

IN THE SUPREME COURT OF OHIO

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

Case No. 08-0895

Appellee,

v.

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

GIANT EAGLE, INC.,

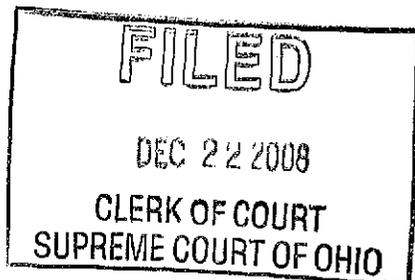
Appellant.

REPLY BRIEF OF APPELLANT GIANT EAGLE, INC.

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I. INTRODUCTION

Much of Appellee Mary Niskanen's ("Mrs. Niskanen") merit brief rests on a false premise—that she pursued and prevailed upon an intentional tort theory. Despite strategic dismissal of her intentional tort claims before trial, Mrs. Niskanen has reversed course. Mrs. Niskanen now says she never abandoned her intentional tort claims in the hope of creating a plausible basis under *Malone v. Courtyard by Marriott, L.P.*, 74 Ohio St.3d 440, 1996-Ohio-311, 659 N.E.2d 1242, to obtain a new trial on punitive damages. That hope is unfounded.

No matter how Mrs. Niskanen may now characterize her allegations relating to punitive damages, this case, according to the Ninth District, "proceeded on claims sounding solely in negligence." (Appx. 12, ¶21). After dropping her intentional tort claims before trial, Mrs. Niskanen asked the trial court to instruct the jury on only negligence claims. (Supp. 1110-15.) And given her trial strategy, Mrs. Niskanen never objected when the trial court instructed the jury on only negligence claims. When the jury returned its verdict after a nearly three-week trial, Mrs. Niskanen lost on all her claims.

Even if Mrs. Niskanen's allegations could be liberally construed to include an intentional tort, her request for punitive damages would still be doomed. Merely having alleged an intentional tort is not enough to avoid the comparative fault bar. Only success on an intentional tort claim triggers the so-called American rule that, in this limited circumstance, trumps the comparative fault bar. Mrs. Niskanen seeks to expand the American rule to require only success on what is not a claim at all—punitive damages—even though she prevailed on none of her claims and recovered no compensatory damages.

This Court declined a similar invitation in *Malone* to untether the American rule from success on an intentional tort claim. So too have the highest courts from other states. 1 STEIN ON PERSONAL INJURY DAMAGES §4:43 (3d ed. 2007). This Court should again decline the

invitation to permit a jury to consider punitive damages unaccompanied by success on an underlying claim.

The thrust of Mrs. Niskanen's self-defense argument also rests on a mistaken premise. Mrs. Niskanen asserts that Appellant Giant Eagle, Inc. ("Giant Eagle") could not claim self-defense merely by admitting that its employees intentionally restrained her son. According to Mrs. Niskanen, Giant Eagle could claim self-defense only by admitting that its employees "intentionally placed [Niskanen] in a deadly chokehold"—a version of the events that the jury rejected. Self-defense does not require the defendant to admit an intent to harm his attacker. Even if the criminal rule that precludes a defendant from asserting self-defense and negligent homicide applies in civil actions, as the Ninth District mistakenly assumed, it requires only that the defendant admit that his response to the attack was intentional—nothing more. Yet Giant Eagle admitted throughout trial that its employees responded to Niskanen's attack by intentionally holding him down until the police arrived. Giant Eagle did not have to "admit" anything else to avail itself of self-defense.

II. COUNTERSTATEMENT OF THE FACTS

Hoping to avoid this Court's controlling decisions in *Marriott* and *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 1997-Ohio-401, 679 N.E.2d 1099, Mrs. Niskanen presents certain facts as being "undisputed" even though they were hotly contested at trial and even though the jury, given its verdict, ultimately found against her on these disputed facts. By assuming away many of the fundamental factual disputes during the trial, Mrs. Niskanen undermines much of her legal argument.

