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IN THE SUPREME COURT OF OHIO

ALLEN STOCKBERGER, THERESA A. BEMILLER, AND ROGER REED, in their official capacity as the Board of County Commissioners of Knox County,	:	11-0859
Appellants,	:	On Appeal from the Knox County Court of Appeals Fifth Appellate District
v.	:	Court of Appeals Case No. 10CA000018
JAMES L. HENRY, in his official capacity as Knox County Engineer,	:	
Appellee.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS ALLEN STOCKBERGER, THERESA A. BEMILLER, AND ROGER REED, IN THEIR OFFICIAL CAPACITY AS THE BOARD OF COUNTY COMMISSIONERS OF KNOX COUNTY

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SUPREME COURT OF OHIO

TABLE OF CONTENTS

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION 1

STATEMENT OF THE CASE AND FACTS 5

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW 8

Proposition of Law No. I: Article XII, Section 5a of the Ohio Constitution authorizes the use of motor vehicle and gas tax funds to defray a county's cost of participating in a joint self-insurance pool attributable to covering the risk of liability and loss resulting from the operations of a county engineer's highway department. 8

Proposition of Law No. II: A county board of commissioners has a right to obtain payment of the cost of participating in a joint self-insurance pool attributable to covering the risk of liability and loss resulting from the operations of a county engineer's highway department from motor vehicle and gas tax funds. 10

CONCLUSION 13

CERTIFICATE OF SERVICE 14

APPENDIX — Appx. Page

Opinion of the Knox County Court of Appeals, Fifth Appellate District (April 7, 2011) 1

Judgment Entry of the Knox County Court of Appeals, Fifth Appellate District (April 7, 2011) 19

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case presents an opportunity for this Court to clarify a substantial constitutional issue that has divided the courts and county officials for years and was expressly left unresolved by this Court in *Knox Cty. Bd. of Commrs. v. Knox Cty. Engineer*, 109 Ohio St.3d 353, 2006-Ohio-2576, syllabus ("*Knox I*"). Specifically, under what circumstances does the Ohio Constitution Article XII, Section 5a ("Section 5a") authorize the use of MVGT funds[1] to defray the portion of a county's costs of insurance (in this case, the cost of participating in the County Risk Sharing Authority ("CORSA")) covering liability and casualty risks resulting from the operations of a county engineer's highway department? Moreover, assuming that the requisite constitutional showing has been established, are county commissioners entitled to have the premium paid out of MVGT funds, even over a county engineer's objections?

In *Knox I*, the Appellants, the Knox County Commissioners ("the Commissioners"), sought reimbursement from the Appellee, Knox County Engineer ("the Engineer"), out of MVGT funds for a portion of the county's CORSA premium for the years 2002 and 2003. *Knox I*, 109 Ohio St.3d at ¶4. The Commissioners argued that the payments were mandated and constitutional because R.C. 315.12(A) directs that two-thirds of the cost of operation of the office of the county engineer shall be paid from MVGT funds and that the premiums at issue constituted a "cost of operating" that office. Id. at ¶8. This Court ruled, however, that "despite the mandate of R.C. 315.12(A)," the limited record before the Court failed to contain evidence

[1] "MVGT funds" are motor vehicle license tax revenues distributed to Knox County ("County") pursuant to Revised Code Chapters 4501, 4503 and 4504 and motor vehicle fuel excise tax revenues distributed to the County pursuant to Revised Code Chapter 5735. These funds are segregated from a county's general revenue fund and used to pay the costs associated with the county engineer's highway department.

regarding whether the specific CORSA insurance premiums at issue were "directly connected" with a highway purpose. Id. at ¶11.[2]

This Court did not hold, however, that MVGT funds could never be used to fund a portion of the county's CORSA premiums. Rather, the key concern underlying the *Knox I* decision was the lack of evidence in the record demonstrating that the specific premium amounts were related solely to the highway operations of the Engineer's office, as opposed to his non-highway functions. See *Knox I*, 109 Ohio St.3d at ¶¶12-13 (identifying various non-highway activities of the office of the county engineer). This failure of proof was particularly troubling to this Court since the parties had stipulated that all funding for the entirety of the Engineer's office came from MVGT funds. Id. at ¶5 and ¶15. Significantly, this Court affirmatively recognized that "if the record contained evidence that the CORSA premiums pertained to highway purposes or were directly related thereto, or if the engineer's budget did not consist wholly of restricted funds, our outcome might not be the same." Id. at ¶11.

Knox I failed to resolve the dispute as to whether and under what circumstances MVGT funds could be used to pay CORSA premium costs. In fact, approximately one month after *Knox I* was issued, then-State Auditor Betty Montgomery issued a formal opinion letter stating that based upon her reading of *Knox I*, "should CORSA provide information in specific cases demonstrating that its liability insurance premiums represent a 'highway purpose,' such payments could be made using gas tax revenues." July 10, 2006 Letter from Auditor Betty Montgomery to Larry Long, Executive Director, County Commissioner's Association.[3] In so stating, Auditor Montgomery recognized, however, that *Knox I* "provides no guidance" as to

[2] Having come to the Court on cross-motions for summary judgment, the *Knox I* record was minimal – consisting of the pleadings, written discovery responses, stipulations, and affidavits.
[3] A copy of this letter was made part of the record below as part of Joint Exhibit 10.

"exactly what type of evidence would have been sufficient to prove the connection between liability premiums and highway purposes," and that "[s]uch a determination will most likely have to be made by another court in the future." Id. Thus, Auditor Montgomery concluded that "until such time as a court provides more specific guidance," her staff would issue findings for recovery in specific audits of counties only if there was no information made available connecting liability insurance premiums with highway purposes. Id.

Given the lack of clarity after *Knox I*, some county engineers continued to reimburse the county's general revenue fund for a portion of the CORSA premium. Other county engineers, including the Knox County Engineer, did not.

