

IN THE SUPREME COURT OF OHIO

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| MARY NISKANEN, etc. | : | Case No. 2008-0895 |
| | : | |
| Appellee | : | On Appeal from the |
| | : | Summit County Court of Appeals, |
| vs. | : | Ninth Appellate District |
| | : | |
| GIANT EAGLE, INC. | : | Court of Appeals |
| | : | Case No. 23445 |
| Appellant | : | |

**AMICUS CURIAE REPLY BRIEF OF
THE OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS
URGING REVERSAL ON BEHALF OF APPELLANT
GIANT EAGLE, INC.**

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LAW & ARGUMENT

A. Introduction

A jury decided this case after hearing all the evidence and arguments and after receiving proper instructions from the Trial Court. The Ninth Appellate District disagreed and bent Ohio law to require another trial. This Court should make things right by reinstating the Trial Court's judgment for Giant Eagle.¹

Giant Eagle, OACTA and others have already explained the legal deficiencies in the Ninth Appellate District's Opinion. That is, the Ninth Appellate District committed reversible error by holding: (1) that a personal injury plaintiff could shield a negligence claim from a comparative fault defense by including a punitive damages prayer; and (2) self-defense/defense of others is never a defense to a negligence claim. Rather than address these legal deficiencies directly, Niskanen attempts to side-step them. First, Niskanen concedes "that a plaintiff may not assert a 'stand alone claim' for punitive damages . . . *Niskanen has never disputed this point*, and readily concedes that a plaintiff must establish liability for compensatory damages before she may recover punitive damages." (Emphasis in original; Niskanen's Merit Brief, pp. 22-23). Second, Niskanen concedes that "the Ninth District did not 'eliminate[] the right of self-defense in negligence actions,'" but instead simply held that the self-defense was not an applicable defense in *this action*. (*Id.*, pp. 36-37). Niskanen's side-step shuffle is actually a tacit admission that the central reasoning of the Ninth Appellate District was flawed and should be reversed.

¹For purposes of clarity, consistency and brevity, the same abbreviations used in OACTA's Amicus Curiae Brief are used in this Amicus Curiae Reply Brief.

With respect to Niskanen, the pronouns "he" or "she" are used depending upon whether reference is being made to Niskanen himself or his administratrix.

Recognizing this problem, Niskanen then mischaracterizes the “inartfully stated” reasoning of the decision below (Niskanen’s Merit Brief, p. 23, FN 19), and instead advances two alternative arguments she believes justify nullification of the jury’s verdict. First, she argues that she had the right to have the jury determine whether Giant Eagle acted with actual malice *within the context of her negligence claims*, regardless of whether the jury went on to award punitive damages. If she proved actual malice as a part of her negligence claims, then Giant Eagle would not be permitted to utilize contributory fault as an affirmative defense to those claims. Second, Niskanen argues that, even though self-defense can be an affirmative defense in negligence cases, a self-defense instruction should not have been part of *this* negligence case because: (1) Giant Eagle never conceded “that its employees were ‘justified’ in applying a chokehold’ to Paul [by] conceding in the first instance that they ‘intended’ to use *that level of force* to protect themselves” (Emphasis added, Niskanen’s Merit Brief, p. 38); and (2) “self-defense was ‘completely irrelevant’ to both theories of negligence” advanced by Niskanen (*Id.*, p. 43).

In essence, these alternative arguments can be distilled down to a very simple proposition: the jury was improperly instructed by the Trial Court. Because Niskanen limits her appellate arguments to this alternative view of the decision below, this Reply Brief focuses on those alternative arguments. But in truth, this alternative argument has no more merit than the plain language of the decision below. Either way, the Ninth Appellate District committed reversible error in overturning the jury’s difficult decision and judgment for Giant Eagle should be reinstated.

B. Standard of Review

If, as OACTA believes, the Ninth Appellate District's Opinion actually adopts the sweeping legal rules suggested by its plain language, then Giant Eagle is correct that this Court's review is de novo. (Giant Eagle's Merit Brief, p. 11). If, however, the alternative view advanced by Niskanen is correct, the Trial Court's actions would be subject to an abuse of discretion standard of review.

