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. 2011-0859
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.	:	

BRIEF 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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INTRODUCTION

The issue in this case is straightforward. 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 solely from the operations of a county engineer's highway department? Based upon the undisputed evidence presented below, the answer is yes. Such costs fall squarely within the costs of constructing, reconstructing, maintaining, and repairing public roads and bridges or directly connected thereto.

Plaintiffs-Appellants, the Knox County Commissioners ("the Commissioners"), brought this case seeking reimbursement from the Defendant-Appellee, James Henry, Knox County Engineer ("the Engineer"), for such insurance costs. While Section 5a restricts the use of MVGT funds to certain enumerated "highway purposes," Section 5a does not limit the use of MVGT funds solely for expenses incurred in the physical construction of highways. Particularly relevant here, in *Madden v. Bower* (1969), 20 Ohio St.2d 135, this Court recognized that the payment of health insurance premiums for the county engineer's highway department employees 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 insurance premium at issue here. Constructing, maintaining, and repairing roads (the very functions of the Engineer's highway department) create a risk of liability and loss, and those risks are a cost of performing

[1] "MVGT funds" are motor vehicle license tax revenues distributed to counties pursuant to Revised Code Chapters 4501, 4503 and 4504 and motor vehicle fuel excise tax revenues distributed to counties 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. See R.C. 315.12(A).

such activities. These costs are not discretionary expenditures of the county or the Engineer. Rather, they are additional costs that are inherent in every operation and activity that the Engineer's highway department engages. These costs are paid by the county one way or the other, and insurance is one mechanism to pay such costs. The Engineer has never disputed that MVGT funds may be used to pay such losses and liabilities directly as they are incurred. There is no principled basis to suggest that the very same MVGT funds cannot be used to purchase insurance to defray such future costs.

This case presents an opportunity for this Court to clarify a substantial constitutional issue that has divided the courts and county officials for years. The issue 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 ("*Knox I*"). In *Knox I*, this Court held that the limited record before the Court contained insufficient evidence to demonstrate that the specific CORSA insurance premiums at issue were "directly connected" with a highway purpose as required by Section 5a. Id. at ¶11. At the same time, 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.

Unlike *Knox I*, the uncontroverted evidence presented in this case establishes that the CORSA premium at issue here 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 does not relate to the non-highway operations of the county engineer's office, and that the CORSA premium is directly related to covering the risks inherent in constructing, maintaining, and repairing roads and bridges.

Because 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 the Engineer's highway department, the decision below must be reversed.

STATEMENT OF THE CASE AND FACTS[2]

CORSA is a joint self-insurance pool, providing insurance coverage to its member counties, including Knox County and the Engineer's office.

Ohio counties 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 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 R.C. 2744.081. [Tr. 18:13-15 (Brooks); S-5.][3] While CORSA is not 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);

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[2] A one-day bench trial was held on August 24, 2009. The Trial Court heard testimony from three witnesses: David Brooks, Managing Director of CORSA; Rochelle Shackle, Clerk/Administrator for the Commissioners; and the Engineer. The testimony of Sharon Lamb, Deputy County Auditor, was presented by stipulation filed by the Parties on August 17, 2009. The parties also stipulated to the admissibility of thirty-three Joint Exhibits. There were no material factual disputes between the parties.

[3] "Tr." 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-___." A copy of the trial transcript (condensed) and copies of specific Joint Exhibits are contained in the Supplement to the Merit Brief of Plaintiff-Appellants filed contemporaneously herewith, and where applicable, references to the Supplement page numbers are included as "S-___."

S-5.] CORSA collects premiums from its members based on rates established by an actuary and pays costs associated with covered claims. [Tr. 19:14-19 (Brooks); S-5.]

Knox County has been a member of CORSA since 1987. [Tr. 22:23 – 23:3 (Brooks); S-6.] For the relevant period of time, CORSA provided general liability coverage, law enforcement liability coverage, automobile liability coverage, errors and omissions liability coverage, and property coverage for Knox County. [Tr. 24:17 – 25:16 (Brooks); JX-5, pg. 20-35 (Memorandum of Coverage for Knox County, May 1, 2007); S-5, 6.] With the exception of law enforcement liability coverage, which only applies to the Knox County Sheriff's Department and correctional facility, the coverages applied to all Knox County offices, including the Engineer. [Tr. 25:17 – 26:5 (Brooks); S-7.] The total Knox County CORSA premium for the 2007/2008 coverage year was $217,510, which amount was paid by the Commissioners to CORSA out of the county's general fund. [Tr. 33:15-22 (Brooks); 111:6-10 (Shackle); S-9, 28.]

