IN THE SUPREME COURT OF OHIO

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

Appellee,

v.

GIANT EAGLE, INC.,

Appellant.

Case No. 08-0895

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

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

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REPLY

Amicus Curiae, The Ohio Chamber of Commerce, joins and incorporates the arguments set forth in Appellant Giant Eagle's Reply Brief and the Amicus Curiae Reply Brief of the Ohio Council of Retail Merchants and the Ohio Grocers Association Urging Reversal on Behalf of Appellant Giant Eagle, Inc. as though the same were set forth herein.

With respect to its holding on punitive damages, there is simply no precedent to support the Ninth District's (and Mrs. Niskanen's) theory that the jury should have considered punitive damages despite its finding that Niskanen's negligence exceeded Giant Eagle's (60% to 40%), and despite the fact that no intentional tort claims were submitted to the jury as a result of Mrs. Niskanen's strategic decision to dismiss all of the intentional tort claims pled in her Amended Complaint on the eve of trial. To accept this theory would unravel decades of precedent and essentially turn a demand for punitive damages into a stand alone tort claim and basically eliminate the comparative fault defense whenever "malice" is pled in an effort to obtain punitive damages. Under existing Ohio law, Mrs. Niskanen needed to prevail on her underlying negligence claim before the jury could consider punitive damages. The record shows that Giant Eagle did not commit an intentional tort and was only 40% negligent. Therefore, Niskanen was not entitled to actual damages and the trial court properly instructed the jury not to consider punitive damages. This Court should reverse the Ninth District's decision to preserve fairness in the context of demands for punitive damages when only negligence is submitted to the jury.

Similarly, with respect to its holding that self-defense was "completely irrelevant," the Ninth District ignored established precedent, improperly relied on criminal law, and ignored the standard of review by substituting its judgment for that of the trial court. Notably, this holding was premised on the fact that "[t]here were no longer any claims that Giant Eagle or any of its

employees had intentionally harmed Niskanen." (Appx. 14, 15 at ¶26, ¶28). Yet Mrs. Niskanen argues that Giant Eagle can only claim self-defense if it admits that its employees intentionally applied a deadly chokehold with the purpose of killing Niskanen. This is not the law in Ohio. Intending the act is sufficient to invoke self-defense without intending the consequences of the act. Indeed, Giant Eagle consistently argued throughout trial that its employees intentionally restrained Niskanen to defend themselves and others from harm while waiting for the police to arrive but did not intend to kill him. Pursuant to Rule 8(E)(2) of the Ohio Rules of Civil Procedure, Giant Eagle was permitted to assert defenses in the alternative, including self-defense, to allegations of intentional and negligent conduct. The jury's finding that Giant Eagle acted in self-defense necessarily included a consideration of whether Niskanen was under control and/or whether the employees remained in fear for their lives and others, and particularly, whether the use of force was reasonable under the circumstances. The negligence claim failed because by finding that Giant Eagle acted in self-defense, Mrs. Niskanen could not establish breach of a duty because the actions of Giant Eagle were considered justified and lawful under the circumstances.

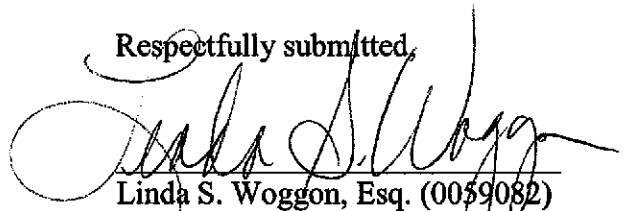
Giant Eagle—and merchants who are litigants in the future—have a fundamental right to put forth evidence to support the theory that its employees acted in self-defense and the Ninth District erred by finding that only *the plaintiff's theory of liability* may dictate which defenses a defendant may pursue. To remove the right to self-defense from merchants and their employees who are faced with an unprovoked physical confrontation with a violent shoplifter will have a devastating impact on the fairness of civil litigation in Ohio and will expose the citizens of Ohio, employees and customers to civil liability where none should exist.

Finally, the recognition by the Ninth District that a cause of action exists under R.C. § 2935.041—but self-defense is "likewise irrelevant" to such a claim—is contrary to the intent of the legislature and public policy in granting a privilege (i.e., an affirmative defense) to merchants to detain suspected shoplifters if probable cause exists to do so. This Court cannot consider whether self-defense may defeat a statutory claim for undue restraint without first deciding whether R.C. § 2935.041 creates such a cause of action. This Court should reverse the Ninth District's interpretation of R.C. § 2935.041, the "so-called shopkeeper's privilege," (App. 16, at ¶ 29), because it will adversely affect every merchant in Ohio by eliminating a defense while at the same time expanding their potential for liability. This Court should remedy the errors of the Ninth District and reinstate the jury verdict in favor of Giant Eagle.

In close, for the foregoing reasons and based on the arguments set forth in Appellant Giant Eagle's Reply Brief and the Amicus Curiae Reply Brief of the Ohio Council of Retail Merchants and the Ohio Grocers Association Urging Reversal on Behalf of Appellant Giant Eagle, Inc., the Ohio Chamber of Commerce respectfully requests that this Court reverse the decision of the Ninth District and reinstate the jury's verdict to preserve a fair system of civil litigation in Ohio and protect Ohio's retail businesses, their customers, and all defendants who have been found less responsible than a plaintiff and whose actions have been found to be justified and lawful under the circumstances.

Dated: December 22, 2008

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Amicus Curiae Reply Brief of the Ohio Chamber of Commerce Urging Reversal on Behalf of Appellant, Giant Eagle, Inc., was sent via regular mail to counsel of record listed below this 22nd day of December, 2008:

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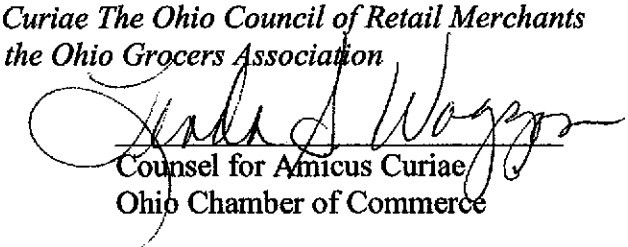

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