ORIGINAL

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,	:	Case No. 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 AMICI CURIAE COUNTY COMMISSIONERS ASSOCIATION OF OHIO, COUNTY RISK SHARING AUTHORITY, AUGLAIZE, LUCAS, WAYNE, CRAWFORD, PIKE, HANCOCK, CLERMONT, VAN WERT, JACKSON, STARK, TUSCARAWAS, AND GREENE COUNTIES SUPPORTING APPELLANTS ALLEN STOCKBERGER, ET AL.

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TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

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 6

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. 6

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' highway department from motor vehicle and gas tax funds. 9

CONCLUSION 10

CERTIFICATE OF SERVICE 11

PRELIMINARY STATEMENT

The County Commissioners Association of Ohio ("CCAO") is a private, not-for-profit statewide association of county commissioners founded in 1880 to promote the best practices and policies in the administration of county government for the benefit of Ohio residents. CCAO's membership consists of the county commissioners of 86 of Ohio's 88 counties and the members of the Summit and Cuyahoga County councils.

The County Risk Sharing Authority ("CORSA") is a joint self-insurance pool, formed pursuant to Revised Code Sec. 2744.081 et seq. and composed of 62 Ohio counties and 17 multi-county facilities. COSA exists to provide for the payment of judgments, settlement of claims, expense, loss, and damage that arises, or is claimed to have arisen, from an act or omission of its members or their employees in connection with a governmental or proprietary function.

In addition to CORSA, many counties that are not members of CORSA, are also concerned about this issue and the uncertainty surrounding it and have joined in this brief to urge review by this Court. These counties are Auglaize, Lucas, Wayne, Crawford, Pike, Hancock, Clermont, Van Wert, Jackson, Stark, Tuscarawas, and Greene.

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

This case presents a unique 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 in *Knox Cty. Bd. of Commrs. v. Knox Cty. Engineer*, 109 Ohio St.3d 353, 2006-Ohio-2576, syllabus ("*Knox I*). More specifically, under what circumstances does the Ohio Constitution Article XII, Section 5a ("Section 5a") authorize the use of MVGT funds[1] to defray

[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

the portion of a county's costs of insurance (in this case, the cost of participating in the "CORSA" covering liability and casualty risks resulting from the operations of a county engineer's highway department?

This Court did not hold that MVGT funds could never be used to fund a portion of the county's CORSA premiums. The primary 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, other than 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). More importantly, 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.[2] In so stating, Auditor Montgomery specifically recognized, as follows:

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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.

[2] A copy of this letter was made part of the record below as part of Joint Exhibit 10.

> Based on this narrow decision, it is the opinion of the Auditor of State that, 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. I should note, however, that the Court provides no guidance—and it is not the role of the Auditor of State to determine—exactly what type of evidence would have been sufficient to prove the connection between liability premiums and highway purposes.
>
> Consequently, in conducting audits of counties, our staff will require that information be made available connecting liability insurance premiums with highway purposes for all premiums paid using as tax revenues. Absent any such information, findings for *recovery may be issued* for the illegal expenditure of public money, based on the *Knox County* decision. The determination by Auditor of State staff not to issue findings for recovery in a specific audit does not in any way indicate that the evidence provided for payments made from gas tax revenues is sufficient to meet the Court's standards. Such a determination will most likely have to be made by another court in the future.

Due to the prohibition on attachments in this court's rules, a copy of this letter has not been attached, to this memorandum, but is part of the record.

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. Based on Ms. Montgomery's letter, even the auditor is reviewing such matters on a case by case basis.

The uncontroverted evidence presented below establishes that the CORSA premium 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 cost were directly related to covering the risks inherent in constructing, maintaining, and repairing roads and bridges.

Despite these uncontroverted facts, 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 direct nexus between the premium and a highway purposes. This conflict highlights the need for further guidance and clarification from this court.

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 importance of these issues is highlighted by twelve (12) counties that are not members of "CORSA" that have joined in this brief. These 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 substantial cuts to the local government fund and the possible elimination of the state estate tax.

Both "CCAO" and "CORSA" as statewide organizations believe that without guidance from this court and a clear delineation of the appropriate standards from this court, county governments will continue to struggle with this issue. In addition, the lack of any clear evidentiary standards from this court will give administrators such as the State Auditor unfettered discretion to decide whether and to what extent CORSA insurance premiums are related to a highway purpose. It is up to this court, not state agencies, to delineate the appropriate evidentiary standards and type of evidence to be applied to those standards. It is time for this court to fill this vacuum and provide guidance to Ohio counties and state agencies.

STATEMENT OF THE CASE AND FACTS

The statement of the case and facts of the Appellant is adopted and incorporated the same as if fully rewritten herein.

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., *State ex rel. Kauer v. Defendbacher* (1950), 153 Ohio St. 268, 91 N.E.2d 512, 41 O.O. 278 (MVGT funds could be expended on study of turnpike project); *State ex rel. Preston v. Ferguson* (1960), 170 Ohio St. 450, 166 N.E.2d 365, 11 O.O.2d 204 (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 (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, 254 N.E.2d 357, 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. In her dissent in Knox I, Justice Stratton found that the *Madden* case was dispositive. Knox I at ¶ 26.

A similar analysis applies to the CORSA premium. 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 such operations.

These costs will inevitably be borne by the counties, and CORSA provides mechanism to pay such costs and provide protection to both the county and those who might be injured by such activities. *See Ohio Govt. Risk Mgt. Plan v. Cty. Risk Sharing Auth., Inc.* (6th Dist. 1998), 130 Ohio App.3d 174, 180, 719 N.E.2d 992 ("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 costs.

Similarly, 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. 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 the sparse 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.

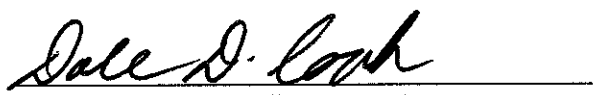
<u>Proposition of Law No. II</u>: A county board of commissioners has a right to obtain payment of the cost of participating in a joint self-insurance pool attributable to covering the risk of liability and loss resulting from the operations of a county engineer' highway department from motor vehicle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

The law and arguments in Appellant's memorandum, which are black letter law on injunctions, are adopted and incorporated the same as if fully rewritten herein. Clearly, if a right or authority is conferred by statute, there should be a means of enforcement. A right without a remedy is meaningless.

CONCLUSION

The Amici request that this Court accept jurisdiction of this case so that the important issues presented will be reviewed on the merits and Ohio counties and State agencies not be left adrift on the current sea of uncertainty.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was served via regular U.S. Mail, postage prepaid, this 23rd day of May, 2011 upon the following:

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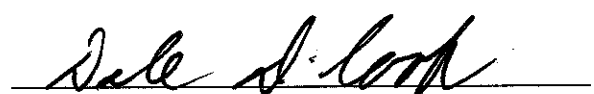

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