART, AND DISSENTS IN PART, SAYING:

{¶48} I agree with the decision of the majority to reverse the trial court's judgment on Appellant's first assignment of error. However, I would overrule Appellant's third, fourth and fifth assignments of error.

{¶49} The majority characterizes the trial, by both sides, as improperly focusing on an alleged justification for the intentional physical actions of the individual employees. This would have been correct if the store employees had been the aggressors in apprehending a shoplifter. The initial acts of the employees were to confront a shoplifter. This would not have been against store policy. Once verbal confrontation was made, it was the individual who became the aggressor. Once the individual became the aggressor, the employees were no longer trying to apprehend a shoplifter. The store employees and the passerby did not have an

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opportunity to disengage per the store policy. The jury could have found, and they apparently did, that they were either attempting to restrain an aggressor for the police or defending themselves from further attack.

APPEARANCES:

STEVEN A. GOLDFARB, ROBERT J. FOGARTY, ANDREW S. POLLIS, and ERIC B. LEVASSEUR, Attorneys at Law, for appellant/cross-appellee.

BERNARD D. MARCUS, SCOTT D. LIVINGSTON, STEPHEN S. ZUBROW, JAMES F. ROSENBERG, and DANA L. MUNHALL, Attorneys at Law, for appellee/cross-appellant.

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STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

COURT OF APPEALS
DANIEL M. HORRIGAN
2008 MAY 20 PM 1:29
SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

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

Appellant

v.

GIANT EAGLE, INC., et al.

Appellee

C.A. No. 23445

JOURNAL ENTRY

Appellee, Giant Eagle, has moved this court to reconsider its decision and journal entry, which was journalized on March 26, 2008, and which reversed the decision of the trial court in Giant Eagle's favor and remanded the matter for a new trial. Alternatively, Giant Eagle has moved for a rehearing en banc. Appellant, Mary Niskanen, has responded in opposition to the motion.

With respect to Giant Eagle's motion for an en banc hearing, this Court first notes that no mechanism exists in this district to perform such a review. Moreover, the mere fact that there was a split decision in this case does not demonstrate a conflict within this appellate district. Giant Eagle has made no showing, nor has it even articulated an argument, that an en banc hearing would be appropriate in this case. See *In re J.J.*, 111 Ohio St.3d 205, 2006-Ohio-5484, paragraph two of the syllabus.

In determining whether to grant a motion for reconsideration, a court of appeals must review the motion to see if it calls to the attention of the court an obvious error in its decision or if it raises issues not considered properly by the court. *Garfield Hts. City School Dist. v. State Bd. of Edn.* (1992), 85 Ohio App.3d 117.

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On the issue of punitive damages, Giant Eagle contends that this Court ignored the Ohio Supreme Court precedent set forth in *Malone v. Courtyard by Marriot, L.P.* (1996), 74 Ohio St.3d 440. The *Malone* Court held, based on the specific facts of the case, that the trial court properly granted a directed verdict on the plaintiffs' punitive damage claim because there was no evidence of malice (i.e., that the defendant had knowledge of the risk posed to the plaintiffs by its inaction). The *Malone* syllabus reads: "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." In this case, on the other hand, the plaintiffs presented evidence that Giant Eagle did have knowledge of the specific risk that caused Niskanen's death and, in fact, that was one of the very reasons for its shoplifting policy. There was evidence in this case to support a claim for punitive damages and the jury should have been allowed to consider that claim.

On the defense of self-defense, Giant Eagle cites several cases which this Court did consider in reaching its decision. None of these cases now cited by Giant Eagle directly addressed the issue of whether the defense of self-defense is an appropriate defense to the types of negligence claims raised in this case. These cases simply recognize that self-defense can be raised as a "tort" defense. The cases all focus on Section 63 of 1 Restatement of Torts 2d, which is grouped with other intentional tort defenses and is included in the first volume of the Restatement of Torts, entitled "Intentional Harms to Persons, Land, and Chattel." Section 63 of the Restatement recognizes self-defense as an intentional tort defense, not as a defense to negligence. Giant Eagle has failed to demonstrate that there was an obvious error in this Court's decision or that there were issues not properly considered by this Court.

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Accordingly, both motions are denied.

Judge

Judge

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DIANA ZALESKI

2006 SEP 22 PM 1:11

SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MARY NISKANEN	)	CASE NO: CV 2004-08-4337
	)	
Plaintiff,	)	JUDGE JUDY HUNTER
	)	
v.	)	**ORDER**
	)	
GIANT EAGLE, INC., et al.	)	
	)	
Defendants.	)	

This matter comes before the Court upon the remand from the Ninth District Court of Appeals on 8/31/06 finding that this case is not yet a final and appealable matter due to the pending claim against the Defendant David Alexoff.

A review of the Probate Court matter of the Estate of Paul Niskanen, Mary Niskanen, Fiduciary, 2004 ES 00830 indicates that said Court approved the wrongful death settlement as to the Defendant David Alexoff per entry dated 8/24/06. As such, the matter between Plaintiff and Defendant David Alexoff is now settled and dismissed.

As to the Defendant Giant Eagle, the claims were tried before the Court and a jury. Pursuant to Civ. R. 58, the Court found for the Defendant Giant Eagle on Plaintiff's claims. As such, it is ordered and adjudged that Plaintiff shall take nothing against Defendant Giant Eagle and that the action be dismissed on its merits.

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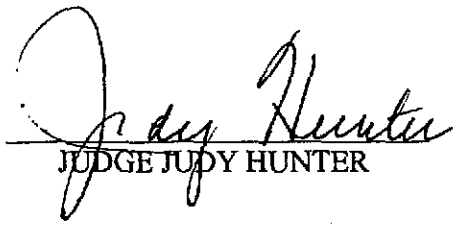
Wherefore, this matter is now fully and completely adjudicated as to the claims against all the Defendants. This matter is now dismissed on the merits. There is no just reason for delay.

So ordered.



JUDGE JUDY HUNTER

cc: Attorney Steven Goldfarb
Attorney Robert Mcclelland
Attorney Stephen Zubrow

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DIANA ZALESKI
2005 JUL 17 PM 2:12
SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MARY NISKANEN	)	CASE NO. CV 2004-08-4337
	)	
Plaintiff	)	JUDGE HUNTER
	)	
vs.	)	ORDER
	)	
GIANT EAGLE, INC., et al.	)	
	)	
Defendants	)	

This matter came on for trial before the Court and a jury, the issues having been duly tried and the jury having rendered its verdict. Pursuant to Civ. R. 58, the Court finds for the Defendant on Plaintiff's claims. As such, IT IS ORDERED AND ADJUDGED that Plaintiff take nothing and that the action be dismissed on the merits. Costs to Plaintiff.

So Ordered.

Judy Hunter
JUDGE JUDY HUNTER

cc: Attorney Steven Goldfarb
Attorney Robert Mcclelland
Attorney Stephen Zubrow

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2006 MAY 25 PM 3:33
SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MARY NISKANEN	)	CASE NO.: CV 2004-08-4337
	)	
Plaintiffs,	)	JUDGE JUDY HUNTER
	)	
v.	)	**ORDER**
	)	
GIANT EAGLE, INC., et al.	)	
	)	
Defendants.	)	

- - - - -

This matter comes before the Court upon Motion of Defendants, Giant Eagle, Inc., John Maczko, Jonathan Stress, and Paul Taylor, for Summary Judgment. This Court has been advised having reviewed the Motion and brief in support, response brief, reply and surreply briefs, pleadings, exhibits, depositions, and applicable law. Upon review, the Court finds that Defendants' Motion for Summary not well taken and it is denied, except for the limited grant detailed herein below..

PROCEDURAL STATEMENT OF FACTS

Plaintiff, Mary Niskanen, individually and as administrix for the estate of her son Paul Niskanen, has brought suit against Giant Eagle, Inc., its employees John Maczko, Jonathan Stress, and Paul Taylor (Giant Eagle Defendants); and against Giant Eagle customer David Alexoff. Plaintiff brings suit against the above Defendants for claims of wrongful death/intentional torts (survival action/property damage, survival action, false imprisonment,

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unlawful restraint, assault and battery), spoliation of evidence, and requesting punitive damages relating to each claim.

Each Defendant has answered the Complaint and asserted numerous affirmative defenses. Now before the Court is Giant Eagle and its employees' Motion for Summary Judgment. Although Defendant Alexoff also has a pending Motion for Summary Judgment, the Court has been notified that Plaintiff has settled its claim against him, subject to probate court approval.[1]

STATEMENT OF LAW – SUMMARY JUDGMENT

In order to prevail on a Motion for Summary Judgment pursuant to Civ. R. 56, the moving party bears the burden of affirmatively showing that there is no genuine issue of material fact. The party seeking summary judgment has a heavy burden of showing the absence of issues of material fact. *Adickes v. S.H. Kress & Co.* (1970), 398 U.S. 144, 153; *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 322. *See also Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112. Moreover, a party seeking summary judgment on the ground that the nonmoving party cannot prove its case bears the initial burden of informing the trial court of the basis for the motion, and identifying evidence in the record of the type outlined in Civ. R. 56, which demonstrates the absence of a genuine issue of material fact on the essential elements of the nonmoving party's claim. *Dresher v. Burt* (1996), 75 Ohio St.3d 280. Summary judgment is only appropriate if reasonable minds can conclude, based on the evidence, that judgment for the movant is appropriate. *See also Vahila v. Hall* (1997), 77 Ohio St.3d 421.

