

**IN THE SUPREME COURT OF OHIO**  
**CASE NO. 05-1689**

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

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**MEMORANDUM OF AMICI CURIAE OHIO CHAMBER OF COMMERCE,  
THE OHIO SELF-INSURERS ASSOCIATION, NATIONAL FEDERATION OF  
INDEPENDENT BUSINESS, OHIO MANUFACTURERS ASSOCIATION,  
OHIO COUNCIL OF RETAIL MERCHANTS  
IN OPPOSITION TO APPELLEE'S MOTION FOR RECONSIDERATION**

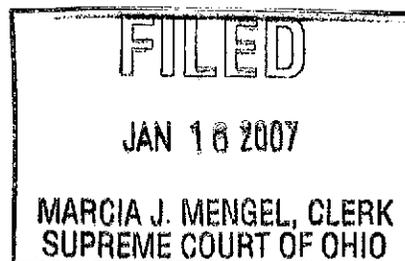
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Gary D. Plunkett (0046805)  
(COUNSEL OF RECORD)  
Brett R. Bissonette (0076527)  
Todd T. Miller (0063169)  
Hochman & Plunkett Co., LPA  
3077 Kettering Blvd.  
Point West, Suite 210  
Dayton OH 45439  
(937) 228-2666  
Fax No. (937) 228-0508  
[garyplunkett@hochmanplunkett.com](mailto:garyplunkett@hochmanplunkett.com)

COUNSEL FOR APPELLEE,  
DAVID M. GROSS

Preston J. Garvin (0018641)  
Michael J. Hickey (0021410)  
Garvin & Hickey, LLC  
181 East Livingston Avenue  
Columbus OH 43215  
(614) 225-9000  
Fax No. (614) 225-9080  
[wclaw@garvin-hickey.com](mailto:wclaw@garvin-hickey.com)

COUNSEL FOR AMICUS CURIAE,  
OHIO CHAMBER OF COMMERCE



Andrew Alatis (0042401)  
(COUNSEL OF RECORD)  
Assistant Attorney General  
Workers' Compensation Department  
State of Ohio  
150 E. Gay Street, 22<sup>nd</sup> Floor  
Columbus OH 43215  
(614) 466-6696  
Fax No. (614) 752-2538  
aalatis@ag.state.oh.us

COUNSEL FOR APPELLANT,  
INDUSTRIAL COMMISSION OF OHIO

Edna Scheuer (00104)  
(COUNSEL OF RECORD)  
Salvator A. Gilene (0075562)  
Scheuer, Mackin & Breslin, LLC  
11025 Reed Hartman Highway  
Cincinnati OH 45242  
(513) 984-2040  
Fax No. (513) 984-6590  
escheuer@smbllaw.net

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

Stewart R. Jaffy (0011377)  
Marc J. Jaffy (0046722)  
Stewart R. Jaffy & Associates Co., LLP  
306 East Gay Street  
Columbus OH 43215  
(614) 228-6148  
Fax No. (614) 228-6140

COUNSEL FOR AMICUS OHIO AFL-CIO

Thomas R. Sant (0023057)  
Bricker & Eckler, LLP  
100 South Third Street  
Columbus OH 43215-4291  
(614) 227-2300  
Fax No. (614) 227-2790  
tsant@bricker.com

COUNSEL FOR AMICI CURIAE,  
OHIO CHAPTER OF THE NATIONAL  
FEDERATION OF INDEPENDENT  
BUSINESS AND OHIO  
MANUFACTURERS' ASSOCIATION

Robert A. Minor (0018371)  
Vorys, Sater, Seymour and Pease, LLP  
52 East Gay Street, PO Box 1008  
Columbus OH 43216-1008  
(614) 464-6410  
Fax No. (614) 719-4874  
raminor@vssp.com

COUNSEL FOR AMICI CURIAE,  
OHIO SELF-INSURERS  
ASSOCIATION AND OHIO  
COUNCIL OF RETAIL  
MERCHANTS

Stephen E. Mindzak (0058477)  
(COUNSEL OF RECORD)  
Shareef S. Rabaa (0076867)  
Stephen E. Mindzak Law Offices, LLC  
51 North High Street, Suite 888  
Columbus OH 43215  
(614) 221-1125  
Fax No. (614) 221-7377

