

IN THE SUPREME COURT OF OHIO

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

Case No. 08-0895

Appellee,

v.

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

GIANT EAGLE, INC.,

Appellant.

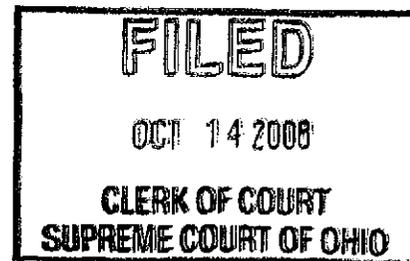
**AMICUS CURIAE BRIEF OF
THE OHIO CHAMBER OF COMMERCE
URGING REVERSAL ON BEHALF OF APPELLANT, GIANT EAGLE, INC.**

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INTRODUCTION

This case will undoubtedly—and negatively—affect the fairness of civil litigation and the overall business climate in Ohio if the decision of the Ninth District stands. This case arises out of the unfortunate death of Plaintiff's decedent, Paul J. Niskanen ("Niskanen"), outside the Giant Eagle grocery store in Rootstown, Ohio. However tragic his death, the undisputed facts, and those accepted by the jury as evidenced by its ultimate findings, established that Niskanen left the Giant Eagle store without paying for approximately \$300 worth of groceries and then initiated an unprovoked physical attack on two Giant Eagle employees who approached him outside the store as he was loading the stolen groceries into the trunk of his car, which he had parked in the fire lane. Eyewitnesses (who were also customers) who observed Niskanen pummeling the Giant Eagle store manager felt compelled to join the fray and assist in holding Niskanen while anxiously waiting for the police to arrive and take control of the volatile situation.

After hearing all of the evidence and theories presented by both sides, the jury found that Niskanen's negligence (60%) exceeded the negligence of Giant Eagle (40%). As a result of the comparative fault bar to the recovery of actual damages, the trial court instructed the jury not to consider punitive damages. The jury also found that the conduct of the Giant Eagle employees was in self-defense and did not constitute undue restraint within the meaning of R.C. §2935.041. Despite these separate and independent findings that each, on their own, support the verdict for Giant Eagle, the Ninth District reversed and remanded for a new trial on two unprecedented and erroneous legal conclusions: (1) that the jury should have considered punitive damages despite its finding that Niskanen's negligence exceeded Giant Eagle's, and despite the fact that no intentional tort claims were submitted to the jury; and (2) according to the Ninth District, the

defense of self-defense was “completely irrelevant” to Niskanen’s claims of negligence and undue restraint and as a result, “the jury lost sight of the entire gist of Niskanen’s claims[.]” (Appx. 14 at ¶ 26). In so holding, the Ninth District erroneously recognized that a cause of action for undue restraint exists under R.C. §2935.041, which by its plain terms, provides an affirmative defense to merchants and their employees who act reasonably when confronting or detaining a suspected shoplifter.

With respect to its holding on punitive damages, the Ninth District ignored decades of established legislative and common law precedent which mandates that in order for the jury to consider punitive damages on a negligence claim, the plaintiff must have prevailed on comparative fault and been awarded compensatory damages.

Similarly, with respect to its holding that self-defense was “completely irrelevant,” the Ninth District ignored established precedent, improperly relied on criminal law, and ignored the standard of review by substituting its judgment for that of the trial court. It is the Ninth District who committed plain error—not the trial court. Indeed, because there is in fact law from this Court (and even the Ninth District’s own precedent) supporting the applicability of self-defense to a negligence claim, the trial court could not have, as a matter of law, abused its discretion or committed plain error in allowing the evidence and instructing the jury on self-defense. The Ninth District’s holding also has serious due process concerns, as according to the Ninth District, the plaintiff’s claims and theories alone dictate how a defendant may defend a case, not its own theories and facts.

Finally, the recognition by the Ninth District that a cause of action exists under R.C. § 2935.041—but self-defense is “likewise irrelevant” to such a claim—is contrary to the intent of the legislature and public policy in granting a privilege (i.e., an affirmative defense) to merchants

to detain suspected shoplifters if probable cause exists to do so. So long as the merchant and its employees act reasonably and do not use undue restraint, the plaintiff cannot establish a legally cognizable injury because the actions are considered lawful and justified under the circumstances. The Ninth District reversed the jury's finding on this "claim" which alone should have served as a complete bar to any recovery—for negligence or any other "claim."

