

ORIGINAL

IN THE SUPRME COURT OF OHIO

ALLEN STOCKBERGER, THERESA A.	:	
BEMILLER, AND ROGER REED,	:	
In their official capacity as the	:	Supreme Court Case No. 2011-0859
Board of County Commissioners	:	
of Knox County,	:	
	:	On Appeal from the Knox County
Appellants	:	Court of Appeals
v.	:	Fifth Appellate District
	:	
JAMES L. HENRY, in his official	:	Court of Appeals
Capacity as Knox County Engineer,	:	Case No. 10CA000018
	:	
Appellee,	:	

MEMORANDUM IN OPPOSITION TO JURISDICTION BY AMICUS CURIAE COUNTY ENGINEERS ASSOCIATION OF OHIO

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I. AMICUS CURIAE COUNTY ENGINEERS ASSOCIATION OF OHIO'S STATEMENT OF WHY THIS CASE NEITHER INVOLVES SUCH A SUBSTANTIAL CONSTITUTION QUESTION NOR IS THE CASE OF SUCH GREAT PUBLIC OR GENERAL INTEREST AS THE THIS COURT SHOULD ACCEPT THE CASE FOR REVIEW

The County Engineers Association of Ohio ('CEAO') of Ohio submits this memorandum on behalf of the Appellee Knox County Engineer and in opposition to the Knox County Commissioners' Memorandum in Support of Jurisdiction.

CEAO is a non-profit corporation comprised of the eighty-eight county engineers, eighty-seven of whom hold office independently of their respective boards of county commissioners. One of the duties of a county engineer is to provide the public with safe and efficient roads and bridges. CEAO works with the public sector, legislators, and state, county, municipal, township and other public officials to secure the necessary funding to create this system of roads and bridges. Sometimes when there are attempts to wrongly divert highway funds intended to help provide that system, CEAO will file *amicus curiae* statement or brief on various legal issues. CEAO does so in this case.

The Commissioners' explanation of why this case ("*Knox II*") is a case of such great public or great general interest and conveys a substantial constitutional question fails to state a case for acceptance of this appeal.

This case is simply a rehash of a case previously decided by the Supreme Court ("*Knox I*") between the same parties over whether or not Article XII, Section 5a of the Ohio Constitution prohibits the use of state motor fuel and vehicle registration tax revenues to pay a portion of the costs incurred by the Knox County Board of Commissioners for belonging to the County Risk Sharing Authority ("CORSA"), a multi county joint self insurance pool that provides liability and property coverage to Knox County in its entirety and there is no compelling need to take Court

time to review the Court of Appeal's decision. *Knox Cty. Bd. of Commrs. v. Knox Cty. Engineer*, 109 Ohio St.3d 353, 2006-Ohio-2576.

In *Knox I*, the Court held "The Ohio Constitution restricts the expenditure of moneys derived from the registration, operation, or use of vehicles on public highways and from fuels used to propel such vehicles to the purposes listed in Section 5a, Article XII or to purposes directly connected there to. (*Grandle v. Rhodes* (1959), 169 Ohio St. 77, 8 O.O.2d 40, 157 N.E.2d 336, approved and followed.)" *Knox I*, Syllabus.

This Court pointed out that *Grandle* held that the permitted uses are *closely* interpreted and must be *directly connected*. This Court found no legal argument that could sustain a finding that highway funds could be used to pay CORSA costs but was troubled by the Knox County Commissioners failure to submit evidence on the issue and said if such evidence were presented the outcome might be different.

The Commissioners brought this action because they felt they were unsure of the meaning of the rather explicit standard that the Court set in *Knox I* and they wanted to divert the funds to other uses, having used general funds to pay CORSA costs. The Commissioners claim they and other counties are short of money for other programs under their control and this Court should review this case and presumably reverse the *Knox I* holding and let them divert the highway funds to another use.

Needing the funds is neither a legal nor a factual argument that can be used to divert Constitutional and statutorily protected funds. And it is not an argument on which to gain a review of any case.

The Commissioners make no serious constitutional argument in their explanation to gain reversal of the Knox County Court of Appeals' decision. If they had such constitutional ground, the Commissioners would have sought a rehearing in *Knox I* and they did not..

