IN THE SUPREME COURT OF OHIO

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

MERIT BRIEF OF APPELLEE

Bernard D. Marcus
marcus@marcus-shapira.com
Scott D. Livingstone
livingstone@marcus-shapira.com
Stephen S. Zubrow
zubrow@marcus-shapira.com
Marcus & Shapira, LLP
35th Floor, One Oxford Centre
Pittsburgh, Pennsylvania 15219
Phone: (412) 471-3490
Telefax: (412) 391-8757

and

Robert C. McClelland (0012352)
rmcclelland@rmmglaw.com
Rademaker, Matty, McClelland & Greve
55 Public Square, Suite 1775
Cleveland, Ohio 44113
Phone: (216) 621-6570
Telefax: (216) 621-1127

Attorneys for Appellant Giant Eagle, Inc. and Defendants John M. Maczko, Jonathan A. Stress & Paul K. Taylor

Steven A. Goldfarb (0030186)
sagoldfarb@hahnlaw.com
(Counsel of Record)
Robert J. Fogarty (0006818)
rjfogarty@hahnlaw.com
Eric B. Levasseur (0075353)
eblevasseur@hahnlaw.com
HAHN LOESER & PARKS LLP
200 Public Square, Suite 2800
Cleveland, Ohio 44114
Phone: (216) 621-0150
Telefax: (216) 241-2824

Attorneys for Appellee Mary Niskanen, Individually, and as Administratrix of the Estate of Paul J. Niskanen

FILED
NOV 13 2008
CLERK OF COURT
SUPREME COURT OF OHIO

Richard D. Schuster (0022813)
rdschuster@vorys.com
Michael J. Hendershot (0081842)
mjhendershot@vorys.com
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
Columbus, Ohio 43216-1008
Phone: (614) 464-5475
Telefax: (614) 719-4955

Attorneys for Amicus Curiae The Ohio Council of Retail Merchants and The Ohio Grocers Association

Linda S. Woggon (0059082)
Vice President, Government Affairs
Ohio Chamber of Commerce
230 East Town Street
Columbus, Ohio 43215-0159
Phone: (614) 228-4201

Attorney for Amicus Curiae Ohio Chamber of Commerce

Richard M. Garner (0061734)
rgarner@davisyoung.com
Davis & Young
1200 Fifth Third Center
600 Superior Avenue, E
Cleveland, OH 44114
Phone: (216) 348-1700
Telefax: (216) 621-0602

Attorney for Amicus Curiae The Ohio Association of Civil Trial Attorneys

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTRODUCTION 1

Summary of the Case and Argument 3

STATEMENT OF THE CASE 7

STATEMENT OF THE FACTS 11

A. Giant Eagle's Employees Pursued and Detained Paul as a Suspected Shoplifter, Resulting in his Death by Asphyxiation. 11

B. Expert Medical Evidence Established that Paul Endured Conscious Pain and Suffering and Died from Homicidal Strangulation and Asphyxia Due to Compression of His Neck and Torso. 16

C. The Evidence of Giant Eagle's Failure to Properly Train Its Employees in the Safe and Proper Techniques for the Apprehension and Detention of Suspected Shoplifters Was Sufficient to Support a Punitive Damages Verdict. 17

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW 22

Proposition of Law No. 1: A plaintiff's comparative negligence will not defeat or diminish the recovery of compensatory damages where the defendant committed the underlying tort with actual malice. (*Schellhouse v. Norfolk & Western Ry. Co.* (1991), 61 Ohio St.3d 520, 575 N.E.2d 453, and *Wightman v. Consol. Rail Corp.*, 86 Ohio St.3d 431, 1999-Ohio-119, 715 N.E.2d 546, approved and followed) 22

A. The Ninth District Did Not Endorse a Stand-Alone Claim for Punitive Damages. 22

B. The Ninth District Properly Applied the American Rule and *Schellhouse* in Holding a Plaintiff's Comparative Negligence Will Not Defeat Recovery of Compensatory Damages Where Evidence of Actual Malice Exists. 24

C. The Ninth District's Opinion is Consistent with This Court's Decision in *Marriott* and its Progeny. 29

D. The Ninth District's Opinion Does Not Preclude Bifurcation of Punitive Damages, Lead to Jury Confusion, or Violate a Defendant's Due-Process Rights. 33

1. The Ninth District Did Not Address R.C. 2315.21(B)(1)'s Mandatory-Bifurcation Requirement Because, by Giant Eagle's Own Admission, It Does Not Apply in this Case. 33

2. The Ninth District's Opinion Does Not Enhance the Risk of Juror Confusion. 34

3. The Ninth District's Opinion Does Not Violate Giant Eagle's Due-Process Rights. 35

Proposition of Law No. 2: The affirmative defense of self-defense is inapplicable where a defendant refuses to acknowledge that it acted intentionally in defense of itself or others, and irrelevant to a claim challenging a defendant's conduct that precedes a physical altercation, such as a negligent failure-to-train claim 36

A. The Ninth District Correctly Held that Self-Defense Was Legally "Inapplicable." 37

1. Giant Eagle Ignores the Dispositive Rule that Self-Defense Applies Only When the Defendant Acknowledges Engaging in Intentional Conduct. 37

2. The Ninth District Properly Recognized that Neither *Goldfuss* nor *Ashford* Renders Self-Defense Applicable to This Case. 39

3. The Ninth District's Holding is Consistent with the United States Supreme Court's *Jopes* Decision and Authority from Other Jurisdictions. 41

B. The Court Correctly Held that Evidence of Self-Defense Was "Irrelevant" Given the Nature of Niskanen's Claims. 42

C. The Ninth District Did Not "Violate Rule 8(E)(2)" by Holding that the Jury Should Not Have Been Instructed on Self-Defense. 44

D. The Ninth District Did Not Violate Giant Eagle's Due-Process Rights in Holding Self-Defense Inapplicable to this Case. 45

E. The Ninth District Properly Held that the Trial Court Was Not Required to Instruct on Self-Defense Simply Because Niskanen Sought Punitive Damages. 45

F. The Ninth District Properly Vacated the Trial Court Judgment Entry Because the Trial Court's Legal Errors Prejudiced Niskanen's Right to Recovery. 46

Proposition of Law No. 3: A party who fails to raise and argument in the court of appeals waives his or her right to raise it in the Supreme Court. (*State ex rel. Zollner v. Indus. Comm. of Ohio*, 66 Ohio St.3d 276, 1993-Ohio-49, 611 N.E.2d 830, approved and followed.) 48

CONCLUSION 50

APPENDIX **Appx. Page**

R.C. 2315.19 1

R.C. 2315.21(B)(1) 2

R.C. 2935.041(A) 6

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES

Page(s)

Ashford v. Betleyoun,
9th Dist. No. 22930, 2006-Ohio-2554 ..... 39, 40, 41

Bailey v. Bevilacqua,
158 Ohio App. 3d 382, 2004-Ohio-4392, 815 N.E.2d 1136 46

Barnes v. Univ. Hosp. of Cleveland,
119 Ohio St. 3d 173, 2008-Ohio-3344, 893 N.E.2d 142 35

Bishop v. Grdina (1985),
20 Ohio St.3d 26, 485 N.E.2d 704 ..... 22, 29, 30

Blackburn v. Johnson (1989),
187 Ill.App.3d 557, 543 N.E.2d 583 42

BMW of N. Am., Inc. v. Gore (1996),
517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 35

Bush v. Harvey Transfer Co. (1940),
146 Ohio St. 657, 33 O.O. 154, 67 N.E.2d 851 47

Chambers v. Mississippi (1973),
410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 45

City of Cincinnati v. Beretta U.S.A. Corp.,
95 Ohio St.3d 416, 2002-Ohio-2480, 768 N.E.2d 1136 32

District of Columbia v. Heller (2008),
128 S.Ct. 2783, 171 L.Ed.2d 637 38

Eisenhuth v. Moneyhon (1954),
161 Ohio St. 367, 53 O.O. 274, 119 N.E.2d 440 49

Estate of Beavers v. Knapp,
175 Ohio App.3d 758, 2008-Ohio-2023, 889 N.E.2d 181 ..... 28, 33

Evans v. Hughes (M.D.N.C.1955),
135 F. Supp. 555 42

Gallimore v. Children's Hosp. Med. Ctr.,
67 Ohio St.3d 244, 1993-Ohio-205, 617 N.E.2d 1052 1

GMAC Mtge. Corp. v. Titch,
9th Dist. No. 04CA0012, 2005-Ohio-868 31

Goldfuss v. Davidson,
79 Ohio St.3d 116, 1997-Ohio-401, 679 N.E.2d 1099 ..... *passim*

Herold v. Shagnasty's, Inc. (Sept. 9, 2004),
Iowa App. No. 03-0894, 2004 Iowa App. LEXIS 1037 42

Huggins v. Metts (June 17, 2005),
S.C.C.P. No. 02-CP-32-2407, 2005 WL 6149022 42

Krause v. Morgan (1895),
53 Ohio St. 26, 40 N.E. 886 ..... 1, 25

Lambert v. Shearer (1992),
84 Ohio App.3d 266, 616 N.E.2d 965 27

MacDonald v. Bernard (1982),
1 Ohio St.3d 85, 1 OBR 122, 438 N.E.2d 410 32

Malone v. Courtyard by Marriott, L.P.,
74 Ohio St.3d 440, 1996-Ohio-311, 659 N.E.2d 1242 ..... 29, 30, 31, 32, 35

Marich v. Bob Bennett Constr. Co.,
116 Ohio St.3d 553, 2008-Ohio-92, 880 N.E.2d 906 49

Mastellone v. Lightning Rod Mut. Ins. Co.,
175 Ohio App.3d 23, 2008-Ohio-311, 884 N.E.2d 1130 34

Mays v. Taylor,
7th Dist. No. 00-CA-209, 2001 Ohio App. LEXIS 5798 27

Moskovitz v. Mt. Sinai Med. Ctr.,
69 Ohio St.3d 638, 1994-Ohio-324, 635 N.E.2d 331 22

New Orleans & Northeastern R.R. Co. v. Jopes (1891),
142 U.S. 18, 12 S.Ct. 109, 35 L.Ed. 919 41

Niskanen v. Giant Eagle, Inc.,
119 Ohio St.3d 1407, 2008-Ohio-3880, 891 N.E.2d 768 11

Niskanen v. Giant Eagle, Inc.,
9th Dist. No. 23445, 2008-Ohio-1385 ..... 2, 10

Payne v. Vance (1921),
103 Ohio St. 59, 133 N.E. 85 ..... 1, 25, 31

Preston v. Murty (1987),
32 Ohio St.3d 334, 512 N.E.2d 1174 24

Robinson v. Brown (Feb. 21, 1989),
12th Dist. No. 88-07-052, 1989 Ohio App. LEXIS 595 38

Schellhouse v. Norfolk & Western Ry. Co. (1991),
61 Ohio St.3d 520, 575 N.E.2d 453 ..... *passim*

State Farm Mut. Auto. Ins. Co. v. Campbell (2003),
538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 35

State ex rel. Bd. of State Teachers Ret. Sys. of Ohio v. Davis,
113 Ohio St.3d 410, 2007-Ohio-2205, 865 N.E.2d 1289 22

State ex rel. Zollner v. Indus. Comm. of Ohio,
66 Ohio St.3d 276, 1993-Ohio-49, 611 N.E.2d 830 ..... 33, 48

State v. Brantley (Sept. 27, 1996),
11th Dist. No. 95-P-0089, 1996 Ohio App. LEXIS 4205 44

State v. Clardy,
1st Dist. No. C-060527, 2007-Ohio-4193 6

State v. King (1984),
20 Ohio App.3d 62, 20 OBR 66, 484 N.E.2d 234 6

State v. Ray,
12th Dist. No. CA2001-06-154, 2003-Ohio-193 49

State v. Robbins (1979),
58 Ohio St.2d 74, 12 O.O.3d 84, 388 N.E.2d 755 38

Wagner v. Roche Lab. (1999),
85 Ohio St.3d 457, 709 N.E.2d 162 48

Westfield Ins. Co. v. Galatis,
100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256 1

Wightman v. Consol. Rail Corp. (1994),
94 Ohio App.3d 389, 640 N.E.2d 1160 ..... 4, 24, 27

Wightman v. Consol. Rail Corp.,
86 Ohio St.3d 431, 1999-Ohio-119, 715 N.E.2d 546 ..... 5, 22, 26, 27, 28, 32

York v. Ohio State Hwy. Patrol (1991),
60 Ohio St.3d 143, 573 N.E.2d 1063 32

Young v. Univ. of Akron,
10th Dist. No. 04AP-318, 2004-Ohio-6720 28

RULES AND STATUTES

Civ.R. 8 ..... 32, 44

Civ.R. 15(B) 32

Civ.R. 42(B) 33

R.C. 2315.19 25

R.C. 2315.21(B)(1) 33

R.C. 2935.041(A) 4, 7, 8, 43, 48, 49

MISCELLANEOUS

64 Ohio Jurisprudence 3d (2003) 48

Blackstone's Commentaries (1803) 1, 38

4 Harper, James and Gray on Torts (3 Ed. 2007) 26

Keeton, Dobbs, Keeton and Owen, Prosser and Keeton on Torts (5 Ed. 1985) 26

Kirchner and Wiseman, Punitive Damages: Law & Practice (2 Ed. 2000) 34

Restatement (Second) of Torts §64 (1965) 42

1 Schlueter, Punitive Damages (5 Ed. 2006) 34

Simons, Rethinking Mental States (1992),
72 Boston Univ.L.Rev. 463 45

INTRODUCTION

> Blackstone said it in his Commentaries when he observed, "precedents and rules must be followed, unless flatly absurd or unjust."
>
> — *Gallimore v. Children's Hosp. Med. Ctr.*, 67 Ohio St.3d 244, 258, 1993-Ohio-205, 617 N.E.2d 1052 (Moyer, C.J., dissenting).

For over 100 years, Ohio has followed the traditional American rule in a tort action that a plaintiff's contributory or comparative negligence will not defeat or diminish the recovery of compensatory damages where a jury finds that the defendant acted with actual malice.[1] Defendant-Appellant Giant Eagle, Inc. ("Giant Eagle") and its amici ask this Court to ignore stare decisis and overturn that precedent. That request, as the Court is well aware, is no minor undertaking. See *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, paragraph one of syllabus.