Mrs. Niskanen first mistakenly claims that, despite ample evidence to the contrary, her son "was completely under control . . . for approximately 10 minutes" after his attack was repelled. Niskanen Br. at 15. Numerous witnesses—including the customers who helped thwart

the attack—testified that they never felt they had control of Niskanen and that, until the police arrived, they feared he would resume his attack if they relinquished their hold. (Supp. 233; 5 Tr. 629); (Supp. 260; 6 Tr. 700); (Supp. 269-70; Tr. 718-19); (Supp. 455-56; 10 Tr. 1348-49).

Mrs. Niskanen's next mistaken refrain is that Giant Eagle's employees "intentionally placed [her son] in a deadly chokehold." Niskanen Br. at 39; *see also* Niskanen Br. at 3, 38, 44, 45, 48. But Giant Eagle's employees denied using a chokehold and, according to the eyewitness accounts, nobody ever tried to hurt Niskanen. (Supp. 259; 6 Tr. 699); (Supp. 502-04; 11 Tr. 1457-59). Everything Giant Eagle's employees and their rescuers did was purely defensive (albeit intentional). (Supp. 258-60; 6 Tr. 698-00); (Supp. 558; 11 Tr. 1599). Whether Giant Eagle's employees intended to hurt Niskanen or, as Giant Eagle contended, merely intended to hold him down, could not have been more disputed.

Mrs. Niskanen also mistakenly suggests that her son's death "was avoidable" because Giant Eagle did not properly train its employees to handle shoplifting incidents. Niskanen Br. at 3. Mrs. Niskanen fails to acknowledge, however, a point even her security expert conceded—that merchants, in accordance with industry practice, do not train their employees on self-defense because of their desire to avoid the use of force, if possible, when confronting a suspected shoplifter. (Supp. 320-21; 7 Tr. 828-29). Nor does Mrs. Niskanen acknowledge her expert's admission that Giant Eagle's employees had a right to defend themselves against Niskanen's unprovoked attack. (Supp. 315-316; Tr. 821-22). Not only was there evidence that Giant Eagle's training had nothing to do with Niskanen's death but, in the end, that evidence persuaded the jury that Niskanen's own actions, not Giant Eagle's training, was the principal cause of his death.

III. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON PUNITIVE DAMAGES

Mrs. Niskanen leads herself astray by confusing intentional torts and punitive damages. The "American Rule" applies only to the former—not the latter. That rule nullifies the comparative fault bar when the jury also finds that the defendant committed an intentional tort. But the jury never made such a finding in this case. It is not enough, as Mrs. Niskanen claims, to merely allege an intentional tort—only actual success on an intentional tort claim triggers the American Rule. Having lost on all claims, Mrs. Niskanen never satisfied this condition to avoidance of the comparative fault bar under the American Rule. That failure of proof, under this Court's long settled precedents, should have ended Mrs. Niskanen's quest for punitive damages.

A. Merely Pleading An Intentional Tort Is Not Enough—Only Ultimate Success On Such A Tort Claim Triggers The American Rule

An unspoken yet fundamental premise of the American Rule is that only ultimate success on an intentional tort claim—not its mere pleading—invokes the rule. Merely pleading that the defendant acted intentionally cannot overcome the jury's *actual* finding that the plaintiff's negligence exceeded 50 percent. *Wightman v. Consolidated Rail Corp.*, 86 Ohio St.3d 431, 436, 715 N.E.2d 546 (comparative fault "is not available as a defense where [an] *intentional tort has been established*" (emphasis added)); *Doyle v. Fairfield Machine Co., Inc.* (1997), 120 Ohio App.3d 192, 224, 697 N.E.2d 667 (J. Ford concurring) (under *Schellhouse* "if an intentional tort was committed . . . then the negligence of the plaintiff is not a defense). If a jury rejects the plaintiff's intentional tort claim, as the jury did here, the American Rule has no application because, by definition, the defendant's scienter (mere negligence) is not different in kind than the plaintiff's scienter (negligence). Put another way, the whole basis for the American Rule—*i.e.*, "the strong natural feeling that faults should be compared [so] that a serious wrongdoer should