For the reasons that follow, and for those reasons given by Giant Eagle and the other defense amicus briefs which are incorporated herein, the Ninth District's unprecedented and legally erroneous decision should be reversed and the original verdict of the jury and judgment of the trial court in favor of Giant Eagle should be reinstated by this Court.

STATEMENT OF AMICUS CURIAE INTEREST

Amicus Curiae, the Ohio Chamber of Commerce ("the Chamber"), was founded in 1893 and is Ohio's largest and most diverse statewide business advocacy organization. The Chamber represents companies doing business in the state that range in size from small owner-operators to large multi-national corporations, and that reflect every major industry category from manufacturing, insurance and health care to finance, transportation, and retail.

The Chamber works to promote and protect the interests of its 4,000 business members while building a more favorable Ohio business climate. As an independent and informed point of contact for government and business leaders, the Chamber is a respected participant in the public policy arena. Through its member-driven standing committees and the Ohio Small Business Council, the Chamber formulates policy positions on issues as diverse as education funding, taxation, public finance, health care, environmental regulation, workers' compensation and campaign finance. The advocacy efforts of the Chamber are dedicated to the creation of a strong pro-jobs environment and an Ohio business climate responsive to expansion and growth.

STATEMENT OF THE CASE AND FACTS

The Chamber adopts the Statement of the Case and the Statement of the Facts contained in the Merit Brief of Appellant Giant Eagle, Inc.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: If the plaintiff does not prevail on comparative fault, then the jury must not consider punitive damages on a negligence claim.

The Ninth District reversed the jury's verdict in favor of Giant Eagle on all of Niskanen's claims because of its misinterpretation and misapplication, in a two-paragraph analysis, of this Court's decision in *Schellhouse v. Norfolk & Western Ry. Co.* (1991), 61 Ohio St.3d 520 and the Sixth District's decision in *Wightman v. Consolidated Rail Corp.* (1994), 94 Ohio App.3d 389. In so holding, the Ninth District transformed a demand for punitive damages into an independent claim and ignored the well-established rule that success on an underlying claim is a prerequisite to the consideration by the jury of punitive damages.

This Court has repeatedly recognized that a demand 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; *see also Hitchings v. Weese* (1997), 77 Ohio St.3d 390, 391, 674 N.E.2d 688; *State ex rel. Bd. of State Teachers Retirement Sys. of Ohio*, 113 Ohio St.3d 410, 2007-Ohio-2205, 865 N.E.2d 1289, at ¶ 46. Instead, "punitive damages are awarded as a mere incident of the cause of action in which they are sought." *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 650, 635 N.E.2d 331. Therefore, "compensable harm stemming from a cognizable cause of action must be shown to exist *before* punitive damages can be considered." *Moskovitz*, at 635 (emphasis added); *Watson v. Ford Motor Co.*, 6th Dist. No. E-06-074, 2007-Ohio-6374, at ¶ 73; *Burwell v. American Edward Labs.* (1989), 62 Ohio App.3d 73, 574 N.E.2d 1094; *see also Malone v. Courtyard by Marriott* (1996), 74 Ohio St.3d 440, 447, 659 N.E.2d 1242 ("even if

punitive damages were warranted in this case, [plaintiff] could not recover them because the jury did not award her compensatory damages.”). This rule of common law has also been codified in Ohio for decades. *See* R.C. § 2315.21(B)(2) (eff. Jan. 5, 1988) (“punitive or exemplary damages are not recoverable . . . unless . . . the plaintiff in question has adduced proof of actual damages”); R.C. § 2315.21(C)(2) (eff. Apr. 7, 2005) (“punitive or exemplary damages are not recoverable . . . unless . . . the trier of fact has returned a verdict” for the plaintiff and awarded “compensatory damages”). The Ninth District ignored this established precedent and its decision should be reversed.¹

The Ninth District also misinterpreted and misapplied this Court’s decision in *Schellhouse v. Norfolk & Western Ry. Co.* (1991), 61 Ohio St.3d 520 and the Sixth District’s decision in *Wightman v. Consolidated Rail Corp.* (1994), 94 Ohio App.3d 389 in holding that the comparative fault finding did not act to bar the jury’s consideration of punitive damages. In fact, these decisions, along with *Malone v. Courtyard by Marriott*, support the trial court’s finding that Niskanen’s percentage of fault (60%) precluded the recovery of actual damages and thereby barred any consideration by the jury of punitive damages.