The instant lawsuit was brought therefore to provide the clarity that local and state governmental officials require in the wake of *Knox I*, and to address the specific concerns underlying this Court's analysis therein. To that goal, the uncontroverted evidence presented below establishes that the CORSA premium at issue in this case relates only to the costs of covering the highway operations of the office of the Engineer (i.e., those activities funded primarily, though not exclusively, with MVGT funds), that the premium did not relate to the non-highway operations of the county engineer's office funded by non-MVGT revenues, and that the CORSA premium costs were directly related to covering the risks inherent in constructing, maintaining, and repairing roads and bridges.

Based upon this uncontroverted factual record, the lower courts have nonetheless issued conflicting decisions. The Trial Court held that the CORSA premiums were properly payable out of MVGT funds. The Fifth District Court of Appeals reversed, finding that the record failed to demonstrate a "nexus" between the premium and a highway purpose.

The matter is now ripe for review by this Court, and only a decision from this Court can provide the finality and clarity needed to ensure uniform application throughout the state. The issues in dispute not only affect the 62 Ohio counties that are members of CORSA, but also affect all other non-CORSA counties that may seek to use MVGT funds to defray the county engineer's portion of other insurance or risk-sharing programs. The issues are especially important during these lean budgetary times for county governments, where the ability to use MVGT funds to defray legitimate highway costs of the county is more necessary than ever. Counties face unprecedented reductions to their general revenue fund as a result of the all-but-certain and substantial cuts to the local government fund and the threatened elimination of the state estate tax. In short, a decision in this case will have a direct and immediate state-wide impact.

Finally, the participation of *amici curiae*, the County Engineers Association of Ohio ("CEAO") and the Ohio Contractor Association ("OCA") on behalf of the County Engineer below is direct evidence that this case is one of public or great general interest. As CEAO admitted below, the issues presented in this case are "of critical importance" to its members throughout the state. CEAO Amicus Brief (December 28, 2010) at p. 1. Likewise, for the OCA, this case is "a matter of significant concern to this Association and its contractor members throughout the State of Ohio." OCA Amicus Brief (December 30, 2010) at p. 2.

This case is a case of public or great general interest and involves a substantial constitutional question.

STATEMENT OF THE CASE AND FACTS

On February 13, 2008, the Commissioners, in their official capacity, filed their Complaint for Declaratory Judgment and Mandatory Injunction against the Engineer, in his official capacity, to specifically address the concerns underlying this Court's decision in *Knox I* and to provide a factual basis to support a finding that the CORSA premium was directly connected to a highway purpose. The Commissioners sought a declaration that an invoice sent by the Commissioners to the Engineer seeking reimbursement for the Engineer's share of the cost of the County's participation in CORSA for 2007-2008 reflected an expenditure for a highway purpose and thus properly payable from MVGT funds. The Commissioners also sought an order requiring the Engineer to authorize payment of the invoice.

A one-day bench trial was held on August 24, 2009. The Trial Court heard testimony from three live witnesses: David Brooks, Managing Director of CORSA, Rochelle Shackle, Clerk/Administrator for the Commissioners, and the Knox County Engineer, James Henry. The testimony of Sharon Lamb, Deputy County Auditor, was presented by stipulation. The parties also stipulated to the admissibility of thirty-three Joint Exhibits. The evidence revealed the following undisputed facts.

Ohio counties (specifically, boards of county commissioners) are authorized to use public funds to secure insurance or maintain a self-insurance program to cover potential liability for injury, death, or loss to persons or property allegedly caused by an act or omission of the county or any of its employees. R.C. 2744.08(A). In addition, pursuant to R.C. 2744.081, Ohio counties are authorized to join with other counties for the purpose of establishing and maintaining a joint self-insurance pool to provide for the payment of judgments, settlement of claims, expense, loss and damage in connection with its potential liability for acts or omissions

of it or its employees. A joint self-insurance pool may also include various forms of property or casualty self-insurance for the purpose of covering any other liabilities or risks of the members of the pool. R.C. 2744.081(E).

CORSA is a joint self-insurance pool established pursuant to the authority of R.C. 2744.081. [Tr. 18:13-15 (Brooks).][4] Knox County is a member of CORSA. [Tr. 22-23 (Brooks).] While CORSA is not technically an "insurance company," see R.C. 2744.081(E)(2), CORSA operates as an insurance provider to its member counties. [Tr. 19:10 – 20:13 (Brooks).] CORSA collects premiums from its members based on rates established by an actuary and then pays costs associated with covered claims. [Tr. 19:14-19 (Brooks).]

R.C. 2744.081(A)(4) specifically authorizes that a "joint self-insurance pool (i.e., CORSA and its member counties such as Knox County) may allocate the costs of funding the pool among the funds or accounts in the treasuries of the political subdivisions … ." This allocation process provides a mechanism to reimburse the county's general fund for the portion of the CORSA premium costs attributable to insuring the activities of county offices that otherwise receive a significant amount of their funding from sources outside of the general fund. [Tr. 36:4-20 (Brooks); 113:15-20 (Shackle).]

Relevant here, the allocation methodology used to calculate the Engineer's share of the annual CORSA premium is determined by calculating the percent of the county's cost for each line of coverage attributable to the Engineer's *highway department* using the *highway department's* payroll, equipment, vehicles, and property data relative to the county's total payroll, equipment, vehicle, and property data. [Tr. 35-44] (Brooks).] Only the salaries, property, vehicles, and real estate that are used by the Engineer's *highway* department are used in

[4] References are to the August 24, 2009 trial transcript by page and line number and designate the witness whose testimony is referenced. Joint Exhibits are cited as "JX-____."

calculating the allocation amount. [JX-23; Tr. 155:7-158:2 (Henry).] The allocation formula excludes coverage attributable to the Engineer's non-highway operations, such as the Map Department and work performed by the Engineer as county sanitary engineer or county storm water engineer. [JX-10, JX-23; Tr. 99:23-100:5 (Shackle); 130:9-25 (Shackle).] The allocation is based upon a formula developed by CORSA under the direction of its actuary. [Tr. 35:5-11 (Brooks).]