To entice the Court to upend settled law, Giant Eagle and its amici mischaracterize the decision below. They urge that the Ninth District "decouple[ed]" (OACTA Brief[2] at 6) claims for compensatory and punitive damages, rendering punitive damages a "separate," "stand alone" claim (GE Brief[3] at 2, 13). But the Ninth District did no more than properly apply this Court's precedent and the American rule: when the trial court determines that there is sufficient evidence

---

[1] See *Payne v. Vance* (1921), 103 Ohio St. 59, 76, 133 N.E. 85 (citing *Krause v. Morgan* (1895), 53 Ohio St. 26, 36, 40 N.E. 886 ("'Where the conduct of the defendant is wanton and willful, or where it indicates that degree of indifference to the rights of others, which may be characterized as reckless, the doctrine of contributory negligence has no place whatever, and the defendant is responsible for the injury he inflicts.'" (internal citation omitted)).

[2] "OACTA Brief" refers to Amicus Curiae Brief of The Ohio Association of Civil Trial Attorneys, filed October 10, 2008. The Amicus Curiae Briefs of The Ohio Council of Retail Merchants and The Ohio Grocers Association, filed October 8, 2008, and The Ohio Chamber of Commerce, filed October 14, 2008, shall likewise be referred to respectively as the "OCRM Brief" and the "OCC Brief."

[3] "GE Brief" refers to the Merit Brief of Appellant Giant Eagle, Inc., filed October 10, 2008.

of a defendant's actual malice to charge the jury, the jury ***must*** be permitted to make a factual finding on the issue to allow the plaintiff to recover compensatory damages. The trial court committed legal error when, despite finding sufficient evidence for a jury to conclude that Giant Eagle acted with actual malice, by the structure of its jury interrogatories, it refused to let the jury make a factual finding of malice so the American rule could be applied. Giant Eagle and its amici fail to establish the American rule is "flatly absurd or unjust." As a result, the Court should not abandon its precedent and should affirm the correct decision below.

Nor did the Ninth District's Opinion[4] "rob[]" Ohio merchants and citizens of the right of self-defense or permit a plaintiff through "strategic pleading" to circumvent a self-defense instruction. The heart of Niskanen's[5] negligence claim was that Giant Eagle failed to train its managers and employees in the proper techniques for detaining shoplifters. Self-defense cannot logically apply to a failure-to-train claim. Nor can self-defense logically apply to Niskanen's claim—once Paul was subdued and "tabled" on the pavement—that Giant Eagle's employees unnecessarily choked him to death by using excessive force. Giant Eagle and its amicis' discussion of the Ninth District's self-defense holding is long on analysis of black-letter law but fatally short on any analysis of the ***reasoning*** that led the Ninth District to find self-defense both "inapplicable" and "irrelevant" in this case.

The Ninth District did not "venture into unchartered jurisprudence." (GE Brief at 1.) Its reasoning was proper. This Court should affirm the Ninth District's Opinion in its entirety.

---

[4] "Opinion" refers to *Niskanen v. Giant Eagle, Inc.*, 9th Dist. No. 23445, 2008-Ohio-1385.

[5] "Niskanen" refers to Plaintiff-Appellee Mary Niskanen, Individually and as Administratrix of the Estate of Paul J. Niskanen.

Summary of the Case and Argument

This case arises from the tragic and avoidable death of 31-year-old Paul Niskanen ("Paul") outside of the Giant Eagle grocery store in Rootstown, Ohio, on January 21, 2004. Suspecting—merely suspecting—Paul to be a shoplifter, Giant Eagle's store manager pursued Paul outside the store and, in violation of Giant Eagle policy, yelled to a stockboy to stop Paul, leading to a fatal confrontation. The salient facts are undisputed; the only factual dispute was whether Paul's death was avoidable.

It ***was*** avoidable. Paul died as a direct result of Giant Eagle's knowing, intentional and malicious failure to train its employees on the proper method to pursue a suspected shoplifter. Giant Eagle's untrained employees used such significant force to restrain Paul—including a dangerous chokehold—that they strangled him to death as on-lookers watched in dismay. Even if Paul was a shoplifter, and even if he reacted combatively when first confronted in the store parking lot by an unidentified stockboy, Giant Eagle's employees had no right to use a deadly chokehold for 5-10 minutes that resulted in Paul's asphyxiation. Giant Eagle's senior management confirmed that it was aware of the risk of death or serious bodily injury that could result from improperly-trained employees attempting to detain suspected shoplifters. Yet Giant Eagle did nothing to prevent such a foreseeable tragedy.

Based on these facts, on July 12, 2005, a Summit County jury found Giant Eagle negligent and awarded Niskanen $1,000,000 in compensatory damages. As a result of the trial court's numerous errors in the jury instructions and jury interrogatories, and failure to follow the American rule, the jury's verdict was subsequently vacated by the trial court based on the jury's finding of comparative negligence.

The Ninth District properly applied this Court's precedents and reached the following conclusions based on the unique facts of this case:

1. The trial court erred in submitting jury interrogatories that precluded the jury from considering whether Giant Eagle acted with actual malice and in entering judgment for Giant Eagle based solely on the jury's finding of comparative negligence. "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." Opinion at ¶17, citing *Schellhouse v. Norfolk & Western Ry. Co.* (1991), 61 Ohio St.3d 520, 575 N.E.2d 453. Thus, "[h]ad 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." Id., citing *Wightman v. Consol. Rail Corp.* (1994), 94 Ohio App.3d 389, 397-98, 640 N.E.2d 1160 ("*Wightman I*"); and

2. That Giant Eagle's affirmative defense of self-defense was both legally "inapplicable in this negligence case" and "completely irrelevant" based on the facts of ***this particular case***, a finding wholly consistent with this Court's decision in *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 1997-Ohio-401, 679 N.E.2d 1099. See Opinion at ¶20, 28.

The Ninth District made no particular finding, as alleged by Giant Eagle and its amici, whether R.C. 2935.041(A)—the so-called "shopkeeper's privilege"—gives rise to a private cause of action. Giant Eagle failed to raise that issue in the merits briefing below, raising it for the first time in a post-decision motion for reconsideration.

Comparative Negligence and Defendant's Actual Malice

Contrary to Giant Eagle's and its amicis' argument, the Ninth District did ***not*** hold that "[p]unitive damages are recoverable when compensatory damages are not awarded" or that punitive damages are a "stand-alone claim" for relief. (Cf. GE Brief at 1, 13.) The Ninth District did no more than apply the American rule: that the same conduct that gives rise to

punitive damages—actual malice under a "conscious disregard" standard—***also*** defeats a defense of comparative negligence in the first instance, thus permitting even a negligent plaintiff to recover ***compensatory damages*** when the defendant acts with actual malice. This holding fully comports with the American rule and this Court's decisions in *Schellhouse* and *Wightman v. Consol. Rail Corp.*, 86 Ohio St.3d 431, 436, 1999-Ohio-119, 715 N.E.2d 546 ("*Wightman II*").

To prevail on its punitive-damage argument, Giant Eagle faces a monumental burden: convincing this Court to overturn the American rule, as articulated in *Schellhouse* and *Wightman*. Such a dramatic holding would eviscerate a cornerstone of negligence law that has stood firm since the days of strict contributory negligence: that a plaintiff's comparative negligence ***will not*** bar recovery on an underlying claim against a defendant that has acted with actual malice. Giant Eagle casts the issue as a "punitive damage issue," but in fact the issue is only tangentially related to punitive damages. The real issue is the effect of a defendant's malicious conduct on the defendant's ability to invoke a comparative-negligence defense and avoid ***compensatory*** damages. Under the settled American rule, a defendant that has acted with actual malice cannot point to a plaintiff's negligence as a basis for avoiding or limiting liability for the underlying tort.

Giant Eagle wants the Court to overturn this longstanding exception to the comparative-negligence doctrine and endorse the trial court's erroneous jury interrogatories. Those interrogatories failed to permit the jury even to consider whether Giant Eagle acted with malice because of the trial court's erroneous view that Paul's comparative negligence trumped Giant Eagle's malice, even though the American rule—the *Schellhouse/Wightman* test—required the opposite. As a result, Niskanen lost her right to negate the finding of comparative negligence and to recover a judgment for the $1,000,000 in compensatory damages that the jury awarded.

Self-Defense

Giant Eagle and its amici also wrongly suggest that the Ninth District created a global rule prohibiting a defendant from asserting self-defense in response to a negligence claim and authorized plaintiffs to sidestep this defense through "strategic pleading." Not so. What the Ninth District held, based on the unique facts presented to the jury, was that "the defense of self-defense was inapplicable ***in this*** negligence case." Opinion at ¶20 (emphasis added).

In reaching that determination, the focus of the Ninth District's analysis was on ***Giant Eagle's*** characterization of its own conduct, not the manner in which Niskanen pleaded her claim. While Giant Eagle and its amici devote considerable briefing space to the black-letter proposition that self-defense can defeat both negligence and intentional-tort claims (see, e.g., GE Brief at 22-23, 25-26), their analysis ignores the important ***facts*** of ***this*** case that guided the Ninth District's decision. Giant Eagle steadfastly denied throughout the course of this case that its employees intentionally used a deadly chokehold, but self-defense applies only when the defendant uses "deadly force ***intentionally***." *State v. Clardy*, 1st Dist. No. C-060527, 2007-Ohio-4193, at ¶17, quoting *State v. King* (1984), 20 Ohio App.3d 62, 64, 20 OBR 66, 484 N.E.2d 234 (emphasis in original). It was Giant Eagle's failure to concede intentional use of deadly force that made self-defense inapplicable, not Niskanen's styling of her claim.

Furthermore, the Ninth District properly determined that self-defense was "completely irrelevant" (Opinion at ¶28) to Niskanen's failure-to-train claim. Self-defense focuses on the defendant's on-the-spot decision to use force in response to force, but Giant Eagle's tortious conduct, in failing to train its employees, was not an on-the-spot response to Paul's alleged aggression. Thus, the Ninth District properly concluded that "[f]ocusing on [Paul's] violent response as a justification for the acts of the * * * ***employees*** took the focus away from the real

issue: * * * whether ***Giant Eagle's*** failure to train its employees" long before the altercation "caused [Paul's death]." Id.

The "Shopkeeper's Privilege" (R.C. 2935.041(A))

Finally, Giant Eagle (and, to a lesser extent, its amici) suggest that the Ninth District created a new cause of action for violation of the "shopkeeper's privilege" statute, R.C. 2935.041(A), and then wrongly held that self-defense was irrelevant to it. (See GE Brief at 35-37.) That argument misstates the procedural history. The Ninth District assumed that a violation of R.C. 2935.041(A) gave rise to a cause of action only because Giant Eagle ***never argued otherwise***—and, in fact, conceded below that Niskanen could bring a "statutory undue restraint claim." (See Brief of Cross-Appellant Giant Eagle, Inc., filed April 16, 2007 at 18.) Moreover, to establish a violation of the statute, Niskanen had to prove that Paul's manner of detention and Giant Eagle's use of force was "unreasonable." By definition, then, Niskanen's prima-facie showing on a claim under R.C. 2935.041(A) necessarily refutes self-defense.

* * *

For these reasons, and those more fully set forth below, this Court should affirm the Ninth District's Decision and Journal Entry in its entirety.

STATEMENT OF THE CASE

Paul's mother, Mary Niskanen, commenced the underlying wrongful-death and survival action in the Summit County Court of Common Pleas on August 5, 2004, asserting claims for compensatory and punitive damages against Giant Eagle.[6] Niskanen alleged gross negligence,

[6] Niskanen also asserted claims against four individuals who participated in the asphyxiation, three of whom were Giant Eagle employees. The claims against these defendants were all dismissed before trial. (Supp. 23, 24; 1 Tr. 2:6-25, 3:1-4; Supp. 19-21; Notice of Voluntary Dismissal, filed June 19, 2006.)

false imprisonment, assault and battery, unlawful restraint in violation of R.C. 2935.041(A), and wrongful death.

On March 25, 2005, Niskanen filed an Amended Complaint (Supp.[7] 1-18), in which she asserted claims for negligence (lack of due care in training and supervision and in apprehending and detaining Paul), false imprisonment, assault and battery, unlawful restraint in violation of R.C. 2935.041(A), spoliation of evidence, and wrongful death, and requested compensatory and punitive damages. Giant Eagle answered the Amended Complaint, denying liability.

On May 25, 2006, the trial court denied Giant Eagle's motion for summary judgment in its entirety. With respect to Niskanen's intentional-tort and negligence claims, the trial court found the record "replete with evidence" that Giant Eagle had failed to "train or disseminate [its] [shoplifting] policies to its management and employees in Rootstown." (GE Appx.[8] at 37; 5/25/06 Order at 6.) The trial court further found that if Giant Eagle had "followed its own policy and procedures regarding the apprehension and detention of potential shoplifters, Mr. Niskanen possibly could be alive today." (GE Appx. at 36; 5/26/06 Order at 5.) The trial court further noted "the unrebutted medical evidence suggest[ing] that the amount of force used by Defendants may have been unreasonable." (GE Appx. at 37; 5/26/06 Order at 6.) With regard to Niskanen's request for punitive damages, the trial court found sufficient evidence that Giant Eagle had consciously disregarded the rights and safety of others with a great probability of causing substantial harm, specifically finding that Giant Eagle could not "skirt its responsibilities" under the shield of Ohio's shopkeeper-detention statute. (GE Appx. at 41-43; 5/26/06 Order at 10-12.)

---

[7] "Supp." refers to the Supplement to the Merit Brief of Appellant Giant Eagle, Inc., filed October 10, 2008.

[8] "GE Appx." refers to the Appendix to the Merit Brief of Appellant Giant Eagle, Inc., filed October 10, 2008.

Niskanen voluntarily dismissed her claims for property damage, false imprisonment, and assault and battery, and on June 19, 2006, the case proceeded to trial on the remaining claims—common-law negligence (lack of due care in training and supervision and in apprehending and detaining Paul), statutory unlawful restraint, spoliation of evidence, and wrongful death. (Supp. 24-25; 1 Tr. 3-4.) The trial court twice denied Giant Eagle's motions for directed verdict on the issue of punitive damages (Supp. 417, 582-83; 10 Tr. 1253:5-6, 13 Tr. 1669:22:1670:2), finding sufficient evidence that Giant Eagle's actions evidenced actual malice, and instructed the jury accordingly.

