

In the  
**Supreme Court of Ohio**

STATE OF OHIO ex rel.	:	Case No. 2005-1689
DAVID M. GROSS,	:	
	:	
Appellee,	:	On Appeal from the
	:	Franklin County
v.	:	Court of Appeals,
	:	Tenth Appellate District
INDUSTRIAL COMMISSION OF OHIO,	:	
	:	Court of Appeals Case
Appellee,	:	No. 04AP-756
and	:	
	:	
FOOD, FOLKS & FUN, INC., d/b/a KFC,	:	
	:	
Appellant.	:	

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**BRIEF OF THE INDUSTRIAL COMMISSION OF OHIO  
ON THE ISSUE OF RECONSIDERATION**

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GARY PLUNKETT (0046805)  
BRETT BISSONNETTE (0076527)  
TODD MILLER (0063169)  
Hochman & Plunkett Co., LPA  
3077 Kettering Blvd., Suite 210  
Dayton, Ohio 45439  
937-228-2666  
937-228-0508 fax

Counsel for Appellee  
David M. Gross

EDNA SCHEUER (0010467)  
SALVATORE A. GILENE (0075562)  
Scheuer, Mackin & Breslin  
11025 Reed Hartman Hwy.  
Cincinnati, Ohio 45242  
513-984-2040  
513-984-6590 fax

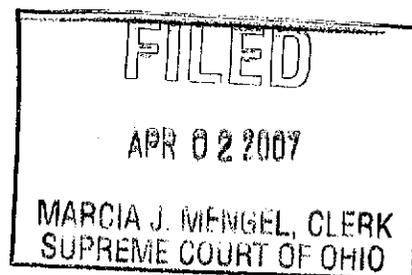
Counsel for Appellant  
Food, Folks & Fun, Inc., d/b/a KFC

MARC DANN (0039425)  
Attorney General of Ohio

ELISE PORTER\* (0055548)  
Acting Solicitor General  
*\*Counsel of Record*

GERALD H. WATERMAN (0020243)  
ANDREW J. ALATIS (0042401)  
Assistant Attorneys General  
30 East Broad Street, 17th Floor  
Columbus, Ohio 43215  
614-466-8980  
614-466-5087 fax  
eport@ag.state.oh.us

Counsel for Appellee  
Industrial Commission of Ohio



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## INTRODUCTION

This case is about an exception to entitlement to a type of workers' compensation—temporary total disability (“TTD”), provided for in R.C. 4123.56—an exception that, under the Court’s holding here, could undermine TTD in a large number of cases, and perhaps undermine the no-fault nature of the workers’ compensation system. As the primary arbiter of workers’ compensation cases in the State of Ohio, the Ohio Industrial Commission (“Commission”) will be called on to apply this decision to other fact situations. Because of the thorny issues involved here, the Commission requests that this Court reconsider its decision.

The underlying principles associated with the statutory entitlement to compensation for TTD under the Workers’ Compensation Act are well established, and the limits to a TTD award imposed by a finding of “voluntary abandonment” have been addressed in several decisions of this Court and countless cases before the Tenth District Court of Appeals. E.g., *State ex rel. Pretty Prods., Inc. v. Indus. Comm.* (1996), 77 Ohio St. 3d 5; *State ex rel. La.-Pac. Corp. v. Indus. Comm.* (1995), 72 Ohio St. 3d 401.

However, partly because of the highly unusual facts in this case, the Court’s opinion provides inadequate guidance for applying this case elsewhere. The facts of this case present issues of first impression for this Court. Specifically, this is the first case to reach this Court in which the actions leading to the “voluntary abandonment” are inextricably linked—both temporally and causally—to the industrial injury. In all previous rulings addressing the voluntary abandonment doctrine, independent events gave rise to the employees’ terminations, and thus their “voluntary abandonment” of employment. In this case, the circumstance surrounding the injury directly led to Appellee David Gross’s firing.

The unusual facts of this case can provide a vehicle for a better and clearer understanding of the “voluntary abandonment” doctrine. The doctrine is an important element of Ohio’s

workers' compensation program and the Commission needs guidance in understanding its application in cases similar to this one. In addition, the decision received immediate, widespread attention in the workers' compensation community and the media, with the alarming concern that the ruling may now inject fault into the "no-fault" workers' compensation system.

The Commission therefore requests that the Court reconsider its decision and hold that the voluntary abandonment doctrine is limited in effect to the termination of TTD. In addition, the Commission requests that the Court reconsider and hold that there can be no causal nexus between the voluntary abandonment and the injury. The Commission further requests that the Court remand this case to the Commission to apply those principles to the facts in this case.