On November 19, 2009, the Trial Court issued its decision, ruling that the CORSA premium was directly connected to a highway purpose and constitutionally payable from MVGT funds. The Engineer appealed, and on August 31, 2010, the Court of Appeals dismissed that appeal, finding that the November 19, 2009 Judgment Entry was not a final appealable order because it failed to address the Commissioners' additional request for mandatory injunctive relief requiring the Engineer to pay the invoice in question. 2010-Ohio-4099 at ¶¶17-18.

On remand, the Trial Court issued its Amended Judgment Entry, reaffirming its prior decision to grant the Commissioners' request for declaratory judgment. In that same entry, however, the Trial Court denied, without explanation, the Commissioners' request for a mandatory injunction. On appeal, the Court of Appeals reversed, holding that the Commissioners did not present sufficient evidence establishing a direct nexus between the premiums and a highway purpose. Opinion at ¶61.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: Article XII, Section 5a of the Ohio Constitution authorizes the use of motor vehicle and gas tax funds to defray a county's cost of participating in a joint self-insurance pool attributable to covering the risk of liability and loss resulting from the operations of a county engineer's highway department.

Section 5a does not limit the use of MVGT funds to those expenses incurred solely from the physical construction of highways. See e.g., *Kauer v. Defendbacher* (1950), 153 Ohio St. 268 (holding that MVGT funds could be expended on study of turnpike project); *Preston v. Ferguson* (1960), 170 Ohio St. 450 (holding that MVGT funds could be used to purchase whole tracts of land when only a part thereof may eventually be used for highway purposes); *State ex rel. Walter v. Vogel* (1964), 169 Ohio St. 368 (holding that building and maintaining street lighting system for urban portion of limited access highways could be paid from MVGT funds).

Particularly relevant here, in *Madden v. Bower* (1969), 20 Ohio St.2d 135, this Court recognized that the payment of health insurance premiums for highway department employees of the office of the county engineer were properly payable from MVGT funds. As this Court recognized, the health insurance premiums were part of the costs of the services of such employees and incurred in furtherance of a highway purpose.

The same analysis applies equally if not more persuasively to the CORSA premium at issue here. It is not disputed that constructing, maintaining, and repairing roads creates a risk of liability and/or loss, and those risks are a cost of performing such activities. These costs are not discretionary expenditures of the Engineer, but rather, they are additional costs that are inherent in every operation and activity that the highway department engages.

These costs are paid by the county one way or the other, and CORSA provides an insurance mechanism to pay such costs. See *Ohio Gvt. Risk Mgt. Plan v. Cty. Risk Sharing Auth.*,

Inc. (6th Dist. 1998), 130 Ohio App.3d 174, 180 ("CORSA's self-insurance pool is undoubtedly akin to insurance, in that its terms of coverage are derived from an insurance policy and, in exchange for a premium, CORSA agrees to indemnify its assureds for loss or damage from stated causes in a definite or ascertainable amount."). In fact, the Engineer's suggestion below (and in apparent agreement by the Court of Appeals) that it would be constitutional to use MVGT funds to pay the actual costs of such damages and liabilities as they are incurred proves the point. If MVGT funds can pay such costs as they are incurred out of pocket, there is no principled basis to suggest that the very same MVGT funds cannot be used to purchase insurance to defray such future costs.

Similarly, there is no dispute that MVGT funds can pay the salaries of the Engineer's employees who maintain roads and bridges (including health insurance for such employees), can pay for the purchase of vehicles and equipment used to maintain and repair roads and bridges, and can pay for the maintenance and repairs of such vehicles and equipment. It logically follows therefore that MVGT funds can and should be used to pay for the cost of insuring against the risk of liability arising out of the work activities of those very same employees and the use of those very same vehicles and equipment. Likewise, it is only logical that MVGT funds can be used to pay for the cost of insurance that pays for the repair and/or replacement of such property, vehicles, and equipment if damaged and/or destroyed due to a covered event. The payment of the CORSA premium is simply another mechanism for ensuring the repair and/or replacement of the vehicles, equipment, and property that the Engineer needs to perform his highway operations.

Nothing in *Knox I* is a repudiation of this analysis. As explained above, the undisputed evidence in this case, as opposed to that in the record in *Knox I*, conclusively establishes that the allocation methodology used to determine the CORSA premium ensures that reimbursement is

sought solely for costs attributable to covering the highway department activities of the Engineer. Only the salaries, property, vehicles, and real estate that are used by the Engineer's highway department are used in calculating the allocation amount. The allocation formula excludes coverage attributable to the Engineer's non-highway operations, such as the Map Department and work performed by the Engineer as county sanitary engineer or county storm water engineer. In short, the allocation methodology ensures that only the insurance costs associated with operations of the engineer's *highway department* are to be paid from MVGT funds.

In sum, the Court of Appeals erred when it held that the MVGT funds could not be used to defray a county's CORSA costs covering the risk of liability and loss resulting from the operations of a county engineer's highway department.

Proposition of Law No. II: A county board of commissioners has a right to obtain payment of the cost of participating in a joint self-insurance pool attributable to covering the risk of liability and loss resulting from the operations of a county engineer's highway department from motor vehicle and gas tax funds.

The payment of the CORSA premium from MVGT funds is not only authorized by Section 5a, but Ohio law also entitles the Commissioners to payment of such premium amounts from MVGT funds despite the objections of the Engineer. The Trial Court erred in failing to grant the Commissioners' request for a mandatory injunction ordering the payment of the invoice in question.