not escape liability because of the trivial misstep of his victim"—does not apply when the jury refuses to find that the defendant acted intentionally. 4 HARPER, JAMES AND GREY ON TORTS §22.6 (3d ed. 2007); *accord*, PROSSER AND KEETON ON TORTS §65 (5th ed. 1985) (American Rule applies when there "is a difference[] not merely in degree but in the kind of fault").

Mrs. Niskanen suggests that *Marriott* permits a plaintiff to overcome the comparative fault bar by merely alleging an intentional tort claim. Niskanen Br. at 30-31. But to state this proposition is to refute it. Only successful proof of an intentional tort claim trumps the comparative fault bar—mere allegations are insufficient. This Court, in *Marriott*, noted the plaintiff's failure to even plead an intentional tort claim only because, unless pled, it is impossible to prevail on such a claim. *Marriott* self-evidently does not stand for the proposition that merely pleading an intentional tort claim overcomes comparative fault.

Were that the law, the comparative fault doctrine would quickly become extinct in Ohio tort law due to the routine pleading of an intentional tort in every case. No matter how great their own negligence, plaintiffs could skirt the comparative fault bar by alleging an intentional tort. Nothing in *Marriott* suggests this Court intended to eliminate the comparative fault doctrine by permitting invocation of the American Rule when the plaintiff has only pled, rather than prevailed on, an intentional tort claim. Success still matters.

B. The Effect Of Mrs. Niskanen's Position That The Jury Must Reach Punitive Damages Even If The Plaintiff Prevails On No Claim Elevates Punitive Damages To A Stand Alone Claim

Recognizing that transforming punitive damages into a stand alone claim would require a sea change in this Court's well developed jurisprudence on punitive damages, Mrs. Niskanen claims that the "Ninth District did not endorse a stand alone claim for punitive damages," that she "has never disputed this point" nor that "a plaintiff must establish liability for compensatory damages before she may recover punitive damages," and that "[t]he principles of punitive-

damage law remain in tact and unchallenged." Niskanen Br. at 22-23. Though Niskanen claims that she does not challenge this Court's core principles on punitive damages, that is precisely what her position on punitive damages requires.

Having not prevailed on any claim, let alone an intentional tort claim, the jury could not proceed to consider punitive damages without elevating a request for such damages to an independent tort claim. As even Mrs. Niskanen concedes, "a plaintiff must establish liability for compensatory damages" before a request for punitive damages becomes ripe. Niskanen Br. at 23-24. This principle and its corollary that a request for punitive damages is not a stand alone claim cannot be reconciled with the Ninth District's view, as supported by Mrs. Niskanen, that the jury should have considered punitive damages despite her failure to prevail on any claim.¹

Mrs. Niskanen tries to overcome her lack of success by arguing that her complaint could be construed as also alleging a separate intentional tort against Giant Eagle. Niskanen Br. at 30-31. Contrary to the Ninth District's finding that "the case proceeded on claims sounding solely in negligence," (Appx. 12, ¶21), Mrs. Niskanen claims she "did not dismiss this intentional tort claim [alleged in paragraph 42 of her Amended Complaint] which remained in the case through the verdict." Niskanen Br. at 31. This interpretation of her complaint is one that came only recently to Mrs. Niskanen because, at trial, she had the view that her allegations asserted only negligence claims (except for spoliation). Not only did she not request an instruction for an intentional tort, Mrs. Niskanen did not object when the trial court gave no such instruction. Mrs.