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

N. Victor Goodman (0004912)  
Mark D. Tucker (0036855)  
Benesch, Friedlander, Coplan & Aronoff, LLP  
88 East Broad Street, 9<sup>th</sup> Floor  
Columbus OH 43215-3506  
(614) 223-9300  
Fax No. (614) 223-9330

COUNSEL FOR AMICUS CURIAE  
OHIO STATE BUILDING AND  
CONSTRUCTION TRADES COUNCIL

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## STATEMENT OF INTEREST

The Ohio Chamber of Commerce (“Chamber”) was founded in 1893 and is Ohio’s largest and most diverse statewide business advocacy organization. The Chamber works to promote and protect the interests of its 4,000 business members while building a more favorable Ohio business climate. As an independent and informed point of contact for government and business leaders, the Ohio Chamber is a respected participant in the public policy arena. The advocacy efforts of the Ohio Chamber of Commerce are dedicated to supporting and strengthening the overall business climate in Ohio.

The Ohio Self-Insurers Association was formed in 1974 to represent Ohio’s self-insuring employers in workers’ compensation issues. It is the only statewide organization that represents self-insured employers exclusively and is devoted to the issue of workers’ compensation. There are over one thousand self-insured employers in the State of Ohio and OSIA has over 400 members. Ohio self-insured employers represent one-third of the Ohio work force and over 40% of the Ohio payroll. OSIA also routinely files *amicus* briefs to assist its members in presenting arguments to the Ohio Supreme Court as well as other courts throughout the state.

The Ohio Chapter of the National Federation of Independent Business (“NFIB”), with more than 36,000 members, is the state’s largest association dedicated exclusively to the interests of small and independent business owners. A major tenet of the NFIB public policy agenda is to ensure that Ohio’s civil justice system is balanced, treating individuals, businesses, corporations, and other entities fairly. NFIB strives to provide an economic climate in Ohio that encourages the attraction of new business, as well as business growth and development.

The Ohio Manufacturers' Association ("OMA"), is a statewide association of more than 2,200 manufacturing companies that collectively employ the majority of the 800,000 men and women who work in manufacturing in Ohio. The OMA represents manufacturers' interests before the General Assembly and state regulatory agencies. The OMA advocates public policies that will foster an economic and regulatory environment in which manufacturing businesses can thrive and the people of Ohio can enjoy the benefits of a robust manufacturing economy.

The Ohio Council of Retail Merchants, representing more than 3,100 retailers, is the voice of the retail industry in Ohio. Leading merchants, who founded the Council in 1922, realized that it would be possible for them to achieve as a group when no single retailer could ever accomplish alone. This philosophy remains Council's cornerstone today and is more important and relevant to Ohio's retailers than ever before. The Council's purpose is to make certain that state legislators, government officials, other trade groups, the news media, and the public hear the voice of retailing clearly and accurately.

This case involves a fundamental principle of Ohio workers' compensation law that there must be a direct and causal relation between an injured workers' injury and his economic loss. Where an injured worker is determined to have voluntarily abandoned his employment, a subsequent economic loss is due not to his industrial injury but, rather, is due to his own volitional action.

All of these organizations and their members are vitally concerned about the issues presented in this case and any suggestion that the voluntary abandonment principle be disturbed.

#### **STATEMENT OF FACTS**

*Amici Curiae* adopt the facts as set forth in the Supreme Court decision of December 27, 2006. *State ex rel. Gross v. Indus. Comm.* (2006), 122 Ohio St. 3d 65.

## LAW AND ARGUMENT

### **PROPOSITION OF LAW:**

The Industrial Commission of Ohio does not abuse its discretion when it finds that a claimant is not entitled to temporary total disability compensation when claimant was terminated for a violation of a known work rule or policy.

An employee who voluntarily abandons his employment by violating a known work rule is precluded from receiving temporary total disability compensation. The employee's economic loss is due to the violation and therefore temporary total disability compensation is precluded.