The Allocation Process.

R.C. 2744.081(A)(4) specifically states 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 the Commissioners the authority to allocate the costs for participating in CORSA to the various funds and accounts in the treasury of Knox County.

Historically, the Commissioners have allocated a portion of the annual CORSA premium to certain county offices that receive a significant amount of their funding from sources outside of the general fund. 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 these offices. [Tr. 36:4-20 (Brooks); 113:15-20 (Shackle); S-9, 29.] The allocation process

also encourages loss control by placing the cost of insurance directly in the budgets of these offices, thereby creating an incentive to reduce such risks of loss. [Tr. 36:6-20 (Brooks); S-9.] The allocation is based upon a formula developed by CORSA under the direction of its actuary. [Tr. 35:5-11 (Brooks); S-9.]

The dispute in this case involves the allocation of the CORSA premium to the Engineer's highway department to be paid out of MVGT funds. The Engineer's office is divided into two departments, a map department and the highway department, and each department receives funding from different sources. [Tr. 97:10-14 (Shackle); S-25.] The map department is funded exclusively by the county's general fund. [Tr. 98:6-10 (Shackle); S-25.] The operations of the Engineer's highway department, however, are funded primarily, though not exclusively, from MVGT funds. [Stipulation in Lieu of Trial Testimony of Sharon Lamb, Knox County Deputy Auditor ("Lamb Stipulation") at ¶¶1-2; Tr. 97:15 – 99:1 (Shackle); S-25, 51.] In fact, R.C. 315.12(A) requires that at least two-thirds of the cost of operations of the county engineer's office be paid from these MVGT funds.

All of the county departments, except the Engineer, authorized payment of the reimbursements sought by the Commissioners. [Tr. 114:9-14 (Shackle); S-29.] While the Engineer previously authorized payment from MVGT funds, he stopped doing so in approximately 2001, based upon legal advice that continuing to do this would be a violation of the Ohio Constitution. [Tr. 174:4-13 (Henry); S-44.]

The Knox I Litigation.

In 2003, the Commissioners sought a judicial resolution to their dispute with the Engineer as to whether MVGT funds could be used to pay the portion of the county's CORSA premium allocated to the Engineer. To that end, the Commissioners filed a declaratory judgment action

against the Engineer, which litigation resulted in this Court's 2006 decision in *Knox I.* 109 Ohio St.3d 353, 2006-Ohio-2576.

In *Knox I*, this Court reaffirmed the general proposition that Section 5a restricts the expenditure of MVGT funds to the highway purposes listed in Section 5a or to purposes directly connected thereto. Id., syllabus. As to the CORSA premiums at issue in that case, this Court found that the limited record before the Court failed to contain sufficient evidence to show whether these premiums were "directly connected" with a highway purpose as required by Section 5a. Id. at ¶11. At the same time, however, 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.

The Commissioners filed this litigation to clarify and address this Court's Knox I concerns.

Given this Court's opinion in *Knox I*, the issue of whether and under what circumstances MVGT funds could be used to defray CORSA premium costs was left unresolved. Consistent with the Court's holding in *Knox I*, the Commissioners continued to believe that MVGT funds could be used to defray such costs attributable to the Engineer's highway department so long as evidence demonstrated that the CORSA premium was a highway purpose.

To that end, on June 26, 2007, the Commissioners sent the Engineer an invoice for $19,789.00, the amount allocated for the Engineer's portion of the total 2007/2008 Knox County CORSA premium. [JX-10; Tr. 37:14-21 (Brooks), 111:11-19 (Shackle); S-10, 28, 71-90.] The formula used to calculate that invoice reflected the amount of the total CORSA premium attributable only to the Engineer's highway department. [Tr. 39:16 – 46:9 (Brooks), 155:7 – 158:2 (Henry); S-10-12, 39-40.] The invoice included an explanation as to the method of

calculating the allocation and an explanation of why the requested reimbursement was a highway purpose and/or directly connected to a highway purpose. [JX-10; Tr. 38:3-22 (Brooks); S-10, 71, 74, 76, 78, 80.] The Engineer refused to authorize payment of this invoice. [Tr. 111:20 – 112:3 (Shackle); 178:3-6 (Henry); S-28, 45.]