In this regard, jury instructions are committed to the sound discretion of the trial court. *State v. Wolons* (1989), 44 Ohio St.3d 64, 68, 541 N.E.2d 443. Accordingly, in order to constitute reversible error, any error predicated upon jury instructions must demonstrate that the trial court abused its discretion. *Id.* As often stated, an abuse of discretion means more than just an error of law or judgment, it means the trial court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. Furthermore, in *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585, 575 N.E.2d 828, this Court explained:

It is well established that the trial court will not instruct the jury where there is no evidence to support an issue . . . However, the corollary of this maxim is also true. [FN 3]

FN 3 "The fundamental rule for determining the scope of the instruction to be given by the court is that it should be adapted to and embrace all issues made by the pleadings and the evidence. * * * The instructions should be broad enough to properly cover the issues presented for consideration, or all the facts in issue which the evidence tends to establish or disprove." (footnote omitted). 89 Ohio Jurisprudence 3d (1989) 354-355, Trial, Section 289.

"Ordinarily requested instructions should be given if they are correct statements of the law applicable to the facts in the case and reasonable minds might reach the conclusion sought by the instruction." Markus & Palmer, *Trial Handbook for Ohio Lawyers* (3 Ed.1991), 860, Section 36:2. See, also, *Feterle v. Huettner* (1971),

28 Ohio St.2d 54, 57 O.O. 2d 213, 275 N.E.2d 340, at the syllabus: “In reviewing a record to ascertain the presence of sufficient evidence to support the giving of a[n] * * * instruction, an appellate court should determine whether the record contains evidence from which reasonable minds might reach the conclusion sought by the instruction.”

A party is generally not permitted to seek reversal of a case based upon instructions given to a jury, unless the party has raised a timely objection with the Trial Court. Civ. R. 52. It is with these principles in mind that Niskanen’s alternative arguments are now considered—and that consideration is not favorable to the Ninth Appellate District’s holding.

C. Niskanen’s Claims Pertinent To This Appeal Are Properly Characterized As Negligence Claims.

The substantive jury instructions requested by Niskanen and Giant Eagle pertinent to this appeal were limited to three broad categories: negligence, affirmative defenses to negligence, and punitive damages.² The Ninth Appellate District succinctly explained why the parties submitted such substantively limited jury instructions:

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

* * *

²The judgment for Giant Eagle on Niskanen’s spoliation claim is not part of this appeal.

[¶21] Although Niskanen’s suit originally included claims for intentional torts such as assault and false imprisonment, Niskanen had dismissed those claims prior to trial and *the case proceeded on claims sounding solely in negligence*. (Emphasis added).

Niskanen v. Giant Eagle, Inc., 9th Dist. No. 23445, 2008-Ohio-1385, at ¶¶8, 21; *see also* Niskanen’s Merit Brief, p. 9. Thus, *all of Niskanen’s claims against Giant Eagle sounded in negligence*—direct and vicarious. The Ninth Appellate District’s Opinion is dependent upon this characterization, and makes no sense if this characterization is incorrect.

Until now, Niskanen never questioned this characterization—and even encouraged it.

However, now she sheepishly attempts to distance herself from it, arguing:

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 . . . [C]ontrary to Giant Eagle’s repeated claims that Niskanen did not ‘pursue[] any intentional tort claim’ but ‘only a negligence theory’ at trial[]—Niskanen did *not* dismiss *this* intentional-tort claim, which remained in the case through verdict.

(Niskanen’s Merit Brief, pp. 30-31). However, there are two problems with this argument. First, in *Payne v. Vance* (1921), 103 Ohio St. 59, 69, 133 N.E. 85, this Court made clear that tacking adjectives onto a negligence claim does not change its essential character—negligence is negligence.³ Second, even if Niskanen’s contention had some merit, one cannot escape the conclusion that Niskanen either waived or invited any error with respect to any intentional tort instruction by the

³“Many cases have used the terms ‘gross negligence,’ ‘willful negligence,’ and ‘wanton negligence’ without drawing the clear distinctions which must be observed in a proper analysis of the subject, and have thereby led to unfortunate results. A defendant might be guilty of the grossest negligence and his acts might be fraught with the direst consequences without having those elements of intent and purpose necessary to constitute willful tort.” *Id.*

Trial Court by: (1) dismissing all of her intentional tort claims on the eve of trial, (2) not requesting an instruction on willful, intentional and/or grossly negligent conduct, and (3) by affirmatively requesting an instruction limited to ordinary negligence with respect to her compensatory damages claims against Giant Eagle. Thus, under Ohio law, she is precluded from asserting the existence of a stealth intentional tort claim in order to avoid Giant Eagle's arguments in this appeal.