A party is entitled to the equitable remedy of mandatory injunction if two requirements are established. First, the party must establish that a vested right has been abridged, infringed upon or eliminated. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141, 153. Second, the moving party must also show by clear and convincing evidence that immediate and irreparable harm will result and that no adequate remedy at law exists. *Lemley v. Stevenson*

(1995), 104 Ohio App.3d 126, 136. Irreparable injury is one for which there is no plain, adequate and complete remedy at law, and for which money damages would be impossible, difficult or incomplete. *Cleveland v. Cleveland Elec. Illum. Co.* (1996), 115 Ohio App.3d 1, 12. Here, the Commissioners satisfy both of these requirements as a matter of law.

First, the Commissioners have a right to obtain payment of the Engineer's share of the CORSA premium out of MVGT funds. R.C. 2744.081(A)(4) specifically provides that a "joint self-insurance pool may allocate the costs of funding the pool among the funds or accounts in the treasuries of the political subdivisions..." Pursuant to this statute, the Ohio General Assembly has granted CORSA and its member counties (including Knox County) the authority to allocate the costs for participating in CORSA to the various funds and accounts in the treasury of Knox County, including the MVGT fund used to pay the costs of the Engineer's highway department. *Knox I*, 109 Ohio St.3d at ¶25 (J. Lundberg Stratton, concurring in part and dissenting in part).

While R.C. 2744.081(A)(4) does not identify "CORSA" or "MVGT funds" by name, it is undisputed that CORSA is a "joint self-insurance pool," that Knox County is one of its members, and that the Engineer's MVGT account is a "fund or account" in the treasury of Knox County. [See Tr. 18:13-15; 22:23-23:3 (Brooks); Lamb Stipulation at ¶¶1-3.]

In addition, R.C. 315.12(A) mandates that at least two-thirds of the "cost of operation" of the office of the county engineer "*shall be* paid out" of the MVGT funds distributed to the county. Significantly, R.C. 315.12(A) does not preclude the remaining one-third of the Engineer's operating costs from being paid with MVGT funds. *Scioto Cty. Bd. of Commrs. v. Scioto Cty. Budget Comm.* (1969), 17 Ohio St.2d 39, 43. In fact, the authority to make the choice as to how the remaining one-third is to be paid, and to make appropriations from those funds, is lodged in the Board of County Commissioners. *Madden*, 20 Ohio at 139.

Here, the CORSA costs allocated to the Engineer are for a highway purpose and a cost of operating the Engineer's highway department. One component of the cost of the Engineer's office is the risk of liability and loss covered by (and included in) the CORSA premium attributable to the Engineer's highway department. Accordingly, R.C. 2744.081(A)(4) and R.C. 315.12(A) provide specific statutory authority to have the CORSA costs at issue in this case allocated to and paid out of the county's MVGT account.

Second, there can be no question that the Commissioners are irreparably harmed by the Engineer's failure to authorize payment of such costs and that the Commissioners have no other remedy at law. Every time that the Engineer refuses to pay the CORSA costs attributable to the highway operations of his highway department, the Knox County general fund is saddled with a heavier financial burden. In short, by refusing to use MVGT funds for the CORSA expenditures, the Engineer forces the Commissioners to pay for the costs of his highway operations out of general funds.

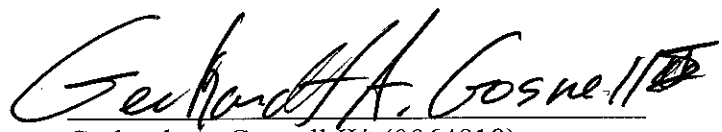
A mandatory injunction is the only remedy available to the Commissioners to obtain payment of the CORSA costs. "Standing alone, a declaratory judgment cannot compel a government official to perform a specific legal duty." *State ex rel. General Motors Corp. v. Industrial Comm.,* 117 Ohio St.3d 480, 2008-Ohio-1593, ¶10. Thus, in order to compel the Engineer to authorize payment of the invoice, mandatory injunction is necessary and proper, and should be granted.

The Trial Court erred in denying the Commissioners' request for mandatory injunctive relief.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. The Appellants request that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing *Memorandum In Support Of Jurisdiction of Appellants Allen Stockberger, Theresa A. Bemiller, and Roger Reed, in Their Official Capacity as the Board of County Commissioners of Knox County* was served via regular U.S. Mail, postage prepaid, this 20th day of May, 2011 upon the following:

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APPENDIX

Opinion of the Knox County Court of Appeals, Fifth Appellate District (April 7, 2011) 1

Judgment Entry of the Knox County Court of Appeals, Fifth Appellate District (April 7, 2011) 19

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COURT OF APPEALS
KNOX COUNTY, OHIO

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
ALLEN STOCKBERGER, ET AL, KNOX COUNTY COMMISSIONERS	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
Plaintiffs-Appellees	:	
-vs-	:	Case No. 10CA000018
JAMES L. HENRY, KNOX COUNTY ENGINEER	:	OPINION
Defendant-Appellant		

CHARACTER OF PROCEEDING: Civil appeal from the Knox County Court from Knox County Court Common Pleas, Case No. 08OT02-0109

JUDGMENT: Affirmed in part; Reversed in part and Remanded

DATE OF JUDGMENT ENTRY:

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193
165

Gwin, P.J.

{¶1} Defendant-appellant James L. Henry, in his capacity as the Knox County Engineer (hereinafter referred to as the Engineer), appeals a judgment of the Court of Common Pleas of Knox County, Ohio, entered in favor of Allen Stockberger, Teresa Bemiller and Roger Reed in their official capacity as the Board of County Commissioners of Knox County (hereafter the Commissioners). Robert Wise, a former County Commissioner, was originally named in the case, but Mr. Reed, his successor, has been substituted. In reviewing the legal issues involved, we have reviewed Amici Curae briefs from the County Engineers Association of Ohio and Ohio Contractors Association in addition to the briefs of the Engineer and the Commissioners.

{¶2} The Engineer assigns two errors to the trial court:

{¶3} "I. THE TRIAL COURT ERRED BY FAILING TO USE AN ABUSE OF DISCRETION STANDARD AS THE COUNTY ENGINEER ENJOYS DISCRETION TO DETERMINE WHETHER AN EXPENDITURE IS FOR A 'HIGHWAY PURPOSE'.

