

ORIGINAL

IN THE SUPREME COURT OF OHIO

Allen Stockberger, Theresa A. Bemiller, & Roger :
Reed, in their official capacity as the :
Knox County Board of County Commissioners, :

Appellants, :

v. :

James L. Henry, in his official :
capacity as Knox County Engineer, :

Appellee. :

Case No. 11-0859

On Appeal from the Knox County
Court of Appeals , Fifth Appellate
District, Case No. 10CA000018

APPELLEE KNOX COUNTY ENGINEER'S MEMORANDUM CONTRA TO
APPELLANTS KNOX COUNTY BOARD OF COUNTY COMMISSIONERS'
MEMORANDUM IN SUPPORT OF JURISDICTION

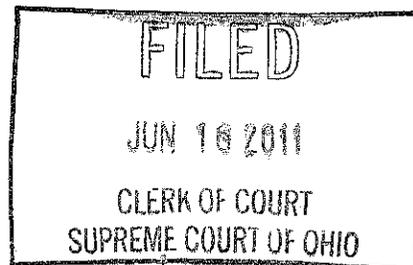
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APPELLEE KNOX COUNTY ENGINEER'S MEMORANDUM CONTRA TO
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Appellee's Explanation As To Why This Is Not A Case Of
Public Or Great General Interest And Does Not Involve A Substantial
Constitutional Question

Appellants object to a factual determination by the lower courts, and not to a question or finding of law. Thus there is no issue of public or great general interest and no substantial constitutional question for this Court to clarify or resolve.

Appellants presented evidence at trial of this matter. The Appellate Court found Appellants' evidence insufficient to draw the conclusion required by established law. Appellants now want this Court to reverse on a factual determination, or to reverse direct, established legal precedent from the Supreme Court in a companion case.

The Supreme Court previously addressed these very parties, on the legal issue of whether invoices for CORSA insurance premiums could be paid out of Constitutionally-restricted MVGT funds in *Knox County Board of Commissioners v. Knox County Engineer* (2006), 109 Ohio St.3d 353, 355, 2006 Ohio 2567, 847 N.E.2d 1206 (*Knox I*). This Court determined that CORSA premiums must be directly related to highway purposes, and, absent evidence of such a nexus, Section 5a, Article XII of the Ohio Constitution prohibited the Engineer's office from paying the CORSA premiums.

Knox I had been resolved by the trial court on summary judgment without an evidentiary hearing. After filing the second, present case on similar facts, Appellants

offered evidence at trial in an attempt to connect the CORSA premium with a highway purpose.

The trial court issued a decision entitled, "Findings of Fact."¹ The Fifth District Court of Appeals determined factually that "the Commissioners have not established a nexus between the [CORSA] premium and highway purposes or the operation of the Engineer's office." Opinion, ¶ 47.² As additional predicate facts, the Court of Appeals found in the trial record that the CORSA representative's calculations are speculative as to the actual purpose used for those funds paid by Constitutionally-restricted MVGT funds. Opinion, ¶¶ 56, 57, 65. Confirming the factual nature of this review, "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." Opinion, ¶ 61.

Although Appellants couch their discretionary appeal as involving law, Appellants want this Court to reverse on the evidence presented at the trial court. Appellants raise a factual issue, not an issue of law, and not issues of public or great general interest, and present no substantial constitutional question.

Any other invitation to legal analysis is on a hypothetical fact record. Stating

¹ Findings of Fact, Judgment Entry, Trial Court, 11/19/09; Amended Judgment Entry, Trial Court, 10/5/10.

² Opinion, Court of Appeals, Knox County, Ohio, Fifth Appellate District, Case No. 10CA000018, 4/7/11.

their claimed issue, Appellants stray from the factual record: “Specifically, under what circumstances does the Ohio Constitution Article XII, Section 5a (‘Section 5a’) authorize the use of MVGT funds ...”³ is irrelevant; the only relevant issue is whether the current facts meet the Constitutional test. A court may not issue an advisory opinion when no actual controversy exists. *Kincaid v. Erie Ins. Co.*, 2011-Ohio-647, 127 Ohio St.3d 1550, 941 N.E.2d 805.

Statement of the Case & Facts

Appellee Knox County Engineer generally adopts the “Background Facts” of the Court of Appeals’ Opinion, ¶23. et al.

Knox County participates in the County Risk Sharing Authority (CORSA). Opinion, ¶23. CORSA provides general liability coverage, automobile liability coverage, errors and omissions coverage and property coverage for all of Knox County’s officers, including the Knox County Engineer’s Office. *Id.* Sixty-two counties participate in CORSA, and each county’s CORSA premium is determined by an actuary employed by CORSA.⁴ Each county’s premium is “based upon the exposure and loss experienced of the individual counties, but not specifically for each separate department of the county.” Opinion, ¶24.

At the trial of this matter, Appellants presented evidence that they use a

³ Appellants’ Memorandum, p. 1.

⁴ Appellants’ Memorandum, p. 4; Opinion, ¶ 24.