D. The Trial Court Properly Instructed The Jury On Contributory Fault And Punitive Damages And Those Instructions Do Not Justify Reversal.

Neither Niskanen nor the Ninth Appellate District contend that the general substance of the jury instructions given with respect to contributory fault or punitive damages was improper. Indeed, the Ninth Appellate District expressly found that contributory fault was a valid defense to Niskanen's negligence claims and from the evidence "the jury could reasonably conclude that Niskanen also had been negligent". *Niskanen v. Giant Eagle, Inc.*, 9th Dist. No. 23445, 2008-Ohio-1385, at ¶32. Moreover, both Niskanen and the Ninth Appellate District contend that the general substance of the jury instructions given with respect to punitive damages was proper and should have been considered by the jury. Thus, Niskanen's argument now depends upon nuance involving the interaction between the contributory fault and punitive damages jury instructions.

In this regard, Niskanen argues that the Trial Court should have allowed the jury to consider the jury interrogatories related to punitive damages *even though the jury found that Niskanen was mostly responsible for his own death and was therefore precluded from recovery*. Niskanen reasons that there was ample evidence for the jury to find actual malice because the Trial Court, at various times, refused to take this issue from the jury. Thus, if the jury had responded to the punitive damages interrogatories, it might have found that Giant Eagle acted with actual malice as opposed

to just negligence. Why make this roundabout reference to the punitive damages instructions? Because this is the only place where Niskanen actually asked the jury to decide the issue of malice. It apparently never occurred to her that the jury might find that Giant Eagle was not liable for the underlying negligence claim and therefore would never reach the issue of punitive damages. Thus, on appeal, she had to formulate arguments about why it was error for the jury not to consider the punitive damages jury instructions despite the fact that it found Niskanen mostly responsible for his own death. Despite the best efforts of her lawyers, these arguments fail for two reasons.

First, they violate long-standing public policy. In this regard, the clear statutory directive of R. C. 2315.32 provides, in pertinent part:

- (B) The contributory fault of the plaintiff may be asserted as an affirmative defense to a negligence claim or to a tort claim other than a negligence claim, *except that the contributory fault of the plaintiff may not be asserted as an affirmative defense to an intentional tort claim.* (Emphasis added).

Niskanen elected to dismiss her intentional tort claims on the eve of trial, and proceed only on a negligence theory. According to R. C. 2315.21(B), Giant Eagle was entitled to assert the defense of contributory fault (comparative negligence)⁴ against such a claim—unless Niskanen presented “an intentional tort claim.” Niskanen did not, and even if one could consider her gross negligence claim to be more than ordinary negligence it would not protect it from contributory fault principles. Although Ohio has apparently not yet directly addressed the issue, the general rule is that allegations of gross negligence, recklessness and the like are not treated as an intentional tort as to shield a negligence claim from comparative negligence/fault principles in the first instance. *See Annotation,*

⁴Throughout this brief, the terms “contributory fault” and “comparative negligence” are used interchangeably.

Application of Comparative Negligence in Action Based on Gross Negligence, Recklessness, or the Like, 10 A.L.R.4th 946 (1981); *Nga Li v. Yellow Cab Co. of California* (1975), 13 Cal.3d 804, 825-826, 532 P.2d 1226; *Amoco Pipeline Co. v. Montgomery* (W.D. Ok. 1980), 487 F.Supp. 1268, 1271-1272. As succinctly explained in *Montgomery*:

The concepts of willful and wanton misconduct and gross negligence were originally instituted to ameliorate the hardships of plaintiff's inability to recover under the harsh contributory negligence rule . . . [when] plaintiff's contributory negligence is no longer a total bar to recovery . . . the rationale for treating acts of gross negligence and willful negligence differently from acts of ordinary negligence no longer applies.