{¶4} "II. THE TRIAL COURT ERRED BY NOT DISMISSING THIS CASE ON ITS FACE, AS A MATTER OF LAW."

{¶5} The Commissioners assign a single error on cross-appeal:

{¶6} Cross-Assignment of Error

{¶7} "I. THE TRIAL COURT ERRED IN DENYING PLAINTIFFS'-CROSS APPELLANTS' REQUEST FOR INJUNCTIVE RELIEF."

{¶8} The issue presented in this case is whether the Knox County Engineer can use funds restricted by the Ohio Constitution for highway purposes to pay his

193
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office's share of the cost of Knox County's premium for a risk sharing pool. The trial court found the Engineer could do so; we disagree.

The Constitutional and Statutory Basis

{¶9} R.C. 2744.08 provides:

{¶10} " Regardless of whether a political subdivision, under section 2744.08 of the Revised Code, secures a policy or policies of liability insurance, establishes and maintains a self-insurance program, or enters into an agreement for the joint administration of a self-insurance program, the political subdivision may, pursuant to a written agreement and to the extent that it considers necessary, join with other political subdivisions in establishing and maintaining a joint self-insurance pool to provide for the payment of judgments, settlement of claims, expenses, loss, and damage that arises, or is claimed to have arisen, from an act or omission of the political subdivision or any of its employees in connection with a governmental or proprietary function and to indemnify or hold harmless the subdivision's employees against such loss or damage."

{¶11} Section V (A), Article XII of the Ohio Constitution provides:

{¶12} "No monies derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on public highways, or to fuels used for propelling such vehicles, shall be expended for other than the cost of administering such laws, statutory refunds and adjustments provided therein, payment of highways obligations, costs for construction, re-construction, maintenance and repair of the public highways and bridges and other statutory highway purposes, expense of state

enforcement of traffic laws, and expenditures authorized for hospitalization of indigent persons injured in motor vehicle accidents on the public highway."

{¶13} R.C. 315.12 (A) states:

{¶14} "[T]wo thirds of the cost of operation of the office of the county engineer, including the salaries of all the employees and the cost of maintenance of such office as provided by the annual appropriation made by the Board of County Commissioners for such purpose, shall be paid out of the county's share of the fund derived from the receipts from motor vehicle licenses, as distributed under Section 4501.04 of the Revised Code, and from the county's share of the fund derived from the motor vehicle fuel tax as distributed under Section 5735.27 of the Revised Code."

{¶15} We will refer to the restricted funds as MVGT funds.

{¶16} R.C. 5543.01 states:

{¶17} "(A) Except as provided in division (B) of this section, the county engineer shall have general charge of the following:

{¶18} "(1) Construction, reconstruction, improvement, maintenance, and repair of all bridges and highways within the engineer's county, under the jurisdiction of the board of county commissioners, except for those county roads the board places on non-maintained status pursuant to section 5541.05 of the Revised Code;

{¶19} "(2) Construction, reconstruction, resurfacing, or improvement of roads by boards of township trustees under sections 5571.01, 5571.06, 5571.07, 5571.15, 5573.01 to 5573.15, and 5575.02 to 5575.09 of the Revised Code;

{¶20} "(3) Construction, reconstruction, resurfacing, or improvement of the roads of a road district under section 5573.21 of the Revised Code.

193/168

{¶21} "(B) For any particular project, after notifying the county engineer, the board of township trustees of a township that has adopted a limited home rule government under Chapter 504 of the Revised Code may hire an independent professional engineer to be in charge of those activities listed in division (A)(2) of this section. The county engineer shall review all of the independent professional engineer's plans for improvements and provide the board of township trustees with comments on those plans within ten working days after receiving them. The county engineer shall monitor all plans for improvements in order to maintain compliance with existing construction standards and thoroughfare plans, and coordinate construction timelines within the county.

{¶22} "(C) The county engineer may not perform any duties in connection with the repair, maintenance, or dragging of roads by boards of township trustees, except that, upon the request of any board of township trustees, the county engineer shall inspect any road designated by it and advise as to the best methods of repairing, maintaining, or dragging that road."

Background Facts

{¶23} Knox County participates in the County Risk Sharing Authority, hereinafter referred as CORSA. CORSA provides general liability coverage, automobile liability coverage, errors and omissions liability coverage, and property coverage for all Knox County officers. It also provides law enforcement liability coverage which applies only to the sheriff's department and correctional facility. The Knox County Engineer's Office is included in the coverage.

{¶24} The county's CORSA premium is determined by an actuary employed by CORSA. It is based upon the exposure and loss experience of the individual counties, but not specifically for each separate department of the county. "Loss experience" involves claims made against the county in the previous five years, while "exposure" refers to the risk of each member based upon property values, number of vehicles, and payrolls for offices other than for the sheriff. CORSA encourages counties to seek reimbursement to the general fund from such offices.

{¶25} The Commissioners presented evidence they use a proportional mathematical comparison, using only the exposure component of risk, to determine the engineer's share of the CORSA premium. The court heard testimony from a representative of CORSA, who described how the county's premiums, and the Engineer's share, were computed. The CORSA representative testified the Engineer's departmental share did not reflect actual claims paid out on his office's behalf; the actuary computed only the county's overall payout. There are not enough claims per department from which the actuary could establish an accurate estimate or rate for each department.

{¶26} The CORSA premium for Knox County for 2007/2008 was $217,510.00, which the Commissioners paid out of the county's general fund. Thereafter, the Commissioners requested reimbursement from including the Engineer's Office and certain other offices which receive a significant amount of funding from sources outside the general fund.

{¶27} In June of 2007, the Commissioners sent the Engineer an invoice for $19,789.00, the amount CORSA computed was the Engineer's share of the CORSA

premium for 2007-2008. The Engineer refused to authorize payment of the invoice from the MVGT funds.