As to the case being of such great public or general interest, the Commissioners have shown no other county where the commissioners were so uncertain as the holding in *Knox I* that they neither filed a lawsuit seeking the funds nor requested a declaration to entitlement to the funds.

The Commissioners cite no instance where because of purported lack of clarity in the *Knox I*, a county official sought a legal opinion from their county prosecuting attorney on the subject or the county prosecuting attorney sought an formal opinion from the Ohio Attorney General.

The Knox County Commissioners claim that a formal opinion letter from the Auditor of State expresses her finding of a lack of clarity. The Auditor's letter is not a formal opinion but simply a letter warning Larry Long, the Executive Director of the Ohio County Commissioner's Association that local county officials would need to have evidence showing compliance with Section 5a per the ruling of this Court in *Knox I* if his members sought to raid highway funds for other purposes. It does not appear that her letter was of such moment that it needed to be placed in a Auditor's Bulletin sent to all local officials. The Auditor of State is not the legal advisor to county officials. That is the role of the county prosecuting attorney and at the prosecution attorney's request, by the issuance of an Ohio Attorney General. The Auditor of State as well could have and has not sought a formal Ohio Attorney General's Opinion on the subject.

The Commissioners claim the lower courts have issued conflicting decisions implying the state courts are awash in conflicting decisions. The only trial court in the state that is in conflict

over this suit is the one that the Knox County Court of Appeals overruled. The Commissioners point to no pending or decided case in any of the courts of appeals and this is not a conflict appeal involving other courts of appeals.

This case is simply an instance where a court of appeals reviewed the record and found no evidence to support the Commissioner's request. This is something courts of appeals do routinely without the necessity of review by this Court. This case is not a case of great public or general interest.

II. AMICUS CURIAE COUNTY ENGINEERS ASSOCIATION OF OHIO (CEAO)
ARGUMENT IN OPPOSITION TO APPELLANT KNOX COUNTY
COMMISSIONERS PROPOSITIONS OF LAW IN THEIR MEMORANDUM IN
SUPPORT OF JURISDICTION

The Knox County Commissioners brought this case “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.” Commissioners’ Statement, page 1.

Knox I was an earlier case brought on essentially the same facts except that it was based on premiums paid 2002 and 2003 rather than 2007-2008 as in this case.

The reference to “directly connected to a highway purpose” is a reference to permissible uses contained in Article XII, Section 5a of the Ohio Constitution. Those uses that might be considered in this case include “construction, reconstruction, maintenance and repair of public highways and bridges and other statutory highway purposes”.

Other than by offering evidence to provide a factual basis to support a finding that CORSA premiums were directly connected to a highway purpose, the Knox County Commissioners can only challenge the decision in *Knox I* by a timely filed motion for reconsideration. The record is clear, the Knox County Commissioners did not timely file a

Motion for Reconsideration and cannot now obtain a reconsideration of any other concerns that they may have about the Court's decision in *Knox I*. S.Ct. Prac. R. 11.2.

The general facts of this case are set forth in the Opinion of the Knox County Court of Appeals in this case and need not be repeated in detail here. Appeal Opinion ¶¶ 8 through 31. The general undisputed background facts are that Knox County Commissioners joined a joint self-insurance pool, the County Risk Sharing Authority, generally referred to as CORSA. CORSA is created pursuant to and authorized by R.C. 2744.081 to provide member political subdivisions and their employees with protection against liability and property losses.

For the purpose of determining each member's cost of belonging to CORSA, CORSA calculates annual premium charges attributable to each county for the cost of belonging to CORSA. The calculations are based upon an actuarial review of past claims and projected future payouts. The result of this calculation is used to charge each county an annual premium.

All covered claims are paid from the pool of funds created as a result of the annual premiums from members of the pool. Appeal Opinion ¶57; Testimony of David Brooks, Managing Director of CORSA, Record Transcript, page 67, lines 3-5.

The Knox County Commissioners paid the annual premium charge from its general fund and then selected various agencies with restricted funds and billed certain agencies for a portion of the premium charges.

In the instance of the Knox County Engineer, the Knox County Commissioners demanded payment upon an allocation formula that used a comparison of the highway department's payroll, equipment, vehicles and property data relative to the county's total payroll, equipment, vehicle and property data.