Id., at 1272.

Second, the Ninth Appellate District's conclusion that "[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" is patently incorrect.⁵ Even if the punitive damages jury interrogatories had been answered by the jury, Giant Eagle would have been entitled to judgment as a matter of law--no matter the answers given. In this regard, Niskanen argues that the jury was prevented from considering the issue of Giant Eagle's malice due to the structure of the jury interrogatories. The problem with this argument, is that the jury was only "*prevented*" from answering two standard jury interrogatories related exclusively to punitive damages:

7. Punitive Damages

* * *

7-A. Do you find by clear and convincing evidence that Giant Eagle acted with actual malice characterized by a conscious disregard for the

⁵*Niskanen*, at ¶17.

rights and safety of Paul Niskanen that had a great probability of causing substantial harm?

* * *

7-B. Do you find Plaintiff is entitled to an award of her reasonable attorneys' fees and costs incurred in prosecuting this litigation in an amount to be determined by the Court?

Neither jury interrogatory is relevant to the issue of whether Niskanen is entitled to compensatory damages under her negligence claim. Jury Interrogatory 7-B (regarding attorneys fees) is patently irrelevant, and Jury Interrogatory 7-A cannot be used to circumvent a contributory fault defense. *Malone v. Courtyard by Marriott Ltd. Partnership*, 74 Ohio St.3d 440, 447, 1996-Ohio-311.

Moreover, as this Court pointed out in *Schellhouse v. Norfolk & Western Railway Co.* (1991), 61 Ohio St.3d 520, 524, 575 N.E.2d 453, simply asking a jury whether a defendant acted with "actual malice" does not resolve the issue of "whether the acts of [the defendant] which constituted 'actual malice' *were a proximate cause of the accident.*" (Emphasis added). If a defendant's "malice" did not "*cause*" the plaintiff's damages, then a jury interrogatory finding malice is irrelevant to the issue of contributory fault. *Id.* As neither Jury Interrogatory 7-A nor Jury Interrogatory 7-B included a causation element, there was no basis for the Ninth Appellate District to find reversible error. Again, Niskanen either invited or waived any error with respect to the jury instruction. Her dilemma is the product of her own trial strategy.

Niskanen's attempts to distinguish *Malone* or declare its reasoning to be dicta are unpersuasive. Both *Malone* and this case addressed the exact same legal standard for punitive damages. *Compare Malone*, 74 Ohio St.3d at 443 (plaintiffs were seeking punitive damages because the defendant's actions were allegedly "*willful, wanton, and reckless, and demonstrated a*

*conscious disregard for the safety and well being [of the plaintiffs] when a great probability of harm existed”), with Jury Interrogatory 7-A (characterizing actual malice for punitive damages as “a conscious disregard for the rights and safety of Paul Niskanen that had a great probability of causing substantial harm”). Thus, Niskanen’s argument that *Malone* is distinguishable because it addressed “recklessness” instead of “malice” is a distinction without a difference. (Niskanen’s Merit Brief, pp. 30-31). Moreover, in *Malone*, this Court made clear that its holding to deny punitive damages was predicated upon *two complementary reasons*: (1) the defendant did not have “subjective knowledge of the danger posed to” the plaintiffs; and (2) one of the two plaintiffs’ negligence claims was barred by comparative negligence principles, and such a defense could not be defeated by arguing that a jury might find actual malice if it were permitted to consider the demand for punitive damages. 74 Ohio St.3d at 445-447.⁶*

While Niskanen argues again and again that her punitive damages claim should have shielded her negligence claims from contributory fault principles, she fails to provide a single legal authority (from anywhere in the country) that directly applies her argument to a plaintiff whose negligence claim is barred by contributory fault. The closest she comes is *Schellhouse*—where this Court reversed a judgment for a plaintiff because it could not tell whether the judgment was predicated upon an intentional tort claims (which would be shielded from comparative negligence principles) or a negligence claim (which would be subject to comparative negligence principles). 61 Ohio St.3d at 524-526. In *Schellhouse*, ironically, a principal cause of the confusion (and the consequent