#### **STATEMENT OF THE CASE AND FACTS**

The relevant facts are straightforward: Appellee David Gross was a 16-year-old who began working for Appellant employer Food, Folks & Fun ("F.F.F.") as part of a high school work-study program just two months prior to his injury on November 26, 2003. One of his responsibilities was to clean the cooker. One of the safety rules in the employee handbook was: "*Never boil water in a cooker to clean it.*" *State ex rel. Gross v. Indus. Comm.*, 112 Ohio St. 3d 65, 2006-Ohio-6500, at ¶ 5. Another rule provided that an employee could immediately lose his or her job for violating safety guidelines that cause or could cause illness or injury. *Id.* at ¶¶ 7, 9. A warning label affixed to the lid of the cooker stated the lid should not be closed with water or cleaning agents in the cook pot. *Id.* at ¶ 15.

Gross had been observed putting water into the cooker to clean it and a supervisor explained the proper procedure and that serious injury could occur. *Id.* at ¶ 11. On the date of injury, Gross was observed by a co-worker again putting water into a cooker and was warned not to open the cooker's lid. *Id.* at ¶ 12. Gross nevertheless opened the lid, causing severe burns to himself and two co-workers. *Id.*

Gross's workers' compensation claim was allowed and not challenged by F.F.F. Gross was paid TTD until February of 2004. After it had investigated the incident, F.F.F. terminated Gross for violation of work rules on February 13, 2004. *Id.* at ¶ 16. F.F.F. then moved the Commission to terminate Gross's TTD as of the date of the letter, contending that Gross's firing constituted a voluntary abandonment of his employment. *Id.* at ¶ 17. Following hearing, a Staff Hearing Officer ("SHO") found that F.F.F. had met the criteria of *Louisiana-Pacific*. See *State ex rel. Gross v. Indus. Comm.*, Franklin App. No. 04AP-756, 2005-Ohio-3936, at ¶ 23.

Gross sought a writ of mandamus to compel the Commission to vacate the SHO's order. Relying primarily on the doctrine articulated in *State ex rel. Pretty Products, Inc.*, 7 Ohio St. 3d at 7, the Tenth District Court of Appeals issued a writ of mandamus, finding Gross's termination was not "voluntary." F.F.F. appealed and this Court reversed the court of appeals, upholding the SHO's decision that Gross had voluntarily abandoned his position and forfeited TTD. *State ex rel. Gross v. Indus. Comm.*, 112 Ohio St. 3d 65, 2006-Ohio-6500, at ¶ 33.

## ARGUMENT

This Court needs to reconsider its decision here because the highly unusual facts of this case and the lack of guidance in the first opinion have resulted in uncertainty about the doctrine of voluntary abandonment and its application in some cases. The facts in this case are unusual in two respects. The first is temporal; in most previous cases, the voluntary abandonment of employment took place after the injury. The second is causal; in previous cases, there was no nexus between the injury and the violated work rule. Because these fundamental principles will almost certainly come up in future TTD cases, the Court should reconsider to clarify their affect on the doctrine of voluntary abandonment.

The underlying purpose of TTD compensation is to remedy a worker's loss of wages when he must leave the workplace due to a work-related injury. *State ex. rel. McCoy v. Dedicated Transport, Inc., et al.*, 97 Ohio St. 3d 25, 2002-Ohio-5305, at ¶ 35. However, TTD is not unlimited; specifically, when an employee's own actions preclude a return to his original job, his TTD may be discontinued. "[W]here the employee has taken action that would preclude his returning to his former position of employment, even if he were able to do so, he is not entitled to continued temporary total disability benefits since it is his own action, rather than the industrial injury, which prevents his returning to such former position of employment." *State ex rel. Jones & Laughlin Steel Corp. v. Indus. Comm.* (10th Dist. 1985), 29 Ohio App. 3d 145, syllabus. Thus, for example, the incarceration of an injured worker suspends his entitlement to TTD. *State ex rel. Ashcraft v. Indus. Comm.* (1987), 34 Ohio St. 3d 42, 44-45. This Court coined the term "voluntary abandonment" in *State ex rel. Rockwell International v. Industrial Commission* (1988), 40 Ohio St. 3d 44, 46.

Getting fired from the job can constitute a voluntary abandonment of employment while an injured worker is on TTD, if the firing is a consequence of behavior voluntarily undertaken by

the injured worker. *State ex rel. Watts v. Schottenstein Stores Corp.* (1993), 68 Ohio St. 3d 118, 121. Although being fired is not usually consented to or initiated by the employee, this Court has characterized as “voluntary” a “termination generated by the claimant’s violation of a written work rule or policy that (1) clearly defined the prohibited conduct, (2) had been previously identified by the employer as a dischargeable offense, and (3) was known or should have been known to the employee.” *State ex rel. La.-Pac. Corp. v. Indus. Comm.* (1995), 72 Ohio St. 3d 401, 403.