The evidence presented on a motion for summary judgment is always construed in favor of the party opposing the motion who is given the benefit of all favorable inferences that can be drawn from it. *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150, 153. As

[1] See footnote one in the Joint Motion to Continue Trial Date filed on 5/3/06.

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the United States Supreme Court has stated, "on summary judgment the inferences to be drawn from the underlying facts contained in [the affidavits, exhibits, and deposition] must be viewed in light most favorable to the party opposing the motion." *United State v. Diebold, Inc.* (1962), 369 U.S. 654; *Day v. United Auto., Aero & Agr. Imp. Wkrs.* (1972), 466 F.2d 83, 99; *EEOC v. United Ass'n of J. & a. of Plumb. And Pipe Indust.* (C.A. 6, 1970), 427 F.2d 1091, 1093, *cert denied,* 404 U.S. 832. A summary judgment "should be used cautiously so that a litigant's right to trial ... is not usurped." *Norris v. Ohio Standard Oil Co.* (1982), 70 Ohio St.2d 1, 2.

The nonmoving party has a reciprocal burden of specificity. Civ. R. 56(E), provides in part: "when a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of his pleadings, but his responses, by affidavit or as otherwise provided in these rules must set forth specific facts showing that there is a genuine issue for trial." In this regard, the claimant must present some evidence with respect to those elements which the party must establish at trial. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317.

INTENTIONAL TORT CLAIMS

Giant Eagle Defendants assert that all the intentional tort claims should be barred as a matter of law under the defenses of self defense, defense of others, and primary assumption of risk. The Court will respond to each defense separately below.

SELF DEFENSE/DEFENSE OF OTHERS

In order to establish the defense of self-defense, a defendant must prove the following elements: (1) that he was not at fault in creating the situation giving rise to the affray; (2) that he had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of force; (3) that he must not have

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violated any duty to retreat or avoid the danger; and (4) that the amount of force used was reasonable. *State v. Robbins* (1979), 58 Ohio St.2d 74, syllabus, paragraph two and *State v. Williford* (1990), 49 Ohio St.3d 247, 249. However, "[i]f the defendant fails to prove any one of these elements by a preponderance of the evidence, then he has failed to demonstrate that he acted in self-defense." *State v. Robbins*, 58 Ohio St.2d, at paragraph two of the syllabus and *State v. Jackson* (1986), 22 Ohio St. 3d 281, 284.

In order to establish self-defense of others, the defendant must show that the other person was in imminent danger of death or serious bodily harm, and that the amount of force was reasonable to the same extent as that person would be entitled to use in his own defense. *State v. Williford* (1990), 49 Ohio St.3d 247, 250.

Thus, self-defense and defense of others represents more than a denial or contradiction of evidence. *State v. Martin* (1986), 21 Ohio St.3d 91, 94. Rather, these defenses admit the facts claimed by the plaintiff and then rely on independent facts or circumstances which the defendant claims exempt him from liability. *Id.* Specifically, these affirmative defenses seek to relieve a defendant from culpability rather than to negate an element of the offense charged. *Id.*

Giant Eagle Defendants claim that they were not at fault in creating the situation in the parking lot that ultimately led to Mr. Niskanen's death. Giant Eagle states the record supports their claim Mr. Niskanen was the aggressor in the parking lot - first by assaulting Mr. Maczko, and then by assaulting Mr. Stress when he went to Mr. Maszko's aid. Giant Eagle also asserts that the Defendants had the right to restrain Niskanen in the parking lot until the police came. Lastly, the Defendants state they had no duty to retreat and that the amount of force used was

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reasonable, taking into consideration Niskanen's large stature and their bona fide belief that he would get back up and place them in imminent danger of great bodily harm.

Plaintiff responds that had Giant Eagle followed its own policy and procedures regarding suspected shoplifters, the situation in the parking lot would never had occurred. Second, Plaintiff argues that within two minutes of restraint, they had a duty to let him go. Lastly, Plaintiff asserts that the un-refuted medical evidence shows that the amount of force used to restrain Mr. Niskanen in the parking lot was excessive, and ultimately, led to his death.

As to the question of fault in creating the situation in the parking lot, the analysis becomes a "which comes first – the chicken or the egg." Upon review, the record does support Giant Eagle's assertion that Mr. Niskanen did not pay for the cart of groceries and that he was the initial aggressor against both Mr. Maszko and Mr. Stress. However, as Plaintiff correctly points out, had Giant Eagle followed its own policy and procedures regarding the apprehension and detention of potential shoplifters, Mr. Niskanen possibly could be alive today.

Giant Eagle's loss prevention policy states:

1. If a shoplifting suspect flees from the store, do not pursue the suspect outside the store.
2. If a shoplifting suspect flees the store, let them be.
3. If you didn't see it, it didn't happen.
4. If you are not sure, forget about it.
5. The best rule is no force.

Giant Eagle's employee handbook states that retail businesses lose billions of dollars due to shoplifting every year. Giant Eagle states that it instructs its employees that loss prevention is a growing concern and that its curtailment is part of an employee's responsibility.

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However, the record is replete with evidence Giant Eagle did not train or disseminate their policies to its management and employees in Rootstown. Although Giant Eagle trained its outside security provider regarding the above policy, the Rootstown store used this company only four to eight hours per week and said security was not present on January 21, 2004. Furthermore, the record indicates that Giant Eagle headquarters in Pennsylvania was aware of a newspaper article regarding deaths of suspected shoplifters that occurred at certain non-Giant Eagle retail outlets in the Detroit area in 2001. Due to concerns about its stores, Giant Eagle took the affirmative step to draft and disseminate a one page hand-out titled "Blazosky's Shoplifting Apprehension Guidelines" to its upper management. Although these guidelines, which unequivocally state – "if they flee, let them be", were disseminated at a corporate meeting to general managers, including to Dale Barnhardt of the Rootstown store, said guidelines were never circulated to other Rootstown management or employees. As such, the Court finds a genuine issue of material fact as whether Giant Eagle and its employees were at fault for the altercation in the parking lot.

The Court also finds a genuine issue of material fact whether the amount of force used by the Defendants was reasonable. Although Defendants assert that the record is clear that Mr. Alexoff did not place Niskanen in a chokehold, there is the un-refuted expert medical opinion that Mr. Niskanen died from "asphyxiation due to compression of the neck and torso." Whether the death was caused by Mr. Alexoff placing Niskanen in a "headlock", or in combination with the other participants lying across his lower back and restraining his arm and legs, the unrebutted medical evidence suggests that the amount of force used by Defendants may have been unreasonable. In further support of this determination, the record reflects that on at least two occasions bystanders, concerned for Niskanen's safety while he was being

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physically restrained, asked Mr. Stress whether Niskanen was okay. Whether the amount of force used is in excess of that which was reasonable and necessary is ordinarily a question for the jury. *Allison v. Fiscus* (1951), 156 Ohio St. 120, syllabus four.

As such, the Court finds that there is a genuine issue of material fact as to at least two of the four elements of the affirmative defense of self-defense – who was at fault for creating the situation in the parking lot and whether the amount of force used was reasonable. Thus, Defendants have failed to establish a prima facie case for asserting the affirmative defense of self-defense.

PRIMARY ASSUMPTION OF RISK

The Court notes that there is a difference between primary assumption of risk and implied assumption of risk. Primary assumption of the risk is an absolute bar to recovery in a negligence suit. *Anderson v. Ceccardi* (1983), 6 Ohio St.3d 110. It is based upon a determination, as a matter of law, that a defendant owes no duty to the plaintiff because certain risks are so inherent in some activities that they cannot be eliminated. *Cremeans v. Willmar Henderson Mfg. Co.* (Aug. 22, 1989), Union App. No. 14-88-5, unreported, 1989 WL 98426, affirmed and remanded (1991), 57 Ohio St.3d 145 and *Collier v. Northland Swim Club* (1987), 35 Ohio App.3d 35.

On the other hand, implied assumption of the risk is defined as the plaintiff's consent or acquiescence in an appreciated, known or obvious risk to the plaintiff's safety. *Wever v. Hicks* (1967), 11 Ohio St.2d 230. Implied assumption of the risk recognizes the existence of a duty owed by the defendant to the plaintiff but holds that the plaintiff's acquiescence in or appreciation of a known risk may be invoked as a defense to the plaintiff's action. Unlike

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primary assumption of the risk, the pivotal question in implied assumption of risk is ordinarily one of fact, not one of law. *Id.* at 234.