The Knox County Commissioners requested the Knox County Engineer pay the amount billed from motor vehicle registration and motor vehicle fuel tax revenues and when the Engineer refused to pay, filed this action in which the Commissioners seeking an injunction seeking to enforce their request for payment against Knox County Engineer.

In *Knox I*, this Court found that the Knox County Commissioners had failed to prove that the billed charges were for or directly related to any of the purposes allowed by Article XII, Section 5a of the Ohio Constitution. Section 5a prohibits the use of these tax revenues except for purposes listed in 5a. And for this reason, this Court denied as a matter of law the Commissioners' request for a favorable declaratory judgment allowing the use of highway funds to pay CORSA premiums and denied an injunction mandating the Engineer to pay a portion of the CORSA premiums from the motor vehicle registration and fuel tax revenues available to the Engineer.

Clearly a multi self-insurance pool coverage that provides coverage for many lines of coverage including motorist type coverage does not distinguish between whether the person is engaged in work that is exempted under Section 5a or not covered by Section 5a. The premiums are paid into a pool or several pools that do not make such distinctions and covered claims are paid from the pools whose funds may include highway revenues paid to claimant regardless of covered claim.

However, this Court further indicated it was troubled by the Commissioners' failure to offer evidence to show that it fell within the exception to the prohibition against using highway revenues in Article XII, Section 5a and had the Commissioners offered such evidence, they might have prevailed. Tjhe Supreme Court did not say they would prevail but if they meet this evidentiary burden, the Commissioners might prevail. *Knox I* Opinion ¶¶3, 11, 14 and 15.

As indicated in their Statement of Case and Fact, the Commissioners filed the case before this Court for the express purpose of offering evidence that would prove the use of highway revenues to pay CORSA costs fell within the exceptions contained in Section 5a. An evidentiary hearing was held at which the Commissioners offered their evidence.

The Knox County Court of Appeals reviewed the evidence in the record including all the evidence offered by the Commissioners and applied Article XII, Section 5a against the offered evidence to determine if the evidence supported a finding that use of highway funds would fall within one of the permissible uses in Article XII, Section 5a. ¶45.

The Court noted that the Ohio Constitution sets out a list of uses that are acceptable for using highway funds but insurance or risk sharing are not in the list. ¶48.

“The evidence must show the expenditures are related to the operation of the office which are related to highway purposes, not simply operations of any office.” ¶53.

The Court found that: “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 does not, the share of premiums paid by the Engineer in effect provide a benefit to persons and offices not directly related to highway purposes.” ¶57,

The Commissioners in their Statement of Case and Fact, pp 5-7, do not challenge this finding.

Based on this finding, the Court found the “Commissioners have not established a nexus between the premium and highway purposes or the operation of the Engineer’s office”. The Court ruled that Commissioners failed to prove a case in which the expenditure of highway funds were permitted by Section 5a. ¶¶ 47, 61.

Commissioners' 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 and liability and loss resulting from the operations of a county engineer's highway department.

Commissioners' Proposition of Law No. 1 is erroneous on its face. Section 5a does not authorize the expenditure of one dime of highway funds. Statutory authority to expend funds must be found and that authority must be an expenditure allowed by Section 5a.

However, the Commissioners did present evidence it claimed would prove that the expenditure of highway funds to pay the portion of highway costs that they demanded the Engineer pay from highway funds was permissible under the exceptions to the prohibition against use of highway funds in Article XII, Section 5a.

The Knox County Court of Appeals found otherwise. The Court found no nexus between the benefits received by the county and the exceptions to the prohibition against use of highway funds in Article XII, Section 5a.

The Commissioners in their Proposition I Argument, the Commissioners point to no evidence that is contra to finding of the Knox County Court of Appeals.

First, the Commissioners review four cases that do not involve the evidentiary issue in this case of whether or not highway funds can be used to pay a portion of CORSA premium. *State ex rel. Kauer v. Defenbacher* (1950), 153 Ohio St. 268, 91 N.E.2d 512; *State ex rel. Preston v. Ferguson* (1960), 170 Ohio St. 450, 166 N.E.2d 365; *State ex rel. Walter v. Vogel* (1959), 169 Ohio St. 368, 159 N.E.2d 892; *Madden v. Bower* (1969), 20 Ohio St.2d 135, 254 N.E.2d 357 (1969).