Despite finding sufficient evidence of Giant Eagle's actual malice to submit the issue to the jury, the trial court, over Niskanen's repeated objections,[9] precluded the jury from making a factual finding on this issue based on the structure of the jury interrogatories. (Supp. 1122; Jury Interrog. 7-A, B.)

After five days of deliberations and several jury questions indicating confusion and misunderstanding (see Ninth District Docket Entry 11[sic]/24/07—Jury Questions, pp. 1-7), the jury returned a general verdict in favor of Niskanen.

The jury also answered several interrogatories, and their answers to the interrogatories establish that it made the following findings of fact:

- That Giant Eagle was negligent and that its negligence was a direct and proximate cause of Paul's injuries and death. (Supp. 1117-1118; Jury Interrog. 1-A, B.)
- That Paul's own negligence was also a direct and proximate cause of his injuries. (Supp. 1118; Jury Interrog. 1-C, D.)

[9] See Supp. 753-55, 769-70; 14 Tr. 1850:11-1852:17, 1865:12-1866:4, see, also, Niskanen's Bench Memo. in Opp. to Giant Eagle's Proposed Jury Instructions at p. 5, filed 7/5/06; Niskanen's Proposed Jury Interrogs. filed 6/1/06, Revised Proposed Jury Interrogs. filed 7/5/06, and Second Revised Proposed Interrogs. filed 7/5/06.)

- That Giant Eagle was 40% negligent and Paul was 60% negligent. (Supp. 1120; Jury Interrog. 4.)
- That Niskanen was entitled to $500,000 in compensatory damages on her survival claims and $500,000 in compensatory damages on her wrongful death claim, for a total damage award of $1,000,000. (Supp. 1119-1120; Jury Interrog. 3-A, B.)

In addition to these factual findings, the jury also found, based upon erroneous instructions of law, that Giant Eagle's employees had acted in self-defense (see Supp. 1120-1121; Jury Interrog. 5) and that Giant Eagle did not willfully spoliate evidence. (Supp. 1121; Jury Interrog. 6.)

On July 17, 2006, based upon the jury's finding of comparative negligence, the trial court entered judgment in favor of Giant Eagle, notwithstanding the general verdict for Niskanen. (GE Appx. at 31; 7/17/06 Order.) The trial court dismissed all remaining claims by order dated September 22, 2006. (GE Appx. at 29-30; 9/22/06 Order.)

On October 19, 2006, Niskanen timely filed her Notice of Appeal to the Ninth District Court of Appeals. On March 26, 2008, the Ninth District reversed and remanded for a new trial on all claims except the spoliation claim. (GE Appx. at 4-25; 3/25/08 Decision and Journal Entry.) See *Niskanen v. Giant Eagle, Inc.*, 9th Dist. No. 23445, 2008-Ohio-1385.

Dissatisfied with the Ninth District's reasoning—and raising for the first time many of the arguments which now form the basis of this appeal—Giant Eagle filed an application for reconsideration or, in the alternative, for a rehearing en banc. Finding no obvious error and confirming that it considered the litany of new authority first referenced by Giant Eagle at the reconsideration stage, the Ninth District declined Giant Eagle's invitation to reconsider its decision or hear the matter en banc. (GE Appx. at 26-28; 5/20/08 Journal Entry.) This appeal

followed. This Court accepted jurisdiction on August 6, 2008. *Niskanen v. Giant Eagle, Inc.*, 119 Ohio St.3d 1407, 2008-Ohio-3880, 891 N.E.2d 768.

STATEMENT OF THE FACTS

A. Giant Eagle's Employees Pursued and Detained Paul as a Suspected Shoplifter, Resulting in his Death by Asphyxiation.

At 6:18 p.m. on January 21, 2004, Paul entered the Giant Eagle supermarket in Rootstown, Ohio.[10] (See Trial Ex. 23A-1 (still image of surveillance camera footage indicating time).) For the next 22 minutes, he casually proceeded through the store and placed a variety of grocery items in his shopping cart. (Trial Ex. 23A-2, A-5; Trial Ex. 9.) At one point Paul stopped Giant Eagle store manager John Maczko ("Maczko") to ask where certain items in the store were located. (Supp. 448; 10 Tr. 1341:6-8.)

Paul then proceeded to the checkout counter where, like any other Giant Eagle customer, he removed items from his cart and placed them on the conveyor belt to be scanned. (Supp. 161, 422; 4 Tr. 467:21-25, 10 Tr. 1273:2-6.) Cashier Lindsay White ("White") scanned his groceries and asked him for his Giant Eagle Advantage Card. (Supp. 422; 10 Tr. 1273:10-15.) After searching his pockets, Paul told White that he did not have his Advantage Card and that "he would have to go out to the car to get his wallet." (Supp. 422-423; 10 Tr. 1273:25-74:1.) Paul then left the store to retrieve his Advantage Card, a customer savings-and-rewards card. (Supp. 423; 10 Tr. 1274:2-3.) While Paul was outside the store, White proceeded to bag his groceries and place them back in the shopping cart at the end of her register. (Supp. 425-426; 10 Tr. 1277:21-78:4.)

[10] Giant Eagle stipulated that its employees were acting within the course and scope of their employment on the evening of January 21, 2004. (Supp. 96-97; 3 Tr. 280-81.)

Paul was unable to find his Advantage Card in his car,[11] so he reentered the store and explained the situation to White, who directed him to the customer-service desk to obtain a temporary Advantage Card. (Supp. 426; 10 Tr. 1278:5-24.) Paul proceeded to the customer-service desk, where he correctly identified himself to customer service agent Theresa Sanzone as Paul Niskanen. (Supp. 438; 10 Tr. 1309:17-18.)

After shopping for additional items, Paul returned to White's register where his bags had been packed. (Supp. 423-424; 10 Tr. 1274:21-75:13.) He placed the additional items on the checkout counter while White was in the process of checking out another customer. (Supp. 177, 428, 430; 4 Tr. 520:6-9, 10 Tr. 1280:11-16, 1284:19-21.) Paul then took the cart of bagged groceries and proceeded out the front door of the store. (Supp. 431; 10 Tr. 1285:4-5.) White then informed Maczko—who by this time was standing next to White—that Paul was "stealing" the groceries. (Supp. 431; 10 Tr. 1285:12-14.) Based solely on White's word, Maczko went running after Paul outside the store, believing him to be a shoplifter. (Supp. 178, 179, 184-85, 261; 4 Tr. 522:19-24, 523:4-11, 5 Tr. 533:24-34:7, 6 Tr. 708:6.) This pursuit was in direct violation of Giant Eagle policy that "if a shoplifting suspect flees, do not pursue outside the store" (Supp. 140; 3 Tr. 390:2-21)—a policy that Giant Eagle had never provided to Maczko (Supp. 167, 168; 4 Tr. 502:9-23, 503:11-22) and on which he had received no training. (Supp. 169, 174, 175; 4 Tr. 504:4-12, 509:1-25, 510:1-8.)

Outside the store, Maczko saw Paul loading a bag of groceries into the trunk of his car. (Supp. 182-183; 5 Tr. 531:16-32:18.) Giant Eagle policy required that Maczko, if he believed Paul to be a shoplifter, to approach him politely, identify himself, and request that he return inside the store. (Supp. 136; 3 Tr. 386:7-14.) Maczko admitted he did none of these things.

[11] Days later Niskanen's brother did, in fact, find Paul's Advantage Card inside his vehicle. (Supp. 325-327; 7 Tr. 859:12-61:13; Trial Ex. 47.)

(Supp. 188; 5 Tr. 541:8-16.) Instead, he yelled to Jonathan Stress ("Stress")—a 23-year-old stock-boy, who was collecting carts in the parking lot and further away from Paul than Maczko—to "stop the shoplifter." (Supp. 184, 189, 190, 234; 5 Tr. 533:10-19, 542:2-4, 543:19-21, 640:16-18.) Though Maczko was the manager in charge, he claims he directed Stress to handle the situation because he was "afraid." (Supp. 193, 194; 5 Tr. 548:2, 549.) Paul loaded one bag of groceries into his trunk; Maczko admits all of the other bags of groceries were still in the cart and could have been retrieved without further incident. (Supp. 191; 5 Tr. 545:8-24.)

Stress, who was 50-60 feet away, then ran up behind Paul. (Supp. 186, 195-196, 235; 5 Tr. 539:19-21, 553:19-554:4, 641:10-14.) Stress did not—and did not intend to—identify himself to Paul as a Giant Eagle employee. (Supp. 236; 5 Tr. 642:10-17.) As Stress came up suddenly from behind, Paul allegedly turned and hit Stress once in the left shoulder knocking Stress off balance and causing him to fall. (Supp. 198, 237; 5 Tr. 556:1-10, 643:13-21.)[12] Maczko then approached and restrained Paul from the front in what Stress described as a "bear hug." (Supp. 239; 5 Tr. 646:16-21.) Maczko testified that Paul then hit him twice and that, as Maczko grabbed him, the two men fell to the pavement. (Supp. 199-200, 240; 5 Tr. 559:23-60:1, 648:10-17.) Stress testified that at the same time, he had gotten back up, jumped on Paul's back, and placed his arm around Paul's neck in a headlock, at which point the three men fell. (Supp. 241-242; 5 Tr. 649:23-50:2.)

Approximately 25 seconds after the scuffle allegedly began, Giant Eagle customer David Alexoff ("Alexoff") was exiting the supermarket and approached the scene. (Supp. 262; 6 Tr.

---

[12] Despite a host of video-surveillance cameras inside the Rootstown store, Giant Eagle maintained no surveillance cameras outside the store in the parking lot area. (11 Tr. 1605:11-21.) With no surveillance-camera footage, the sequence of events leading to the initial exchange between Stress, Maczko and Paul was necessarily based solely on the testimony of Stress and Maczko.

711:9-18; Trial Ex. 23A-13, A-14.) Alexoff joined Stress and Maczko in restraining Paul, straddling himself across Paul's torso while Maczko restrained his legs and Stress restrained his head/neck region. (Supp. 220-221, 202, 263-268; 5 Tr. 599-600, 566:17-25, 6 Tr. 712:15-17:8.) According to Alexoff, within 50 seconds after the scuffle began, the men had Paul "tabled" on the pavement face down in a position where Paul could not move. (Supp. 272-273, 288-289; 6 Tr. 721-22:4-10, 739:23-40:5.) Alexoff's wife quickly went back in the store to summon help, and when she returned outside, 63 seconds after the altercation began, the situation was "under control." (Supp. 290, 291; 6 Tr. 750:9-21, 756:4-7.) Bystander Donald Allman ("Allman") described the situation as Paul's body being "covered from top to bottom." (Supp. 250; 6 Tr. 672:17-18.) While restrained, Paul yelled to some passersby that "they [Maczko and Stress] are trying to steal my car." (Supp. 201; 5 Tr. 564:5-8.)

Despite Giant Eagle's repeated characterizations at trial that Paul had engaged in a "vicious attack" on Maczko and Stress (Supp. 73, 634; 2 Tr. 227:6, 13 Tr. 1723:20-21), numerous witnesses—both Maczko and Stress, as well Alexoff and his wife, Giant Eagle employee Paul Taylor ("Taylor") and a host of bystanders including Allman, Tom Stewart and John Fowler—testified that the situation was quickly under control and that Paul made no further aggressive moves (if any movement at all) other than a "flinch." (Supp. 204, 206-207, 219, 251, 255, 559; 5 Tr. 572:20-23, 575:25-76:3, 598:22-25, 6 Tr. 674:9-11, 688:16-17, 11 Tr. 1601:5-10.)[13] In fact, within under four minutes, the situation was so controlled that Maczko felt comfortable getting up and instructing Taylor to take over his position. (Supp. 203, 217; 5 Tr. 571:5-14, 596:16-21; Trial Ex. 23A-19.) Though he was the Giant Eagle manager in charge of

[13] In an effort to buttress its image of "Paul-as-dangerous-shoplifter," Giant Eagle further cites the testimony of a bystander who thought he saw Paul, once restrained, reach into his pocket for "something" like a "knife." (GE Brief at 9.) However, there was absolutely no evidence that Paul had a weapon of any kind on his person.

the situation, Maczko nevertheless got up, walked inside the supermarket, and left the potentially "dangerous" situation quite literally in the hands of an untrained stockboy, Stress. (Supp. 208-209, 213-214; 5 Tr. 580:23-81:4, 585:24-86:4.)

Despite a host of undisputed forensic evidence and eyewitness testimony indicating to the contrary, Stress claimed that almost immediately when the men fell to the pavement, his arm slipped-up from Paul's neck and that for the rest of the detention his arm was "wrapped around [Paul's] head." (Supp. 143, 503; 5 Tr. 651:22, 11 Tr. 1458:12-15.) But numerous bystanders—including Allman and Taylor—expressed concern and asked Stress whether he was choking Paul. (Supp. 252, 253, 254, 256; 6 Tr. 675:15-23, 676:3-6, 684:18-21, 692:7-20.) Indeed, Alexoff, who was closely positioned to Stress, asked ***on three separate occasions*** whether Paul was being choked and if he could breathe. (Supp. 275, 276, 277, 278; 6 Tr. 724:16-25, 725:9-12, 726:15-17, 727:13-14.) Each time, Stress responded that Paul was "fine" or that he could breathe. (Supp. 253; 6 Tr. 676:3-6.) At trial, Stress even went so far as to admit that he ***never checked at any time*** to see whether Paul could breathe. (Supp. 247-248; 6 Tr. 665:24-66:1.)[14] Similarly, and despite admitting he owed a duty to ensure that Giant Eagle employees avoid excessive force, Maczko admitted he (1) took no steps to ensure excessive force was not used, (2) never asked if Paul was being choked or could breathe, and (3) actually did nothing. (Supp. 210-212; 5 Tr. 582:8-84:7.)