*Amici Curiae* supporting Reconsideration argue that the decision rendered herein changes the standards of compensable workplace injuries and generally upsets the balance of the workers' compensation system. These statements are incorrect. Here Appellee, David Gross' injuries were compensable. Neither the Industrial Commission nor this Court found his injuries non-compensable.

The Court correctly framed the issue as "Did the Industrial Commission abuse its discretion in finding that an employee voluntarily abandoned his employment, thus disqualifying himself from compensation for temporary total disability?" In addressing this issue the Court held that the Industrial Commission had not abused its discretion.

Nevertheless, Gross' supporters attempt to change the issue herein to one of compensability. The Ohio Academy of Trial Lawyers, sets forth a proposition of law, stating all injuries, except those purposefully self-inflicted, are *fully* compensable. The OATL asks this Court to adopt a proposition that would require all claims be allowed except those purposely self-inflicted, and once allowed, the claimant must be fully compensated. Neither of these statements is correct.

The Industrial Commission has jurisdiction to determine which claims should or should not

be allowed. In the instant case, the compensability of the David Gross' claim has never been an issue. The claim was allowed and the claim continues to be allowed.

The only issue herein is whether Gross is entitled to temporary total disability compensation after it was determined he voluntarily abandoned his job. Contrary to OATL's position, many compensable injuries are not fully compensable. For example, permanent total disability compensation is not payable when an injured worker voluntarily retires. Wage loss compensation is not payable if an injured worker fails to conduct a good faith job search. Temporary total disability compensation is not payable when an injured worker voluntarily abandons his job through retirement, imprisonment, resignation or violation of a written work rule. *State ex rel. Rockwell International v. Indus. Comm.* (1988), 40 Ohio St. 3d 44; *State ex rel. Honda Transm. Mfg. Of Am., Inc. v. Indus. Comm.* (2002), 95 Ohio St. 3d 95; *State ex rel. Jones & Laughlin Steel Corp. v. Indus. Comm.* (1985), 29 Ohio App. 3d 145; *State ex rel. Ashcraft v. Indus. Comm.* (1987) 34 Ohio St. 3d 42; *State ex rel. Smith v. Superior's Brand Meats* (1996), 76 Ohio St. 3d 408; *State ex rel. Louisiana-Pacific Corp. v. Indus. Comm.* (1995), 72 Ohio St. 3d 401. In the instant case, Gross violated a written work rule, was found to have voluntarily abandoned his employment, and the Industrial Commission determined that temporary total disability compensation was not payable.

Gross's supporters argue that the Court's decision will give employers incentive to fire employees because of their injuries. (AFL-CIO brief, page 1, para. 3). This assertion ignores the fact that employers are subject to lawsuits for wrongful termination. An employer may be sued under R.C. 4123.90 for terminating or taking punitive action against an employee for pursuing a workers' compensation claim. Numerous Courts of Appeals have held that an employer may be sued under common law and subject to compensatory and punitive damages for termination of employees

pursuing workers' compensation claims. Additionally, if a collective bargaining agreement is in place, procedures must be followed before employment may be terminated.

Moreover, the employer must meet the criteria set forth by this Court in *Louisiana-Pacific*, *supra* before the Industrial Commission may find voluntary abandonment. Therefore, any argument that this decision will lead to employers terminating employees employment is without merit.

This argument further ignores the economics of the workplace. The Ohio Bureau of Workers' Compensation, through its Group Rating Program, Retrospective Rating Program, and claims reserving policies, has encouraged employers to return injured workers' to work as soon as possible. With the encouragement of the BWC, many employers have established light duty work programs to return injured workers' to the workplace as soon as possible. When an employee is terminated, the employer is no longer in a position to make light duty work available. In many instances this will result in significantly higher premiums and will result in employers being declared ineligible for group rating programs. A single claim involving payment of temporary total compensation may result in an employer facing tens of thousands of dollars in increased premiums. The best interest of the employer and injured worker are served by retaining an injured worker and returning that individual to work as soon as possible.

