

IN THE SUPREME COURT OF OHIO

State of Ohio ex rel. :  
David M. Gross, : Case No. 05-1689  
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 Appellee, : On Appeal from the  
 : Franklin County Court  
 v. : of Appeals, Tenth  
 : Appellate District  
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 :  
 The Industrial Commission :  
 of Ohio, et. al., : Court of Appeals Case No. 04AP-756  
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 :  
 Appellants. :

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MEMORANDUM OF THE UNITED AUTO AEROSPACE &  
AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,  
REGION 2-B, AS *AMICUS CURIAE*,  
IN SUPPORT OF APPELLEE'S, DAVID M. GROSS',  
MOTION FOR RECONSIDERATION

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Stephen E. Mindzak (0058477)  
(COUNSEL OF RECORD)  
Shareef S. Rabaa (0076867)  
STEPHEN E. MINDZAK LAW OFFICES, LLC  
51 N High Street, Suite 888  
Columbus, OH 43215  
Telephone: (614) 221-1125  
Facsimile: (614) 221-7377

Gary D. Plunkett (0046805)  
(COUNSEL OF RECORD)  
Brett R. Bissonnette (0076527)  
Todd T. Miller (0063169)  
HOCHMAN & PLUNKETT CO., LPA  
3077 Kettering Blvd.  
Point West, Suite 210  
Dayton, OH 45439  
Telephone: (937) 228-2666  
Facsimile: (937) 228-0508

COUNSEL FOR *AMICUS CURIAE*,  
UNITED AUTO AEROSPACE &  
AGRICULTURAL IMPLEMENT  
WORKERS OF AMERICA, REGION 2-B

COUNSEL FOR APPELLEE,  
DAVID M. GROSS

Andrew Alatis (0042401)  
(COUNSEL OF RECORD)  
ASSISTANT ATTORNEY GENERAL  
Workers' Compensation Department  
State of Ohio  
150 East Gay Street, 22<sup>nd</sup> Floor  
Columbus, OH 43215  
Telephone: (614) 466-6696  
Facsimile: (614) 752-2538

COUNSEL FOR APPELLANT,  
THE INDUSTRIAL COMMISSION  
OF OHIO

Edna Scheuer (0010467)  
(COUNSEL OF RECORD)  
Salvator A. Gilene (0075562)  
SCHEUER, MACKIN & BRESLIN LLC  
11025 Reed Hartman Highway  
Cincinnati, OH 45242  
Telephone: (513) 984-2040  
Facsimile: (513) 984-6590

COUNSEL FOR APPELLANT,  
FOOD, FOLKS & FUN, INC.

## STATEMENT OF AMICUS INTEREST

The United Auto Aerospace & Agricultural Implement Workers of America, Region 2-B (hereinafter "UAW"), comprises the United Auto Aerospace & Agricultural Implement Workers of America in the State of Ohio. The UAW is an unincorporated voluntary association representing over one hundred eighty thousand (180,000) active and retired workers throughout the State of Ohio who are covered under the provisions of the Ohio Workers' Compensation Laws. The UAW is also an employer within the meaning of the Workers' Compensation Law and pays premiums into the workers' compensation fund as required by law. The UAW represents its injured members before the Bureau of Workers' Compensation and the Industrial Commission of Ohio. Due to the far-reaching legal repercussions of this Court's decision, the UAW has joined in this action as *amicus curiae* in support of David Gross' position. As an interested party both as an employer and on behalf of its membership, the UAW is filing this memorandum in support of Gross' Motion for Reconsideration to request that this Court reconsider its decision.

## STATEMENT OF FACTS

The UAW, as *amicus*, hereby adopts, in its entirety, and incorporates by reference the statement of facts contained within the brief of appellee.

## LAW AND ARGUMENT

### PROPOSITION OF LAW # 1:

**OHIO'S WORKERS' COMPENSATION SYSTEM IS A STATUTORY CREATION OF THE LEGISLATURE DESIGNED TO COMPENSATE INDIVIDUALS INJURED AT WORK WITHOUT ANY SUPERIMPOSITION OF FAULT SUBSCRIBED THERETO.**

In 1912, the Ohio General Assembly amended the Ohio Constitution when it adopted an express provision authorizing the enactment of worker's compensation legislation designed to compensate workers, their decedents, and dependents for injuries sustained in the course of their employment. The rights and duties created were purely statutory, and did not rest upon any common law principles but exclusively on the grant of legislative authority by the enabling Workers' Compensation Act. The cornerstone of the system was the welfare of the workers in Ohio.

Prior to the legislatively-based Workers' Compensation Act, the common law based recovery for work-related injuries on a showing of fault or negligence. The Workers' Compensation Act eliminated negligence and fault as the bases of loss allocation. Consequently, questions of fault, blame, wrongdoing, wrongful acts or omissions, dereliction, or neglect became irrelevant in the compensation system. The determinative inquiry was whether the workers' employment had the requisite causal connection with the injury. In the words of a long ago campaign slogan supporting the workers' compensation acts, "the cost of the product should bear the blood of the workman." Thus, the bargain was set – employees gave up their right to sue their employers for work-related injuries and employers were guaranteed that the statutorily prescribed benefits would constitute the workers' exclusive remedy for such injuries.