In the case at hand, Defendants do not argue implied assumption of risk (comparative negligence) in their Motion for Summary Judgment. Instead, the Defendants argue that the defense of primary assumption of risk bars recovery for Plaintiff. As a procedural matter, Plaintiff asserts that the Defendants did not specifically plead primary assumption of risk as an affirmative defense, and thus, are precluded from asserting this defense at this stage of the proceeding. Defendants respond that they pled both comparative negligence and assumption of risk in their Answer. Upon review, the Court finds that by raising assumption of risk in their answer, Defendants have met their minimal Civ. R. 8(C) requirement to affirmatively set forth their defenses. *Hoover v. Sumlin* (1984), 12 Ohio St.3d 1, 3-4. Furthermore, as the Defendants have raised the issue of primary assumption of risk by way of Motion for Summary Judgment, they have sustained their notice requirement. *Gallagher v. Cleveland Browns* (1995), 74 Ohio St.3d 427, syllabus, and *Goldfuss*, 79 Ohio St. at 125.

In order to establish the defense of primary assumption of risk, a defendant must prove the following elements: (1) the plaintiff must have full knowledge of a condition; (2) such condition must be patently dangerous to him; and (3) he must voluntarily expose himself to the hazard created. *Briere v. Lathrop Co.* (1970), 22 Ohio St. 2d 166, 174-175, cited in *Siglow v. Smart* (1987), 43 Ohio App. 3d 55, 56.

Although primary assumption of risk is a defense of extraordinary strength, the trial court must proceed with caution when making a determination whether it should apply to bar a plaintiff's recovery. *Gallagher*, 74 Ohio St.3d at 431-432.

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In the case at hand, Giant Eagle asserts that due to the fact that Niskanen made the voluntary and conscious choice to steal the groceries and then attack both Maczko and Stress in the parking lot, that he assumed the inherent risk that Giant Eagle would not only attempt to stop him from stealing, but also to restrain him in any manner until the police arrived. In support thereof, Defendants assert that fighting is an inherently dangerous activity and that several Ohio courts have insinuated that an individual involved in the criminal activity of fighting places that person in a known risk injury or death. As such, Defendants assert that they have no duty to use a reasonable amount of force in subduing Niskanen.

The case at hand is not the typical scenario where primary assumption of risk would apply. "This type of assumption of the risk is typified by the baseball cases where a plaintiff is injured when a baseball is hit into the stands." *Anderson v. Ceccardi* (1983), 6 Ohio St.3d 110, 114, cited in *Crosby v. Lenart*, 1995 Ohio App. LEXIS 1644 (Ohio Ct. App. 1995). In the textbook example of primary assumption of risk such as when a patron attends a baseball game, the risks are completely self-evident.

Upon review, this Court cannot find any cases that extend the defense of primary assumption of risk to the situation herein. The Ohio Supreme Court in *Goldfuss* specifically rejected the notion that that public policy precludes recovery for injuries sustained in the commission of a felony:

> "The law should not encourage vigilantism. This court has recognized that an owner of property acting in good faith is justified in using as much force as is reasonably necessary to protect his or her property against one who is feloniously attempting to steal it. We have, however, further recognized the well-established rule that a plaintiff injured by the actions of private citizens may be entitled to recover even if that plaintiff was engaged in criminal activity at the time of his injury, if the force used exceeded that which was reasonable and necessary to repel and prevent the felony. *Allison v. Fiscus* (1951), 156 Ohio St. 120, 45 Ohio Op. 128, 100 N.E.2d 237, at paragraphs one, four and five of the syllabus."

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Goldfuss, supra at 123. As such, the doctrine of primary assumption of risk does not apply to the situation herein. The Defendants thus can only use as much force is reasonably necessary to protect themselves and their property. Whether the Defendants went beyond that amount of force is a question for the jury to decide.

PUNITIVE DAMAGES

R.C. 2315.21, in effect at the time of Niskanan's death, states in pertinent part:

> (B) [p]unitive or exemplary damages are not recoverable from a defendant in question in a tort action unless both of the following apply:
>
> (1) The actions or omissions of that defendant demonstrate malice or aggravated or egregious fraud, or that defendant as principal or master knowingly authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate.
>
> (2) The plaintiff in question has adduced proof of actual damages that resulted from actions or omissions as described in division (B)(1) of this section.
>
> (C)(1) In a tort action, the trier of fact shall determine the liability of any defendant for punitive or exemplary damages and the amount of those damages.
>
> (2) In a tort action, the burden of proof shall be upon a plaintiff by clear and convincing evidence, to establish that the plaintiff is entitled to recover punitive or exemplary damages.

In the seminal case of *Preston v. Murty* (1987), 32 Ohio St.3d 334, the Ohio Supreme Court set the standard for when punitive damages are available by requiring a finding of actual malice. "Actual malice" for these purposes is "(1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." *Preston*, 32 Ohio St.3d, syllabus.

The Court in *Preston* replaced language from earlier cases such as "outrageous," "flagrant," and "criminal" with the language of "great probability of causing substantial harm."

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Preston, at 335-336, cited in *Calmes v. Goodyear Tire & Rubber Co.* (1991), 61 Ohio St.3d 470, 473. Great probability of substantial harm requires more than "mere foreseeability" - "[i]n the law of negligence, foreseeability is the threshold level of probability at which conduct becomes negligent." *Calmes*, at 474. "Great probability, then, can be likened to high foreseeability." *Id.*

Furthermore, in addition to defining the above requisite mental state, the Ohio Supreme Court in *Preston* also held that misconduct greater than mere negligence is required. *Calmes*, 61 Ohio St. 3d at 473.

Punitive Damages as to Giant Eagle

Giant Eagle asserts that Plaintiff cannot prove by clear and convincing evidence that it possessed subjective knowledge that its employees' conduct in the parking lot would have a great probability of causing substantial harm. Giant Eagle states that the uncontroverted evidence reveals that Niskanen voluntarily engaged in the criminal activity and that the Defendants were acting in self-defense and defense of others. Thus, Giant Eagle opines that it was highly unforeseeable that Niskanen would die from his own behavior of stealing the cart of groceries and assaulting two Giant Eagle employees.

Plaintiff responds that Giant Eagle's failure to properly train its managers and employees regarding loss prevention and theft made the likelihood of substantial harm occurring on January 21, 2004 not only likely, but greatly probable.

Upon review, the Court finds that Giant Eagle was concerned with theft nationally, regionally and at the Rootstown store. This concern was spelled out in its Employment Handbook. Not only was Giant Eagle concerned that shoplifting was an existing problem, it also had knowledge that the apprehension of shoplifters posed a significant risk of death- e.g.,

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the newspaper article. Based upon its concern and knowledge, Giant Eagle printed policy and procedures for the apprehension and detention of suspected shoplifters and issued the one page handout titled "Blazosky's Rules" to management at a training session in Pennsylvania in 2001 or 2002. Giant Eagle also hired private security companies and trained them as to Giant Eagle's procedures for handling shoplifting. However, the record clearly reflects that Giant Eagle did not train its management and employees on how to handle this shoplifting problem. Furthermore, Giant Eagle did not use the Rootstown private security more than eight hours per week.

Giant Eagle asserts that R.C. 2935.041(A) give it the authority to detain Mr. Niskanen "a reasonable length of time." Although this assertion might be true, the detention does not abrogate its responsibility not to do so in an "unreasonable manner." R.C. 2935.041(A). Even though Giant Eagle had a policy and procedure in place for the detention and apprehension of shoplifters, it cannot skirt its responsibilities under the shield of said statute.

An employer is not liable for punitive damages unless the employer authorized, participated, or ratified the actions of the employee. R.C. 2315.21(B)(1). In general, the acts of an employee acting within the scope of his employment will be authorized either expressly or impliedly by the employer. *Fulwiler v. Schneider* (1995), 104 Ohio App.3d 398, 406, cited in *Davis v. The May Department Stores Co.* (2001), 9th Dist. CA No. 20396, 2001 Ohio App. Lexis 4321, *18. For this doctrine of respondeat superior, scope of employment means that the employee acted in a manner "calculated to facilitate or promote the business for which the servant was employed." *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 58, cited in *Davis*, supra at *18. Furthermore, even when an employee diverts from his sanctioned tasks, "the diversion is not an abandonment of his responsibility and service to his employer unless his act is so

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divergent that its very character severs the relationship of employer and employee." *Stranahan Bros. Catering Co. v. Coit* (1896), 55 Ohio St. 398, 410; *Davis*, at *19. Generally, the determination whether an employee's actions are within the scope of employment is a question of fact for the jury. *Osborne v. Lyles* (1992), 63 Ohio St.3d 326, 330, cited in *Davis*, at *19.

In the case at hand, the record reflects that Mr. Maszko, Mr. Stress, and Mr. Taylor restrained Niskanen because he was stealing. The Defendants were never trained in the skills for the apprehension and detention of a shoplifter. As such, Giant Eagle arguably condoned their activity. See e.g., *Davis* holding (viewing the facts in the light most favorable to the patron, a reasonable jury could conclude that Kauffmans was liable for the actions of its in-house security officers in detaining and strip searching a suspected shoplifter).