¹To create confusion regarding the jury's intent, Mrs. Niskanen repeatedly claims that the "jury found Giant Eagle negligent . . . returned a general verdict in [her] favor, and ultimately "awarded her \$1,000,000 in compensatory damages." Niskanen Br. at 3, 9. These claims could not be more misleading. The jury did not intend to give Mrs. Niskanen a general verdict or award her damages. (Supp. 768; 15 Tr. 1864.) The jury did so only because the trial court instructed them that, even though Niskanen's negligence exceeded 50 percent, they "should proceed to record the damages you have determined on the plaintiff's verdict form." (Supp. 773; 15 Tr. 1869); (Supp. 776-80; 15 Tr. 1872-76).

Niskanen, in other words, was content to have the jury instructed solely on negligence claims with a separate instruction on punitive damages.²

But whether the jury should have been given an instruction that Mrs. Niskanen never requested no longer matters. Assuming that Mrs. Niskanen pursued an intentional tort theory at trial as she now claims, the jury must have found against her on this claim. Mrs. Niskanen lost on all her claims—including her recently resurrected intentional tort claim. This means that the predicate trigger for invoking the American Rule—success on an intentional tort—never occurred. Thus, Mrs. Niskanen cannot invoke the American Rule to overcome the comparative fault bar unless this Court reverses its long-held view that a request for punitive damages is not "a cause of action in and of itself." *Bishop v. Grdina* (1985), 20 Ohio St. 26, 28, 485 N.E.2d 704.³

**C. None Of The Decisions Cited By Mrs. Niskanen—
Including *Schellhouse*—Support The Ninth District's View That
Punitive Damages Alone Can Trump The Comparative Fault Bar**

Mrs. Niskanen cites *Schellhouse v. Norfolk & Western Ry. Co.* (1991), 61 Ohio St.3d 520, 575 N.E.2d 453, for a proposition it does not support—*i.e.*, that a jury may consider punitive damages where no compensatory damages have been awarded due to comparative fault. *Schellhouse* does recognize, as this Court has on several occasions, that a plaintiff's victory on her intentional tort claim trumps an adverse comparative fault finding. 61 Ohio St.3d at 525. But nowhere does *Schellhouse* recognize, as Mrs. Niskanen and the Ninth District claim, that a

² It thus appears that everyone—including the trial court, the Ninth District, and Mrs. Niskanen herself—understood that the jury was asked to consider only negligence claims.

³ Even the treatises that Mrs. Niskanen relies on describe the American Rule as applying only to "intentional torts"—not a mere request for punitive damages. PROSSER AND KEETON ON TORTS §65 (5th ed. 1985) (under American Rule the comparative fault bar based on plaintiff's "ordinary negligence" has "never . . . been extended to . . . intentional torts"); 4 HARPER, JAMES AND GREY ON TORTS §22.6 (3d ed. 2007) ("under the traditional American rule, contributory negligence has been no defense to an action for an injury [based on intentional misconduct]").

mere request for punitive damages, though not a claim itself, may overcome the comparative fault bar. Yet only the latter proposition matters for this appeal.

Facing conflicting jury findings, this Court in *Schellhouse* tried to determine whether the defendant railroad committed an intentional tort—not whether the plaintiff was entitled to punitive damages. *Id.* at 524 ("jury's answers were impossible to reconcile [because] [e]ither the railroad committed an intentional tort or it did not"). The outcome, according to this Court, turned on whether the defendant railroad committed an intentional tort:

If the railroad did not commit an intentional tort, but was only thirty-five percent negligent . . . , then . . . a verdict for the defendant should have been entered If the railroad committed an intentional tort . . . and if that intentional tort was the proximate cause of plaintiff's damage, the negligence of the plaintiff is not a defense

Id. The outcome did not turn on whether the plaintiff could establish a right to punitive damages without prevailing on an intentional tort claim. That is why *Schellhouse* held only 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." *Id.* at 525 (emphasis added).⁴