**Industrial Commission of Ohio’s Proposition of Law No. 1:**

*The voluntary abandonment doctrine is limited to the termination of TTD.*

In most voluntary abandonment cases, the abandonment takes place after the initiation of TTD. For example, in *State ex rel. Baker v. Indus. Comm.*, 88 Ohio St. 3d 376, 383 & n.4, 2000-Ohio-168, the injured worker resumed full-time light duty work and then signed a termination notice stating that he had “accepted other employment.” In other cases, the employee was terminated for violating an absentee or tardiness policy after he or she was no longer medically eligible for TTD. In *Louisiana-Pacific* itself, the injured worker failed to report to work for three consecutive days without calling. 72 Ohio St. 3d at 401. See also *State ex rel. Jones v. Preferred, Inc.*, 88 Ohio St. 3d 420, 2000-Ohio-368 (employer maintained that claimant violated the employer’s absenteeism/tardiness policy); *State ex rel. McKnabb v. Indus. Comm.*, 92 Ohio St. 3d 559, 559, 2001-Ohio-1285 (fired for alleged tardiness); *State ex rel. Daniels v. Indus. Comm.*, 99 Ohio St. 3d 282, 283, 2003-Ohio-3626, at ¶ 4 (claimant was released to go back to former position but did not, and he did not file medical evidence extending date of disability); *McCoy*, 2002-Ohio-5305, at ¶ 2 (tardiness and insubordination); *State ex rel. Eckerly v. Indus. Comm.*, 105 Ohio St. 3d 428, 428, 2005-Ohio-2587, at ¶ 1 (unexcused absenteeism); *State ex rel. Pretty Prods., Inc. v. Indus. Comm.* (1996), 77 Ohio St. 3d 5 (claimant terminated for unexcused

absences); *Watts*, 68 Ohio St. 3d at 119 (claimant failed to report to work or contact her employer for three consecutive days and was fired).

However, in this case the alleged “abandonment”—that is, Gross’s violation of the work rule by putting water into the fryer—was simultaneous with the injury, and leads to uncertainty as to the temporal limits of the voluntary abandonment doctrine. How far back can the “abandonment” take place? For example, can a worker “abandon” his employment even before he is injured? If an employee breaks a work rule, but the infraction is not discovered until later—after he has been injured—did he “abandon” his employment even before he was injured?

In situations where the employee is held to have abandoned his position simultaneously or before the injury, he might be considered outside the course and scope of his employment at the time of injury, and not entitled to workers’ compensation at all. Thus, a doctrine intended to be a limited exception to TTD threatens to abolish TTD. Even more important, it may altogether undermine the no-fault nature of workers’ compensation by denying the worker any compensation at all. This Court should make clear that the voluntary abandonment doctrine is limited in effect to terminating TTD, and does not threaten to undermine the purposes of the workers’ compensation system.

Therefore, this Court should reconsider to make clear that, in a case where the rule infraction that constitutes an “abandonment” takes place simultaneously with or before the injury, the effect is properly limited to—at most—termination of his TTD. It should then remand this case so that the Commission can re-evaluate the facts in light of that analysis.

**Industrial Commission of Ohio's Proposition of Law No. 2:**

*The voluntary abandonment doctrine is limited to cases in which there is no nexus between the infraction that led to firing and the injury.*

Since *Louisiana-Pacific*, this Court's voluntary abandonment jurisprudence has been limited to situations in which the events giving rise to terminations were distinct from the actual industrial injury. See, e.g., *State ex rel. Cobb v. Indus. Comm.*, 88 Ohio St. 3d 54, 2000-Ohio-273 (discharge for violation of company policy regarding testing positive for illegal drug use); *Jones*, 88 Ohio St. 3d at 422 (employer maintained that claimant violated the employer's absenteeism/tardiness policy); *Baker*, 88 Ohio St. 3d at 383 & n.4 (injured worker resumed full-time light duty work and then signed a termination notice stating he "accepted other employment"); *State ex rel. McKnabb v. Indus. Comm.*, 92 Ohio St. 3d 559, 2001-Ohio-1285 (fired for alleged tardiness); *Daniels*, 2003-Ohio-3626, at ¶4 (claimant was released to go back to former position but did not, and he did not file medical evidence extending date of disability); *McCoy*, 2002-Ohio-5305, at ¶ 2 (tardiness and insubordination); *State ex rel. Ohio Treatment Alliance v. Paasewe*, 99 Ohio St. 3d 18, 2003-Ohio-2449 (co-worker found claimant asleep under a blanket on a client's sofa); *State ex rel. Hammer v. Indus. Comm.*, 99 Ohio St. 3d 334, 334-35, 2003-Ohio-3960, at ¶ 2 (second incident of sexually inappropriate comments); *Eckerly*, 2005-Ohio-2587, at ¶ 1 (unexcused absenteeism); *State ex rel. Nick Strimbu, Inc. v. Indus. Comm.*, 106 Ohio St. 3d 173, 174, 2005-Ohio-4386, at ¶ 4 (falsification of employment application). None of these involved the situation here, where the firing was as a result of a work-rule violation that also caused the injury.