At the same time, the Commissioners also sent the Engineer an invoice for $2,500.00, seeking reimbursement for a deductible paid by the Commissioners out of the county's general fund for repairs to an Engineer's truck damaged when it overturned while plowing snow on a county road. [JX-20; Tr. 50:14 – 51:10 (Brooks), 115:14-24, 116:5-10 (Shackle); 159:20 – 160:2 (Henry); S-13, 29, 40.] The Engineer also refused to authorize payment of this invoice. [Tr. 116:14-16 (Shackle); 182:6-9 (Henry); S-29, 46.]

On February 13, 2008, the Commissioners, in their official capacity, filed their Complaint against the Engineer, in his official capacity, in order to provide a resolution to the dispute between the parties relating to the two invoices. See February 13, 2008 Complaint. The Commissioners sought a declaration that the invoices sent to the Engineer seeking reimbursement for the Engineer's share of the cost of the county's participation in CORSA for 2007-2008 (JX-10) and for reimbursement of the deductible arising out of the February 2007 accident involving the truck (JX-20) were expenditures for a highway purpose or directly connected with such highway purposes, and thus properly payable from MVGT funds. Id. at 6. The Commissioners also sought an order requiring the Engineer to authorize payment of the invoices. Id. A bench trial was held on August 24, 2009.

On November 19, 2009, the Trial Court issued its decision, labeled Findings of Fact, and its Judgment Entry. [Nov. 19, 2009 Findings of Fact (copy attached at Appendix Ex. 6, A-26); November 19, 2009 Judgment Entry (copy attached at Appendix Ex. 5, A-25).] In that decision

and Judgment Entry, the Trial Court ruled that the CORSA premium and the deductible were both directly connected to a highway purpose and constitutionally payable from MVGT funds.

The Engineer appealed, and on August 31, 2010, the Fifth District Court of Appeals dismissed that appeal, finding that the November 19, 2009 Judgment Entry was not a final appealable order because the Trial Court has failed to address the Commissioners' additional request for mandatory injunctive relief requiring the Engineer to pay the invoices in question. *Knox County Commissioners v. Knox County Engineer*, 2010-Ohio-4099, ¶¶17-18 (5th Dist., Aug. 31, 2010).

On remand, the Trial Court issued an Amended Judgment Entry, reaffirming its prior decision to grant the Commissioners' request for declaratory judgment. [October 5, 2010 Amended Judgment Entry (copy attached at Appendix Ex. 4, A-23).] In that same entry, however, the Trial Court denied, without explanation, the Commissioners' request for a mandatory injunction. Id.

Both parties appealed. The Engineer appealed the trial court's decision that MVGT funds could be used to pay CORSA premiums and the deductible under Section 5a. The Commissioners appealed the Trial Court's refusal to grant a mandatory injunction.

The Fifth District Court of Appeals reversed, holding that the Commissioners had not presented sufficient evidence to establish a direct nexus between the premiums and a highway purpose. *Stockberger et al. v. Henry*, 2011-Ohio-1710, ¶61 (5th Dist. April 7, 2011) (hereinafter "Opinion") (copy attached at Appendix Ex. 3, A-5). In so doing, the Court of Appeals overruled the Engineer's procedural defenses, including the Engineer's arguments that the matter was *res judicata*, that the Commissioners did not have standing to bring the action, and that the Engineer did not have the capacity to be sued. Opinion at ¶¶32-40. The Court of Appeals also rejected the

Engineer's argument that he had the discretion to determine whether an expenditure is for a highway purpose. Opinion at ¶41-45. Likewise, the Court of Appeals held that the Commissioners proved that CORSA's computation of the Engineer's share of the premium was accurate and that the deductible incurred for the repairs to the damaged truck while plowing snow was a highway purpose. Opinion at ¶¶47 & 50.

The Court of Appeals ultimately held, however, that the Commissioners failed to prove that the premium itself was for a highway purpose. According to the Court of Appeals, "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 at ¶17. Having found that the Engineer could not constitutionally pay the CORSA premium with MVGT funds, the Court of Appeals rejected the Commissioners' cross-appeal. Opinion at ¶65-66.

On September 21, 2011, this Court accepted the Commissioners' appeal on Proposition of Law No. I, to wit, whether Section 5a authorizes the use of MVGT 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.

ARGUMENT

The Commissioners' Proposition of Law:

> 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.

A. The cost of CORSA to cover the risk of loss and liability resulting from the operations of a county's highway department is a highway purpose.