This compromise was the bedrock principle underlying Ohio's workers' compensation system.

This founding principle is in danger of being entirely discarded by this Court's decision in the instant case. It is for this reason that reconsideration of the same is being sought. A more detailed explanation will follow. First, it is important to remember that this case deals with a workers' compensation statute (R.C. 4123.56) and that R.C. 4123.95 specifically directs that the statute **shall be liberally construed in favor of employees...**(emphasis added).

Liberal construction requires application of a statute in favor of a claimant when the section of the Workers' Compensation Act will support two reasonable but opposing interpretations. *State ex rel. Sayre v. Indus. Comm.* (1969), 17 Ohio St.2d 57. It requires applying the coverage formula in favor of **awarding benefits** (emphasis added). *Fisher v. Mayfield* (1990), 49 Ohio St.3d 275. Clearly, this case warrants the payment of temporary total disability benefits (hereinafter "TTD") to Gross inasmuch as he immediately became disabled as the result of his work-place accident on November 26, 2003.

As cited in Paragraph 37 of the dissent in the case, this is an issue of first impression for this Court. As such, it should be accompanied by the utmost in careful deliberation with the express intention of not disturbing the almost ninety five (95) year bargained for exchange previously discussed. This Court's majority decision rested upon its application of the principle which prohibits TTD benefits from being paid if an employee's departure from the workplace is voluntary. This becomes even more

confusing in light of this Court's complicated distinctions between voluntary and involuntary departures from employment.

Rather than reiterate the reasoning and supporting case law from the dissenting opinion, suffice it to say that the analysis stands on sound footing and echoes warnings which may have crippling effects on workers, employers, and the entire workers' compensation system in the future. When looking at the allegation by the majority, in paragraph 32 of its opinion, that the teenage worker **willfully** ignored **repeated** warnings not to engage in the proscribed conduct, a glaring question remains to be answered. That question is, "What further investigation was necessary that would take almost three (3) months to complete?" While some cursory formalities may have been needed to comply with formal policy, surely three (3) months seems clearly excessive. It would serve us well to remember that Gross' total part time employment prior to this accident was only three (3) months. Mere clerical formalities should have only taken a day or two to complete. What purpose is there in waiting several months? Should the employer not have to act in a timely manner when alleging such egregious and dangerous behavior? Rather than look to some supposed "intent" on the part of a teenage child, it may well serve the interests of the State of Ohio to hold its much more sophisticated employers accountable for their actions.

What if the employer took six (6) months before firing the employee in this case? Would a twelve (12) month delay still have the same effect on this Court's reasoning? What length of time delay would be too long and what length of time would still be considered reasonable? Should the time lag have its basis in some comparison to the overall length of employment of the worker? Besides the slippery slope already alluded

to as it relates to injecting fault into a no-fault system, what about other far-reaching implications that may yet need to be examined.

For argument's sake, let us suppose that Gross' behavior actually did constitute willful, wanton, egregious conduct without complete disregard for human life and / or safety. And, further suppose that other employees observed the behavior and its consequences, while having no contemporaneous retribution from management. One might assume that management had tacitly approved of, or at least did not openly discourage the harmful actions. If, shortly after this incident one of the onlookers had occasion to mimic Gross' actions and others were injured as a result, this could possibly expose the employer to allegations of an intentional tort inasmuch as they did nothing to address the situation in a timely manner. This would be likened to the gross negligent hiring or retention of sub-standard employees with a very high propensity of injurious behavior.

As can be seen, the effect of this Court's decision may well create an intentional tort liability on employers in Ohio. This Court has set forth a three-prong test to determine if an employer had the requisite intent needed for an intentional tort under R.C. 2745.01. *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St. 3d 100, 116. The three parts to this test are: 1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality, or condition within his business operation; 2) knowledge by the employer that if the employees are required by virtue of their employment to be subjective to such dangerous process, procedure, instrumentality, or condition, then harm to them would be a substantial certainty, and not just a high risk;

and 3) that the employer, under such circumstances, and with such knowledge, did act to so require the employee to continue performing his employment tasks. *Id.*

Here, the employer found that Gross' conduct was so dangerous, and so egregious, that they terminated him. This Court agreed with the employer's analysis, finding that Gross "willfully ignored repeated warnings not to engage in the proscribed conduct, yet still wishes to ascribe his behavior to simple negligence or inadvertence." As a consequence of this analysis, the employer could be liable to the two other injured employees under an intentional tort theory, or any further injuries caused by onlookers who may also perform the cleaning tasks as stated above.