In total, Paul was completely under control and restrained by the three men in the Giant Eagle parking lot for approximately 10 minutes, until Portage County Sheriff's Officers arrived

[14] In a rather telling revision to the "facts" of this case, Giant Eagle's Statement of the Facts to this Court claims that "[w]hile Niskanen was on the ground, *Stress tried desperately to get control of him*." (GE Brief at 9 (emphasis added).) By contrast, in the Ninth District, Giant Eagle claimed that "[w]hile Niskanen was on the ground, *Stress tried to keep him in a headlock*." (See GE Motion for Reconsideration at 6, filed 4/4/08 (emphasis added).)

and instructed them to remove themselves from Paul's body. (See Trial Ex. 23A-22 (Stress returning inside store); Supp. 351-352; 9 Tr. 1048:7-50:6.) Deputy Matthew Skilton, one of the first responding officers, arrived to find Stress with his arms around Paul's "head area and his shoulders" and found Paul with no pulse. (Supp. 353, 356; 9 Tr. 1050:7-12, 1062:2-3.)

B. Expert Medical Evidence Established that Paul Endured Conscious Pain and Suffering and Died from Homicidal Strangulation and Asphyxia Due to Compression of His Neck and Torso.

A subsequent autopsy by Dr. George Sterbenz, Chief Deputy Medical Examiner for the Summit County Medical Examiner's Office ("Sterbenz"), found that Paul died from "asphyxiation due to compression of the neck and torso." (Supp. 99; 3 Tr. 286:13-17; Trial Ex. 41.) Sterbenz's autopsy revealed "severe facial plethora" and "petechial hemorragh[ing]," as well as "subcutaneous and deep muscular contusions to [Paul's] neck." (Supp. 100-101; 3 Tr. 287:11-88:23.) The Portage County Coroner certified Paul's death as a homicide, with the injury occurring by "restraining victim." (Supp. 98; 3 Tr. 285:7-14.)

At trial, Dr. Cyril Wecht, a leading national forensic pathologist perhaps best known for his involvement with investigating the Kennedy assassination and the Charles Manson murders, testified about the specific mechanism of Paul's death and the attendant pain and suffering Paul experienced during the asphyxiation. Dr. Wecht testified that the mechanism of death was "primarily * * * homicidal strangulation with contributing elements of positional asphyxiation and to a lesser extent mechanical asphyxiation," that was caused by application of "both a bar arm or choke hold and a sleeper or carotid hold." (Supp. 104; 3 Tr. 311:2-22; Docket 7/29/06, Notice of Filing of Dr. Wecht Trial Deposition, Ex. A at 16-17, 71:8-11; 90:4-15.) Dr. Wecht opined that the only way a person could sustain the type of hemorrhaging exhibited on Paul's neck was "in the kind of situation from substantial force having been applied to the neck over a * * * prolonged or continuing period of time." (Id., Ex. A at 33-34.)

C. The Evidence of Giant Eagle's Failure to Properly Train Its Employees in the Safe and Proper Techniques for the Apprehension and Detention of Suspected Shoplifters Was Sufficient to Support a Punitive Damages Verdict.

The evidence of Giant Eagle's negligent use of excessive force and unlawful restraint was more than sufficient to support an award of punitive damages. But Giant Eagle's wrongful conduct was all the more egregious, and the result inevitable, in combination with the disturbing trial testimony of Giant Eagle's conscious disregard in failing to properly train its managers and employees in the safe and proper techniques for approaching and detaining suspected shoplifters, despite its well-established knowledge of the foreseeable risk of death or serious injury in attempting to apprehend, detain and restrain a suspected shoplifter.[15]

Giant Eagle's Vice President of Loss Prevention and Safety, Ron Blazosky ("Blazosky"), testified that it was not only foreseeable but "likely" that shoplifting would occur at Giant Eagle stores, including Rootstown (Supp. 108-109, 110-111; 3 Tr. 331:23-32:2, 334:18-35:2), and that there was a substantial risk that death or serious injury could result if those charged with effecting shoplifting detentions were not properly trained in how to approach, detain and apprehend suspected shoplifters. (Supp. 115-116; 3 Tr. 343:20-44:3.) In fact, from 1980 through 2003, there were over 45,000 shoplifting detentions at Giant Eagle's corporate-owned stores by trained security guards. (Supp. 107, 108; 3 Tr. 330:16-21, 331:6-8.) That figure does not even include detentions at Giant Eagle's 83 franchisee-owned (versus corporate-owned) stores, and/or detentions effected by store managers/employees (versus security guards) chain-wide. (Supp. 108, 364-365; 3 Tr. 331:2-5, 9 Tr. 1077-78.)

---

[15] Noticeably absent from Giant Eagle's Statement of the Facts is any reference to training or how Mackzo allegedly acted in accordance with that training when attempting to detain Paul. Giant Eagle briefed those facts below but now avoids focusing on the training issue, which the Ninth District recognized was "the entire gist of Niskanen's claims against Giant Eagle." Opinion at ¶26.

As a result of the inherent risk posed by any shoplifting situation (Supp. 122, 299; 3 Tr. 357:13-25, 7 Tr. 796:3-14), Giant Eagle developed a series of five rules—Blazosky's Rules—that Giant Eagle repeatedly affirmed as the standard of ordinary care for dealing with suspected shoplifters. (Supp. 138, 370; 3 Tr. 388:13-15, 9 Tr. 1086:13-18.) Indeed, Giant Eagle conceded that Blazosky's Rules applied not only to trained third-party security guards working in its stores, but also to those managerial employees—including Maczko—charged with enforcing Giant Eagle's shoplifting policies. (Supp. 129, 139, 149, 149-150, 153-154, 157-158, 370, 371, 464-465, 490; 3 Tr. 368:13-19, 389:3-7, 4 Tr. 423:18-21, 423:18-24:3, 429:22-30:15, 433:15-34:10, 9 Tr. 1086:13-18, 1087:10-16; 10 Tr. 1375:1-76:9, 1416:8-10.) These rules of ordinary care are not only recognized retail-industry standards (Supp. 132, 306; 3 Tr. 376:14-20, 7 Tr. 803:13-15), but further, as Blazosky testified, they represent "the law" (Supp. 133; 3 Tr. 383:18-22) for dealing with suspected shoplifters, regardless of whether the suspect is innocent or guilty. (Supp. 129; 3 Tr. 368:13-19.) Blazosky's Rules are:

1. If a shoplifting suspect flees, do not pursue outside the store;
2. If a shoplifting suspect fights or flees, let him be;
3. Under no circumstances should you make a detention based solely on the word of another;
4. When approaching a suspect, identify yourself with identification, if possible, and politely advise of your intentions; and
5. If a suspect becomes physically aggressive, disengage. The best rule is no force.

(Supp. 129, 139, 149, 149-150, 153-154, 157-158, 370, 371, 464-465, 490; 3 Tr. 368:13-19, 389:3-7, 4 Tr. 423:18-21, 423:18-24:3, 429:22-30:15, 433:15-34:10, 9 Tr. 1086:13-18, 1087:10-16, 10 Tr. 1375-76, 1416:8-10; Supp. 840-62, 863-912; Trial Ex. 17 p. 8, 9, 11-14; Trial Ex. 18.)

Blazosky admits that each of these policies of ordinary care applied to Maczko as he ran after Paul out of the store. (Supp. 159-160; 4 Tr. 435:24-36:14.) It is further undisputed that these policies are set forth in Giant Eagle's own internal shoplifting manuals and guidelines (Supp. 130-131, 373-374, 375-376; 3 Tr. 373-74, 9 Tr. 1092-93, 1098-99; Supp. 840, 863; Trial Ex. 17, 18) and that Giant Eagle required third-party security officers working inside its stores to receive adequate training on these policies and to abide by them. (Supp. 126, 127-128, 371-372; 3 Tr. 364:6-9, 365-66:18-23, 9 Tr. 1087-88.) Yet, Giant Eagle failed to provide any shoplifting training to its managerial employees—the very persons charged with enforcing Giant Eagle's shoplifting policies 90% of the time at Rootstown when no outside security personnel were on-duty.[16] (Supp. 112; 3 Tr. 340:12-16.)

While conceding that employees need proper training (Supp. 117; 3 Tr. 345:10-16), Blazosky testified that the only shoplifting training he provided to any Rootstown employee—managerial or otherwise—was a 15-minute presentation in a 2000 or 2001 orientation session to Rootstown manager Dale Barnhart ("Barnhart"). (Supp. 119, 121, 122; 3 Tr. 354:7-25, 356:8-13, 357:2-4.) The only written materials governing Giant Eagle's shoplifting polices and procedures that Barnhart received were the Blazosky Rules and an article concerning three deaths at a Detroit-area retail store. (Supp. 144-145; 4 Tr. 415:7-17:7.) Blazosky admitted that Giant Eagle did nothing to ensure that Barnhart passed along this training to Maczko and/or

[16] The jury also heard evidence that Paul's suffering and death were ultimately the product of measures to increase company profits. In 2003, Giant Eagle had a security presence in the Rootstown supermarket for an average of only 3.4 hours per week. (Supp. 366-367; 9 Tr. 1082:17-83:1.) The rest of the time, store managers, including Maczko, were primarily responsible for enforcing shoplifting policies and procedures. (Supp. 368-369; 9 Tr. 1084:15-85:1.) One of the reasons for the stunning lack of outside security personnel coverage was "cost savings." (Supp. 362-363; 9 Tr. 1074:13-75:25.) And it is further undisputed that the Rootstown managers' year-end bonuses—including Maczko's—were driven in part by their ability to reduce controlled expenses, such as training, and to reduce loss as a method of enhancing the store's profitability. (Supp. 348; 8 Tr. 986:9-22.)

other lower-level managerial staff or employees. (Supp. 123-125; 3 Tr. 359:18-60:25, 361:1-10.) Nor did Blazosky ever instruct Giant Eagle Loss Prevention Representative Bill Dobich ("Dobich"), who was responsible for the Rootstown store, to provide such training. (Supp. 118; 3 Tr. 348:8-10.) In fact, Blazosky did absolutely nothing in the four years preceding Paul's death ***ever*** to follow-up on this initial 15-minute training session and simply "assumed that [follow-up training] had taken place." (Supp. 156, 158; 4 Tr. 432:3-8, 434:18-24.) Maczko and Stress' trial testimony, which evidenced a disturbing lack of training (Supp. 166-176, 223-225, 226, 227, 231; 4 Tr. 501-11, 5 Tr. 609-11:1-7, 613:13-25, 614:1-13, 618:15-19), proved Blazosky's "assumption" to be a dangerous one.

Blazosky's shocking disregard for ensuring proper training was further highlighted by Dobich's failures. Dobich knew that Rootstown managers Barnhart and Maczko were routinely making shoplifting apprehensions and detentions (Supp. 358; 9 Tr. 1067:14-18) and believed they were authorized to do so. (Supp. 357; 9 Tr. 1065:13-19.) Dobich also understood that training management and employees in proper policies and procedures for apprehending and detaining suspected shoplifters was required for Giant Eagle to meet its standard of ordinary care. But Dobich admits that no such training ever took place at Rootstown (Supp. 359-360; 9 Tr. 1069:12-71:18), and he did not recall and has no record of ever providing training to Maczko. (Supp. 361; 9 Tr. 1071:6-8.) Dobich never personally provided any training on Giant Eagle's reasonable use of force policy to Rootstown employees (Supp. 377; 9 Tr. 1107:6-13), and further never inquired whether anyone else was providing training at Rootstown. (Supp. 361; 9 Tr. 1071:19-24.) In fact, Giant Eagle provided Blazosky's department with no budget at all for loss prevention training at Rootstown. (Supp. 129; 3 Tr. 368:19-21.)

Astonishingly, though Maczko and Stress failed to follow the Blazosky Rules, Blazosky found no fault in the actions they took in detaining Paul (Supp. 487; 10 Tr. 1406:5-17), and Maczko claims that knowing what he knows know, he would still act the same way. (Supp. 215, 216; 5 Tr. 590:17-24, 591:2.) Niskanen's security-industry expert, J.R. Roberts ("Roberts"), testified that Giant Eagle's loss-prevention measures evidenced an egregious example of "pure risk": for Giant Eagle "to develop a policy but not insure that [its managerial employees] were trained [or the policy was] implemented is effectively to have nothing at all. It's pure risk." (Supp. 311, 312; 7 Tr. 814:1-25, 815:1-4.)[17] Finding that Giant Eagle had fallen below acceptable retail industry standards of care in training its managers and employees (Supp. 293-294; 7 Tr. 790:22-91:8), Roberts further testified that Giant Eagle's claimed practice of allowing its managers to "approach" shoplifters but not "detain" them, without adequate training, was a policy "fraught with danger." (Supp. 308; 7 Tr. 808:19-25.)

[17] Giant Eagle has repeatedly sought to create the impression that Roberts was forced to "concede" that Giant Eagle's shoplifting detention policies—reflected in the Blazosky Rules—"are good policies." (GE Brief at 10.) But the wisdom of the Blazosky Rules was never in dispute. Instead, Niskanen showed that Giant Eagle consciously disregarded its duty to train its employees on the Blazosky Rules, knowing that the failure to do so would likely lead to injury and death, as it did in this case. That was the essence of the trial court's denial of Giant Eagle's motions for summary judgment and directed verdict as to Giant Eagle's malice.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: A plaintiff's comparative negligence will not defeat or diminish the recovery of compensatory damages where the defendant committed the underlying tort with actual malice. (*Schellhouse v. Norfolk & Western Ry. Co.* (1991), 61 Ohio St.3d 520, 575 N.E.2d 453, and *Wightman v. Consol. Rail Corp.*, 86 Ohio St.3d 431, 1999-Ohio-119, 715 N.E.2d 546, approved and followed)

A. The Ninth District Did Not Endorse a Stand-Alone Claim for Punitive Damages.

In its First Proposition of Law, Giant Eagle and its amici seek to overturn the American rule, ostensibly because Niskanen allegedly did not sufficiently plead actual malice. But Niskanen's Amended Complaint sufficiently alleged actual malice, particularly under Ohio's liberal notice-pleading standards, and, as a result, the parties actively litigated the punitive-damages issue throughout the litigation below. The trial court twice denied Giant Eagle's motions for directed verdict on the punitive-damage issue, finding there was sufficient evidence of actual malice to charge the jury.

Giant Eagle and its amici devote a significant amount of briefing surveying Ohio and out-of-state authority for the well-settled proposition that "[i]n Ohio, no civil action may be maintained simply for punitive damages." *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 650, 1994-Ohio-324, 635 N.E.2d 331, citing *Bishop v. Grdina* (1985), 20 Ohio St.3d 26, 28, 485 N.E.2d 704; *State ex rel. Bd. of State Teachers Ret. Sys. of Ohio v. Davis*, 113 Ohio St.3d 410, 417, 2007-Ohio-2205, 865 N.E.2d 1289, at ¶46 ("'punitive damages is not a separate claim in itself but rather an issue in the overall claim for damages.'") (citation omitted). "Rather, punitive damages are awarded as a mere incident of the cause of action in which they are sought." Id.