The Ninth District’s reliance on *Schellhouse* is misplaced because, as this Court held there, a plaintiff can overcome an adverse comparative fault finding only by pleading and prevailing on an intentional tort. Niskanen, however, dismissed all of her intentional tort claims prior to trial. As the Ninth District observed, the focus at trial was on negligence and “[t]here were no longer any claims that Giant Eagle or any of its employees had intentionally harmed Niskanen.” (Appx. 12, 14 at ¶¶ 21, 26). Therefore, the comparative fault statute in effect at the

¹ Indeed, the recent revisions to R.C. § 2315.21 requiring bifurcation of the compensatory and punitive phases of trial were premised on the “rational and legitimate state interest in making certain that Ohio has a fair, predictable system of civil justice that preserves the rights of those who have been harmed by negligent behavior, while curbing the number of frivolous lawsuits, which increases the cost of doing business, threatens Ohio jobs, drives up costs to consumers, and stifle[s] innovation.” 2004 Am.Sub.S.B. No. 80 § 3(A)(3).

time of Niskanen's attack on the Giant Eagle employees—which only eliminated comparative fault as a defense to intentional torts—did not preclude Giant Eagle from asserting the comparative fault defense and the Ninth District committed a clear error of law in holding that Niskanen's fault could not prevent the jury from considering punitive damages.

This Court has recognized,

[if] the railroad did not commit an intentional tort, [and] was only thirty-five percent negligent as opposed to the sixty-five percent attributed to the plaintiff's decedent, then the plaintiff is not entitled to damages and a verdict for the defendant should have been entered. R.C. § 2315.19(C).

Schellhouse (1991), 61 Ohio St.3d at 524. Here, Giant Eagle did not commit an intentional tort and was only 40% negligent. Therefore, Niskanen was not entitled to actual damages and the trial court properly instructed the jury not to consider punitive damages.

The Ninth District's reliance on *Wightman* is similarly misplaced because there, unlike here, the plaintiffs not only prevailed on their intentional tort claim, but also on their negligence claim because their comparative fault was less than 50%. *Wightman* (1994), 94 Ohio App.3d at 394-95, 397-98. Because of these findings, the jury could properly consider punitive damages. Again, Niskanen never prevailed on an intentional tort and his negligence exceeded Giant Eagle's, thereby barring the recovery of actual damages, which is a necessary predicate to a consideration of punitive damages.

Finally, in *Marriot*, this Court rejected the Ninth District's reasoning for overcoming the comparative fault bar to an award of punitive damages. There, the losing plaintiff was found to be 51% at fault and, as a consequence, she received no compensatory damages. *Marriott*, at 444. Although the trial court had directed a verdict against the losing plaintiff on punitive damages, this Court noted,

even if punitive damages were warranted in this case, [plaintiff] could not recover them because the jury did not award her compensatory damages. As we have held time and time again, punitive damages may not be awarded when a jury fails to award compensatory damages. []

Marriott, at 447 (citing *Bishop*); see also *Bacon v. Fowlers Mill Inn & Tavern*, No. 2007-G-2753, 2007 WL 2758560 (Ohio Ct. App. Sept. 21, 2007), 2007-Ohio-4958, at ¶ 33 (“Because the record does not support appellant’s underlying negligence claim, he is not entitled to damages, whether general or punitive, as a matter of law.”). In sum, the Ninth District’s decision should be reversed because the finding by the jury that Niskanen was 60% at fault not only barred any compensatory award, but also precluded the jury from considering punitive damages. Reversal of the Ninth District’s decision will ensure the fair system of civil litigation contemplated by legislative and common law precedent in Ohio.

Proposition of Law No. 2: Self-defense must be an available defense to negligence.

The Ninth District ignored established precedent, improperly relied on criminal law, and ignored the standard of review by substituting its judgment for that of the trial court when it held that the defense of self-defense was “irrelevant” and “inapplicable in this negligence case.” (Appx. 12, 15 at ¶ 20, ¶ 28). This holding was premised on the fact that “[t]here were no longer any claims that Giant Eagle or any of its employees had intentionally harmed Niskanen.” (Appx. 14, 15 at ¶26, ¶28).