The lower court decisions that Mrs. Niskanen relies on do not dispense with the requirement that to trump the comparative fault bar the plaintiff must succeed on an intentional tort. They adhere to the holdings in *Schellhouse* and *Marriott* that only success on an intentional tort overcomes the comparative fault bar. *Estate of Beavers v. Knapp*, 175 Ohio App.3d 758, 2008-Ohio-2023, 889 N.E.2d 181, ¶64 (jury expressly found in plaintiff's favor on intentional tort claim for recklessness); *Young v. The Univ. of Akron*, No. 04AP-318, 2004 WL 2892575, at

⁴ Throughout *Schellhouse*, this Court emphasized that only "an intentional tort" overcomes the comparative fault bar. 61 Ohio St.3d at 524-26. While this Court sometimes referred to "an intentional tort [] committed with actual malice," proof of an intentional tort without malice triggers the American Rule. *Id.* at 525. Malice is not necessary.

*6-8 (Ohio Ct. App. Dec. 14, 2004), 2004-Ohio-6720 (recognizing that comparative negligence is no defense to "a reckless or intentional tort" but finding that plaintiff failed to prove recklessness); *Mays v. Taylor*, No. 00-C.A.-209, 2001 WL 1647215, at *5 (Ohio Ct. App. Dec. 14, 2001), 2001-Ohio-3483 (court found in plaintiff's favor on intentional tort claim for recklessness); *Lambert v. Shearer* (1992), 84 Ohio App.3d 266, 275, 616 N.E.2d 965 (merely recognizing that comparative negligence is "no defense to a reckless or intentional tort").⁵

By stretching *Schellhouse* and its progeny beyond their outer limits, Mrs. Niskanen runs head long into the guiding principle that punitive damages are not a stand alone claim and thus

compensable harm stemming from a cognizable cause of action
must be shown to exist *before punitive damages can be
considered.*

Moskovitz v. Mt. Sinai Med. Center, 69 Ohio St.3d 638, 650, 1994-Ohio-324, 635 N.E.2d 331 (emphasis added). No compensable harm can be established when comparative fault bars the plaintiff's recovery—precisely what occurred here. Nor are punitive damages "a cognizable cause of action." Thus, Mrs. Niskanen failed to satisfy an essential requirement that had to occur "before [her request for] punitive damages [could] be considered" by the jury.

IV. THE NINTH DISTRICT IMPROPERLY DEPRIVED GIANT EAGLE OF ITS RIGHT TO ASSERT SELF-DEFENSE AGAINST ALL MRS. NISKANEN'S CLAIMS WHETHER PLED AS INTENTIONAL OR NEGLIGENT TORTS

Though the Ninth District's holding that Giant Eagle should not have been permitted to assert self-defense hinged on its finding that Mrs. Niskanen pursued only a negligence theory, that predicate finding has been called into question by Mrs. Niskanen herself. Trying to buttress her argument on punitive damages, Mrs. Niskanen claims that her "intentional tort claim . . . remained in the case through verdict." Niskanen Br. at 31. This claim, if true, by itself would

⁵ *Beavers* also can be easily distinguished on the basis that there, unlike here, the plaintiff's negligence was less than 50 percent. 175 Ohio App.3d at 785.

warrant reversal of the Ninth District's decision on self-defense. Mrs. Niskanen cannot have it both ways.

Putting this inconsistency aside, the Ninth District's decision on self-defense cannot stand. That decision's reasoning, at bottom, rests on the broad and undeniably mistaken proposition that self-defense cannot be relied on to defeat a negligence claim. Mrs. Niskanen's attempt to rescue the Ninth District from its flawed reasoning on self-defense is equally mistaken. According to Mrs. Niskanen, Giant Eagle must admit not merely that its employees intentionally held Niskanen down, but rather, that they put him in a "deadly chokehold" before it can assert self-defense. Niskanen Br. at 39. But neither the case law nor logic support such a recasting of the law on self-defense.