⁶Notably, the other *Malone* plaintiff was also comparatively negligent, but “the jury determined that her negligence was not a cause of her injuries” so she was entitled to recover damages. 74 Ohio St.3d at 444. This again demonstrates the importance of the “causation” component of jury interrogatories addressed in *Schellhouse*.

reversal) was the remedy Niskanen seeks here--that is, the jury was instructed to answer an interrogatory that asked whether “the actions or inactions [of the defendant] constituted actual malice toward [the plaintiff]” without regard to causation. *Id.*, at 523. By answering the interrogatory in the affirmative, the jury injected an irreconcilable conflict into the case between: (1) whether the plaintiff’s claim was based in negligence and barred by comparative negligence principles; or (2) whether the plaintiff’s claim was based on an intentional tort and immune from comparative negligence principles. *Id.*, at 524-526. This caused this Court to conclude “that a retrial is the only fair result.” *Id.*, at 526.⁷ Had the *Schellhouse* court considered this case, it would have undoubtedly found that Niskanen’s negligence claims were barred by contributory fault.

Based upon the foregoing, if a plaintiff advances a negligence theory, then negligence defenses (such as comparative fault) apply. If the plaintiff prevails on his or her negligence claim, then the jury may consider whether the evidence also supports an award of punitive damages. If the plaintiff does not prevail on his or her negligence claim for any reason (including comparative fault), then the jury may not consider punitive damages. This gives the plaintiff both the benefits⁸ and the burdens of pursuing a negligence theory. It also prevents artful pleading from circumventing the public policy of the state regarding contributory fault.

⁷In so holding, this Court refused “to consider . . . whether a defendant’s intentional tort, without a specific finding of malice, could negate a comparative negligence defense” or “whether negligent acts committed with malice could be anything less than an intentional tort.” 61 Ohio St.3d at 524, FN 1.

⁸*Payne*, 103 Ohio St. at 67 (“[A] plaintiff should not be placed under the burden of proving intent or purpose, where negligence only is charged”).

E. The Trial Court Properly Instructed The Jury On Self Defense And Those Instructions Do Not Justify Reversal.

The Ninth Appellate District split on the issue of whether the jury should have been instructed on self-defense. While the majority contended that “this case became improperly focused on whether the Giant Eagle employees had acted in self-defense,” (*Niskanen*, at ¶19), the dissent correctly recognized that there was conflicting evidence and argument on this issue, and thus the Trial Court was correct to instruct the jury on self-defense. *Id.*, at ¶¶48-49. The dissent concluded: “The jury could have found, and they apparently did, that [Giant Eagle’s employees] were either attempting to restrain an aggressor for the police or defending themselves from further attack.” *Id.*, at ¶49.

The dissent correctly focused on the actual evidence before the Trial Court rather than legal abstractions. A central theme to Giant Eagle’s defense was that its employees used reasonable force in self-defense. There is no suggestion that this evidence or argument was invented by Giant Eagle to mislead or confuse the issues. It was simply one of many issues that needed to be decided by the jury. Moreover, there is no suggestion that Giant Eagle ever claimed a right to use “deadly force”—just reasonable force. As a result, a central theme of *Niskanen*’s rebuttal—at trial and on appeal—was that his death itself was compelling evidence that Giant Eagle’s use of force was unreasonable. The jury was presented with conflicting evidence and argument on this issue and was properly instructed how to resolve it. Its conclusion is entitled to protection.

In *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 124, 1997-Ohio-401, this Court found that self-defense was an affirmative defense to negligent use of deadly force, but there was no basis to instruct the jury on self-defense because: “The court of appeals found insufficient evidence in the record

from which a jury could reasonably conclude that Davidson had a bona fide belief that he or his family were in imminent danger of death or great bodily harm . . . [thus] the evidence did not warrant an instruction on self-defense.” On the other hand, the evidentiary record in this case stands in stark contrast to *Goldfuss*. The record is replete with evidence that Giant Eagle’s employees and even passers-by genuinely believed that Niskanen attacked Giant Eagle’s employees and they were simply trying to defend themselves and each other without any intent to kill Niskanen or use deadly force. (See Giant Eagle’s Merit Brief, pp. 7-11). Accordingly, under *Murphy* and *Goldfuss*, the Trial Court did not abuse its discretion by instructing the jury on self-defense, and there is no indication that the self-defense instruction given was substantively inaccurate.⁹ Niskanen’s arguments to the contrary are without merit for the reasons that follow.