Punitive Damages as to Mackzo, Stress, and Taylor

As it relates to the above Defendants, Plaintiff asserts that the collective use of force and restraint on Mr. Niskanen was both excessive and undue, thus necessitating submission on the issue of punitive damages to the jury. Specifically, Plaintiff makes the same arguments that were made regarding the intentional tort/self defense issue above.

Upon review, this Court cannot find the individual Defendant's collective activity showed actual malice due to a conscious disregard for the rights and safety that has a great probability of causing substantial harm to Mr. Niskanen. As opposed to the defendants in *Davis* above, the Defendants herein were not trained in the correct procedure to apprehend and detain a shoplifter. Had the Defendants herein been trained according to Giant Eagle's policies and procedures, the Court would find otherwise.

Although the Defendants' use of force was at a minimum negligent, this Court cannot find that the amount of force rises to the heightened level of either actual malice or behavior

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such that their restraint of Mr. Niskanen in the parking lot was a conscious disregard for his rights and safety that had a great probability of causing him substantial harm. Neither this Court nor a jury could find that the Defendants' combined act in restraining Niskanen contained a positive element of conscious wrongdoing or a great probability/high foreseeability that their restraint would cause Mr. Niskanen's death.

SPOILATION OF EVIDENCE

The Ohio Supreme Court in *Smith v. Howard Johnson Co., Inc.* (1993), 67 Ohio St.3d 28 established the essential elements of a claim for "interference with or destruction of evidence". To establish a claim for spoliation of evidence, a plaintiff is required to prove the following:

(1) pending or probable litigation involving the plaintiff;

(2) knowledge on the part of the defendant that litigation exists or is probable;

(3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case;

(4) disruption of the plaintiff's case; and

(5) damages proximately caused by the defendant's acts.

Smith, 67 Ohio St.3d, at 29. However, an award for spoliation of evidence requires a showing of actual malice – an intentional alteration, falsification or destruction of records. *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 653, citing *Preston*, supra at syllabus.

Giant Eagle concedes that the first and second elements for proving the spoilation claim are evident herein. As to the third element, Defendants assert that there was no willful destruction of evidence due to the fact that its employees took affirmative steps to preserve any and all relevant portions of the digital surveillance system regarding the night in question. Specifically, Giant Eagle employees edited onto videotape all instances in which Mr. Niskanen

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appeared inside the store; in which Mr. Niskanen appeared with two women in the store; and the store employees Maczko, Stress, and Taylor entering and leaving the store. Thus, Giant Eagle asserts that the above actions were not willful destruction of evidence and references several cases in support thereof.

Upon review, this Court does not find Giant Eagle's cited cases on point. In *Woodell v. Ormet Primary Aluminum Corp.*, 2005 Ohio 4372, 2005 Ohio App. Lexis 3971, no portions of the "strike log" were discarded or destroyed; and no videotape images were discarded or taped over on the days in question. *Woodell*, at P59 and P61. In *Boggs v. The Scotts Company*, 2005 Ohio 1264, 2005 Ohio App. Lexis 1238, the case hinged in part on the fact that the employee in question at Scotts did not know of any pending or probable litigation. *Boggs*, at P33.

Giant Eagle readily admits that they did not reduce to videotape all transactions within the store from the moment Niskanen entered the store until the police came because they did not deem them relevant. Had Giant Eagle taped all the activities during the time frame in question, the footage may have provided:

(1.) a more accurate account of the timing sequence between when Niskanen exited the store with the groceries and when the police arrived, including witnesses corroboration of the ensuing altercation in the parking lot;

(2.) a more accurate account of Giant Eagle's investigation post death, including whether Rootstown store manager Dale Barnhart interviewed Maczko, Stress and White, as well as other employee/customers prior to the police interviews on January 21, 2004; and

(3.) an indication of the physical condition of Maczko, Stress, Taylor after the altercation.

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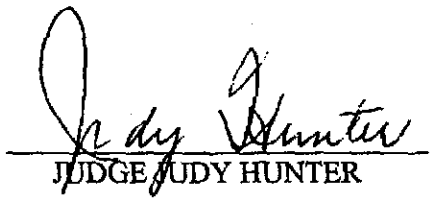
Furthermore, Giant Eagle typically does not get involved in its own independent investigation once the police are involved (Dobich, Trans. P. 108). Although Giant Eagle denies conducting any investigation herein, its subjective dubbing of portions of the digital surveillance system indicates otherwise.

Finally, Giant Eagle asserts that the fourth and fifth elements for spoliation, disruption of plaintiff's case and damages proximately caused by defendant's acts, are missing herein. However, upon review, it is apparent that, due to the fact that Giant Eagle selectively edited the hard drive images, Plaintiff was placed in the position of using other discovery means to prove his claims and respond to the affirmative defenses. This extra discovery has a cost, both financially and in additional time and manpower. As such, it appears that Plaintiff has met his burden to bring a claim for spoliation of evidence.

Based upon the above analysis, the Court finds that Defendants' Motion is denied in part and granted in part. The Court denies Defendants' Motion for Summary Judgment on Plaintiff's claims for intentional tort and wrongful death against all Defendants (except Alexoff), the related punitive damages against Giant Eagle, and spoilation of evidence claim against Giant Eagle. However, the Court grants Defendants' Motion for Summary Judgment on Plaintiff's intentional tort and wrongful death claim for punitive damages against the Defendants Maczko, Stress, and Taylor.

So Ordered.



JUDGE JUDY HUNTER

COPY

cc: Attorney Steven Goldfarb
Attorney Robert Mcclelland
Attorney Stephen Zubrow
Attorney Dennis Pilawa

R.C. § 2307.011

Baldwin's Ohio Revised Code Annotated Currentness
Title XXIII. Courts--Common Pleas
Chapter 2307. Civil Actions (Refs & Annos)
General Provisions
2307.011 Definitions

As used in Chapters 2307. and 2315. of the Revised Code:

(A) "Conduct" means actions or omissions.

(B) "Contributory fault" means contributory negligence, other contributory tortious conduct, or, except as provided with respect to product liability claims in section 2307.711 of the Revised Code, express or implied assumption of the risk.

(C) "Economic loss" means any of the following types of pecuniary harm:

(1) All wages, salaries, or other compensation lost as a result of an injury, death, or loss to person or property that is a subject of a tort action, including wages, salaries, or other compensation lost as of the date of a judgment and future expected lost earnings;

(2) All expenditures for medical care or treatment, rehabilitation services, or other care, treatment, services, products, or accommodations incurred as a result of an injury, death, or loss to person that is a subject of a tort action, including expenditures for those purposes that were incurred as of the date of a judgment and expenditures for those purposes that, in the determination of the trier of fact, will be incurred in the future because of the injury, whether paid by the injured person or by another person on behalf of the injured person;

(3) All expenditures of a person whose property was injured or destroyed or of another person on behalf of the person whose property was injured or destroyed in order to repair or replace the property;

(4) Any other expenditures incurred as a result of an injury, death, or loss to person or property that is a subject of a tort action, except expenditures of the injured person, the person whose property was injured or destroyed, or another person on behalf of the injured person or the person whose property was injured or destroyed in relation to the actual preparation or presentation of the claim involved.

(D) "Intentional tort claim" means a claim alleging that a tortfeasor intentionally caused or intentionally contributed to the injury or loss to person or property or the wrongful death or that a tortfeasor knew or believed that the injury or loss to person or property or the wrongful death was substantially certain to result from the tortfeasor's conduct. As used in sections 2307.22, 2307.711, and 2315.32 of the Revised Code, "intentional tort claim" does not include an intentional tort claim alleged by an employee or the employee's legal representative against the employee's employer and that arises from the tortfeasor's conduct that occurs on premises owned, leased, or supervised by the employer.

(E) "Noneconomic loss" means nonpecuniary harm that results from an injury, death, or loss to person that is a subject of a tort action, including, but not limited to, pain and suffering; loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education; mental anguish; and any other intangible loss.

(F) "Person" has the same meaning as in division (C) of section 1.59 of the Revised Code and additionally includes a political subdivision and the state.

(G) "Persons from whom the plaintiff does not seek recovery in this action" includes, but is not limited to, the following:

(1) Persons who have entered into a settlement agreement with the plaintiff;

(2) Persons whom the plaintiff has dismissed from the tort action without prejudice;

(3) Persons whom the plaintiff has dismissed from the tort action with prejudice;

(4) Persons who are not a party to the tort action whether or not that person was or could have been a party to the

tort action if the name of the person has been disclosed prior to trial.

(H) "Plaintiff" includes the person for whom the plaintiff is legal representative.

(I) "Political subdivision" and " state" have the same meanings as in section 2744.01 of the Revised Code.

(J) "Tort action" means a civil action for damages for injury, death, or loss to person or property. "Tort action" includes a product liability claim, as defined in section 2307.71 of the Revised Code, and an asbestos claim, as defined in section 2307.91 of the Revised Code, but does not include a civil action for damages for a breach of contract or another agreement between persons.

(K) "Trier of fact" means the jury or, in a nonjury action, the court.

