

IN THE SUPREME COURT OF OHIO

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

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.

Richard D. Schuster (0022813)
(COUNSEL OF RECORD)
Michael J. Hendershot (0081842)
VORYS, SATER, SEYMOUR AND
PEASE LLP
52 East Gay Street
Columbus, Ohio 43216-1008
Tel.: (614) 464-5475
Fax: (614) 719-4955
RDSchuster@vorys.com
MJHendershot@vorys.com

COUNSEL FOR AMICI CURIAE,
THE OHIO COUNCIL OF RETAIL
MERCHANTS AND THE OHIO
GROCERS ASSOCIATION

Steven A. Goldfarb (0030186)
(COUNSEL OF RECORD)
Robert J. Fogarty (0006818)
Andrew S. Pollis (0046392)
Eric B. Levasseur (0075353)
HAHN LOESER & PARKS LLP
33 BP Tower
200 Public Square
Cleveland, Ohio 44114
Tel: (216) 621-0150
Fax: (216) 241-2824
sagoldfarb@hahnlaw.com

COUNSEL FOR APPELLEE,
MARY NISKANEN

FILED

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CLERK OF COURT
SUPREME COURT OF OHIO

Bernard D. Marcus (admitted pro hac vice)
Scott D. Livingston (admitted pro hac vice)
Stephen S. Zubrow (admitted pro hac vice)
MARCUS & SHAPIRA LLP
35TH Floor, One Oxford Centre
301 Grant Street
Pittsburgh, PA 15219
Tel: (412) 471-3490
Fax: (412) 391-8757
marcus@marcu-shapira.com

Linda S. Woggon (0059082)
Ohio Chamber of Commerce
230 East Town St.
Columbus, Ohio 43215-0159
Tel: (614) 228-4201

COUNSEL FOR AMICUS CURIAE
OHIO CHAMBER OF COMMERCE

and

Robert C. McLelland (0012352)
(COUNSEL OF RECORD)
RADEMAKER, MATTY,
MCCLELLAND & GREVE
55 Public Square, Suite 1775
Cleveland, Ohio 44114
Tel: (216) 621-6570
Fax: (216) 621-1127
mcclelland@rmmglaw.com

Richard M. Garner (0061734)
Davis & Young
1200 Fifth Third Center
600 Superior Avenue East
Cleveland, Ohio 44114-2654
Tel: (216) 377-2731
Fax: (216) 621-0602
rgarner@davisyoung.com

COUNSEL FOR APPELLANT, GIANT
EAGLE, INC.

COUNSEL FOR AMICUS CURIA OHIO
ASSOCIATION OF CIVIL TRIAL
ATTORNEYS

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REPLY

Niskanen's response brief is like a magician's assistant's shiny costume—it draws attention from the main event so the magician can make the audience believe something that is incredible. Niskanen's sleight-of-hand relies on the malleable word malice and the equally pliable concept of intent to convince the Court that it should adopt two incredible propositions: (1) that punitive damages are recoverable despite a jury verdict finding the plaintiff more culpable for his injuries than the defendant; and (2) that a plaintiff's decision to label the defendant's acts "negligence" removes the defendant's option to argue self-defense.

Regarding punitive damages, Niskanen's distraction of choice is the amorphous word malice. Niskanen argues that, because the complaint contains perhaps the most misused word in law, this Court should overturn a verdict despite the jury's unambiguous finding that Niskanen was more responsible for his injury than defendants.

Regarding self-defense, Niskanen's shiny object is a questionable rule of criminal law that has no bearing on this case. Even if Ohio's criminal-law rule about pleading self-defense and negligence survives the U.S. Supreme Court's *Mathews* decision, that rule only prohibits a defendant from pleading inconsistent mental states.¹ It does not bar a defendant from consistently claiming he took intentional steps that produced an accidental result.

I. Malice is not a panacea to Niskanen's lost case

Malice is the heavy spice in Niskanen's brief. Despite its length, Niskanen's argument is essentially this: comparative fault is irrelevant if the plaintiff shows malice. That is not what *Schellhouse* says. *Schellhouse* reserved the question of whether malice is equivalent to an intentional tort. "Thus we need not consider at this time whether a defendant's intentional tort,

¹ *Mathews v. U.S.* (1988), 485 U.S. 58.

without a specific finding of malice, would negate a comparative negligence defense. Nor do we need wrestle with the hypothetical question of whether negligent acts committed with malice could be anything less than an intentional tort.” *Schellhouse v. Norfolk & Western Ry. Co.* (1991), 61 Ohio St.3d 520, 525, 575 N.E.2d 453 (emphasis added).