**A. The Ninth District Relied On A Fundamentally Flawed Premise—
That Self-Defense Can Never Be Asserted In A Negligence Case—
To Support Its Grant Of A New Trial**

The Ninth District's elimination of self-defense from this case has far-reaching implications for merchants who, like Giant Eagle, may be the victim of an unprovoked attack by a shoplifter. To justify taking this defense away from Giant Eagle, the Ninth District relied on its mistaken finding that "no Ohio authority [exists] for recognizing self-defense as a defense in a negligence action." (Appx. 14, ¶25). Having grudgingly conceded that Ohio authority does exist recognizing self-defense in a negligence action, *see* Niskanen Br. at 40 ("Giant Eagle is correct that the Ninth District previously acknowledged in *Ashford* that self-defense can apply in certain negligence actions"), Mrs. Niskanen claims that the Ninth District's decision can be read narrowly to apply only to the particular facts of this case.

But the relevancy inquiry in this case cannot be distinguished from the relevancy inquiry in *Ashford*. Nothing about Mrs. Niskanen's negligence claims—including her negligent training claim—made self-defense "irrelevant" in this particular case." Niskanen Br. at 42. Self-defense,

rather, went to the heart of Mrs. Niskanen's negligence claims. Their thrust was that, although Giant Eagle's employees had "the right . . . to defend themselves [while Niskanen] was an aggressor," they (and others) negligently failed to loosen their hold after they "had succeeded in restraining him." *Id.* at 42-43. "[O]nce [Niskanen] was subdued," according to Mrs. Niskanen and the Ninth District's reasoning, self-defense became irrelevant "because [Giant Eagle's] employees at that point were [not] in imminent danger of great bodily harm." *Id.* at 43 (*quoting Goldfuss, 79 Ohio St.3d at 124*).

But whether Niskanen was ever safely subdued was a question for the jury, not the Ninth District, to decide. So too was the related question of whether Giant Eagle's employees reasonably believed they remained threatened with harm until the police arrived. These issues were vigorously contested at trial. Ultimately, given its finding in favor of Giant Eagle on self-defense, the jury was persuaded that Giant Eagle's employees reasonably believed that Niskanen remained a threat until the police arrived. Mrs. Niskanen does not challenge the sufficiency of the evidence supporting the jury's finding that Giant Eagle's employees acted in self-defense—nor could she mount such a challenge given the ample evidentiary support for that finding. (Supp. 233; 5 Tr. 629); (Supp. 260; 6 Tr. 700); (Supp. 269-70; Tr. 718-19); (Supp. 455-56; 10 Tr. 1348-49). Thus, by definition, self-defense was directly relevant to Mrs. Niskanen's claim that Giant Eagle's employees negligently restrained her son in response to his attack.

B. Giant Eagle Did Not Have To Admit Using A "Deadly Chokehold" To Claim Self-Defense

Hoping to bolster the Ninth District's elimination of self-defense from a case indisputably involving a defensive response to an attack, Mrs. Niskanen argues that Giant Eagle's refusal to admit using a "deadly chokehold" on her son was inconsistent with that defense. While Ohio Civ. R. 8(E)(2) permits a party to not only plead, but also prove "as many separate . . . defenses

as he has regardless of consistency," Giant Eagle did not take inconsistent positions by asserting self-defense. *Automobile Ins. Co. of Hartford, Conn. v. Barnes-Manley Wet Wash Laundry Co.* (1948), 168 F.2d 381, 386-87 (10th Cir.) (interpreting federal counterpart to Rule 8(E)(2) to permit taking inconsistent positions at trial and on appeal).