That emphasis on the proposition that a plaintiff may not assert a "stand alone claim" for punitive damages (GE Brief at 13) is curious for two reasons. First, ***Niskanen has never disputed this point***, and readily concedes that a plaintiff must establish liability for compensatory

damages before she may recover punitive damages.[18] Second, nowhere in its Opinion did the Ninth District "dispense[] with" the requirement that a plaintiff recover compensatory damages before she may recover punitive damages or hold that Niskanen (or any other plaintiff) may assert a "stand alone" claim for punitive damages. These principles of punitive-damage law remain intact and unchallenged.

Where Giant Eagle and its amicis' analyses veer off course is in the failure to concede the American rule that comparative negligence "'will not defeat or diminish the recovery of damages where the defendant's intentional tort, committed with actual malice, proximately caused the injury.'" *Schellhouse*, 61 Ohio St.3d at 525. In fact, this Court has previously held—in *Schellhouse* and its progeny—that a plaintiff's comparative negligence does not bar a claim for ***compensatory*** damages if the defendant has acted with actual malice.[19] In short, malice alone does not suffice if there is no valid predicate claim for compensatory damages. But a finding of malice trumps a comparative-negligence defense that could otherwise defeat a predicate claim for compensatory damages.

---

[18] See, e.g., Niskanen Brief in Opp. to Motion for Reconsideration, filed 4/18/08, at 4 ("Giant Eagle continues to press that a plaintiff must establish liability for compensatory damages before she may recover punitive damages . . . [t]hat argument, which Niskanen has never disputed, goes only so far.").

[19] Giant Eagle and its amici seize on the Ninth District's comment—perhaps inartfully stated—that the Niskanen jury should have been allowed to consider "the punitive damage issue." (See, e.g., GE Brief at 12; OCRM Brief at 4.) By focusing on this limited language and ignoring the balance of the Court's analysis, Giant Eagle and amici seek to create the impression that the Ninth District's holding would require a jury to "jump" to consideration of a punitive *award*, before considering the predicate claim. But that was clearly not the Court's holding. Rather, consistent with *Schellhouse*, the Ninth District recognized that a finding of actual malice (i.e. "the punitive damage issue") would negate comparative negligence as a defense to the predicate claim.

B. **The Ninth District Properly Applied the American Rule and *Schellhouse* in Holding a Plaintiff's Comparative Negligence Will Not Defeat Recovery of Compensatory Damages Where Evidence of Actual Malice Exists.**

On appeal to the Ninth District, Niskanen alleged that the trial court committed reversible error because, over Niskanen's objection:

> [T]he structure of "the jury interrogatories precluded the jury from reaching a verdict on the punitive damage issues * * * despite the trial court's prior determinations that Niskanen had presented sufficient evidence [i.e. evidence of Giant Eagle's conscious disregard] from which the jury could award punitive damages." (Niskanen Appellant's Brief at 16-17.)

"Rather than allow a finding of punitive damages"—i.e., actual malice under a conscious-disregard theory[20]—"to trump a comparative negligence defense," as *Schellhouse* requires, "the trial court allowed the comparative negligence finding to trump all." Id.

Recognizing the trial court's error, the Ninth District confirmed that "[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." Opinion at ¶17, citing *Schellhouse*, 61 Ohio St.3d 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." Id., citing *Wightman I*, 94 Ohio App.3d at 398.

In fact, *Schellhouse* merely confirmed the long-standing American rule—which has held firm since the days of strict contributory negligence—that "acts committed with actual malice constitute behavior qualitatively different from that which may be characterized as merely negligent." *Schellhouse*, 61 Ohio St.3d at 524. Thus, even where a plaintiff may have acted

---

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

negligently—whether under a strict contributory ***or*** comparative-negligence tort system—that negligence should not serve to preclude recovery on a predicate claim for compensatory damages where the defendant's conduct exhibited actual malice. As the *Schellhouse* Court noted:

> Where wanton misconduct on the part of a defendant existed, negligence on the part of the plaintiff is not available as a defense. * * * Contributory negligence, prior to the enactment of R.C. 2315.19, did not bar recovery in an action predicated on the willful, wanton or reckless conduct of a defendant. Likewise, the provisions of the statute which operate to prevent or reduce the recovery of a plaintiff due to her comparative negligence should not apply in such a case. Accordingly, in a civil action for tort or wrongful death, a finding by the jury that a plaintiff (or plaintiff's decedent) was comparatively negligent will not defeat or diminish the recovery of damages where the defendant's intentional tort, committed with actual malice, proximately caused the injury.

Schellhouse, 61 Ohio St.3d at 525;[21] see *Payne,* 103 Ohio St. at 76 (citing *Krause,* 53 Ohio St. at 36 ("'Where the conduct of the defendant is wanton and willful, or where it indicates that degree of indifference to the rights of others, which may be characterized as reckless, the doctrine of contributory negligence has no place whatever, and the defendant is responsible for the injury he inflicts.'" (internal citation omitted)).

As one commentator has noted, this fundamental rule, holding strong since the days of strict contributory negligence, finds its basis in providing for a just result based on the nature of the respective parties' conduct:

> Under the traditional ***American rule***, contributory negligence has been no defense to an action for an injury caused by willful, wanton or reckless misconduct. * * * [T]he rule may be explained by the strong natural feeling that faults should be compared, at least in the sense that a serious wrongdoer should not escape liability because of the trivial misstep of his victim.

---

[21] Previewing a further refinement of this holding in *Wightman II*, the Supreme Court also noted that "negligent acts committed with malice" may be no "less than an intentional tort." *Schellhouse*, 61 Ohio St.3d at 525, fn. 1.

4 Harper, James and Gray on Torts (3 Ed. 2007), 363-364, Section 22.6 (emphasis added). Professors Prosser and Keeton likewise affirm the rule:

> [W]here the defendant's conduct is actually intended to inflict harm upon the plaintiff, there is a difference, not merely in degree but in the kind of fault; and the defense never has been extended to such intentional torts. * * * ***The same is true of that aggravated form of negligence, approaching intent, which has been characterized variously as "willful," "wanton," or "reckless," as to which all courts have held that ordinary negligence on the part of the plaintiff will not bar recovery.***

Keeton, Dobbs, Keeton and Owen, Prosser and Keeton on Torts (5 Ed. 1985) 462, Section 65 (emphasis added).

As the Ninth District acknowledged, that rule becomes all the more important in a unique factual situation such as this, where Niskanen had no way of preventing or avoiding the consequences of Giant Eagle's conscious disregard in depriving its employees of crucial training in the safe and proper techniques for the apprehension and detention of suspected shoplifters.

Nor is the *Schellhouse* rule aberrational or limited to the facts of that decision. Instead, this Court and Ohio appellate courts have continued to apply it consistently even after the statutory enactment of comparative negligence.[22] Less than a year after *Schellhouse*, the Tenth District Court of Appeals followed *Schellhouse* in an action where a decedent's estate sought to recover punitive damages on a medical-malpractice claim where "plaintiff's complaint did not [even] mention punitive damages, but instead requested compensatory damages based on

[22] Giant Eagle purports to distinguish *Schellhouse* on the grounds that (1) it only applies where a plaintiff pleads an intentional tort claim, and (2) the holding in that case was the result of the jury's failure to return a general verdict and this Court's subsequent inability to square the jury's comparative negligence and punitive damage findings. (GE Brief at 16-17.) As set forth below, subsequent authority from this Court (*Wightman II*) and lower courts applying *Schellhouse* have made clear that the *Schellhouse/Wightman* rule is not as narrow as Giant Eagle would have it be, and in fact applies in any situation where a defendant's conduct rises to the level of actual malice, regardless of how the plaintiff has pled her claim (i.e., in negligence or intentional tort).

defendant's professional negligence." *Lambert v. Shearer* (1992), 84 Ohio App.3d 266, 274, 616 N.E.2d 965. In *Lambert*, where the plaintiff did not allege any intentional tort claims, the Tenth District cited *Schellhouse* and noted that "contributory negligence and comparative negligence are no defense to a ***reckless or*** intentional tort." Id. at 275 (emphasis added).

Two years after *Lambert,* the Sixth District Court of Appeals once again invoked *Schellhouse* in affirming the denial of a directed verdict in favor of a defendant railroad company that had argued the plaintiff's decedent's negligence precluded an award of punitive damages. *Wightman I.* Upon finding that plaintiff had adduced sufficient evidence that the defendant "acted with actual malice or at least acted negligently," the matter was remanded for the jury to determine the proper award of punitive damages. At the subsequent retrial, the jury awarded the plaintiff $25 million in punitive damages (remitted to $15 million), a verdict the Sixth District affirmed. In *Wightman II*, this Court again affirmed the *Schellhouse* rule that a plaintiff's comparative negligence will not serve to defeat or diminish the recovery of predicate compensatory damages where a defendant acts with actual malice. Recognizing once again that "acts committed with actual malice constitute behavior qualitatively different from that which may be characterized as merely negligent," the Court concluded that "contributory negligence is not available as a defense ***where conduct in conscious disregard*** has been established." Id. at 436 (emphasis added). ***That*** was precisely the conduct alleged by Niskanen in this action and for which the trial court found sufficient evidence to charge the jury.

Numerous Court of Appeal decisions following *Wightman II* have continued to adhere to this rule. See *Mays v. Taylor*, 7th Dist. No. 00-CA-209, 2001 Ohio App. LEXIS 5798, at *13-14 (citing *Schellhouse* and *Wightman II*, holding "[o]nce the trial court reached the conclusion that [defendant] was reckless as a matter of law, it properly removed any question of comparative

negligence on [plaintiff's] part from the case."); *Young v. Univ. of Akron*, 10th Dist. No. 04AP-318, 2004-Ohio-6720, at ¶22 ("[o]nce it is established that a defendant acted recklessly or with actual malice, evidence of a plaintiff's comparative or contributory negligence is rendered inadmissible and ***the trier of fact may not consider those defenses***.") (emphasis added); *Estate of Beavers v. Knapp*, 175 Ohio App.3d 758, 766-770, 2008-Ohio-2023, 889 N.E.2d 181 (affirming $500,000 punitive-damage verdict, noting that "the jury necessarily found that [driver-defendant] acted with actual malice, a finding that negates a set-off for damages under Ohio's comparative negligence law.").

Against this overwhelming precedent, Giant Eagle continues to press that the Ninth District's application of *Schellhouse* impermissibly allows Niskanen to "sidestep[] the comparative fault bar" (GE Brief at 13) by "dispensing with" the predicate-claim requirement (i.e., compensatory damages on a substantive claim for relief). But the "comparative fault bar" exists only if comparative negligence is a ***available*** as a defense ***in the first instance***. *Schellhouse* and its progeny instruct that where a defendant has acted with actual malice "in conscious disregard," see *Wightman II*, 86 Ohio St.3d at 436, the defense of comparative negligence is "inadmissible and the trier of fact may not consider those defenses." *Young* at ¶22. Applying these principles, the Ninth District did not "dispense with" with predicate-claim requirement. On retrial, Niskanen would still have to establish liability for compensatory damages before recovering any punitive award. But—consistent with *Schellhouse* and the age-old contributory-negligence exception—she is entitled to recover those compensatory damages without regard to Paul's own negligence if the jury concludes that Giant Eagle exhibited recklessness or actual malice.[23]

[23] The folly of Giant Eagle and its amicis' logic is perhaps best evidenced by the OACTA's

C. The Ninth District's Opinion is Consistent with This Court's Decision in *Marriott* and its Progeny.

Having failed to convince the Ninth District to depart from the *Schellhouse/Wightman* rule, Giant Eagle next contends that a finding of malice needed for punitive damages is not enough to defeat a comparative-negligence defense, but that the "finding of malice must be accompanied by success of a separate intentional tort claim that includes an award of compensatory damages." (GE Brief at 16, n.8.) As support for this contention, Giant Eagle relies on this Court's decision in *Malone v. Courtyard by Marriott, L.P.,* 74 Ohio St.3d 440, 1996-Ohio-311, 659 N.E.2d 1242. But *Marriott* does nothing to undermine the established *Schellhouse/Wightman* rule, and in fact confirms the wisdom of the Ninth District's reasoning.

In *Marriott,* the "core" question was whether the trial court's grant of a directed verdict on punitive damages in favor of Marriott was error. Id. at 445. Reviewing the evidence presented at trial, this Court found that plaintiffs failed to present sufficient evidence of Marriott's conscious disregard and thus affirmed the directed verdict.[24] Id. Affirming the *Bishop* rule that a plaintiff may not assert a stand-alone claim for punitive damages, the Court noted 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.

---

comment that "[a]t common law, any contributory fault (or contributory negligence) by Niskanen would have completely barred Niskanen's negligence claim." (OACTA Brief at 9, n.3.) That statement ignores the traditional "American rule" limitation—reflected in *Schellhouse* under a comparative-negligence regime—that where a defendant acts with actual malice, any negligence by the plaintiff, whether it be 1% or 99%—"will not defeat or diminish the recovery of compensatory damages" in the first place.

[24] Here, by contrast, both the trial court and Ninth District found that Niskanen presented sufficient evidence to support a finding of actual malice, see Opinion at ¶38-39, and Giant Eagle did not seek this Court's review of that aspect of the Ninth District's decision.

Giant Eagle seizes on the Court's dictum in *Marriott* regarding the plaintiff's efforts to "circumvent [the *Bishop*] bar," where the plaintiff argued that she "could have recovered compensatory damages on a recklessness theory." Id. Giant Eagle's *Marriott* argument—first presented to the court of appeals in connection with Giant Eagle's motion for reconsideration—fails for two reasons.

First, even if the dictum in *Marriott* were controlling, it would not change the result here. *Marriott* recognized that a plaintiff's comparative negligence is immaterial if the plaintiff "advance[es] a claim for compensatory damages based on [the defendant's] ***recklessness***," see 74 Ohio St.3d at 447 (emphasis added), and recklessness is a level of wrongfulness ***lower than the level required to establish malice***. In that respect, *Marriott* actually confirms that comparative negligence "will not defeat" a plaintiff's recovery of compensatory damages when the defendant's conduct is sufficiently reprehensible.