CREDIT(S)

(2004 S 80, eff. 4-7-05; 2002 S 120, eff. 4-9-03)

UNCODIFIED LAW

2002 S 120, § 3, eff. 4-9-03, reads:

Sections 1775.14, 2307.011, 2307.22, 2307.23, 2307.24, 2307.25, 2307.26, 2307.27, 2307.28, 2307.29, 2315.32, 2315.33, 2315.34, 2315.35, 2315.36, 2315.41, 2315.42, 2315.43, 2315.44, 2315.45, 2315.46, 4171.10, 4507.07, and 5703.54 of the Revised Code, as amended or enacted, by this act, apply only to causes of action that accrue on or after the effective date of this act. Any cause of action that accrues prior to the effective date of this act is governed by the law in effect when the cause of action accrued.

HISTORICAL AND STATUTORY NOTES

Amendment Note: 2004 S 80 rewrote this section, which prior thereto read:

"As used in Chapters 2307. and 2315. of the Revised Code:

"(A) 'Conduct' means actions or omissions.

"(B) 'Contributory fault' means contributory negligence, other contributory tortious conduct, comparative negligence, or express or implied assumption of the risk.

"(C) 'Economic loss' means any of the following types of pecuniary harm:

"(1) All wages, salaries, or other compensation lost as a result of an injury, death, or loss to person or property that is a subject of a tort action, including wages, salaries, or other compensation lost as of the date of a judgment and future expected lost earnings;

"(2) All expenditures for medical care or treatment, rehabilitation services, or other care, treatment, services, products, or accommodations incurred as a result of an injury, death, or loss to person that is a subject of a tort action, including expenditures for those purposes that were incurred as of the date of a judgment and expenditures for those purposes that, in the determination of the trier of fact, will be incurred in the future because of the injury, whether paid by the injured person or by another person on behalf of the injured person;

"(3) All expenditures of a person whose property was injured or destroyed or of another person on behalf of the person whose property was injured or destroyed in order to repair or replace the property;

"(4) Any other expenditures incurred as a result of an injury, death, or loss to person or property that is a subject of a tort action, except expenditures of the injured person, the person whose property was injured or destroyed, or another person on behalf of the injured person or the person whose property was injured or destroyed in relation to

the actual preparation or presentation of the claim involved.

"(D) 'Intentional tort claim' means a claim alleging that a tortfeasor intentionally caused or intentionally contributed to the injury or loss to person or property or the wrongful death or that a tortfeasor knew or believed that the injury or loss to person or property or the wrongful death was substantially certain to result from the tortfeasor's conduct. As used in sections 2307.22, 2315.32, and 2315. 42 of the Revised Code, 'intentional tort claim' does not include an intentional tort claim alleged by an employee or the employee's legal representative against the employee's employer and that arises from the tortfeasor's conduct that occurs on premises owned, leased, or supervised by the employer.

"(E) 'Negligence claim' means a civil action for damages for injury, death, or loss to person or property to the extent that the damages are sought or recovered based on allegation or proof of negligence.

"(F) 'Noneconomic loss' means nonpecuniary harm that results from an injury, death, or loss to person that is a subject of a tort action, including, but not limited to, pain and suffering; loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education; mental anguish; and any other intangible loss.

"(G) 'Person' has the same meaning as in division (C) of section 1.59 of the Revised Code and additionally includes a political subdivision and the state.

"(H) 'Persons from whom the plaintiff does not seek recovery in this action' includes, but is not limited to, the following:

"(1) Persons who have entered into a settlement agreement with the plaintiff;

"(2) Persons whom the plaintiff has dismissed from the tort action without prejudice;

"(3) Persons whom the plaintiff has dismissed from the tort action with prejudice;

"(4) Persons who are not a party to the tort action whether or not that person was or could have been a party to the tort action if the name of the person has been disclosed prior to trial.

"(I) 'Plaintiff' includes the person for whom the plaintiff is legal representative.

"(J) 'Political subdivision' and 'state' have the same meanings as in section 2744.01 of the Revised Code.

"(K) 'Tort action' means a civil action for damages for injury, death, or loss to person or property. 'Tort action' includes a product liability claim but does not include a civil action for damages for a breach of contract or another agreement between persons.

"(L) 'Trier of fact' means the jury or, in a nonjury action, the court."

R.C. § 2315.21

Baldwin's Ohio Revised Code Annotated Currentness
Title XXIII. Courts--Common Pleas
Chapter 2315. Trial Procedure (Refs & Annos)
Determination of Amount of Recovery; Contributory Negligence and Assumption of Risk; Damages
➡2315.21 Recovery of compensatory, punitive, or exemplary damages in tort action; bifurcated trial; burden of proof

(A) As used in this section:

(1) "Tort action" means a civil action for damages for injury or loss to person or property. "Tort action" includes a product liability claim for damages for injury or loss to person or property that is subject to sections 2307.71 to 2307.80 of the Revised Code, but does not include a civil action for damages for a breach of contract or another agreement between persons.

(2) "Trier of fact" means the jury or, in a nonjury action, the court.

(3) "Home" has the same meaning as in section 3721.10 of the Revised Code.

(4) "Employer" includes, but is not limited to, a parent, subsidiary, affiliate, division, or department of the employer. If the employer is an individual, the individual shall be considered an employer under this section only if the subject of the tort action is related to the individual's capacity as an employer.

(5) "Small employer" means an employer who employs not more than one hundred persons on a full-time permanent basis, or, if the employer is classified as being in the manufacturing sector by the North American industrial classification system, "small employer" means an employer who employs not more than five hundred persons on a full-time permanent basis.

(B)(1) In a tort action that is tried to a jury and in which a plaintiff makes a claim for compensatory damages and a claim for punitive or exemplary damages, upon the motion of any party, the trial of the tort action shall be bifurcated as follows:

(a) The initial stage of the trial shall relate only to the presentation of evidence, and a determination by the jury, with respect to whether the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant. During this stage, no party to the tort action shall present, and the court shall not permit a party to present, evidence that relates solely to the issue of whether the plaintiff is entitled to recover punitive or exemplary damages for the injury or loss to person or property from the defendant.

(b) If the jury determines in the initial stage of the trial that the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant, evidence may be presented in the second stage of the trial, and a determination by that jury shall be made, with respect to whether the plaintiff additionally is entitled to recover punitive or exemplary damages for the injury or loss to person or property from the defendant.

(2) In a tort action that is tried to a jury and in which a plaintiff makes a claim for both compensatory damages and punitive or exemplary damages, the court shall instruct the jury to return, and the jury shall return, a general verdict and, if that verdict is in favor of the plaintiff, answers to an interrogatory that specifies the total compensatory damages recoverable by the plaintiff from each defendant.

(3) In a tort action that is tried to a court and in which a plaintiff makes a claim for both compensatory damages and punitive or exemplary damages, the court shall make its determination with respect to whether the plaintiff is entitled to recover compensatory damages for the injury or loss to person or property from the defendant and, if that determination is in favor of the plaintiff, shall make findings of fact that specify the total compensatory damages recoverable by the plaintiff from the defendant.

(C) Subject to division (E) of this section, punitive or exemplary damages are not recoverable from a defendant in question in a tort action unless both of the following apply:

(1) The actions or omissions of that defendant demonstrate malice or aggravated or egregious fraud, or that defendant as principal or master knowingly authorized, participated in, or ratified actions or omissions of an agent or

servant that so demonstrate.

(2) The trier of fact has returned a verdict or has made a determination pursuant to division (B)(2) or (3) of this section of the total compensatory damages recoverable by the plaintiff from that defendant.

(D)(1) In a tort action, the trier of fact shall determine the liability of any defendant for punitive or exemplary damages and the amount of those damages.

(2) Except as provided in division (D)(6) of this section, all of the following apply regarding any award of punitive or exemplary damages in a tort action:

(a) The court shall not enter judgment for punitive or exemplary damages in excess of two times the amount of the compensatory damages awarded to the plaintiff from that defendant, as determined pursuant to division (B)(2) or (3) of this section.

(b) If the defendant is a small employer or individual, the court shall not enter judgment for punitive or exemplary damages in excess of the lesser of two times the amount of the compensatory damages awarded to the plaintiff from the defendant or ten percent of the employer's or individual's net worth when the tort was committed up to a maximum of three hundred fifty thousand dollars, as determined pursuant to division (B)(2) or (3) of this section.

(c) Any attorneys fees awarded as a result of a claim for punitive or exemplary damages shall not be considered for purposes of determining the cap on punitive damages.

(3) No award of prejudgment interest under division (C)(1) of section 1343.03 of the Revised Code shall include any prejudgment interest on punitive or exemplary damages found by the trier of fact.

(4) In a tort action, the burden of proof shall be upon a plaintiff in question, by clear and convincing evidence, to establish that the plaintiff is entitled to recover punitive or exemplary damages.