“proportional mathematical comparison, using only the exposure component of risk, to determine the engineer’s share of the CORSA premium.” *Id.* at ¶ 25. The CORSA representative testified that the Engineer’s share “did not reflect actual claims paid out on his office’s behalf...” *Id.*

In June 2007, Appellants sent the Engineer an invoice for \$19,789.00, the amount CORSA purported to be the Engineer’s share of the CORSA premium for 2007-2008. *Id.*, at ¶ 27. The Engineer refused to authorize payment of the invoice from the Constitutionally-restricted MVGT funds because the CORSA premiums were not directly related to a highway purpose. *Id.* The Engineer’s refusal to pay Appellants’ invoice led to this current action.

This Court reviewed the same legal issue for the same parties in *Knox I* for the years 2002-2003. *Id.* at ¶ 30. As the Appellate Court noted in its decision, the “Ohio Supreme Court found the Ohio Constitution restricted the use of MVGT funds for highway purposes or purposes directly connected thereto.” *Id.* In *Knox I*, this Court cautioned that if the factual record contained evidence that the CORSA premiums pertained or directly related to highway purposes, “the outcome could be different.” *Id.* at ¶ 33, see also ¶ 30. (emphasis added).

In the present case, Appellants filed a nearly identical complaint to that in *Knox I*, but for years 2007-2008. At trial, Appellants presented evidence in an attempt to demonstrate that CORSA premiums pertained to, or were directly related to highway

purposes. Id. at ¶ 31.

On the trial court record, the Fifth District Court of Appeals reversed the trial court, finding that the Appellants failed to demonstrate that CORSA premiums were directly related to a highway purpose, and thus “the Engineer could not Constitutionally reimburse Appellants with MVGT funds...” Id. at ¶¶ 61, 65.

Appellants’ Proposition of Law No. 1: 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.

Appellee’s Position to Appellants’ Proposition of Law No. I: Article XII, Section 5a of the Ohio Constitution closely restricts the use of MVGT funds as directly-related to highway purposes.

Appellants conclude their argument with the statement, “As explained above, the undisputed evidence in this case, as opposed to that in the record in *Knox I*, conclusively establishes that *** In sum, the Court of Appeals erred when it held that the MVGT funds could not be used....”⁵ By Appellants’ own admission, this is a fact appeal, merely arguing with the facts as the Court of Appeals determined.

The only legal arguments offered require this Court to overturn over 50 years of its own precedent—that of *Grandle v. Rhodes* (1959), 169 Ohio St. 77, 157 N.E.2d 336—and the more recent decision of *Knox I, supra*. However, Appellants fail justify what the Court should abandon the precedent of *Grandle* and *Knox I*.

⁵ Appellants’ Memorandum, pp. 9-10.

Appellants offer no reason to re-review trial facts or prior legal precedent. Re-reviewing the lower courts' factual application of the Supreme Court's legal precedent will lead to never-ending challenges, rather than abiding by stare decisis. "[T]he doctrine of stare decisis is designed to provide continuity and predictability in our legal system. We adhere to stare decisis as a means of thwarting the arbitrary administration of justice as well as providing a clear rule of law by which the citizenry can organize their affairs." *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003 Ohio 5849, 797 N.E.2d 1256. " 'Any departure from the doctrine of stare decisis demands special justification.' " *Galatis* at ¶44, quoting *Wampler v. Higgins* (2001), 93 Ohio St.3d 111, 120, 2001 Ohio 1293, 752 N.E.2d 962. The Supreme Court defined what constitutes "special justification" in its decision in *Galatis*: "[I]n Ohio, a prior decision of the Supreme Court may be overruled where (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it." *Id.* at 463; see, also, *State v. Mathis*, 109 Ohio St.3d 54, 2006 Ohio 855, 846 N.E.2d 1, at fn.7 (courts must adhere to prior precedent unless the *Galatis* elements have been satisfied); *Burton* at ¶22 (applying the *Galatis* test). Appellants have not raised any "specific justification" as to why this court should overrule *Grandle, supra*.

In *Grandle, supra*, the Ohio Supreme Court held 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..." *Grandle v. Rhodes* (1959), *supra*, and *Knox I, supra*; see also Opinion, ¶ 49 (emphasis in original). The Court in *Knox I* adopted the precedent set in *Grandle*, finding that the Ohio Constitution restricts expenditure of the County Engineer's funds for use for highway purposes, and without evidence of that "direct connection" to a highway purpose, the "state Constitution precludes the engineer from paying the CORSA invoices at issue." *Knox I*, 109 Ohio St.3d at 356; see also Article XII, Section 5A of the Ohio Constitution.

Appellants, however, focus on the *Knox I* language where the Ohio Supreme Court stated that, "if the record contained evidence that the CORSA premiums pertained to highway purposes or were directly related thereto...our outcome might not be the same." *Id.* at 356 (emphasis added). Using identical evidence as stipulated in *Knox I*, Appellants' apparent interpretation of this part of the *Knox I* decision implies that the Ohio Supreme Court required only a proffer of evidence that the CORSA premiums were directly tied to highway purposes; upon that proffer, the Engineer would be required to pay the CORSA premium invoice sent by Appellant. In other words, if the Appellants say CORSA premiums are tied to highway purposes, then it must be so, and the Engineer must pay the premium. That is not a proper reading of

Knox I.