The General Assembly has ended the need for further hypothesizing on the interplay between malice and intentional torts. Revised Code 2315.32(B) imposes comparative fault for all torts other than “intentional” torts. The General Assembly did not use the term malice, and for good reason. “It is generally agreed that malice * * * has become too confusing and has lost its legal and practical usefulness.” *Sunward Corp. v. Dun & Bradstreet, Inc.* (C.A.10, 1987), 811 F.2d 511, 525 n.12 (internal punctuation omitted). “The various definitions of malice have led leading scholars to state that, perhaps no word in law is used more loosely than malice.” *Dairy Stores, Inc. v. Sentinel Pub. Co., Inc.* (N.J.1986), 516 A.2d 220, 232 (internal punctuation and citation omitted). “There is no good reason ever to use again the dangerously imprecise abstraction malice.” *Glenn v. State* (Md.App.1986), 511 A.2d 1110, 1127 (internal punctuation omitted).

Alleging—or even proving—malice does not abrogate statutory comparative fault principles. Only proving an intentional tort does that. This court should ignore Niskanen’s sideshow that relies on a dubious word that confounds courts and commentators with its imprecision. Niskanen did not prove an intentional tort. A jury concluded that Niskanen was more at fault than Giant Eagle. No illusions draped in malice, no fuzzy thinking aided by the most ridiculed word in law, can change those central facts.

Niskanen’s fascination with malice leads her astray regarding the relationship between punitive and compensatory damages. She contends that she takes no issue with the proposition

that punitive damages are not a stand-alone tort. [App'ee Br. at 22-23] Yet in the same breath, she claims that allegations of malice contained in the jury interrogatory for punitive damages “trump” comparative fault and rescue her negligence claim. [Id. at 23] Niskanen conveniently overlooks the separateness of punitive damages. The *Moskovitz* case is an example of no matter how malicious Dr. Moskowitz was in destroying evidence, his malice would not have overcome the plaintiff's failure to prove the underlying medical malpractice negligence if the plaintiff had been more than 50% at fault. That is one consequence of the Court's statement that, “it would make no sense for this court to establish a rule requiring that malicious conduct giving rise to a claim for punitive damages must independently cause compensable harm before punitive damages may be awarded.” *Moskovitz v. Mt. Sinai Med. Ctr.*, (1994), 69 Ohio St.3d 638, 651.

The malice relevant to assessing punitive damages has no necessary connection to the mental state relevant to establishing compensatory damages. Here, the jury did not consider malice in the punitive context because it concluded that there was no underlying liability. No degree of malice analyzed under the punitive damages question will undo a defense verdict on underlying liability.

Niskanen seeks a ruling that would convert allegations of malice contained in a punitive damage instruction into an abrogation of comparative fault. This ignores problems with the overused word malice and ignores the separateness of punitive damages from compensatory damages. This Court should reverse.

II. Niskanen confuses a defendant's pleading of his own mental state with a plaintiff's characterization of the defendant's mental state

As with malice, Niskanen persists in using misdirection to argue about self-defense. Setting aside the problems with Niskanen's self-defense argument posed by the improper analogy to a doctrine of criminal law and the questionable viability of that doctrine in light of

Mathews v. U.S., Niskanen mischaracterizes Giant Eagle's argument. Niskanen argues that because criminal defendants in Ohio cannot claim that they simultaneously acted intentionally and negligently, Giant Eagle cannot defend this civil case by arguing that its employees acted intentionally and not negligently.

The inconsistency of the criminal defendant's argument is not present in Giant Eagle's position. It is obviously possible to intend an act that is not negligent. A doctor sued for malpractice can intentionally perform a last-second biopsy of a tumor discovered during surgery and argue that the resulting nerve damage was not negligent because it prevented further harm. A lawyer who intentionally calls a witness that sinks a case can defend the malpractice action by arguing that the ex ante benefits outweighed the risks. Giant Eagle's argument is no different. Its employees intentionally restrained Niskanen to defend themselves and others from harm. Giant Eagle is entitled to claim that these intentional acts were not negligent because they arose in self-defense.