(5)(a) In any tort action, except as provided in division (D)(5)(b) or (6) of this section, punitive or exemplary damages shall not be awarded against a defendant if that defendant files with the court a certified judgment, judgment entries, or other evidence showing that punitive or exemplary damages have already been awarded and have been collected, in any state or federal court, against that defendant based on the same act or course of conduct that is alleged to have caused the injury or loss to person or property for which the plaintiff seeks compensatory damages and that the aggregate of those previous punitive or exemplary damage awards exceeds the maximum amount of punitive or exemplary damages that may be awarded under division (D)(2) of this section against that defendant in the tort action.

(b) Notwithstanding division (D)(5)(a) of this section and except as provided in division (D)(6) of this section, punitive or exemplary damages may be awarded against a defendant in either of the following types of tort actions:

(i) In subsequent tort actions involving the same act or course of conduct for which punitive or exemplary damages have already been awarded, if the court determines by clear and convincing evidence that the plaintiff will offer new and substantial evidence of previously undiscovered, additional behavior of a type described in division (C) of this section on the part of that defendant, other than the injury or loss for which the plaintiff seeks compensatory damages. In that case, the court shall make specific findings of fact in the record to support its conclusion. The court shall reduce the amount of any punitive or exemplary damages otherwise awardable pursuant to this section by the sum of the punitive or exemplary damages awards previously rendered against that defendant in any state or federal court. The court shall not inform the jury about the court's determination and action under division (D)(5)(b)(i) of this section.

(ii) In subsequent tort actions involving the same act or course of conduct for which punitive or exemplary damages have already been awarded, if the court determines by clear and convincing evidence that the total amount of prior punitive or exemplary damages awards was totally insufficient to punish that defendant's behavior of a type described in division (C) of this section and to deter that defendant and others from similar behavior in the future. In that case, the court shall make specific findings of fact in the record to support its conclusion. The court shall reduce the amount of any punitive or exemplary damages otherwise awardable pursuant to this section by the sum of the punitive or exemplary damages awards previously rendered against that defendant in any state or federal court. The court shall not inform the jury about the court's determination and action under division (D)(5)(b)(ii) of this section.

(6) Division (D)(2) of this section does not apply to a tort action where the alleged injury, death, or loss to person or property resulted from the defendant acting with one or more of the culpable mental states of purposely and knowingly as described in section 2901.22 of the Revised Code and when the defendant has been convicted of or pleaded guilty to a criminal offense that is a felony, that had as an element of the offense one or more of the

culpable mental states of purposely and knowingly as described in that section, and that is the basis of the tort action.

(E) This section does not apply to tort actions against the state in the court of claims, including, but not limited to, tort actions against a state university or college that are subject to division (B)(1) of section 3345.40 of the Revised Code, to tort actions against political subdivisions of this state that are commenced under or are subject to Chapter 2744. of the Revised Code, or to the extent that another section of the Revised Code expressly provides any of the following:

(1) Punitive or exemplary damages are recoverable from a defendant in question in a tort action on a basis other than that the actions or omissions of that defendant demonstrate malice or aggravated or egregious fraud or on a basis other than that the defendant in question as principal or master knowingly authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate.

(2) Punitive or exemplary damages are recoverable from a defendant in question in a tort action irrespective of whether the plaintiff in question has adduced proof of actual damages.

(3) The burden of proof upon a plaintiff in question to recover punitive or exemplary damages from a defendant in question in a tort action is one other than clear and convincing evidence.

(4) Punitive or exemplary damages are not recoverable from a defendant in question in a tort action.

(F) If the trier of fact is a jury, the court shall not instruct the jury with respect to the limits on punitive or exemplary damages pursuant to division (D) of this section, and neither counsel for any party or a witness shall inform the jury or potential jurors of those limits.

(G) When determining the amount of an award of punitive or exemplary damages against either a home or a residential facility licensed under section 5123.19 of the Revised Code, the trier of fact shall consider all of the following:

(1) The ability of the home or residential facility to pay the award of punitive or exemplary damages based on the home's or residential facility's assets, income, and net worth;

(2) Whether the amount of punitive or exemplary damages is sufficient to deter future tortious conduct;

(3) The financial ability of the home or residential facility, both currently and in the future, to provide accommodations, personal care services, and skilled nursing care.

CREDIT(S)

(2004 S 80, eff. 4-7-05; 2002 H 412, eff. 11-7-02; 2001 S 108, § 2.01, eff. 7-6-01; 2001 S 108, § 2.02, eff. 7-6-01; 1996 H 350, eff. 1-27-97 (See Historical and Statutory Notes); 1987 H 1, eff. 1-5-88)

UNCODIFIED LAW

2002 H 412, § 3, eff. 11-7-02, reads:

Nothing in this act applies to proceedings or appeals involving workers' compensation claims under Chapter 4121. or 4123. of the Revised Code.

2002 H 412, § 4, eff. 11-7-02, reads:

If any provision of section 2305.11, 2315.21, 3721.02, or 3721.17 of the Revised Code, as amended by this act, any provision of section 5111.411 of the Revised Code, as enacted by this act, or the application of any provision of those sections to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the particular section or related sections that can be given effect without the invalid provision or application, and to this end the provisions of the particular section are severable.

2001 S 108, § 1: See Uncodified Law under 2315.01.

2001 S 108, § 3, eff. 7-6-01, reads, in part:

(A) *In Section 2.01 of this act:*

(8) Section 2315.21 of the Revised Code is revived, supersedes the version of the same section that is repealed by Section 2.02 of this act, and includes amendments to respond to division (C)(2) of section 2315.21 of the Revised Code having been held unconstitutional by the Supreme Court of Ohio in *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552.

1987 H 1, § 3, eff. 1-5-88, provides, in part, that the provisions of 2315.21 enacted by 1987 H 1, § 1, "shall apply only to tort or other civil actions that are commenced on and after the effective date of this act and that are based upon claims for relief that arise on or after that date, and only to tortious conduct that occurs on or after that date."

1987 H 1, § 3, eff. 1-5-88, reads, in part: (D) It is the intent of the General Assembly in enacting section 2315.21 of the Revised Code in this act to recognize that punitive or exemplary damages are not recoverable in wrongful death actions under Chapter 2125. of the Revised Code, as found by the Supreme Court in *Rubeck v. Huffman*, 54 Ohio St. 2d 20 (1978).

HISTORICAL AND STATUTORY NOTES

Ed. Note: Former 2315.21 repealed by 1970 H 1201, eff. 7-1-71; 1953 H 1; GC 11421-1a.

Ed. Note: Former 2315.21 was in conflict with Civil Rule 39; see Civil Rule 39 for annotations construing this former section.

Ed. Note: 1996 H 350, eff. 1-27-97. See Notes of Decisions, *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (Ohio 1999), 86 Ohio St.3d 451, 715 N.E.2d 1062.

Ed. Note: The amendment of this section by 1996 H 350, eff. 1-27-97, was repealed by 2001 S 108, § 2.02, eff. 7-6-01. See *Baldwin's Ohio Legislative Service Annotated*, 1996, page 10/L-3427, and 2001, page 6/L-1441, or the OH-LEGIS or OH-LEGIS-OLD database on Westlaw, for original versions of these Acts.

Pre-1953 H 1 Amendments: 120 v 707

Amendment Note: 2004 S 80 rewrote this section, which prior thereto read:

"(A) As used in this section:

"(1) 'Tort action' means a civil action for damages for injury or loss to person or property. 'Tort action' includes a product liability claim for damages for injury or loss to person or property that is subject to sections 2307.71 to 2307.80 of the Revised Code, but does not include a civil action for damages for a breach of contract or another agreement between persons.

"(2) 'Trier of fact' means the jury or, in a nonjury action, the court.

"(3) 'Home' has the same meaning as in section 3721.10 of the Revised Code.

"Subject to division (D) of this section, punitive or exemplary damages are not recoverable from a defendant in question in a tort action unless both of the following apply:

"(1) The actions or omissions of that defendant demonstrate malice, aggravated or egregious fraud, oppression, or insult, or that defendant as principal or master authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate.

"(2) The plaintiff in question has adduced proof of actual damages that resulted from actions or omissions as described in division (B)(1) of this section.

"(C)(1) In a tort action, the trier of fact shall determine the liability of any defendant for punitive or exemplary damages and the amount of those damages.

"(2) In a tort action, the burden of proof shall be upon a plaintiff in question, by clear and convincing evidence, to establish that the plaintiff is entitled to recover punitive or exemplary damages.

"(D) This section does not apply to tort actions against the state in the court of claims or to the extent that another section of the Revised Code expressly provides any of the following:

"(1) Punitive or exemplary damages are recoverable from a defendant in question in a tort action on a basis other than that the actions or omissions of that defendant demonstrate malice, aggravated or egregious fraud, oppression, or insult, or on a basis other than that the defendant in question as principal or master authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate.

"(2) Punitive or exemplary damages are recoverable from a defendant in question in a tort action irrespective of whether the plaintiff in question has adduced proof of actual damages.

"(3) The burden of proof upon a plaintiff in question to recover punitive or exemplary damages from a defendant in question in a tort action is one other than clear and convincing evidence.

"(4) Punitive or exemplary damages are not recoverable from a defendant in question in a tort action.