Mrs. Niskanen claims that to avail itself of self-defense, Giant Eagle had to admit the "cornerstone" of that defense—*i.e.*, "intentional conduct in purposefully using force to repel an attack." Niskanen Br. at 38. Self-defense, according to Mrs. Niskanen, requires the defendant to concede she "used force by design, not accidentally." *Id.* But Giant Eagle never contended that its restraint of Niskanen was unintentional. Throughout trial, rather, Giant Eagle admitted its employees, with help from customers, intentionally held Niskanen down.

Regarding the use of force, the parties disputed precisely how Giant Eagle held Niskanen down. Mrs. Niskanen claimed that Giant Eagle's employees used a "deadly chokehold," *see* Niskanen Br. at 39, but they and others denied that a chokehold was ever used. (Supp. 256; 6 Tr. 699); (Supp. 502-04; 11 Tr. 1457-59). To invoke self-defense, Giant Eagle did not have to admit to Mrs. Niskanen's version of how its employees intentionally restrained her son. It is enough, at least for self-defense, that Giant Eagle readily conceded that its employees intentionally restrained Niskanen. Given this admission, there was nothing inconsistent between Giant Eagle's assertion of self-defense and its defense on the merits—*i.e.*, that its employees intentionally restrained Niskanen but without any intent to harm him.

C. Neither *Goldfuss* Nor *Ashford*, Which Recognize A Right To Assert Self-Defense In A Negligence Action, Can Be Distinguished

This Court's decision in *Goldfuss* and the Ninth District's earlier decision in *Ashford v. Betleyoun*, No. 22930, 2006 WL 1409793 (Ohio Ct. App. May 24, 2006), 2006-Ohio-2554, recognize a right to assert self-defense even against a negligence claim. To avoid the same result here, Mrs. Niskanen tries to distinguish *Goldfuss* and *Ashford*, arguing that the defendants in those decisions, unlike Giant Eagle, admitted intentional conduct. Neither decision can be distinguished on this basis.

Mrs. Niskanen correctly points out that in *Goldfuss* "the defendant intentionally fired a warning shot . . . accidentally shooting the plaintiff." Niskanen Br. at 39; *Goldfuss*, 79 Ohio St.3d at 117. The defendant in *Goldfuss*, in other words, acted intentionally but without any intent to harm the plaintiff. Precisely the same is true here. Giant Eagle's employees intentionally held Niskanen down but without any intent to harm him. Self-defense is a proper instruction on these facts, according to *Goldfuss*, so long as its other elements—including the threat of imminent bodily harm—are present. 79 Ohio St.3d at 124 (self-defense instruction proper in negligence case if evidence sufficient for jury to conclude defendant faced imminent threat of bodily harm).⁶

Ashford also is directly on point. The plaintiff in *Ashford*, like Mrs. Niskanen, brought suit only under a negligence theory. 2006 WL 1409793, at *1. Like Giant Eagle, the defendant in *Ashford* claimed that the decedent was never safely subdued and "that [defendant] was in danger of death or serious bodily harm" from him until the end. *Id.* at 4. And in *Ashford*, like

⁶ The plaintiff in *Goldfuss*, like Mrs. Niskanen, sued the defendant for "negligently" causing the decedent's death. 79 Ohio St.3d at 118. Presumably the plaintiff in *Goldfuss* pursued a negligence cause of action because, although the defendant acted intentionally, he did not intend to harm the decedent. Here too Giant Eagle's employees intended no harm. *Goldfuss* is on all fours with this case.

here, it was undisputed—if not indisputable—that the defendant's actions were purely defensive. *Id.* at 3-4. As this comparison makes clear, the Ninth District's decision in *Ashford* cannot be squared with its decision below.⁷

D. The Narrow Application Of Self Defense In Civil Cases Championed By Mrs. Niskanen And The Ninth District Defies Common Sense

Mrs. Niskanen and the Ninth District claim that self defense can only be invoked where the defendant concedes that she intended to harm the plaintiff. Niskanen Br. at 37-40; (Appx. 14, ¶25) (acknowledging that self defense may be appropriate where "defendant . . . was alleged to have intentionally harmed the defendant"). A simple analogy, however, illustrates the folly of this narrow application of self defense.