{¶28} In February 2007, one of the trucks in the Engineer's fleet, being operated by an employee of the Engineer's Office, overturned while plowing snow on a county road, causing $13,138.16 damage to the truck. CORSA's agreement with the county provided for a deductable of $2,500.00 per occurrence in the automobile liability and physical damage coverage portion of the program. The Commissioners paid for the repair costs of the truck out of the general fund, and were reimbursed by CORSA for the repair costs minus the deductible. The Commissioners invoiced the Engineer for the $2,500.00 deductible. The Engineer refused payment of this invoice, although he subsequently conceded the deductible was directly related to a highway purpose and could be paid from MVGT funds.

{¶29} The County Engineer argues he is constitutionally restricted from using MVGT funds to pay his office's share of the CORSA premium for the county. The Commissioners, on the other hand, argue maintaining CORSA coverage is part of the cost of operating the office, and the Engineer may pay his office's share of the premiums.

{¶30} This dispute has been the subject of prior litigation. In *Knox County Board of Commissioners v. Knox County Engineer,* 109 Ohio St. 3d 353, 2006-Ohio-2576, the Ohio Supreme Court reviewed this same issue involving the years 2002-2003. The Supreme Court found the Ohio Constitution restricted the use of MVGT funds for highway purposes or purposes directly connected thereto. In *Knox I,* the Supreme Court found there was no evidence in the record showing the payment of CORSA

premiums constitutes a highway purpose or is directly connected with construction, maintenance, and repair of highways or the enforcement of traffic laws. The Supreme Court cautioned, however, that if the record contained evidence that the CORSA premiums pertained or directly related to highway purposes, or if the Engineer's budget did not consist wholly of restricted funds, the outcome of the case might not be the same. Id. at paragraph 11.

{¶31} In the case at bar, the trial court reviewed testimony regarding whether the CORSA premiums pertained to, or were directly related to, highway purposes, and testimony regarding the Engineer's budget. The trial court found the Commissioners were entitled to a declaratory judgment that the CORSA costs were directly connected to a highway purpose, and MVGT funds can be used to pay a portion of the annual cost of premiums. The court also found MVGT funds may be used to reimburse the county for the deductible on the damage to the truck. However, the trial court refused to issue a mandatory injunction ordering the Engineer to pay the allocated portion of the CORSA insurance costs.

II.

{¶32} In his second assignment of error, the Engineer argues the court should have dismissed this action for three separate reasons: 1. the matter is res judicata; 2. The Commissioners do not have standing to bring this action; and 3. The Engineer's office does not have the capacity to be sued.

{¶33} The Engineer argues the matter is res judicata because the Supreme Court has already reviewed the identical issue in *Knox I*. We do not agree. *Knox I* concerned a dispute for the 2002-2003 years while the case at bar deals with 2007-

2008. In *Knox I,* the Supreme Court based its decision solely on the fact there was no evidence in the record that would support the Commissioners' argument the payment of the CORSA premiums was directly related to a highway use purpose. The court specifically stated if the record were otherwise, the outcome could be different.

{¶34} The doctrine of res judicata involves two concepts: (1) claim preclusion, or estoppel by judgment, and (2) issue preclusion, or collateral estoppel, *Krahn v. Kenney* (1989), 43 Ohio St.3d 103, 107, 538 N.E.2d 1058, citing *Whitehead v. General Telephone Co.* (1969), 20 Ohio St.2d 108, 254 N.E.2d 10. The collateral estoppel aspect of res judicata precludes the re-litigation, in a second action, of an issue that has been actually and necessarily litigated and determined in a prior action , although the prior action was litigated on a different cause of action. *Whitehead*, supra at 112, 254 N.E.2d 10 (Emphasis *sic).* However, where a change in the facts has occurred since a decision was rendered, which raises a new material issue or which would have been relevant in the earlier action, the doctrine of *res judicata* will not bar litigation of that issue in a later action. *State ex rel. Westchester v. Bacon* (1980), 61 Ohio St.2d 42, 399 N.E.2d 81, paragraph two of the syllabus.

{¶35} We find this action is not res judicata because the Supreme Court's decision in *Knox I* was based solely on C. R. 56 governing summary judgments and the absence of evidence in the record but did not address the question of whether MVGT funds may ever be used to pay CORSA premiums.

{¶36} The Engineer also argues the Commissioners lack standing and capacity to sue. Standing refers to whether a plaintiff can demonstrate that he has suffered or will suffer a specific injury which is traceable to the defendant's challenged action, and

the injury is capable of judicial resolution. *Engineering Technicians Assn. v. Ohio Dept. of Transportation* (1991), 72 Ohio App.3d 106, 110-111, 593 N.E.2d 472. An entity has standing when it has a personal stake in the outcome of the action. *Middletown v. Ferguson* (1987), 25 Ohio St.3d 71, 75, 495 N.E.2d 380. The Engineer asserts the Commissioners cannot demonstrate the county has suffered any injury. We find, however, that if the CORSA premiums cannot be paid with MVGT funds, then the money must come out of the county's general fund. This is sufficient to give the Commissioners standing to bring this action.

{¶37} Capacity to sue refers to whether the party can sue and be sued. The Engineer argues the Commissioners can sue and be sued pursuant to R.C. 305.12, but the Revised Code contains no provision for suits against the Engineer's Office. He states the Commissioners have a duty to defend his office, and thus here the county is suing itself. The Commissioners reply that this is true as to matters relating to liability to third parties, not internal disputes. A county has capacity to bring an action against a county official. See, e.g., *Board of County Commissioners v. Hensley,* Montgomery County App. No.19754, 2003-Ohio-5730, where, as here, the Board sought a declaratory judgment regarding the authority of county court judges.

{¶38} Declaratory actions are brought under R.C. 2721.03. It provides in pertinent part: "***any person whose rights, status, or other legal relations are affected by a constitutional provision, [or] statute, ***may have determined any question of construction or validity arising under the *** constitutional provision, [or] statute, ***and obtain a declaration of rights, status, or other legal relations under it."