This Court in *Pretty Products* implied that the abandonment was not voluntary where the termination was because of the industrial injury. 77 Ohio St. 3d at 8 (some evidence that absences due to injury, remand to Commission for clarification of factual findings). Similarly,

the Court has remarked in another case that, from 1985 to 2000, “*every case* in which we held the voluntary abandonment rule applicable to bar TTD compensation involved a claimant who had not only abandoned the former position of employment, but who was also unemployed over the claimed period of disability *for reasons unrelated to his or her industrial injury.*” *McCoy*, 97 Ohio St. 3d, at ¶ 22 (emphasis added).

The question here is slightly different—not whether the termination was because of the injury, but whether the termination was because of a rule infraction that *caused* the injury. This aspect of the case has given rise to the accusation that the Court’s decision threatens the no-fault nature of the workers’ compensation system.

Besides using an employee’s infraction of a rule to deny an injured employee’s TTD, where the infraction precedes or is simultaneous with the injury, the employer could argue that, immediately upon an employee’s breaking a work rule that leads to injury, the employee removed himself from the scope of employment. The employer could thus use the infraction to deny workers’ compensation participation altogether—thus turning what was a narrow exception to TTD into a denial of any workers’ compensation matter for trial under R.C. 4123.512, rather than a mandamus case.

Thus, as the dissent notes, the majority opinion may be construed as “tacitly injecting fault into a no-fault system of compensation and reintroducing contributory negligence as a basis for defeating the right to recover compensation.” *State ex rel. Gross v. Indus. Comm.*, 2006-Ohio-6500, at ¶ 40 (Lundberg Stratton, J., dissenting). The Court should eliminate the possibility for such a misunderstanding by reconsidering this case and holding that the infraction of a work rule leading to voluntary abandonment does not apply when the infraction also caused the industrial injury. In addition, the Court should make clear that such an infraction, even if it is held to be a

voluntary abandonment, affects solely TTD compensation, and is not grounds for removing altogether a claimant from the workers' compensation system.

This Court should reconsider and clarify both the temporal and causal limits of the voluntary abandonment doctrine.<sup>1</sup> In addition, the Court should remand the case to allow the Commission to reconsider its decision in light of the legal principles announced. The Commission remains the exclusive fact-finder and evaluator of the evidence in a workers' compensation claim. *State ex rel. Athey v. Indus. Comm.*, 89 Ohio St. 3d 473, 475, 2000-Ohio-489. It should therefore be allowed to re-evaluate the evidence here in light of the Court's new analysis.

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<sup>1</sup> However, the majority here appropriately pointed out that *Coolidge v. Riverdale Local School District*, 100 Ohio St. 3d 141, 2003-Ohio-5357, was an employment law case and not properly applied to workers' compensation matters. Thus, on reconsideration, the Court's holding regarding *Coolidge* should be retained.

## CONCLUSION

For the above reasons, the Industrial Commission of Ohio respectfully requests that this Court reconsider its decision in this case, clarify the temporal and causal aspects of the voluntary abandonment doctrine, and remand the case to the Commission to evaluate the facts in light of this Court's decision.

Respectfully submitted,

MARC DANN (0039425)  
Attorney General of Ohio



ELISE PORTER\* (0055548)  
Acting Solicitor General

*\*Counsel of Record*

GERALD H. WATERMAN (0020243)

ANDREW J. ALATIS (0042401)

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

eporter@ag.state.oh.us

Counsel for Appellee  
Industrial Commission of Ohio

## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief of the Industrial Commission of Ohio was served by U.S. mail this 2nd day of April, 2007, upon the following counsel:

Gary Plunkett  
Brett Bissonette  
Todd Miller  
Hochman & Plunkett Co., LPA  
3077 Kettering Blvd., Suite 210  
Dayton, Ohio 45439

Counsel for Appellee  
David M. Gross

Edna Scheuer  
Salvatore A. Gilene  
Scheuer, Mackin & Breslin  
11025 Reed Hartman Hwy.  
Cincinnati, Ohio 45242

Counsel for Appellant  
Food, Folks & Fun, Inc., d/b/a KFC



ELISE PORTER  
Acting Solicitor General