Niskanen tries another tactic to gain traction for the self-defense argument by claiming that Giant Eagle can only argue self-defense if it admits that its employees intentionally applied a deadly chokehold with the purpose of killing Niskanen. [App'ee Br. at 39] This argument confuses the parts and the whole. Niskanen thinks that Giant Eagle must admit that its employees intended the result to take advantage of a self-defense justification. To the contrary, the employees need only have intended to defend themselves to avoid arguing—inconsistently—that they both intended and accidentally restrained Niskanen.

If the rule barring inconsistent mental states is even relevant to this case, it surely does not require that the defendant intend the result. Intending the act is sufficient. The Restatement sheds some light. An "act" is defined as "an external manifestation of the actor's will and does

not include any of its results, even the most direct, immediate, and intended.” Restatement (Second) of Torts (1965), Section 2. It is possible to intend an act of self-defense without intending the consequences.

For example, a criminal defendant resisting a homicide charge could argue that he intended to defend himself from a home invasion by grabbing a pellet gun from the closet. If he instead used a rifle with fatal consequences, his act may be negligent, but it does not eliminate his right to plead self-defense. This hypothetical defendant intended his act, but does not claim inconsistent mental states. Niskanen’s forced analogy fails.

If Niskanen insists on an analogy from criminal law, a more appropriate comparison is imperfect self-defense. As explained by the Tenth Circuit, “a defendant may commit involuntary manslaughter if he acts in self-defense but is criminally negligent in doing so.” *United States v. Brown* (C.A.10, 2002), 287 F.3d 965, 975 (reversing conviction of defendant who intentionally swung at victim with a knife in self-defense, but accidentally killed him). Here, Giant Eagle’s employees intentionally used force to subdue Niskanen’s attack. Whether their intentional use of force was negligent was a question for the jury. The jury found no negligence. No amount of legal hocus pocus changes this straightforward analysis. Only Niskanen’s slippery, and false, equivalence between a defendant pleading inconsistent mental states and an intended act of self-defense with an unintended outcome makes this proposition appear more complicated than it is.

CONCLUSION

Niskanen’s magic show mislead the Ninth District into reversing the common sense finding of a jury that Giant Eagle was not liable for its employees intentional acts of self-defense that accidentally caused Niskanen’s death. This Court should not fall for the same tricks.

Niskanen misdirects the Court's focus to malice. But, other than spoliation—which Niskanen does not rely on—this case was tried with no tort capable of erasing comparative-fault principles. Therefore, all the talk of malice goes only to show why the word clouds clear thinking. It does not trump the jury's comparative fault finding.

Niskanen's self-dense argument also asks this Court to suspend disbelief. Instead of accepting the straightforward proposition that a person may act intentionally and not negligently, Niskanen offers an illusion concocted from a questionable and misapplied rule of criminal law.

Magic should remain on the stage. It has no place at 65 South Front Street.

Respectfully submitted,

Richard D. Schuster (by Mike Hendershot 0081842)

Richard D. Schuster (0022813)

(COUNSEL OF RECORD)

Michael J. Hendershot (0081842)

VORYS, SATER, SEYMOUR AND

PEASE LLP

52 East Gay Street

Columbus, OH 43216-1008

Tel.: (614) 464-5475

Fax: (614) 719-4955

COUNSEL FOR AMICI CURIAE, THE OHIO
COUNCIL OF RETAIL MERCHANTS AND THE
OHIO GROCERS ASSOCIATION

CERTIFICATE OF SERVICE

I certify that a copy of this Amicus Curiae Brief was sent by first-class U.S. mail,
postage prepaid, this 23d day of December, 2008 to:

Steven A. Goldfarb
Robert J. Fogarty
Andrew S. Pollis
Eric B. Levasseur
HAHN LOESER & PARKS LLP
33 BP Tower
200 Public Square
Cleveland, Ohio 44114

Bernard D. Marcus
Scott D. Livingston
Stephen S. Zubrow
MARCUS & SHAPIRA LLP
35TH Floor, One Oxford Centre
301 Grant Street
Pittsburgh, PA 15219

Robert C. McLelland
RADEMAKER, MATTY,
MCCLELLAND & GREVE
55 Public Square, Suite 1775
Cleveland, Ohio 44114

Linda S. Woggon
Ohio Chamber of Commerce
230 East Town St.
Columbus, Ohio 43215-0159

Richard M. Garner
Davis & Young
1200 Fifth Third Center
600 Superior Avenue East
Cleveland, Ohio 44114-2654



Michael J. Hendershot (0081842)