"(E) When determining the amount of an award of punitive or exemplary damages against either a home or a residential facility licensed under section 5123.19 of the Revised Code, the trier of fact shall consider all of the following:

"(1) The ability of the home or residential facility to pay the award of punitive or exemplary damages based on the home's or residential facility's assets, income, and net worth;

"(2) Whether the amount of punitive or exemplary damages is sufficient to deter future tortious conduct;

"(3) The financial ability of the home or residential facility, both currently and in the future, to provide accommodations, personal care services, and skilled nursing care."

Amendment Note: 2002 H 412 added new divisions (A)(3) and (E).

Amendment Note: 1996 H 350 rewrote this section, which prior thereto read:

"(A) As used in this section:

"(1) "Tort action" means a civil action for damages for injury or loss to person or property. "Tort action" includes a product liability claim for damages for injury or loss to person or property that is subject to sections 2307.71 to 2307.80 of the Revised Code, but does not include a civil action for damages for a breach of contract or another agreement between persons.

"(2) "Trier of fact" means the jury or, in a nonjury action, the court.

"(B) Subject to division (D) of this section, punitive or exemplary damages are not recoverable from a defendant in question in a tort action unless both of the following apply:

"(1) The actions or omissions of that defendant demonstrate malice, aggravated or egregious fraud, oppression, or insult, or that defendant as principal or master authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate;

"(2) The plaintiff in question has adduced proof of actual damages that resulted from actions or omissions as described in division (B)(1) of this section.

"(C)(1) In a tort action, the trier of fact shall determine the liability of any defendant for punitive or exemplary damages.

"(2) In a tort action, whether the trier of fact is a jury or the court, if the trier of fact determines that any defendant is liable for punitive or exemplary damages, the amount of those damages shall be determined by the court.

"(3) In a tort action, the burden of proof shall be upon a plaintiff in question, by clear and convincing evidence, to establish that he is entitled to recover punitive or exemplary damages.

"(D) This section does not apply to tort actions against the state in the court of claims or to the extent that another section of the Revised Code expressly provides any of the following:

"(1) Punitive or exemplary damages are recoverable from a defendant in question in a tort action on a basis other than that the actions or omissions of that defendant demonstrate malice, aggravated or egregious fraud, oppression, or insult, or on a basis other than that the defendant in question as principal or master authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate;

"(2) Punitive or exemplary damages are recoverable from a defendant in question in a tort action irrespective of whether the plaintiff in question has adduced proof of actual damages;

"(3) The burden of proof upon a plaintiff in question to recover punitive or exemplary damages from a defendant in question in a tort action is one other than clear and convincing evidence;

"(4) Punitive or exemplary damages are not recoverable from a defendant in question in a tort action;

"(5) The amount of punitive or exemplary damages awarded against a defendant in question in a tort action may be determined by a jury as the trier of fact."

Sec. 2315.21. (A) As used in this section:
(1) "Tort action" means a civil action for damages for injury **or loss to** person or property. "Tort action" includes a product liability claim for damages for injury or loss to person or property that is subject to sections 2307.71 to 2307.80 of the Revised Code, but does not include a civil action for damages for a breach of contract or another agreement between persons.
(2) "Trier of fact" means the jury or, in a nonjury action, the court.
(3) "Home" has the same meaning as in section 3721.10 of the Revised Code.
(B) Subject to division (D) of this section, punitive or exemplary damages are not recoverable from a defendant in question in a tort action unless both of the following apply:
(1) The actions or omissions of that defendant demonstrate malice, aggravated or egregious fraud, oppression, or insult, or that defendant as principal or master authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate~~;~~**.**
(2) The plaintiff in question has adduced proof of actual damages that resulted from actions or omissions as described in division (B)(1) of this section.
(C)(1) In a tort action, the trier of fact shall determine the liability of any defendant for punitive or exemplary damages and the amount of those damages.
(2) In a tort action, the burden of proof shall be upon a plaintiff in question, by clear and convincing evidence, to establish that the plaintiff is entitled to recover punitive or exemplary damages.
(D) This section does not apply to tort actions against the state in the court of claims or to the extent that another section of the Revised Code expressly provides any of the following:
(1) Punitive or exemplary damages are recoverable from a defendant in question in a tort action on a basis other than that the actions or omissions of that defendant demonstrate malice, aggravated or egregious fraud, oppression, or insult, or on a basis other than that the defendant in question as principal or master authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate~~;~~**.**
(2) Punitive or exemplary damages are recoverable from a defendant in question in a tort action irrespective of whether the plaintiff in question has adduced proof of actual damages~~;~~**.**
(3) The burden of proof upon a plaintiff in question to recover punitive or exemplary damages from a defendant in question in a tort action is one other than clear and convincing evidence~~;~~**.**
(4) Punitive or exemplary damages are not recoverable from a defendant in question in a tort action.
(E) When determining the amount of an award of punitive or exemplary damages against either a home or a residential facility licensed under section 5123.19 of the Revised Code, the trier of fact shall consider all of the following:
(1) The ability of the home or residential facility to pay the award of punitive or exemplary damages based on the home's or residential facility's assets, income, and net worth;
(2) Whether the amount of punitive or exemplary damages is sufficient to deter future tortious conduct;
(3) The financial ability of the home or residential facility, both currently and in the future, to provide accommodations, personal care services, and skilled nursing care.

Sec. 2315.32. (A) Sections 2315.32 to 2315.36 of the Revised Code do not apply to tort actions based on a product liability claim.
(B) The contributory fault of the plaintiff may be asserted as an affirmative defense to a negligence claim or to a tort claim other than a negligence claim, except that the contributory fault of the plaintiff may not be asserted as an affirmative defense to an intentional tort claim.

R.C. § 2315.32

Baldwin's Ohio Revised Code Annotated Currentness
Title XXIII. Courts--Common Pleas
Chapter 2315. Trial Procedure (Refs & Annos)
Referees
2315.32 Limitations on R.C. sections 2315.32 to 2315.36; affirmative defenses

(A) Sections 2315.32 to 2315.36 of the Revised Code do not apply to actions described in section 4113.03 of the Revised Code.

(B) The contributory fault of the plaintiff may be asserted as an affirmative defense to a tort claim, except that the contributory fault of the plaintiff may not be asserted as an affirmative defense to an intentional tort claim.

CREDIT(S)

(2004 S 80, eff. 4-7-05; 2002 S 120, eff. 4-9-03)

R.C. § 2905.03

Baldwin's Ohio Revised Code Annotated Currentness
Title XXIX. Crimes--Procedure (Refs & Annos)
Chapter 2905. Kidnapping and Extortion
Kidnapping and Related Offenses
2905.03 Unlawful restraint

(A) No person, without privilege to do so, shall knowingly restrain another of the other person's liberty.

(B) No person, without privilege to do so and with a sexual motivation, shall knowingly restrain another of the other person's liberty.

(C) Whoever violates this section is guilty of unlawful restraint, a misdemeanor of the third degree.

(D) As used in this section, "sexual motivation" has the same meaning as in section 2971.01 of the Revised Code.

CREDIT(S)

(2007 S 10, eff. 1-1-08; 1972 H 511, eff. 1-1-74)

HISTORICAL AND STATUTORY NOTES

Ed. Note: Former 2905.03 repealed by 1972 H 511, eff. 1-1-74; 1953 H 1; GC 12414; see now 2907.04 for provisions analogous to former 2905.03.

Pre-1953 H 1 Amendments: RS 6816, 6817

Amendment Note: 2007 S 10 rewrote this section, which prior thereto read:

"(A) No person, without privilege to do so, shall knowingly restrain another of his liberty.

"(B) Whoever violates this section is guilty of unlawful restraint, a misdemeanor of the third degree."

LEGISLATIVE SERVICE COMMISSION

1973:

This section defines the most minor offense in the trilogy of offenses beginning with kidnapping, and provides criminal sanctions against conduct which would ordinarily amount to grounds for a civil action for false arrest or imprisonment.

R.C. § 2935.041

Baldwin's Ohio Revised Code Annotated Currentness
Title XXIX. Crimes--Procedure (Refs & Annos)
Chapter 2935. Arrest, Citation, and Disposition Alternatives
Arrest

➡2935.041 Detention of shoplifters; rights of museums and libraries; rights of motion picture facility owner or lessee

(A) A merchant, or an employee or agent of a merchant, who has probable cause to believe that items offered for sale by a mercantile establishment have been unlawfully taken by a person, may, for the purposes set forth in division (C) of this section, detain the person in a reasonable manner for a reasonable length of time within the mercantile establishment or its immediate vicinity.

(B) Any officer, employee, or agent of a library, museum, or archival institution may, for the purposes set forth in division (C) of this section or for the purpose of conducting a reasonable investigation of a belief that the person has acted in a manner described in divisions (B)(1) and (2) of this section, detain a person in a reasonable manner for a reasonable length of time within, or in the immediate vicinity of, the library, museum, or archival institution, if the officer, employee, or agent has probable cause to believe that the person has either:

(1) Without privilege to do so, knowingly moved, defaced, damaged, destroyed, or otherwise improperly tempered with property owned by or in the custody of the library, museum, or archival institution; or

(2) With purpose to deprive the library, museum, or archival institution of property owned by it or in its custody, knowingly obtained or exerted control over the property without the consent of the owner or person authorized to give consent, beyond the scope of the express or implied consent of the owner or person authorized to give consent, by deception, or by threat.