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

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

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

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

(Supp. 1-17; Amended Complaint, filed 3/25/05, at ¶42 (emphasis added).)[25] Importantly—and contrary to Giant Eagle's repeated claims that Niskanen did not "pursue[] any intentional tort claim" but "only a negligence theory" at trial (GE Brief at 17)[26]—Niskanen did ***not*** dismiss ***this*** intentional-tort claim, which remained in the case through the verdict.[27] But the jury, having found Paul more than 50% negligent, and being charged on actual malice, was not permitted to consider the interrogatory and make a factual finding that Giant Eagle acted with actual malice.

Thus, Niskanen raised and pursued the very allegations that are required under *Marriott* to defeat a finding of comparative negligence. Giant Eagle knows as much but chooses to minimize these allegations, accusing Niskanen of "sprinkl[ing]" them "throughout much of her amended complaint" as though they had no purpose other than to adorn the pleading. (See GE Brief at 15, n.1.) Giant Eagle wants this Court to adopt a new pleading requirement not found in the civil rules that a "plaintiff must ***separately*** plead and ultimately prevail on a compensatory damage claim asserting intentional conduct" (id. (emphasis added)), so that the inclusion of allegations of both negligence and intentional and willful misconduct within the same cause of action will somehow strip the intentional-tort allegations of any significance and cause a plaintiff to forfeit her right to use those allegations to defeat a comparative-negligence defense. This

---

[25] Although Niskanen did not specifically plead "recklessness," she alleged and pursued at trial an even higher level of misconduct—that Giant Eagle's "intentional" and "willful" violations of its duties of care caused compensatory damages. (See Supp. 1-17; Amended Complaint, filed 3/25/05, at ¶42.) In any event, Niskanen also alleged "gross negligence" (see id.), which courts have recognized "is such '***reckless*** and heedless conduct [as] would amount to a legal willful tort.'" *GMAC Mtge. Corp. v. Titch*, 9th Dist. No. 04CA0012, 2005-Ohio-868, at ¶19, quoting *Payne*, 103 Ohio St. at 69.

[26] Giant Eagle's amici made similarly incorrect statements. See, e.g., OCC Brief at 5 ("Niskanen, however, dismissed all of her intentional tort claims prior to trial.").

[27] The dismissed claims were for false imprisonment (Third Claim for Relief) and assault and battery (Fifth Claim for Relief). (See Supp. 1-17; Amended Complaint, filed 3/25/05, at ¶52-56, 63-65; Supp. 24-25; 1 Tr. 3:22-23, 4:1.)

argument exalts form over substance and runs far afoul of Civ.R. 8(F), which directs that "[a]ll pleadings shall be so construed as to do substantial justice." See, also, *MacDonald v. Bernard* (1982), 1 Ohio St.3d 85, 86, 1 OBR 122, 438 N.E.2d 410, fn.1 (pleadings shall "be construed liberally in order that the substantive merits of the action may be served.").

Likewise, Giant Eagle's argument does not square with Ohio's liberal notice-pleading standards, see Civ.R. 8, or the rule that parties may amend pleadings even at trial or after the entry of judgment in order to conform them to the evidence. See Civ. R. 15(B); see, also, *City of Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, 768 N.E.2d 1136, at ¶29 ("since Ohio is a notice-pleading state, Ohio law does not ordinarily require a plaintiff to plead operative facts with particularity."); *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 144-45, 573 N.E.2d 1063 (under the "notice pleading regimen * * * incorporated into the Ohio Rules of Civil Procedure * * * a plaintiff is not required to prove his or her case at the pleading stage.").

Second, even if Niskanen had not raised allegations of harm caused by intentional, willful or reckless misconduct, Giant Eagle's "separately pled intentional tort claim" argument would still fail, as it ignores the Court's suggestion in *Schellhouse* that "negligent acts committed with malice" may be no "less than an intentional tort." See 61 Ohio St.3d at 525, fn.1; see, also, id. at 524 ("acts committed with actual malice constitute behavior qualitatively different from that which may be characterized as merely negligent"). And in 1999—three years ***after*** the decision in *Marriott*—this Court reaffirmed in *Wightman II* that "contributory negligence is ***not available as a defense*** where conduct ***in conscious disregard*** has been established." 86 Ohio St.3d at 436 (emphasis added). Thus, under *Wightman II*, there is no requirement of a separate intentional tort; "actual malice" is enough. Subsequent appellate decisions applying *Schellhouse* to cases

involving negligence theories confirm this analysis. See, e.g., *Estate of Beavers v. Knapp* (10th Dist. 2008), 175 Ohio App.3d 758, 766-70, 2008-Ohio-2023, 889 N.E.2d 181.

D. The Ninth District's Opinion Does Not Preclude Bifurcation of Punitive Damages, Lead to Jury Confusion, or Violate a Defendant's Due-Process Rights.

Giant Eagle raises three new arguments for the first time on appeal to this Court: (1) that the Ninth District's holding is inconsistent with the now-mandatory bifurcation of punitive damages in a tort action (see R.C. 2315.21(B)(1) (eff. April 7, 2005)); (2) that "[t]elling juries they must consider punitive damages" (GE Brief at 20) would lead to juror confusion; and (3) that "any award of punitive damages" (GE Brief at 21) would violate Giant Eagle's due-process rights. As an initial matter, Giant Eagle failed to raise any of these arguments below and therefore has "waive[d] [its] right to raise it here." See *State ex rel. Zollner v. Indus. Comm. of Ohio*, 66 Ohio St.3d 276, 278, 1993-Ohio-49, 611 N.E.2d 830. Niskanen nevertheless addresses the substance of these arguments, because none of them has merit.

1. The Ninth District Did Not Address R.C. 2315.21(B)(1)'s Mandatory-Bifurcation Requirement Because, by Giant Eagle's Own Admission, It Does Not Apply in this Case.

Giant Eagle first argues that "the Ninth District's view on punitive damages, if adopted, would eliminate bifurcation as an option in any negligence action." (GE Brief at 19.) This argument is both irrelevant and wrong.

With regard to relevancy, Giant Eagle concedes that in this action "bifurcation was only discretionary" under Civ.R. 42(B), because the mandatory-bifurcation requirement of R.C. 2315.21(B)(1) became effective April 7, 2005, after Niskanen filed suit. As Giant Eagle's own authority recognizes, "'[i]t is well-settled law that statutes are presumed to apply prospectively unless expressly declared to be retroactive.' * * * R.C. 2315.21(B) contains no express statement about being retroactive * * * hence, [the] analysis comes to an end."

Mastellone v. Lightning Rod Mut. Ins. Co., 175 Ohio App.3d 23, 2008-Ohio-311, 884 N.E.2d 1130, at ¶19, 21 (internal citations omitted).

But even under a mandatory-bifurcation scheme, the conceptual basis of Giant Eagle's argument is flawed. The main purpose of bifurcation is to exclude the potential prejudice that could arise from a jury being permitted to consider evidence of a defendant's wealth during the liability phase of a trial. See Kirchner and Wiseman, Punitive Damages: Law & Practice (2 Ed. 2000), 12-11, Section 12.04 ("Perhaps the most compelling reason to order a separate trial of punitive damages is the avoidance of prejudice [that is] enhanced by evidence of a defendant's financial condition"); 1 Schlueter, Punitive Damages (5 Ed. 2006), 167, Section 4.2(B)(3) ("purpose of bifurcation is to prevent any prejudice to the defendant * * * because of [the] extraneous, irrelevant and highly prejudicial evidence of his financial condition."). By contrast, allowing a jury to consider whether a defendant's conduct rose to the level of actual malice during the liability phase would not trigger this concern, nor would it require the introduction of otherwise-improper evidence of wealth. Again, Giant Eagle fails to concede that the entire purpose of the *Schellhouse/Wightman* rule is to permit the jury to make a *factual finding* on actual malice during the liability phase of trial (which the jury here was precluded from doing due to the structure of the jury interrogatories), not to require the jury immediately to "proceed to the punitive damages phase" (GE Brief at 9) where it would decide the size of a punitive award.

2. <u>The Ninth District's Opinion Does Not Enhance the Risk of Juror Confusion.</u>

Giant Eagle also urges that permitting juries to consider evidence of a defendant's actual malice to negate a comparative negligence defense "will almost certainly lead to jury confusion." (GE Brief at 20.) Nonsense. For over 100 years, Ohio has followed the American rule without jury confusion. Contrary to Giant Eagle's claim, neither the Ninth District's Opinion nor

Schellhouse require a court to "[t]ell[] juries they must consider punitive damages." (GE Brief at 20.) Again, Giant Eagle fails to distinguish between deciding whether a defendant has acted with actual malice and deciding the amount of any award of punitive damages. Properly instructed, there is no risk that a jury would be "confused" when asked to make a factual finding as to whether a defendant has acted with actual malice.

3. The Ninth District's Opinion Does Not Violate Giant Eagle's Due-Process Rights.

Giant Eagle's third new argument is that "any award" of punitive damages would violate its due-process rights. Relying on *BMW of N. Am., Inc. v. Gore* (1996), 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 and *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003), 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585, Giant Eagle claims that "[a]ny award of punitive damages seems excessive when compared to recovery of zero compensatory damages." (GE Brief at 21.)

But as this Court is well aware, see *Barnes v. Univ. Hosp. of Cleveland*, 119 Ohio St.3d 173, 2008-Ohio-3344, 893 N.E.2d 142, *BMW* and *State Farm* are concerned with the proper ratio of compensatory-to-punitive damages such that an excessive ratio would render a large punitive award unconstitutional. In this case, the ratio of compensatory to punitive damages is not an issue at this point, because there has not yet been an award of punitive damages. If, on retrial, Niskanen prevails and recovers compensatory and punitive damages, the trial and appellate court would certainly be capable of ensuring that the size of the punitive award comported with due process. Upholding *Schellhouse* does nothing to undermine that due-process review. Indeed, the *Schellhouse* rule speaks to the availability of ***compensatory*** damages, not ***punitive*** damages.

* * *

In short, the Ninth District correctly applied existing precedent—from *Schellhouse*, to *Marriott* to *Wightman*—in holding that the trial court erred when it precluded the jury from considering Giant Eagle's actual malice, where such a finding would have "negated any potential

set-off for [predicate, compensatory] damages under Ohio's comparative negligence law." Opinion at ¶17. This rule—unchallenged since the days of strict contributory negligence—remains sound and unaltered by the Ninth District's application of precedent to the facts of this case, and there is no reason to disturb it now.

> **Proposition of Law No. 2**: The affirmative defense of self-defense is inapplicable where a defendant refuses to acknowledge that it acted intentionally in defense of itself or others, and irrelevant to a claim challenging a defendant's conduct that precedes a physical altercation, such as a negligent failure-to-train claim.

Giant Eagle and its amici challenge the Ninth District's holding that self-defense was "completely irrelevant" to this case and that the trial court's self-defense instruction caused the jury to "los[e] sight of the entire gist of Niskanen's claims against Giant Eagle, who was the defendant remaining in the case." (See Opinion at ¶26, 28.) But the Ninth District did not "eliminate[] the right of self-defense in negligence actions" (cf. OCRM Brief at 2) or "strip[] Giant Eagle and its employees of their right to defend themselves against a vicious unprovoked attack." (Cf. GE Brief at 2.) What the Ninth District ***did*** hold is that "the defense of self defense [is] ***inapplicable***" because Giant Eagle steadfastly denied that its employees placed Paul in a chokehold, and "***irrelevant***" to Niskanen's negligence theories that Giant Eagle deprived its employees of proper training and unreasonably restrained Paul once he was subdued. (Opinion at ¶20, 28) (emphasis added). That holding is perfectly consistent with established precedent, including this Court's decision in *Goldfuss*.

Equally misguided is the argument that the Ninth District's holding permits a plaintiff, through "artful" or "strategic" pleading (cf. OACTA Brief at 15; GE Brief at 34), to circumvent an otherwise proper self-defense instruction by pleading only negligence, rather than intentional tort, claims. Giant Eagle urges that the Ninth District's holding means that the "constitutionally

protected"[28] right to assert self-defense now "hinges on the plaintiff's pleading choices." (GE Brief at 27.) But Giant Eagle and its amici overlook the heart of the Ninth District's self-defense holding: that the applicability of self-defense to a plaintiff's tort claim does not "hinge" on the ***plaintiff's*** characterization of the defendant's conduct in the pleadings, but rather from the ***defendant's*** characterization of his conduct in attempting to invoke the defense.[29] (See Opinion at ¶25.)

Finally, Giant Eagle and its amici once again seek to elevate the Ninth District's limited holding, based on the unique facts of this case, to a matter of constitutional concern. But Giant Eagle's analogy to the Second Amendment and its invocation of due process fail to undermine the Ninth District's logical conclusion that self-defense was both "inapplicable" and "irrelevant" to Niskanen's claims. This Court should affirm.

A. The Ninth District Correctly Held that Self-Defense Was Legally "Inapplicable."

1. Giant Eagle Ignores the Dispositive Rule that Self-Defense Applies Only When the Defendant Acknowledges Engaging in Intentional Conduct.

The Ninth District followed existing precedent and correctly held that self-defense applies only when the defendant acknowledges having engaged in "'an ***intentional response***'" to aggression; otherwise self-defense is "inapplicable." See Opinion at ¶20, 22 (emphasis added),

---

[28] Giant Eagle continually refers to self-defense as a "constitutionally-protected defense." (E.g., GE Brief at 24.) Curiously, it does so by relying in large part on a citizen's Second Amendment right to bear arms. (See GE Brief at 23, fn.11.) But Giant Eagle has provided no authority for the proposition that a civil defendant is constitutionally entitled to a jury instruction on self-defense where the facts of the case do not merit one.