The employer knew that cleaning the fryer with water was very dangerous, as evidenced by the Employer's Employee Handbook. Supplement at Page 15 (hereinafter "Supp. At 15"). The employer first warned Gross not to fill the fryer with water when they made Gross sign the handbook. This presumably put Gross on notice that he was not to fill the fryer with water. Even with this notice, previous to the night of the accident, Gross filled the fryer with water, and was warned not to fill the fryer with water by Adrian LeBlanc. Finally, on the night of the accident, Gross' supervisor again found him filling the fryer with water. Even though the employer supposedly knew how dangerous this was, the employer still sent Gross back to work on the same fryer that he had been warned not to pour water into. This conduct by the employer wherein the employer knew that Gross had violated this work rule coupled with the fact that they failed to timely terminate him, would surely traverse into the realm of an intentional tort. Therefore, in following this decision, the two employees who were injured by Gross' misconduct should have a viable action under an intentional tort theory against the

employer. As can be seen from these examples, this Court's opinion could well open a virtual Pandora's Box of maladies if an employer does not act in an expeditious manner to address safety concerns when terminating employment.

All of the above-noted analyses and discussion are well taken when addressing a mature, competent adult workforce. However, there must be greater latitude offered when dealing with minor children. A voluntary abandonment, and subsequent forfeiture of benefits, was found in this case which was predicated upon a finding that a minor child somehow had the requisite mental capacity to fully understand that his "willfully ignoring repeated warnings would cause him to forfeit the benefits due him as a result of his workplace injury." Can anyone realistically say that a minor child is capable of truly understanding the ramifications of such actions?

In other areas of Ohio law, a contract with a sixteen year old child is voidable because of the child's lack of legal capacity to assent to an agreement. Without such capacity, how can anyone say that this same minor child has the requisite capacity to understand the far-reaching implications of a negligent act at work. Rather than choosing to apply himself to his studies, Gross made the laudatory move to introduce himself into the workforce only to come face-to-face with such a result as this Court has now set forth. Rather than follow established law relating to the "legal disability of age", this Court would superimpose extra capacity on a minor child which would be well beyond his years.

In addition, if a sixteen year old child were to willfully break a neighbor's window, his parents or their insurance company would be responsible to the aggrieved party. How can this result also be squared against the analysis of this Court in the instant

case? There are many more examples that could be given, but the import should be clear.

Finally, Ohio's Labor Laws clearly enumerate certain prohibitions on working hours, prohibited employment, and further restrictions which apply to sixteen year old children. These prohibitions do not apply to adults in our society. Therefore, the legislature and the courts have previously set forth demarcation lines that separate and delineate different treatment for children and adults.

### CONCLUSION

For all of the foregoing reasons, the United Auto Aerospace & Agricultural Implement Workers of America, Region 2-B, as *amicus curiae*, urge support of appellee's motion for reconsideration. The decision is flawed in its application in a no-fault workers' compensation system and is especially repugnant when applied in that heightened venue on behalf of a minor child.

Respectfully submitted,



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Stephen E. Mindzak (0058477)  
(COUNSEL OF RECORD)  
Shareef S. Rabaa (0076867)  
STEPHEN E. MINDZAK LAW OFFICES, LLC  
51 N High Street, Suite 888  
Columbus, OH 43215  
Telephone: (614) 221-1125  
Facsimile: (614) 221-7377

CERTIFICATE OF SERVICE

I certify that a copy of this Amicus Curiae Memorandum in Support of Appellee's Motion for Reconsideration was sent by ordinary U.S. Mail, postage prepaid, to the following parties on January 8, 2007:

Gary D. Plunkett (0046805)  
(COUNSEL OF RECORD)  
Brett R. Bissonnette (0076527)  
Todd T. Miller (0063169)  
HOCHMAN & PLUNKETT CO., LPA  
3077 Kettering Blvd.  
Point West, Suite 210  
Dayton, OH 45439  
Telephone: (937) 228-2666  
Facsimile: (937) 228-0508

COUNSEL FOR APPELLEE,  
DAVID M. GROSS

Andrew Alatis (0042401)  
(COUNSEL OF RECORD)  
ASSISTANT ATTORNEY GENERAL  
Workers' Compensation Department  
LLC  
State of Ohio  
150 East Gay Street, 22<sup>nd</sup> Floor  
Columbus, OH 43215  
Telephone: (614) 466-6696  
Facsimile: (614) 752-2538

COUNSEL FOR APPELLANT,  
THE INDUSTRIAL COMMISSION  
OF OHIO

Edna Scheuer (0010467)  
(COUNSEL OF RECORD)  
Salvator A. Gilene (0075562)  
SCHEUER, MACKIN & BRESLIN  
11025 Reed Hartman Highway  
Cincinnati, OH 45242  
Telephone: (513) 984-2040  
Facsimile: (513) 984-6590

COUNSEL FOR APPELLANT,  
FOOD, FOLKS & FUN, INC.

  
Stephen E. Mindzak (0058477)