In fact, as is clearly disclosed in their Proposition I Argument, the cases do not involve CORSA payment issues at all. Because they do not discuss issue before this Court, the Opinions

in those cases are not relevant to the outcome in this case and cannot be used to determine the evidentiary outcome of this case.

Next, the Commissioners cite the case of *Ohio Govt. Risk Mgt. Plan v. City. Risk Sharing Auth. Inc.* (6th Dist. 1998), 130 Ohio Ap.3d 174, 180. This case involves coverage disputes between two joint self-insurance pools. The court used certain insurance principles to interpret the meaning of pool coverage documents that also appear in insurance coverage documents. The Court did not find that the pools were insurers or in operated as insurers. Payment of the costs of belonging to either pool was not an issue in the case and case's holding is irrelevant to the issue of using highway funds to pay a portion of CORSA costs.

The Commissioners conclude with a rambling argument they claim is logical. Yet they offer no challenge to the Court's key finding that a premium paid with highway funds, could be used to pay a claim in another department which was not based on highway operations. Such a use of premiums paid with highway funds would clearly violate Article XI, Section 5a. Because of this factor, there is no nexus between the premiums paid with highway funds and the exemptions from the use of highway funds in Section 5a.

The Commissioners argument of direct connection to the list in Section 5a fails principally because risk of liability or property loss is not part of construction, etc. or related to the process of construction etc. but rather at best, may result from those activities. This is not the kind of close restriction that is directly connected to the list of exceptions in Section 5a that meets the constitutional requirement for an exemption from the prohibition.

Of course, if the Court had found that the expenditure was for a highway purpose, the Commissioners would have had to show statutory authority for the use of the highway funds and

their Proposition I Argument does not make a statutory argument. There is no mention of statutory authority anywhere in Proposition I.

If a statutory argument is to be made, it must consider the fact that motor vehicle fuels and registration taxes are levied and the revenues distributed to counties pursuant to statutes to be used for certain purposes. However none of the tax levying and distribution statutes list or reference the costs of belonging to a joint self-insurance pool as one of the purposes for which the funds may be expended. R.C. 4503.02, 4504.02, 4504.15, 4504.16, 5735.05, 5735.25, 5735.27(A)(3)4), 5735.29.

Particularly significant is the fact that the cost of a joint self-insurance pool is not listed in the tax levying statutes. Use of highway funds to pay costs not listed in the tax levy statutes would trigger a violation of Article XII, Section 5 of the Ohio Constitution which requires as a matter of constitutional law that "...every law imposing a tax shall state, distinctly, the object of the same, to which only, it shall be applied." See *Walton, Ex Rel., v. Edmondson* (1914), 89 Ohio St. 351, 363-5. *In re Petition for Transfer of Funds by Perry Twp.* (1988), 52 Ohio App.3d 1, 3-4.

Argument regarding Commissioners' 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.

In order to obtain an injunction ordering the Knox County Engineer requiring payment of CORSA costs from highway funds, the Commissioners must prove the Commissioners have a vested right to receive the funds and the Engineer has an obligation or duty to respond to their demand for the funds, and the Commissioners as the moving party must show by clear and

convincing evidence that immediate and irreparable harm will result and that no adequate remedy at law exists.

Commissioners argue that two statutes create a vested right of the Commissioners to receive the highway revenues and an obligation or duty of the Engineer to respond to that right, R.C. 2744.081(A)(4) and R.C. 305.12(A).

R.C. 2744.081(A)(4)

The Commissioners statement that “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 cost of the Engineer’s highway department.” and their statement that ‘R.C. 2744.081(A)(4) specifically authorizes that a “joint self-insurance pool (i.e., CORSA and member counties such as Knox County) may allocate the costs of funding the pool among the funds or accounts in treasuries of the political subdivisions’ are a mischaracterization of the language in R.C. 2744.081(A)(4) and are intended to lead the reader into believing that Knox County has specific statutory authority to allocate costs to any department it so chooses. Commissioners Prop II Argument, page 11 and Commissioners Jurisdiction Statement, 6 respectively. R.C. 2744.081(A)(4) 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 on the basis of their relative exposure and loss experience.” No where does the provision allow for an individual county to allocate costs at all. In acting alone, Knox county allocated in violation of this statute. R.C. 2744.081(A)(4) neither empowers Knox County to allocate costs or authorizes the Commissioners to require the Engineer to pay according to the allocation.