The Ninth District based its decision on the mistaken premise that there is “no Ohio authority for recognizing self-defense as a defense in a negligence action.” (Appx. 14 at ¶ 25). Because there is ample authority—including decisions of this Court—which recognize self-defense in a negligence action, the trial court did not, as a matter of law, abuse its discretion or commit plain error in allowing evidence of self-defense and instructing the jury on self-defense. In *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 1997-Ohio-401, 679 N.E.2d 1099, this Court noted

"a defendant may be relieved of liability for tortious conduct by proving that such conduct was in self-defense." *Goldfuss*, at 124 (citing 1 RESTATEMENT OF TORTS §63 *et seq.*). Tortious conduct includes, of course, negligent conduct. The Ninth District similarly recognized the applicability of self-defense to a negligence claim in *Ashford v. Betleyoun*, No. 22930, 2006 WL 1409793 (Ohio Ct. App. May 24, 2006), 2006-Ohio-2554, noting "[t]he Ohio Supreme Court has recognized that 'a defendant may be relieved of liability for tortious conduct by proving that such conduct was in self-defense.'" See also *Estate of Daniels v. City of Cleveland*, No. 87-3017, 1989 WL 903, at *5 (6th Cir. Jan. 11, 1989) (Table) (approving self-defense instruction where police alleged to have negligently failed to follow police procedures in apprehending suspect). Since there is ample case law supporting the applicability of self-defense to a negligence claim, the trial court could not have, as a matter of law, abused its discretion in allowing the evidence and instructing the jury on self-defense.

This Court has noted that it is well settled that the trial court should instruct the jury where there is evidence to support an issue. See *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585, 591, 575 N.E.2d 828 (citation omitted). Requested jury instructions should be given if they are correct statements of the law applicable to the facts in the case and reasonable minds might reach the conclusion sought by the instruction. *Murphy*, 61 Ohio St.3d at 591. The fundamental rule for determining the scope of the instruction to be given by the trial court is that it should be adapted to and embrace *all of the issues made by the pleadings and evidence*. *Murphy*, 61 Ohio St.3d at 591, n.3 (emphasis added). In other words, Giant Eagle—and merchants who are litigants in the future—have a fundamental right to put forth evidence to support the theory that its employees acted in self-defense and the Ninth District erred by finding that only *the plaintiff's theory of liability* may dictate which defenses a defendant may pursue.

Simply stated, to deny Giant Eagle the right to self-defense would deny it “a fair opportunity to defend against [Niskanen’s] allegations.” *Chambers v. Mississippi* (1973), 410 U.S. 284, 294, 93 S.Ct. 1038.

The Ninth District’s holding also usurps the trial court’s broad discretion to decide whether to give a requested jury instruction. *See Chambers v. Admr. Bureau of Workers’ Comp.*, 164 Ohio App.3d 397, 2005-Ohio-6086, 842 N.E.2d 580, at ¶ 6 (“[A]bsent an abuse of discretion, this court must affirm the trial court’s language of the jury instructions.”); *Van Scyoc v. Huba*, No. 22637, 2005 WL 3193843 (Ohio Ct. App. Nov. 30, 2005), 2005-Ohio-6322, at ¶ 6 (citations omitted). This Court has explained, “an abuse of discretion connotes more than an error of law or judgment; it implies an attitude on the part of the trial court that is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. This Court has likewise cautioned that when applying the abuse-of-discretion standard, the court of appeals may not substitute its judgment for that of the trial court. *See Pons v. Ohio St. Med. Bd.*, 66 Ohio St.3d 619, 621, 1993-Ohio-122, 614 N.E.2d 748; *Chambers*, 164 Ohio App.3d at 402. In sum, “in order to demonstrate reversible error with respect to a trial court’s jury instruction, an appellant must demonstrate that, first, the trial court abused its discretion, and second, that the appellant was prejudiced as a result.” *Van Scyoc*, at ¶ 7 (citations omitted).

Here, because there is in fact law from this Court (and even the Ninth District’s own precedent) supporting the applicability of self-defense to a negligence claim, the trial court could not have, as a matter of law, abused its discretion or committed plain error in allowing the evidence and instructing the jury on self-defense. Further, there is nothing in the record to support that Niskanen was prejudiced as a result of the evidence and jury instruction on self-

defense. Instead, the jury consistently found that the acts of the Giant Eagle employees were reasonable under the circumstances and that Niskanen was more responsible for causing his own injuries. *See, e.g., Perez v. Falls Financial, Inc.*, 87 Ohio St.3d 371, 377, 2000-Ohio-453, 721 N.E.2d 47 (declining to find that the “very high standard necessary to invoke the civil plain error doctrine” was present as a result of the trial court’s reconciliation instruction to the jury and noting, “in the end it appears that the jury achieved its intended result”).