[29] One cannot help but note that Giant Eagle advocates two inconsistent approaches to pleading. Giant Eagle urges a strict construction when attacking Niskanen's Amended Complaint as deficient for only "sprinkling allegations relating to punitive damages" and alleged failure to plead a separate "stand alone intentional tort claim." (See GE Brief at 13, 15, fn.1.) But Giant Eagle wants the Court to adopt a more equitable construction of the Amended Complaint when its argument turns to self-defense. Giant Eagle cannot have it both ways.

quoting *Robinson v. Brown* (Feb. 21, 1989), 12th Dist. No. 88-07-052, 1989 Ohio App. LEXIS 595, at *4; see, also, id. at ¶24. Self-defense requires a showing that the defendant's "only means of escape from * * * danger was in the use of such force," which by definition establishes that the defendant used force by design, not accidentally. See, e.g., *State v. Robbins* (1979), 58 Ohio St.2d 74, 12 O.O.3d 84, 388 N.E.2d 755, paragraph two of the syllabus. Thus, "a defendant cannot act ***negligently*** and, at the same time, raise the defense of self-defense because the two theories are inconsistent." Opinion at ¶23 (emphasis added). Accordingly, the Ninth District correctly reasoned that Giant Eagle could have asserted self-defense—that is, that its employees acts were "justified" in applying a chokehold to Paul—only by ***conceding*** in the first instance that they "intended" to use that level of force to protect themselves. See id.

As Giant Eagle's own authorities tracing the history of the privilege of self-defense acknowledge, a defendant-actor's ***intentional*** conduct in purposefully using force to repel an attack is the cornerstone of self-defense. See GE Brief at 22-23; *District of Columbia v. Heller* (2008), 128 S.Ct. 2783, 2799, 171 L.Ed.2d 637 (acknowledging citizen's right to "repe[l] force by force", quoting Blackstone's Commentaries (1803) 145-146, fn. 42).

But Giant Eagle has never conceded that its employees ***intentionally*** placed Paul ***in a chokehold***, much less that doing so was "an intentional response" to Paul's conduct. To the contrary, Giant Eagle steadfastly insisted at trial that Paul's death was "an accident versus intentional conduct" and that there was "nothing, nothing, nothing in the record[] to suggest any intentional conduct by Giant Eagle in causing this incident to occur." (Supp. 678, 679; 13 Tr. at 1768:6-12, 1767:20-24 (Giant Eagle arguing that none of its employees "intentionally hurt" Paul).) Accordingly, Giant Eagle failed to assert the predicate basis for invoking self-defense.

On appeal to this Court, Giant Eagle now abandons the position it advanced in the Ninth

District, that "its defenses were not inconsistent" because it "admitted nothing," and now seeks to square its contradictory defenses. (See GE Brief at 27-28.) Giant Eagle now claims it:

> 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.

(GE Brief at 27-28.) But Giant Eagle fails to acknowledge or concede that its employees intentionally placed Paul in a deadly chokehold for a period of 5-10 minutes while he was subdued—the very essence of Niskanen's undue-restraint claim. Indeed, it was precisely for this reason that the Ninth District determined that—while the affirmative defense of self-defense was not available to shield Giant Eagle from liability on a negligence claim—its allegedly defensive actions were nevertheless relevant to a ***comparative negligence*** defense. See Opinion ¶33.

2. The Ninth District Properly Recognized that Neither *Goldfuss* nor *Ashford* Renders Self-Defense Applicable to This Case.

To circumvent the logic of the Ninth District's analysis, Giant Eagle claims the Ninth District erred in ignoring authorities "permitting self-defense in a negligence action"—specifically, this Court's decision in *Goldfuss*, and the Ninth District's prior decision in *Ashford v. Betleyoun*, 9th Dist. No. 22930, 2006-Ohio-2554. But neither *Goldfuss* nor *Ashford*—cases that Giant Eagle did not raise until the reconsideration stage in the Ninth District—supports Giant Eagle's position.

In *Goldfuss*, the defendant intentionally fired a warning shot at intruders breaking into his barn, accidentally shooting the plaintiff. *Goldfuss*, 79 Ohio St.3d at 117. The defendant was not entitled to assert self-defense because he was never in fear for his own physical safety. Id. at 124. *Goldfuss* is inapposite because in that case this Court held there was "insufficient evidence" to support a self-defense instruction. Id. And, contrary to Giant Eagle's misleading quotation

from *Goldfuss* (see GE Brief at 25), the case contains ***no language*** suggesting that self-defense is applicable in negligence cases.[30] In fact, *Goldfuss* implicitly illustrates that a defendant must acknowledge the intentional use of force in order to assert self-defense.

Giant Eagle is correct that the Ninth District previously acknowledged in *Ashford* that self-defense can apply in certain negligence actions. (GE Brief at 25.) And the Ninth District recognized as much in its decision without specifically citing *Ashford*. See Opinion at ¶25. But *Ashford* illustrates even more directly that it is the ***defendant's*** characterization of his own actions, rather than the plaintiff's pleading, that determines whether self-defense is an available defense. The security guard defendant in *Ashford*, for example, acknowledged that he intentionally pulled out a gun and shot the plaintiff's decedent because the plaintiff's decedent had pointed a gun at the defendant's face while trying to rob him. *Ashford* at ¶13-19. Thus, unlike Giant Eagle, the defendant in *Ashford* acknowledged that the conduct giving rise to the plaintiff's lawsuit was, in fact, intentional and, so acknowledging, was permitted to argue that the conduct was justified even though the cause of action sounded in negligence. That case has no application here because Giant Eagle ***contests*** that its employees used a chokehold, much less intentionally, and insisted that Paul's death was at most "an accident." (Supp. 679; 13 Tr. at 1768:6-12.)[31]

---

[30] The words "including negligence," which appear in brackets in Giant Eagle's quotation from *Goldfuss* (see GE Brief at 25), are ***Giant Eagle's insertion***, not this Court's language.

[31] Here, Giant Eagle acknowledges that its employees intentionally "held Niskanen down" (cf. GE Brief at 28) but specifically deny intentionally or unintentionally using a chokehold, which is the dangerous force that Niskanen alleges was unreasonable.

3. **The Ninth District's Holding is Consistent with the United States Supreme Court's *Jopes* Decision and Authority from Other Jurisdictions.**

Though the Ninth District's decision fully comports with *Goldfuss* and *Ashford*, Giant Eagle and its amici purport to take the Ninth District to task for its "shabby treatment" (OACTA Brief at 2) of the self-defense issue by seizing on two points: (1) the Ninth District's statement that it "found no Ohio authority for recognizing self-defense as a defense in a negligence action," Opinion at ¶25; and (2) the Ninth District's allegedly improper analogy to Ohio criminal law. (See Opinion at ¶23-24.) Neither of these arguments, however, detracts from the fundamental rule that a defendant must concede that his conduct was intentional before invoking the privilege of self-defense. And neither of them provides a basis for reversing the Ninth District's decision.

First, Giant Eagle invokes the connection between negligence and self-defense in the United States Supreme Court's decision in *New Orleans & Northeastern R.R. Co. v. Jopes* (1891), 142 U.S. 18, 12 S.Ct. 109, 35 L.Ed. 919. But *Jopes* and its progeny add nothing to the *Goldfuss/Ashford* analysis and fail to explain how self-defense would apply on the facts of ***this*** case. The defendant in *Jopes*, fearing for his life, admitted that he acted intentionally in shooting the plaintiff, who was approaching him with a knife (similar to the defendant in *Ashford*). See *Jopes*, 142 U.S. at 23. Giant Eagle seeks to expand on the *Jopes* holding by claiming that "[s]elf-defense, according to *Jopes*, renders a defendant 'free from all civil * * * liability,' not free only from liability for ***intentional torts*** * * *." (GE Brief at 26 (emphasis added).) Yet Giant Eagle can point to no part of the *Jopes* decision abandoning the requirement that a defendant invoking self-defense first acknowledge that his intentional conduct led to the plaintiff's injuries. For similar reasons, Giant Eagle and its amicis' reliance on out-of-state authority—of limited precedential value in the first place—does nothing to alter the propriety of

the Ninth District's analysis.[32]

Finally, OACTA misleadingly suggests that the Restatement of Torts supports its self-defense argument:

> The Restatement makes clear that self-defense is a valid defense to negligence-based claims. [Restatement (Second) of Torts §64 (1965] (Self-Defense ***Against*** Negligent Conduct); *Id.*, at §66 (Self-Defense ***Against*** Negligent Conduct Threatening Death or Serious Bodily Injury). Until the decision below, Ohio Courts agreed [citing cases].

(OACTA Brief at 12 (emphasis added), citing Restatement of the Law 2d Torts, Sections 64, 66.) But these Restatement sections simply hold that a party may defend himself against bodily harm even though the threat comes from ***another*** whose conduct is merely negligent. The negligence referenced in the Restatement is the negligence of the ***original actor*** (here, according to Giant Eagle, Paul)—***not the negligence of the party asserting self-defense.***

B. <u>The Court Correctly Held that Evidence of Self-Defense Was "Irrelevant" Given the Nature of Niskanen's Claims.</u>

Regardless whether self-defense could legally apply when a defendant steadfastly denies engaging in the challenged conduct (and it cannot), the Ninth District properly concluded that the defense was also "irrelevant" in this particular case. Niskanen never challenged the right of Giant Eagle employees to defend themselves at the point when Giant Eagle claims that Paul was an aggressor. But the claims Niskanen pursued at trial did not involve responses to Paul's alleged "attack"; instead, the claims involved ***entirely different conduct.***

---

[32] See, e.g., *Evans v. Hughes* (M.D.N.C.1955), 135 F.Supp. 555, 558 (defendant acted intentionally in self defense by shooting plaintiff); *Huggins v. Metts* (June 17, 2005), S.C.C.P. No. 02-CP-32-2407, 2005 WL 6149022 (defendant police officer intentionally shot at plaintiff's decedent approaching with raised knives); *Blackburn v. Johnson* (1989), 187 Ill.App.3d 557, 543 N.E.2d 583 (affirming jury award of damages on wrongful death claim sounding in negligence where "[d]efendant argue[d] an intentional tort took place" and defendant admitted to intentionally stabbing his son during argument); *Herold v. Shagnasty's, Inc.* (Sept. 9, 2004), Iowa App. No. 03-0894, 2004 Iowa App. LEXIS 1037 (defendant's security guard admitted intentional conduct resulting in plaintiff's injury of broken ankle).

Niskanen tried her case under two liability theories: (1) that Giant Eagle was negligent in failing to train its employees not to "attempt[] to stop and/or confront a fleeing shoplifter" in accordance with Giant Eagle's "own policy," see Opinion at ¶27;[33] and (2) that once the Giant Eagle employees restrained Paul, they failed to maintain control over him in a "reasonable manner and for a reasonable time" in accordance with the shopkeeper's privilege codified in R.C. 2935.041(A). See Opinion at ¶29. The conduct underlying the first of these claims occurred long before Paul "Niskanen's Attack" (cf. GE Brief at 7), and the conduct underlying the second of these claims occurred once Giant Eagle's employees had succeeded in restraining him. Self-defense was "completely irrelevant" to both theories of negligence, see Opinion at ¶28, because there was no evidence that the employees at that point were in "imminent danger of death or great bodily harm." See *Goldfuss*, 79 Ohio St.3d at 124. As a result, evidence of self-defense "merely served to confuse the claim[s] before the jury." Opinion at ¶28.[34]

Accordingly, permitting the jury to consider self-defense and permitting Giant Eagle to present evidence of that defense was prejudicial error. It made no difference, for example, that Giant Eagle could find a "security expert" willing to testify "that the Giant Eagle employees were legally entitled to defend themselves and each other in this situation." See Opinion at ¶12. The employees' right to defend themselves "in this situation" did not exonerate Giant Eagle from failing to train them ***long before the incident***, in accordance with a standard of care intended to prevent the very tragedy that occurred. See id. at ¶27-28.

---

[33] As the Ninth District noted, Paul's death "was one of the specific risks that Giant Eagle's policy was intended to avoid." See Opinion at ¶27.

[34] The OCC contends that the Ninth District's holding "also usurps the trial court's broad discretion to decide whether to give a requested instruction." (OCC Brief at 9 (citation omitted).) However, where the court of appeals determines that the trial court ***abused*** that "broad discretion" to the appellant's prejudice—as the Ninth District did here—it has an obligation to correct the error.

Likewise, the employees' right to defend themselves is not relevant to the reasonableness of using a chokehold ***once Paul was subdued.*** See id. at ¶29. To hold otherwise would potentially insulate any defendant from the consequences of excessive force merely because at some earlier point in time the victim had acted aggressively. But the law is well-settled that the right to invoke self-defense terminates once the defendant no longer has "good reason to apprehend any continuing danger." See, e.g., *Goldfuss*, 79 Ohio St.3d at 124; *State v. Brantley* (Sept. 27, 1996), 11th Dist. No. 95-P-0089, 1996 Ohio App. LEXIS 4205, at *7.

C. <u>The Ninth District Did Not "Violate Rule 8(E)(2)" by Holding that the Jury Should Not Have Been Instructed on Self-Defense.</u>

Giant Eagle next contends that "even if" its negligence-based defense was "inconsistent" with the assertion of intentional self-defense, the Ninth District nevertheless erred because under Civ.R. 8(E)(2), "[a] party may * * * state as many separate * * * defenses as he has regardless of consistency." (GE Brief at 28.) But this argument goes only so far, and it has no bearing on this Court's analysis.

Giant Eagle itself acknowledges that the "basic right given defendants under [Civ.R. 8(E)(2)]" is the right "to ***plead*** inconsistent defenses." (GE Brief at 29 (emphasis added).) Contrary to its claim, the Ninth District's decision did not "eliminat[e]" Giant Eagle's right to plead self-defense as an affirmative defense; the court below did not even address the pleading issue. Indeed, Giant Eagle ***did*** plead self-defense as an affirmative defense (GE Answer at ¶83, 84, filed 4/14/05), and the Ninth District's decision did not "strip" it of the right to do so.

Instead, the issue actually addressed by the Ninth District was whether a defendant is entitled to a ***jury instruction*** on self-defense where it is both "inapplicable" and "completely irrelevant," such that the instruction would cause the jury to "lose sight" of the "entire gist" of plaintiff's claims. See Opinion at ¶20, 26, 28.

D. The Ninth District Did Not Violate Giant Eagle's Due-Process Rights in Holding Self-Defense Inapplicable to this Case.

Giant Eagle's due-process argument suffers from similar infirmities. It depends on the factual conclusion that Paul's "death occurred ***while*** Giant Eagle's employees * * * were defending themselves." (See GE Brief at 31 (emphasis added).) But it is undisputed that Paul was "no longer resisting and was not even moving"—in short, he was passive and lying on the ground—"for approximately five minutes" before he was asphyxiated. See Opinion at ¶7.