{¶39} We conclude the trial court correctly overruled the motion to dismiss. The Commissioners have standing to bring the action; the Engineer has capacity to be sued; and the matter is not res judicata.

{¶40} The second assignment of error is overruled.

I

{¶41} In his first assignment of error, the Engineer argues the trial court erred in not applying an abuse of discretion standard to the Engineer's decision not to pay the insurance premium. The Engineer urges he has the authority to determine whether an expenditure is for highway purposes, and the court should not have entered judgment for the Commissioners without finding he abused his discretion. We do not agree. However, we do agree the trial court reached the wrong decision based upon the record in the case.

{¶42} The trial court's amended judgment entry states the Engineer "cannot" use MVGT funds, rather than "shall not" use MVGT funds. The entry further "authorizes" the Engineer to make the payments rather than "ordering" him to do so. This, coupled with the denial of the Commissioners' request for injunction, is the basis of the Engineer's assertion the trial court did not find payment was mandatory, but rather he had discretion to determine whether to pay the premium and deductibles.

{¶43} The Engineer argues Boards of County Commissioners are creatures of statute and have only such authority as granted by statute or which can be fairly implied from a statute. *Geauga County Board of Commissioners v. Munn Sand & Gravel* (1993), 67 Ohio St. 3d 579, 621 N.E. 2d 696. The Engineer asserts that he is an independently elected public official charged with duties related to construction and

maintenance of public highways, bridges, and other facilities, pursuant to R.C. 315.08. The engineer argues the county commissioners have no general supervisory authority over his actions if he is acting within his authority. He asserts county commissioners can appropriate funds to be used by the engineer, but they have no authority to require the engineer to expend those funds.

{¶44} The Commissioners respond that the decision of whether an expenditure is sufficiently related to highways purposes to satisfy the requirements of the Ohio Constitution is a legal determination for a court, and not a factual determination left to the Engineer's discretion. The Commissioners argue several courts of appeals have held the decision whether a given action violates the Ohio Constitution presents a question of law. See *Andreyko v. Cincinnati,* 153 Ohio App. 3d 108, 2003-Ohio-2759, out of the Fourth District; *LTV Steel Company v. Industrial Commission* (2000), 140 Ohio App. 3d 680, out of the Tenth District, and *Fuchs v. Scripts Howard Broadcasting Company,* 170 Ohio App. 3d 679, 2006-Ohio-5349, out of the First District. The Commissioners also note in *Knox I* the Ohio Supreme Court did not accord the engineer any discretion in the decision whether to pay for CORSA premiums.

{¶45} We agree the issue is not a matter of discretion for the Engineer's determination, but is a mixed question of law and fact for the courts. Because the issue presents a question of law we review the matter de novo. *Cleveland Electric Illuminating Co. v. Public Utilities Comm.* (1996), 76 Ohio St.3d 521, 523, 668 N.E.2d 889.

{¶46} Our analysis consists of two steps. First, the Commissioners must demonstrate the share of the cost of CORSA allocated to the Engineer's office is

accurate. Secondly, there is a separate issue of showing participation in CORSA is either directly related to highway purposes or to the operation of the office.

{¶47} The trial court found the formula for allocating health insurance premiums and Workers' Compensation is the same formula used to apportion the CORSA premiums among the departments. We agree the Commissioners proved CORSA's computation of the Engineer's share of the premium is accurate. However, for the reasons that follow, we find the Commissioners have not established a nexus between the premium and highway purposes or the operation of the Engineer's office.

{¶48} The plain language of the statute gives us no guidelines regarding the factors a court should use to determine whether there is sufficient nexus between the activity or cost and a "highway purpose". The Ohio Constitution sets out a list of uses that are acceptable, but does not provide for insurance or risk sharing. It does authorize use of MVGT funds to pay "highway obligations". Likewise R.C. 315.12 provides MVGT funds can be used for salaries and operational costs.

{¶49} In *Knox I* the Supreme Court directed our attention to *Grandle v. Rhodes* (1959) 169 Ohio St. 77, 157 N.E.2d 336: "we stated in our syllabus that "Section 5a, Article XII of the Constitution of Ohio closely restricts the expenditure of the fees and taxes received in relation to vehicles using the public highways to purposes *directly connected with* the construction, maintenance and repair of highways and the enforcement of traffic laws * * *." (Emphasis added.) There we held that the restricted funds could not be used to pay fees of a taxpayer's lawyers who successfully sued to block the use of highway funds for a preliminary study regarding the contemplated construction of a parking garage underneath the statehouse." *Knox I* at paragraph 10.

{¶50} The court found the Engineer conceded the deductable for repairs to the damaged truck could be paid with MVGT funds, because it was damaged while being used for a highway purpose. We agree.

{¶51} The trial court found the Engineer pays for health insurance premiums, travel to county engineer conferences and seminars, office supplies, copy machines, printers, and utilities out of MVGT funds. The court cited *Madden v. Bower* (1969), 20 Ohio St. 2d 135, 254 N.E. 2d 357, wherein the Supreme Court found if a county employee receives the benefits of a group health insurance plan procured by a board of county commissioners, the part of the premium which is paid from public funds is a part of the cost of the public service performed by each such employee. The proportionate cost of premiums for county employees' group health insurance plan paid on behalf of employees of a county engineer who are engaged directly in work on county roads is a part of the cost of services rendered by such employees and is payable from the funds established by R.C. 315.10.

{¶52} We find *Madden* is distinguishable from the case at bar. *Madden* supra dealt with health insurance premiums. By contrast the CORSA risk-sharing pool is not a part of the employee's fringe benefits. CORSA is not insurance. R.C. 2744.08 clearly differentiates between a risk sharing pool and insurance. "A joint self-insurance pool is not an insurance company. Its operation does not constitute doing an insurance business and is not subject to the insurance laws of this state." R.C. 2744.081((E)(2).