First, Niskanen incorrectly asserts Giant Eagle was required to concede “that its employees 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.” (Emphasis added, Niskanen’s Merit Brief, p. 38). However, this confuses “intentional use of force” with “intentional use of *deadly* force”. Giant Eagle disputed that its employees intended to use deadly force. However, the record fully supports Giant Eagle’s assertion that its employees intentionally used reasonable force to defend themselves. Indeed, it is impossible to read the record any other way. (See Giant Eagle’s Merit Brief, pp. 7-11). Moreover, like the firearm used in *Goldfuss*, the physical restraint used by Giant Eagle’s employees is not necessarily characterized as “deadly force”.

⁹Indeed, Niskanen concedes: “Niskanen never challenged the right of Giant Eagle employees to defend themselves at the point when Giant Eagle claims that Paul was an aggressor.” (Niskanen’s Merit Brief, p. 42).

Second, Niskanen incorrectly asserts that self-defense was irrelevant to Niskanen's negligence theories against Giant Eagle because Giant Eagle's training and corporate negligence predated the confrontation between its employees and Niskanen. According to Niskanen, the jury was required to find that either Giant Eagle's negligence had caused Niskanen's death or it had not. It could not find that Niskanen's death was caused by justified use of force by Giant Eagle's employees. Of course, this theory is at odds with the evidence actually presented to the jury. While it might be fair to say that there was conflicting evidence and argument on the issue of self-defense, it is not fair to say that self-defense was irrelevant to the issue of what caused Niskanen's death.

Finally, as explained in OACTA's Amicus Brief, the Ninth Appellate District's holding actually is based upon the proposition that self-defense is *never* a defense to a negligence claim.¹⁰ This runs counter to Ohio law and justifies reversing the Ninth Appellate District.

CONCLUSION

Niskanen begins his Merit Brief:

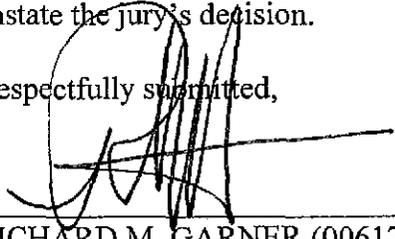
This case arises from the tragic and avoidable death of 31-year-old Paul Niskanen . . . The salient facts are undisputed; the only factual dispute was whether's death was avoidable . . . It was avoidable.

(Niskanen's Merit Brief, p. 3). There is no arguing with this statement. Niskanen's tragic death was avoidable. But the real question is: what caused it? After listening to all of the evidence and arguments, a jury found that Niskanen was the legal cause of his own death. Based upon the

¹⁰“This Court has found no Ohio authority for recognizing self-defense as a defense in a negligence action. Although a few courts in other jurisdictions have recognized that self-defense may be a defense to negligence in limited situations, those situations have involved a defendant who was alleged to have intentionally harmed a plaintiff, but the plaintiff's claims were couched in terms of negligence [citations omitted] . . . Even if this Court were inclined to follow the reasoning of those other jurisdictions, there were no similar claims or allegations in this case.” *Niskanen*, at ¶25.

foregoing arguments, and for all of the reasons in OACTA's Amicus Brief, this Court should reverse the Ninth Appellate District's decision and reinstate the jury's decision.

Respectfully submitted,



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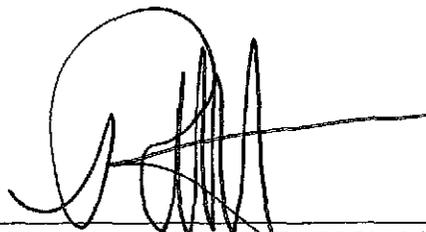
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A handwritten signature in black ink, appearing to read 'R. M. Garner', written over a horizontal line.

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