It is a fact that the Commissars allocated the CORSA costs to the Engineer and the other agencies from whom the Commissioners determined they could get the funds. There is no evidence in the record that the either CORSA or its member counties acting as a group required Knox County to allocate. With respect to CORSA, it was their policy not to allocate the costs or to require its members to allocate costs but leaves the determination to each county. Testimony of David Brooks, Managing Director of CORSA, Record Transcript, page 36, lines 1 and 2; pages 74, line 5 through page 76, line10. The evidence is clear that CORSA billed the county for CORSA costs in their entirety and accepted payment from the county out of its general fund. CORSA required no allocation of the funds. The Knox County Commissioners allocated the funds by its own authority, invoiced the Engineer for the allocated amount and filed this action demanding an injunction requiring the Engineer authorize payment from the state motor vehicle fuel and license tax revenues under his control.

Even if the Commissioners were found to have such authority under R.C. 2744.01(A)(4), the Commissioners did not perform an allocation required by the section. The Commissioners performed the allocation only as to certain select funds or accounts within Knox County where as R.C. 2744.01(A)(4) requires the allocation to be performed based upon all of “*** the costs of funding the pool among the funds or accounts in the treasuries of the political subdivisions on the basis of their relative exposure and loss experience.” The Commissioners did not allocate across all of the funds or accounts of the counties who belong to the pool nor did they allocate based upon the pools relative exposure and loss experience although the Court of Appeals Court found the allocation to be mathematically accurate.

R.C. 315.12(A).

R.C. 315.12(A) provides that two thirds of the cost of operation of the office of county engineer, including the salaries of all of the employees and the cost of the maintenance of such office as provided by the annual appropriation made by the board of county commissioners for such purpose, must be paid out of the county's share state motor vehicle and motor fuel taxes distributed to the county pursuant to the tax distribution statutes.

The Knox County Court of Appeals reviewed the record and found that the CORSA coverage covers the entire county in a manner that it could not be considered a cost of the operation of the county engineer because it covered all county offices. Because the CORSA costs are not part of the cost of operation of the office of county engineer, the provision provides no vested right in the Knox County Commissioners to require the County Engineer to pay a portion of the CORSA costs and no injunctive relief can be had. Appeals Opinion, ¶53.

The Court further found that because R.C. 315.12 applied to all costs of the operation of the office of county engineer which office included both highway activities and non-highway activities, the statute cannot be used as a basis for determining if a cost met the test for permissible uses contained in Section 5a. Appeals Opinion, ¶¶53-58.

Even if CORSA costs had been determined to be a cost of the County Engineer's Office, R.C. 315.12 makes no mention of CORSA costs and vests the Commissioners with no authority to pay one bill over another bill from highway funds. The obligation is simply to spend two thirds of the costs of the office from highway funds. Given the size of the revenues generated by state motor vehicle registration and fuel taxes to all other sources of revenues available to the engineer and the size of the highway operations, the engineer would be in compliance with R.C. 315.12 even if he chose to not to pay CORSA costs from those funds.

In any event, the Commissioners offered no evidence that the Engineer was in any manner non-compliant with the requirements in R.C. 315.12.

If a transfer from the MVGT account were to occur, such transfer would be blocked by the anti-division statutes aimed at prohibiting transfers of highway funds that have been sent to the county for specific uses. R.C. 5705.14 and R.C. 5705 15.

With respect to the issue of harm, it is questionable that the county was damaged in anyway by the use of highway funds to run the department of highway operations rather than pay CORSA costs from the highway funds. The county would have received the benefit in terms of highway services. It is in the public interest to see that highway services are properly maintained.

V. CONCLUSION

For the reasons discussed above and the reasons stated by the Knox County Engineer in his Memorandum, CEAO respectfully requests that his case not be accepted for review.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of this *Amicus Curiae* Memorandum in Opposition to Jurisdiction was sent by ordinary U.S. mail on June 20, 2011 to the following:

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