Amici UAW argues that the amount of time spent by the employer investigating Gross' violation of the work rule should somehow be relevant. (UAW page 4). The UAW implies that if an investigation takes too long, then somehow the employer is precluded from raising the issue of voluntary abandonment. Arguing that a rush to judgment should be more acceptable than a deliberate thorough investigation is ludicrous. Here, after conducting a thorough time consuming investigation, the employer determined that Gross violated a written work rule; disregarded written

warning instructions; ignored verbal instructions from his supervisor; and further ignored warnings from a co-worker. Gross was then properly terminated.

Gross's supporters also argue that the decision below introduces fault or negligence into the workers' compensation system, thereby upsetting the balance between workers and employers established by the Ohio Constitution in 1912. This argument is disingenuous since these same groups have argued since 1982 that the fault of an employer entitles an employee to upset that balance and recover in intentional tort.

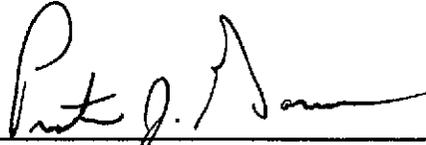
Gross's supporters ignore the constitutional provision that provides that the compensation "shall be in lieu of all other rights to compensation or damages... and any employer who pays the premium or compensation provided by law... shall not be liable to respond in damages at common law or by statute..." The decision below has not introduced fault into the system. The only introduction of fault has come from those who have argued that Ohio employers should be liable for both workers' compensation benefits and damages in intentional tort actions and have opposed legislation aimed at providing employers some measure of relief.

The decision below merely holds that the Industrial Commission did not abuse its discretion in ruling that Mr. Gross was not entitled to temporary total compensation because he had violated a written work rule. This case presents no new issue under, nor any deviation from , settled Ohio law.

**CONCLUSION**

Mr. Gross' employment was terminated because he violated a written rule. The Industrial Commission, as the finder of fact, did not abuse its discretion in determining that he voluntarily abandoned his job and was not entitled to temporary total disability compensation.

Respectfully submitted,



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Preston J. Garvin (0018641)  
Michael J. Hickey (0021410)  
Garvin & Hickey, LLC  
181 East Livingston Avenue  
Columbus OH 43215  
(614) 225-9000  
Fax No. (614) 225-9080  
[wclaw@garvin-hickey.com](mailto:wclaw@garvin-hickey.com)

COUNSEL FOR AMICUS CURIAE  
OHIO CHAMBER OF COMMERCE  
AND OHIO COUNCIL FOR RETAIL  
MERCHANTS

And

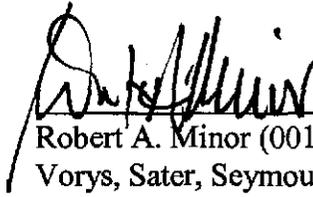


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Thomas R. Sant (0023057)  
Bricker & Eckler, LLP  
100 South Third Street  
Columbus OH 43215-4291  
(614) 227-2300  
Fax No. (614) 227-2790  
[tsant@bricker.com](mailto:tsant@bricker.com)

COUNSEL FOR AMICI CURIAE, OHIO  
CHAPTER OF THE NATIONAL FEDERATION  
OF INDEPENDENT BUSINESS, AND OHIO  
MANUFACTURERS' ASSOCIATION

And

A handwritten signature in black ink, appearing to read "Robert A. Minor", is written over a horizontal line.

Robert A. Minor (0018371)

Vorys, Sater, Seymour and Pease, LLP

52 East Gay Street, PO Box 1008

Columbus OH 43216-1008

(614) 464-6410

Fax No. (614) 719-4874

[raminor@vssp.com](mailto:raminor@vssp.com)

COUNSEL FOR AMICUS CURIAE, OHIO  
SELF-INSURERS ASSOCIATION

CERTIFICATE OF SERVICE

A copy of the foregoing has been served upon the parties and amici curiae in this case by regular U.S. Mail, postage prepaid, this 16<sup>th</sup> day of January, 2007.



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Preston J. Garvin (0081641)