(C) An officer, agent, or employee of a library, museum, or archival institution pursuant to division (B) of this section or a merchant or employee or agent of a merchant pursuant to division (A) of this section may detain another person for any of the following purposes:

(1) To recover the property that is the subject of the unlawful taking, criminal mischief, or theft;

(2) To cause an arrest to be made by a peace officer;

(3) To obtain a warrant of arrest.

(D) The owner or lessee of a facility in which a motion picture is being shown, or the owner's or lessee's employee or agent, who has probable cause to believe that a person is or has been operating an audiovisual recording function of a device in violation of section 2913.07 of the Revised Code may, for the purpose of causing an arrest to be made by a peace officer or of obtaining an arrest warrant, detain the person in a reasonable manner for a reasonable length of time within the facility or its immediate vicinity.

(E) The officer, agent, or employee of the library, museum, or archival institution, the merchant or employee or agent of a merchant, or the owner, lessee, employee, or agent of the facility acting under division (A), (B), or (D) of this section shall not search the person detained, search or seize any property belonging to the person detained without the person's consent, or use undue restraint upon the person detained.

(F) Any peace officer may arrest without a warrant any person that the officer has probable cause to believe has committed any act described in division (B)(1) or (2) of this section, that the officer has probable cause to believe has committed an unlawful taking in a mercantile establishment, or that the officer has reasonable cause to believe has committed an act prohibited by section 2913.07 of the Revised Code. An arrest under this division shall be made within a reasonable time after the commission of the act or unlawful taking.

(G) As used in this section:

(1) "Archival institution" means any public or private building, structure, or shelter in which are stored historical documents, devices, records, manuscripts, or items of public interest, which historical materials are stored to preserve the materials or the information in the materials, to disseminate the information contained in the materials, or to make the materials available for public inspection or for inspection by certain persons who have a particular interest in, use for, or knowledge concerning the materials.

(2) "Museum" means any public or private nonprofit institution that is permanently organized for primarily educational or aesthetic purposes, owns or borrows objects or items of public interest, and cares for and exhibits to the public the objects or items.

(3) "Audiovisual recording function" and "facility" have the same meaning as in section 2913.07 of the Revised Code.

CREDIT(S)

(2003 H 179, eff. 3-9-04; 1978 H 403, eff. 7-4-78; 1969 H 49; 131 v H 395; 127 v 765)

HISTORICAL AND STATUTORY NOTES

Amendment Note: 2003 H 179 added "of a merchant" to division (A) and (C); added new division (D); redesignated former divisions (D) through (F) as new divisions (E) through (G); added division (G)(3); made other nonsubstantive changes; and rewrote former division (D) and (E), which prior thereto read:

"(D) The officer, agent, or employee of the library, museum, or archival institution, or the merchant or his employee or agent acting under division (A) or (B) of this section shall not search the person, search or seize any property belonging to the person detained without the person's consent, or use undue restraint upon the person detained.

"(E) Any peace officer may arrest without a warrant any person that he has probable cause to believe has committed any act described in division (B)(1) or (2) of this section or that he has probable cause to believe has committed an unlawful taking in a mercantile establishment. An arrest under this division shall be made within a reasonable time after the commission of the act or unlawful taking."

CROSS REFERENCES

Freedom from unreasonable seizure; warrants, O Const Art I §14
Privilege, defined, 2901.01
Probable cause, 2933.22
Purposely, defined, 2901.22
Theft, 2913.02

OH Const. Art. I, § 4

Baldwin's Ohio Revised Code Annotated Currentness
Constitution of the State of Ohio (Refs & Annos)
Article I. Bill of Rights (Refs & Annos)
O Const I Sec. 4 Right to bear arms

The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power.

CREDIT(S)

(1851 constitutional convention, adopted eff. 9-1-1851)

UNCODIFIED LAW

2004 H 12, § 6 and 7, eff. 4-8-04, read:

Sec. 6. In amending sections 1547.69, 2911.21, 2921.13, 2923.12, 2923.121, 2923.123, 2923.13, 2923.16, 2953.32, and 4749.10 of the Revised Code and in enacting sections 109.69, 109.731, 311.41, 311.42, and 2923.124 to 2923.1213 of the Revised Code in this act, the General Assembly hereby declares its intent to recognize both of the following:

(A) The inalienable and fundamental right of an individual to defend the individual's person and the members of the individual's family;

(B) The fact that the right described in division (A) of this section predates the adoption of the United States Constitution, the adoption of the Ohio Constitution, and the enactment of all statutory laws by the General Assembly and may not be infringed by any enactment of the General Assembly.

Sec. 7. In enacting sections 109.69, 109.731, 311.41, 311.42, and 2923. 124 to 2923.1213 of the Revised Code in this act and in amending sections 1547.69, 2911.21, 2921.13, 2923.12, 2923.121, 2923.123, 2923.13, 2923.16, 2953.32, and 4749.10 of the Revised Code in this act relative to licenses to carry a concealed handgun, the General Assembly hereby declares that it is not its intent to declare or otherwise give the impression that, prior to the effective date of this act, an individual did not have an inalienable and fundamental right, or a right under the Ohio Constitution or the United States Constitution, to carry a concealed handgun or other firearm for the defense of the individual's person or a member of the individual's family while engaged in lawful activity. Further, the General Assembly declares that it is not its intent to invalidate any prior convictions for violating any section of the Revised Code or a municipal ordinance prior to the effective date of this act or to prevent the prosecution of any violation committed prior to the effective date of this act.

EDITOR'S COMMENT

1990:

This section is a streamlined version of its predecessor, § 20, Article VIII of the 1802 Ohio Constitution, and is substantively the same. The provision guaranteeing the right to bear arms is roughly analogous to the Second Amendment to the United States Constitution. The provisions limiting standing armies and subordinating the military to the civil power have no counterpart in the federal Constitution, but are based on the Declaration of Independence.

The right to bear arms under the Ohio Constitution is broader than the right under the federal Constitution. The Second Amendment to the US Constitution is designed only to preserve the integrity of the militias as instruments of state security, and thus grants a collective but not an individual right to bear arms. United States v Warin, 530 F(2d) 103 (6th Cir Ohio 1976), cert denied 426 US 948, 96 SCt 3168, 49 LEd(2d) 1185 (1976). The Ohio provision, on the other hand, confers both an individual and a collective right to bear arms, inasmuch as the right is not tied to preservation of the militia and, taken at face value, the phrase "for their defense and security" embraces personal defense and security as well as that of the state. The wording of the 1802 provision was quite clear on this point, and since the 1850-51 constitutional debates contain no indication of an intention to give a different thrust to the provision, it must be presumed that the sense of the original section was retained in the 1851 Constitution. It should be noted that the Second Amendment is a limitation only on the federal government, and does not bind the states. Presser v Illinois, 116 US 252, 6 SCt 580, 29 LEd(2d) 615 (1886).

The right to bear arms is not absolute under either the Ohio or federal Constitution, and reasonable controls on weapons are not an infringement of the right. Under § 4, Article I of the Ohio Constitution, the legislature may constitutionally ban the carrying of concealed weapons, or prohibit persons under disability, such as accused felons, from possessing firearms or dangerous ordnance. See, e.g., State v Nieto, 101 OS 409, 130 NE 663 (1920); State v Winkelman, 2 App(3d) 465, 2 OBR 561, 442 NE(2d) 811 (Clermont 1981). Also, it is constitutional to require registration of firearms or their owners. See, e.g., University Heights v O'Leary, 68 OS(2d) 130, 429 NE(2d) 148 (1981); East Cleveland v Scales, 10 App(3d) 25, 10 OBR 32, 460 NE(2d) 1126 (Cuyahoga 1983). Similarly, federal weapons regulations have been upheld under the Second Amendment to the US Constitution. See, e.g., United States v Warin, 530 F(2d) 103 (6th Cir Ohio 1976), cert denied 426 US 948, 96 SCt 3168, 49 LEd(2d) 1185 (1976). The principal Ohio weapons regulations are contained in RC Ch 2923, while the principal federal measures are in 26 USC 5801 et seq.

The other provisions in § 4, Article I, prohibiting standing armies in peacetime and subordinating the military to the civil power, are based on the eleventh and twelfth grievances against the Crown in the Declaration of Independence. The 1802 predecessor of this section was invoked to assert the superior power of the civil authority in State v Goff, Wright 78 (Ohio 1835), when a militia commander on muster day persisted in drilling his company to martial music so near the court as to disturb its deliberations, and was punished for contempt.

CROSS REFERENCES

Governor is commander in chief of militia, O Const Art III §10
Military affairs and Ohio militia, Ch 5911 to 5924
Right to keep and bear arms, US Const Am 2
Weapons control, 2923.11 to 2923.24