Following *Knox I*, the Appellate Court required that the Appellants' evidence demonstrate that there is an actual nexus between CORSA and highway purposes. Opinion, ¶¶55-58, 61.

The Appellate Court found that Appellants failed in their burden to draw that connection. *Id.* Specifically, the Appellate Court found that the CORSA representative, who testified for Appellants, acknowledged that the premiums were prospective in nature: the CORSA premiums cover possible future payouts, rather than reimbursements for actual past payouts. *Id.* at ¶56. Moreover, CORSA protects not only the Engineer's office, but any office and employee of the county. *Id.* at ¶57. If another department suffers a loss, but the Engineer's office does not, the share paid for by the Engineer's office (from the Constitutionally-restricted monies) are paid to benefit those other county offices, rather than directly-related costs of highway purposes. *Id.* Based on the evidence presented at trial by Appellants, the Appellate Court found that the Appellants' evidence was speculative, and failed to establish "a nexus between CORSA and highway purposes or the operation of the Engineer's office." *Id.* at ¶47.

Appellants' 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 funds.

Appellee's Position to Appellants' Proposition of Law No. II: No statutory or case law authority exists establishing Appellants' right to CORSA premiums.

The Commissioners argued no such "right" below. Nor do Appellants explain why this proposition of law is of public or great general interest and involves a substantial constitutional issue.

The Engineer agrees with the basic proposition that Appellants are entitled to payment from Constitutionally-restricted funds when they provide an explanation within the bounds of the law, that the funds are directly related to a highway purpose. Such was the Engineer's admission, and the finding of the Court of Appeals related to a dump truck accident deductible. Opinion, ¶¶28, 50, 60. Using the Appellate Court's criteria — and that of *Knox I* — the deductible for the damaged truck was a specific reimbursement for a vehicle which was being used for a highway purpose, and thus, payment from the Constitutionally-restricted funds was proper. The truck deductible was not a speculative payment for something that may — or may not — happen in the future. Absent such a tie to a highway purpose, the Engineer is precluded by law from making such a payment. *Knox I*, 109 Ohio St.3d at 356.

Reverting to argument prior to this case below, Appellants again request that this

Court overrule its own precedent — that of *Knox I* in asserting that R.C. §315.12 “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,” and that “R.C 315.12(A) does not preclude the remaining one-third of the engineer’s operating costs from being paid with MVGT funds.”⁶ (emphasis in original). *Knox I* overruled this point, noting that the Constitutional restriction overrides any statutory calculation.

Appellants also resurrect *Madden v. Bower* (1969), 20 Ohio St.2d 135, 254 N.E.2d 357. Again, Appellants seek a legal reversal on the Appellate Court’s fact application of this Supreme Court opinion. The Appellate Court correctly distinguished *Madden, supra*, payroll benefits as a matter of fact from payment of CORSA premiums. Opinion, ¶52. *Madden* addressed health insurance premiums for employees. In *Madden*, this Court found that the county engineer’s employee health insurance premiums paid by the county commissioners for the county employees’ group health insurance plan was directly related to a highway purpose because those employees worked on the highway and the premiums were part of an employee benefit package. Opinion, ¶51, citing *Madden, supra*.

CORSA, on the other hand, is not insurance and is not part of an employee benefit package; rather, it is a risk-sharing pool. Opinion, ¶52; see also R.C. 2744.08. The Appellate Court distinguished *Madden* from the present case because health

⁶ Appellants’ Memorandum, p. 11.

insurance premiums paid for employees of the County Engineer — employees working on the highways — are directly related to highway purposes. Opinion, ¶58. The Appellate Court found that the record in the present case, unlike that in *Madden*, simply does not establish a “sufficient nexus between CORSA and either a highway purpose or a cost of operation.”

Finally, Appellants assert that a mandatory injunction is the proper remedy in this case, that “money damages are impossible.”⁷ Yet Appellants seek money damages. Complaint, Prayer for Relief, B, “(1) pay the outstanding invoices... and (2) pay reasonable charges billed....” Appellants’ own jurisdictional brief states that they want “to obtain payment” for the CORSA premiums.⁸

The authority Appellants claim for statutory mandatory injunction referred to in *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141, 153,⁹ was R.C. §2727.01, repealed in 1971; no statute authorizes such a cause of action today, mandamus being the proper remedy to direct the Engineer to exercise his discretion.

Conclusion

There is no issue of public or great general interest and no substantial constitutional question for this Court to address. The issues raised by Appellants are factual issues, or seek the reversal of well-settled Ohio Supreme Court precedent.

⁷ Appellants’ Memorandum, p. 11.

⁸ Appellants’ Memorandum, p. 11.

⁹ Appellants’ Memorandum, p. 10.

Accordingly, the Engineer's request that this Court not accept discretionary jurisdiction of this case.

Respectfully submitted,



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Certificate of Service

I hereby certify that on this 16th day of June, 2011, a copy of Appellee Knox County Engineer's Memorandum Contra was sent by regular U.S. mail to the following:

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