Imagine the decedent attacks the defendant who, in self-defense, responds by pushing the decedent back. The decedent then falls due to the push, hits his head on a rock, and dies. Under Mrs. Niskanen's and the Ninth District's narrow view of self-defense, the defendant could not assert self-defense unless she admitted an intent to kill the decedent despite the irrefutable evidence that his death was an accident. Yet self-defense would be indisputably a proper defense under these facts, even if the defendant, like Giant Eagle, clung to the truth that he did not intend to kill the decedent.⁸

⁷ The defendant's actions in *Ashford* and Giant Eagle's actions here were intentional. The defendant in *Ashford* intentionally fired his gun to protect himself while Giant Eagle's employees intentionally held Niskanen down to protect themselves. On this basis too, *Ashford* cannot be distinguished.

⁸ Contrary to Mrs. Niskanen's and the Ninth District's position on self-defense, all negligence claims involve both intentional and unintentional conduct. *Travelers Indemn. Co. v. Children's Friend and Service, Inc.*, No. PC98-2187, 2005 WL 3276224, at *8 (R.I. Super. Dec. 1, 2005) (recognizing "that driving an automobile is intentional" even though an "automobile accident" is "the paradigm example of negligence").

V. GIANT EAGLE PROPERLY PRESERVED ITS CLAIM THAT THE SHOPKEEPER'S PRIVILEGE DOES NOT CREATE A STATUTORY CAUSE OF ACTION FOR MERCHANTS

Mrs. Niskanen argues that Giant Eagle has not preserved its claim that R.C. 2935.041 creates a privilege for merchants—not a statutory cause of action for shoplifters. Whether R.C. 2935.041 creates a statutory privilege or a claim has been properly preserved for this Court's review. Logically, 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. Mrs. Niskanen concedes that whether self-defense may be asserted against a statutory undue restraint claim has been preserved for this Court's review. To decide this question, however, this Court must first answer the predicate question—whether R.C. 2935.041, although enacted to protect merchants, expands the causes of action available to shoplifters.⁹

VI. CONCLUSION

Mrs. Niskanen claims that the Ninth District's decision, if embraced by this Court, will cause nary a ripple in Ohio tort law. Of all Mrs. Niskanen's exaggerated claims, this one may be the worst. The Ninth District's decision rests on principles that, if adopted by this Court, would lead to a tidal wave of change in Ohio tort law. Punitive damages would be unchained from compensatory damages and, as such, those damages would be transformed into a stand alone tort claim. By pleading only negligence, a plaintiff could eliminate self-defense from a case even when, as here, the evidence overwhelmingly establishes that the decedent died while the defendant was repelling his attack. And a statute enacted to protect merchants, R.C. 2935.041,

⁹ Giant Eagle, in any event, should not be penalized for failing to press this point until now. As Mrs. Niskanen concedes, given their overlapping proof requirements, a defendant cannot prevail on self-defense but lose on undue restraint. Niskanen Br. at 49. Nor can a plaintiff prevail on self-defense but lose on undue restraint. Thus, Giant Eagle had no reason—none at all—to claim that R.C. 2935.041 does not create a statutory cause of action until the Ninth District held that self-defense cannot be asserted to defeat a statutory undue restraint claim.

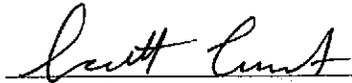
would expand their liability by giving shoplifters a new cause of action to assert against them.

Neither this Court's prior decisions nor common sense support such an upheaval in Ohio tort law.

For all these reasons, this Court should reverse the Ninth District and reinstate the jury verdict in Giant Eagle's favor.

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Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing REPLY BRIEF OF APPELLANT, GIANT EAGLE, INC., has been forwarded by U.S. Mail and electronic mail this 22nd day of December, 2008, to the following:

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