1. Article XII, Section 5a requires that an expenditure from MVGT funds be directly connected to a highway purpose, which includes more than the physical construction of highways.

Section 5a states:

> No moneys 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 costs of administering such laws, statutory refunds and adjustments provided therein, payment of highway obligations, costs for construction, reconstruction, maintenance and repair of 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 highways.

Section 5a was adopted by Ohio's voters by initiative petition on November 4, 1947, and became effective January 1, 1948. It is similar to other "anti-diversion amendments" adopted by numerous other states, primarily beginning in the 1930's. See generally Ohio Constitutional Revision Commission – Proceedings Research Vol. 4, Finance and Taxation Committee, p. 1755 (Sept. 22, 1972). These constitutional amendments were adopted, at least in part, in response to federal law that became effective in 1935, which required that for a state to receive federal highway funds, the state would have to apply the revenue it gained from state highway-related taxes to fund highway-related purposes. See 23 U.S.C.A. §126 (effective until June 8, 1998); Ohio Constitutional Revision Commission – Proceedings Research Vol. 4, p. 1755. This federal

requirement was repealed, however, in 1998. See Pub.L. 105-178, Title I, §1226(d); Pub.L. 105-206, Title IX, §9003(a), July 22, 1998, 112 Stat. 839.

As this Court reaffirmed in *Knox I*, Section 5a restricts the expenditure of MVGT funds to the purposes listed therein or to purposes "directly connected thereto." 109 Ohio St.3d 353, syllabus. At the same time, however, Section 5a is an exception to the legislature's general authority to spend state revenue for general purposes, and as such, it must be strictly construed. *Pioneer Linen Supply Co. v. Evatt* (1946), 146 Ohio St. 248, 250-51; *State ex rel. Keller v. Forney* (1923), 108 Ohio St. 463, paragraph one of the syllabus; see also *Ohio Grocers Assn. v. Levin*, 123 Ohio St.3d 303, 2009-Ohio-4872, ¶11.

Moreover, cases from this Court establish that the restrictions contained in Section 5a allow the expenditure of MVGT funds for much more than the actual physical construction of highways. In other words, Section 5a does not limit the use of MVGT funds to those expenses incurred solely on bricks and mortar. Rather, an expenditure is "directly connected" and therefore authorized under Section 5a so long as the evidence shows that it is part of the costs of engaging in one of the identified highway purposes or in furtherance thereof.

For example, in *Kauer v. Defenbacher* (1950), 153 Ohio St. 268, 277, this Court held that highway funds could be expended for the study of a turnpike project. In *State ex rel. Walter v. Vogel* (1959), 169 Ohio St. 368, 372, this Court held that building and maintaining a street lighting system for the urban portion of a limited access highway could be paid from highway funds. As this Court recognized, "the conclusion is inescapable that, as a further safety factor, lighting systems for such urban portions are appurtenances thereto and a part of such highways and for that reasons are maintainable with funds derived from the fuel and license taxes." Id. Likewise, in *State ex rel. Preston v. Ferguson* (1960), 170 Ohio St. 450, 462-63, this Court held

that highway funds could be used to purchase whole tracts of land even though only a part thereof may eventually be used for highway purposes and the remainder sold for commercial or private use.

Finally, in a case particularly relevant here, *Madden v. Bower* (1969), 20 Ohio St.2d 135, this Court held that the payment of health insurance premiums for the employees of the county engineer's highway department were properly payable from MVGT funds. As this Court recognized, these health insurance premiums were "part of the cost of the services rendered by such employees *in the furtherance* of the purposes for which those statutes were enacted and for which those funds were established and are maintained." Id. at 138. Thus, the premium "attributable" to these employees "must be paid from those special funds and the county auditor has a duty to see that the premium cost is so apportioned." Id.

Here, the undisputed evidence conclusively establishes that the CORSA premium at issue here, attributable to insuring the risk of loss and liability resulting from the Engineer's highway operations, falls squarely within the requirements of Section 5a.

2. The undisputed evidence establishes that the cost of insuring the Engineer's highway department is directly connected to a highway purpose.

Like the cost of employee health insurance in *Madden*, the CORSA insurance costs at issue here are part of the costs incurred by the Engineer's highway department in furtherance of performing its highway operations. Thus, under the same analysis applied in *Madden*, the CORSA insurance costs properly attributable to the Engineer's highway department are "directly connected" with such highway purposes, and MVGT funds can be used to defray those costs consistent with Section 5a.