In sum, the defense of self-defense undoubtedly applies to a negligence claim and a finding by the jury that the defendant acted in self-defense prevents a finding of a breach of a duty because the actions of the defendant are considered justified and lawful under the circumstances. To remove the right to self-defense from merchants and their employees who are faced with an unprovoked physical confrontation with a violent shoplifter will have a devastating impact on the fairness of civil litigation in Ohio and will expose the citizens of Ohio, employees and customers to civil liability where none should exist.

Proposition of Law No. 3: If a merchant does not use undue restraint under R.C. § 2935.041, a plaintiff must be barred from recovery on all claims.

The recognition by the Ninth District that a cause of action exists under R.C. § 2935.041—but self-defense is “likewise irrelevant” to such a claim—is contrary to the intent of the legislature and public policy in granting a privilege (i.e., an affirmative defense) to merchants to detain suspected shoplifters if probable cause exists to do so. R.C. § 2935.041(A). So long as the merchant and its employees act reasonably and do not use undue restraint, the plaintiff cannot establish a legally cognizable injury because the actions of the merchant and its employees are considered lawful and justified under the circumstances. Indeed, this Court has recognized that “[a] privileged act is one which ordinarily would be tortious but which, under the circumstances, does not subject the actor to liability.” *See Goldfuss*, at 124 (citations omitted); *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.”). Further, the Revised Code provides that “privilege” means “an immunity, license, or right conferred by law, bestowed by express or implied grant, arising out of status, position, office, or relationship, or growing out of necessity.” R.C. § 2901.01 (A)(12).

Evidence that establishes the elements of self-defense would clearly be relevant to whether the detention was in a reasonable manner under the circumstances. But the Ninth District reasoned,

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.

(Appx. 15-16, ¶ 29). This holding fails to recognize that the jury was instructed that Mrs. Niskanen had asserted a *claim* of undue restraint and was further instructed on the elements of such a *claim*—separate and apart from Giant Eagle’s defense of self-defense (which, incidentally, requires the same consideration of reasonableness under the circumstances).

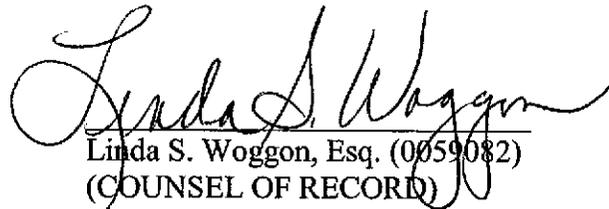
In other words, the Ninth District ignored the jury’s separate and independent finding that the Giant Eagle employees did not use undue restraint which should have acted as an absolute bar to all of Niskanen’s claims and rendered any error on the applicability of self-defense harmless as a matter of law. The Court of Appeals’ interpretation of R.C. § 2935.041, the “so-called shopkeeper’s privilege,” (App. 16, at ¶ 29), will adversely affect every merchant in Ohio by eliminating a defense while at the same time expanding their potential for liability. Citizens will suffer from the increased cost of doing business in Ohio—from increased cost of goods to the loss of jobs if companies leave the state to avoid the massive exposure created by the

decision of the Ninth District. This Court should remedy the errors of the Ninth District and reinstate the jury verdict in favor of Giant Eagle.

CONCLUSION

For the foregoing reasons, the Ohio Chamber of Commerce respectfully requests that this Court reverse the decision of the Ninth District and reinstate the jury's verdict to preserve a fair system of civil litigation in Ohio and protect Ohio's retail businesses, their customers, and all defendants who have been found less responsible than a plaintiff and whose actions have been found to be justified and lawful under the circumstances.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Amicus Curiae Brief of the Ohio Chamber of Commerce Urging Reversal on Behalf of Appellant, Giant Eagle, Inc., was sent via regular mail to counsel of record listed below this 14th day of October, 2008:

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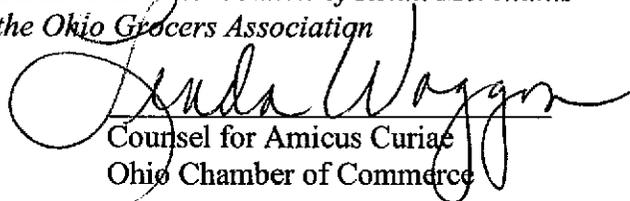
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