While due process requires Giant Eagle be afforded "a fair opportunity to defend against [Niskanen's] allegations" (GE Brief at 31, citing *Chambers v. Mississippi* (1973), 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297), there is no authority for the proposition that due process entitles a civil defendant to a self-defense jury instruction where it has denied engaging in the predicate conduct. Here, Giant Eagle denied intentionally choking Paul, so it had no basis to invoke the defense in the first instance and therefore no right to a self-defense instruction.

Furthermore, Giant Eagle is incorrect in suggesting that the Ninth District has barred Giant Eagle from explaining the circumstances leading up to Paul's death. (Cf. GE Brief at 32.) For one thing, the Ninth District explained that Giant Eagle could offer its allegedly "'reasonable explanation for [its] actions'" to attempt to defeat Niskanen's assertions of negligence, without resorting to confusing and inapposite evidence and instructions involving self-defense. See Opinion at ¶22, quoting Simons, Rethinking Mental States (1992), 72 Boston Univ.L.Rev. 463, 554, fn. 309. The Ninth District also clarified that Paul's conduct in "throwing punches" was relevant to Giant Eagle's claim of a comparative-negligence defense. See id. at ¶32.

E. The Ninth District Properly Held that the Trial Court Was Not Required to Instruct on Self-Defense Simply Because Niskanen Sought Punitive Damages.

Giant Eagle next suggests that self-defense is relevant to "negate" Niskanen's request for punitive damages because "[p]roof of self-defense tends to negate, if not preclude, a finding of

malice needed to support punitive damages." (GE Brief at 33, citing *Bailey v. Bevilacqua*, 158 Ohio App.3d 382, 2004-Ohio-4392, 815 N.E.2d 1136, ¶49). But that proposition could be true only if self-defense were relevant to Niskanen's claim for compensatory damages in the first place—which, as shown above, it is not. Giant Eagle's reliance on *Bailey* likewise adds nothing to the equation. *Bailey* held that a defendant who properly invoked and established self-defense "could not be found to be malicious." Id. at ¶49. But *Bailey* does not render self-defense applicable or relevant merely because the plaintiff has a claim for punitive damages if, as here, self-defense is otherwise not applicable to the case.

Giant Eagle and its amici also urge that self-defense is relevant to the undue-restraint claim, since both self-defense and undue restraint involve questions of "reasonableness." (See OACTA Brief at 13.) But the fact that reasonableness is a common element of these separate issues does not automatically render self-defense relevant when the other requirements for self-defense are absent. In short, self-defense is simply irrelevant when there is no longer a threat of "imminent danger of death or great bodily harm," see *Goldfuss*, 79 Ohio St.3d at 124, and when the defendant denies the intentional use of deadly force in any event. Instead, the reasonableness of Giant Eagle's restraint must be measured against the circumstances at the time of the chokehold (after Giant Eagle had completely subdued Paul), not the earlier circumstances of the initial confrontation (when Giant Eagle claims Paul was acting aggressively).

F. <u>The Ninth District Properly Vacated the Trial Court Judgment Entry Because the Trial Court's Legal Errors Prejudiced Niskanen's Right to Recovery.</u>

Giant Eagle next urges that because the Ninth District (1) "found no error in the jury charge on [Niskanen's] negligence and unreasonable restraint claims," (2) found no error "involving the admission or exclusion of evidence," and (3) "the jury found in Giant Eagle's favor on both [the negligence and undue restraint] claims" (see GE Brief at 34), these findings

together provide an independent basis for affirming the jury's verdict. Giant Eagle's analysis is flawed and misstates the jury's findings in several respects.

First, Giant Eagle is wrong in suggesting that the Ninth District found no "error involving the admission or exclusion of evidence." (Cf. id.) The Ninth District specifically held that "much of the trial[] improperly focused" on self-defense and caused the jury to "lose sight of the entire gist of Niskanen's claims." Opinion at ¶26. Surely the Ninth District did not intend to confine its holding to opening statements, closing arguments, and jury instructions, especially considering that it sustained Niskanen's third assignment of error as it related to self-defense, see id. at ¶34—an assignment expressly challenging admission of Giant Eagle's expert testimony.

Second, Giant Eagle's claim that "the jury found in Giant Eagle's favor on both claims" (see GE Brief at 34) at best blatantly ignores, or at worst misrepresents, that the jury found ***for Niskanen*** on the issue of Giant Eagle's negligence, found ***for Niskanen*** in the general verdict, ***and*** awarded compensatory damages of $1,000,000. (See Supp. 1117-1120; Jury Interrogs. 1-A, B; 3-A, B; 7/14/06 Docket Entry.) While the trial court entered judgment in Giant Eagle's favor, it did so only because of the jury's assessment of comparative negligence to Paul and only after erroneously refusing to permit the jury to consider Giant Eagle's malice, which would have "defeat[ed]" Paul's comparative negligence. See Opinion at ¶17.

In short, this is not a case where a "single determinative issue has been tried free from error," cf. *Bush v. Harvey Transfer Co.* (1940), 146 Ohio St. 657, 667, 33 O.O. 154, 67 N.E.2d 851, but rather one in which the trial court's improper application of settled legal principles (relating to both comparative negligence and self-defense) and admission of irrelevant evidence tainted the entire proceedings, thereby requiring a new trial. Niskanen established, and the Ninth District properly recognized, that this was a case of more that just "some error" (cf. GE Brief at

34 (citing *Wagner v. Roche Lab.* (1999), 85 Ohio St.3d 457, 460, 709 N.E.2d 162), but rather severely prejudicial error that resulted in the entry of a judgment contradicting the jury's verdict.

Finally, Giant Eagle's claim that "it was for the jury, not this Court, to determine what they believed to be the 'real issue'" (GE Brief at 35) is nothing more than a plea for this Court to sanction jury nullification. Only when the trial court follows the law is it the "province of the jury to decide or determine the facts of the case from the evidence adduced and to render a verdict in accordance with the instructions given by the court." See 64 Ohio Jurisprudence 3d (2003), Jury, Section 4.

> **Proposition of Law No. 3:** A party who fails to raise an argument in the court of appeals waives his or her right to raise it in the Supreme Court. (*State ex rel. Zollner v. Indus. Comm. of Ohio*, 66 Ohio St.3d 276, 1993-Ohio-49, 611 N.E.2d 830, approved and followed.)

Finally, Giant Eagle and its amici suggest that the Ninth District created a new cause of action for violation of Ohio's shopkeeper detention statute, R.C. 2935.041(A), and then wrongfully held that self-defense is irrelevant to it.

As a preliminary matter, like many of its other arguments raised for the first time before this Court, Giant Eagle never raised this issue in the courts below and has therefore waived any right to advance its arguments here. See *Zollner*, 66 Ohio St.3d at 278. After over four years of litigation, Giant Eagle can point to no part of the record below where it preserved this issue for this Court's review, and the Court should therefore decline to consider it now.

Indeed, both the trial court and the Ninth District assumed that a violation of R.C. 2935.041(A) gave rise to a cause of action for undue restraint because Giant Eagle never argued otherwise; to the contrary, Giant Eagle conceded below that Niskanen ***could bring*** a "statutory undue restraint claim." (See Brief of Cross-Appellant Giant Eagle, Inc., filed April 16, 2007, at 18.)

In any event, "[i]t is settled law that '[w]here a legislative enactment imposes upon any person a specific duty for the protection of others,' the failure to perform that duty is negligence per se." *Marich v. Bob Bennett Constr. Co.*, 116 Ohio St.3d 553, 2008-Ohio-92, 880 N.E.2d 906, at ¶38, quoting *Eisenhuth v. Moneyhon* (1954), 161 Ohio St. 367, 53 O.O. 274, 119 N.E.2d 440, paragraph two of syllabus. While Giant Eagle and its amici debate whether R.C. 2935.041(A) gives rise to a "privilege" or "affirmative defense," (see, e.g., GE Brief at 35-36, OCC Brief at 10-11), it remains undisputed that for the privilege to apply there is an obligation on shopkeepers to conduct their detentions "in a reasonable manner for a reasonable length of time." Thus, just as R.C. 2935.041(A) confers on shopkeepers the right to detain, it also imposes corollary obligations to detain in a reasonable manner and for a reasonable time.

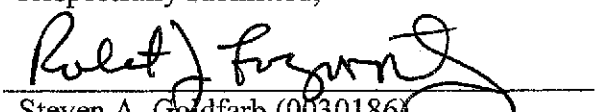
Nor is self-defense a proper defense to a claim under R.C. 2935.041(A). Niskanen's burden, in proving a violation of the statute, is to establish that Giant Eagle failed to "detain [Paul] in a reasonable manner for a reasonable length of time." See id. By definition, then, the jury would have to find that Giant Eagle used unreasonable force in order to find in Niskanen's favor. Such a finding, in turn, would by definition refute self-defense, which must also involve only "reasonable force." See *State v. Ray*, 12th Dist. No. CA2001-06-154, 2003-Ohio-193, at ¶17 (self-defense applies only if defendant uses "reasonable force"). Self-defense would therefore add nothing to the equation other than to confuse the jury into believing that Giant Eagle could somehow be justified in using deadly (unreasonable) force to continue to subdue a suspected shoplifter who was already lying face-down on the ground, barely flinching and noticeably unable to breathe.

CONCLUSION

Giant Eagle and its small army of amici have gone to great lengths to convince this Court, by way of contrived hysteria, that the Ninth District's Opinion "shakes the rafters of our jurisprudence." (OACTA Brief at 14.) Yet the rafters—and, more importantly, the foundation—of this Court's established precedent are based on fundamental principles of tort law and remain well intact. Punitive damages remain coupled with an award of compensatory damages, self-defense remains available to Ohio citizens, and shopkeepers retain the right to detain suspected shoplifters in a reasonable manner for a reasonable period of time.

For these reasons, this Court should affirm the Ninth District's Decision and Journal Entry in its entirety.

Respectfully submitted,



Steven A. Goldfarb (0030186)
sagoldfarb@hahnlaw.com
Robert J. Fogarty (0006818)
rjfogarty@hahnlaw.com
Eric B. Levasseur (0075353)
eblevasseur@hahnlaw.com
HAHN LOESER & PARKS LLP
200 Public Square, Suite 2800
Cleveland, Ohio 44114
Phone: (216) 621-0150
Telefax: (216) 241-2824

Attorneys for Appellee Mary Niskanen, Individually, and as Administratrix of the Estate of Paul J. Niskanen

APPENDIX

TO

MERIT BRIEF OF APPELLEE

2315.19 Review of evidence supporting damages for noneconomic loss.

(A) Upon a post-judgment motion, a trial court in a tort action shall review the evidence supporting an award of compensatory damages for noneconomic loss that the defendant has challenged as excessive. That review shall include, but is not limited to, the following factors:

(1) Whether the evidence presented or the arguments of the attorneys resulted in one or more of the following events in the determination of an award of compensatory damages for noneconomic loss:

(a) It inflamed the passion or prejudice of the trier of fact.

(b) It resulted in the improper consideration of the wealth of the defendant.

(c) It resulted in the improper consideration of the misconduct of the defendant so as to punish the defendant improperly or in circumvention of the limitation on punitive or exemplary damages as provided in section 2315.21 of the Revised Code.

(2) Whether the verdict is in excess of verdicts involving comparable injuries to similarly situated plaintiffs;

(3) Whether there were any extraordinary circumstances in the record to account for an award of compensatory damages for noneconomic loss in excess of what was granted by courts to similarly situated plaintiffs, with consideration given to the type of injury, the severity of the injury, and the plaintiff's age at the time of the injury.

(B) A trial court upholding an award of compensatory damages for noneconomic loss that a party has challenged as inadequate or excessive shall set forth in writing its reasons for upholding the award.

(C) An appellate court shall use a de novo standard of review when considering an appeal of an award of compensatory damages for noneconomic loss on the grounds that the award is inadequate or excessive.

Effective Date: 04-07-2005

2315.21 Punitive or exemplary damages.

(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.

Effective Date: 11-07-2002; 04-07-2005

2935.041 Detention and arrest of shoplifters - detention of persons in library, museum, or archival institution.

(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.

Effective Date: 03-09-2004

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of *Merit Brief of Appellee with Appendix* was served this 12th day of November, 2008, by regular U.S. Mail, upon the following:

Robert C. McClelland, Esq.
Rademaker, Matty, McClelland & Greve
55 Public Square, Suite 1775
Cleveland, Ohio 44113

and

Stephen S. Zubrow, Esq.
Bernard D. Marcus, Esq.
James F. Rosenberg, Esq.
Marcus & Shapira, LLP
35th Floor, One Oxford Centre
Pittsburgh, Pennsylvania 15219

Attorneys for Appellant Giant Eagle, Inc. and Defendants John M. Maczko, Jonathan A. Stress & Paul K. Taylor

Dennis M. Pilawa, Esq.
Rawlin Gravens Co., LPA
55 Public Square, Suite 850
Cleveland, Ohio 44113

Attorney for Defendant David Alexoff

Richard M. Garner, Esq.
Davis & Young
1200 Fifth Third Center
600 Superior Avenue, E
Cleveland, OH 44114
Phone: (216) 348-1700
Telefax: (216) 621-0602

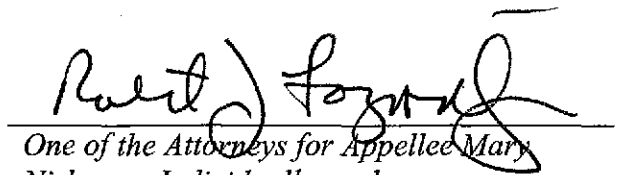
Attorney for Amicus Curiae The Ohio Association of Civil Trial Attorneys

Richard D. Schuster, Esq.
Michael J. Hendershot, Esq.
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
Columbus, Ohio 43216-1008
Phone: (614) 464-5475
Telefax: (614) 719-4955

Attorneys for Amicus Curiae The Ohio Council of Retail Merchants and The Ohio Grocers Association

Linda S. Woggon, Esq.
Vice President, Government Affairs
Ohio Chamber of Commerce
230 East Town Street
Columbus, Ohio 43215-0159
Phone: (614) 228-4201

Attorney for Amicus Curiae Ohio Chamber of Commerce



One of the Attorneys for Appellee Mary Niskanen, Individually, and as Administratrix of the Estate of Paul J. Niskanen