{¶53} In *Knox I* the court referred to a footnote in *Madden*, supra, which cautioned that the Engineer's budget will contain some expenditure for the operation of the office are nevertheless not related to the planning, construction, improvement or

repair of roads, streets and highways. The court set out a non-exhaustive list of a county engineer's duties which involve operations of the office, but are unrelated to highway purposes. Those duties include supervision of surveying, tax-map drafting and assistance to the board in connection with improving waste disposal works, ditches, sanitary sewers, storm drainage works and sidewalks. Thus, it is not sufficient to demonstrate the expenditures are related to the operations of the Engineer's office. The evidence must show the expenditures are related to the operations of the office which are related to highway purposes, not simply operations of any office.

{¶54} The Engineer presented evidence he engages in various activities unrelated to highway purposes. Those activities include: sanitation engineer, storm water engineer pursuant to a contract between the Commissioners and the Soil and Water Conservation District; preparation of a district master plan for sanitation and storm water; administration of community block grants; advising and assisting the county airport and fair; advising incorporated villages in the county; administering local public authority grants; overseeing the inspection of county bike trails.

{¶55} The parties' Joint Exhibit 10 contains a breakdown of the definitions and costs of the various coverages CORSA provides for the Engineer's Office. It includes property coverage, auto liability and physical damage, public official liability, and general liability, all showing the Engineer's share of the premium in percentages. It expresses the percentage of the total county property, payroll, and vehicles and shows the percentage attributable to the Engineer's Office. It does not break the figures down to estimate how much of the Engineer's property and personnel actually deal directly related to highway purposes. The CORSA representative testified it was CORSA's

position that the entire amount it had computed as the Engineer's share of the premiums was for highway purposes.

{¶56} The representative from CORSA acknowledged the premiums were prospective in nature; that is, the coverage the counties purchase is for possible future payouts, not simply reimbursements for past payouts.

{¶57} The county's decision to participate in CORSA protects not only the Engineer's office and employees but covers any office and employee of the county. If another department suffers a loss but the Engineer's office does not, the share of the premiums paid by the Engineer in effect provide a benefit to persons and offices not directly related to highway purposes.

{¶58} The court found there was no difference between the premiums for health insurance and the cost for CORSA. We do not agree. We find that pursuant to *Madden,* health insurance is directly related to highway purposes, but the record does not establish sufficient nexus between CORSA and either a highway purpose or a cost of operation.

{¶59} In the trial court's findings of fact, filed November 19, 2009, the court found the Engineer's account contains both MVGT funds and non-restricted funds, some coming from federal projects or reimbursements from other county departments. We find that is irrelevant; how much of the comingled fund is MVGT funds are ascertainable and identifiable. The Engineer testified that he did place all the funds he received into a single account but sought reimbursements from the other county departments and from the Commissioners for non MVGT activities. The *Knox I* opinion stated if the Engineer's budget did not consist wholly of restricted funds, the outcome

of the case might be different. This implies the Engineer might be able to utilize funds from other sources to reimburse the county. It does not mean if the Engineer comingles the funds then he can use MVGT funds for non-highway purposes.

{¶60} We agree with the trial court the deductible for the repairs to the engineer's vehicle is related to a highway purpose and payable with MVGT funds.

{¶61} We find the Commissioners did not present evidence establishing a direct nexus between the invoice for the premiums or any portion of the premiums and highway purposes or operations of the Engineer's Office. We conclude the trial court utilized the proper standard in analyzing the case but nevertheless reached an incorrect result.

{¶62} The assignment of error is overruled in part, as to the court's finding the deductible for the damage to the truck is payable from MVGT funds, and sustained in part as to its finding the Engineer can pay his share of the premiums from MVGT funds.

Cross Appeal

{¶63} Turning to the cross-appeal, the Commissioners argue the court should have issued a mandatory injunction directing the Engineer to reimburse the county for the CORSA premiums. They argue a mandatory injunction is the proper remedy to compel performance of a government official in conjunction with declaratory relief.

{¶64} An injunction is an extraordinary remedy appropriate only if the party requesting it establishes two requirements. First, the party must show that a vested right has been abridged, infringed, upon, or eliminated. Secondly, the moving party

must also by clear and convincing evidence that immediate and irrefutable harm will result and no adequate remedy at law exists.

{¶65} Because we find the Engineer could not constitutionally reimburse the county with MVGT funds, it follows the Commissioners were not entitled to an injunction directing the Engineer to authorize the payments.

{¶66} The assignment of error on cross-appeal is overruled.

{¶67} For the foregoing reasons, the judgment of the Court of Common Pleas of Knox County, Ohio, is affirmed in part, as to the deductible for the damaged truck, and reversed in part, and the cause is remanded to the court for further proceedings in accord with law and consistent with this opinion.

By Gwin, P.J.,

Farmer, J., and

Delaney, J., concur

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER

HON. PATRICIA A. DELANEY

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193
182

IN THE COURT OF APPEALS FOR KNOX COUNTY, OHIO

FIFTH APPELLATE DISTRICT

FILED

APR -7 2011

COURT OF APPEALS
KNOX COUNTY, OHIO

ALLEN STOCKBERGER, ET AL, KNOX COUNTY COMMISSIONERS	:	
Plaintiffs-Appellees	:	
-vs-	:	JUDGMENT ENTRY
JAMES L. HENRY, KNOX COUNTY ENGINEER	:	
Defendant-Appellant	:	CASE NO. 10CA000018

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Knox County, Ohio, is affirmed in part, as to the deductible for the damaged truck, and reversed in part, and the cause is remanded to the court for further proceedings in accord with law and consistent with this opinion. Costs to be split between the parties.

W. Scott Gwin

HON. W. SCOTT GWIN

Sheila G. Farmer

HON. SHEILA G. FARMER

Patricia A. Delaney

HON. PATRICIA A. DELANEY

193
183