It is not disputed that constructing, maintaining, and repairing roads creates a risk of liability and loss, and those risks are a cost of engaging in such activities. These costs are not

discretionary cost of the county, but rather, they are additional costs that are inherent in every operation and activity conducted by the Engineer's highway department. [Tr. 36:4-20 (Brooks); S-9.]

Moreover, there is no dispute that paying for these losses and liabilities directly from MVGT funds as they are incurred would be a proper highway purpose. While no Ohio court has specifically addressed the issue, courts from other jurisdictions have consistently recognized that tort liability judgments and/or settlements arising from claims of defective highways are properly payable under analogous anti-diversion constitutional provisions. See, e.g., *Michigan Road Builders Assn. v. Dept. of Management and Budget* (Mich. App. 1993), 197 Mich. App. 636, 647, 495 N.W.2d 843, 848 (payment of tort judgments resulting from the improper planning, administering, constructing, reconstructing, financing, and maintaining roads were properly payable from highway funds); *Smith v. Coffey* (Mo. 2001), 37 S.W.3d 797, 801 (payment of judgment against state highway department for alleged failure to provide a clearly delineated stop bar at intersection was properly payable from restricted highway funds; "It follows that highway related activities include those resulting in injury as well as the satisfaction of any civil judgments arising from such activities."); see also Attorney General Opinion No. 97-020 (settlement or judgment amounts in connection with personal injury claims against the county resulting from the action of county engineer's highway department employee were payable from MVGT funds).

Significantly, the Engineer has never argued that MVGT funds could not be used to pay for the losses and liabilities resulting from the activities of the Engineer's highway department. In fact, the Engineer has effectively conceded the point numerous times. As the Court of Appeals itself recognized, the Engineer admitted that the deductible expense incurred for the

repairs to the Engineer's truck damaged while plowing snow on a county highway was a valid highway purpose. See Opinion at ¶50. At trial, the Engineer also admitted that it is a proper use of MVGT funds to repair a truck used by his highway department. [Tr. 161:4-8 (Henry); S-41.]

Given that there can be no serious dispute that it is constitutional to pay such losses and liabilities out of MVGT funds as they are incurred, there is no rational basis to suggest that the very same MVGT funds cannot be used to purchase insurance to defray such costs. While it is certainly true that there is no obligation on a county to purchase insurance or join a risk sharing pool to cover these losses or liabilities, "going bare" does not eliminate the risk of loss or liability. [Tr. 88:18-21 (Brooks); S-22.] Rather, going bare is simply an alternative mechanism to pay those costs. The costs are paid by the county one way or the other, and CORSA provides an insurance mechanism to pay such costs. "Common sense and the dealings of everyday business also demonstrate that liability insurance is a necessary cost of doing business in today's world, especially in the high-risk area of highway construction." *Knox I*, at ¶27 (Lundberg Stratton, J., concurring in part and dissenting in part).

The evidence also conclusively establishes that the risk of liability and loss resulting from the operations of the Engineer's highway department are included in the overall cost of the county's annual CORSA premium. Knox County's annual CORSA premium is determined by an actuary taking into account both the county's total exposure factor (i.e., the measure of risk based upon the county's total property values, number of vehicles, payroll, the number of deputies and inmates, etc.) and the county's loss experience (i.e., the individual loss history of the county for the previous five years). [Tr. 29:24 – 30:3 (Brooks), 31:20 – 33:14 (Brooks); S-8-9.] Thus, the county's total annual premium includes both the exposure and experience components attributable to the office of the Engineer. [Tr. 89:12-24 (Brooks); S-23.]

The evidence also conclusively establishes that the risk of loss and liability resulting from the Engineer's highway department are included in the coverage provided by the CORSA insurance. Specifically, CORSA provides Knox County with four lines of coverage applicable to the Office of the County Engineer. First, general liability coverage provides a legal defense and indemnification for suits or claims brought for nuisance or negligence caused by the Engineer's repair, construction, and maintenance of highways and bridges, including for example, unsafe road conditions, potholes, obstructions of stop signs, and failure to place or maintain guardrails. [JX-10, pg. 180; Tr. 41:5-14 (Brooks); S-11, 74.] Second, public officials liability coverage provides a legal defense and indemnification for claims against the Engineer and his employees for decisions relating to the expenditure of funds for the repair and maintenance of roads and bridges and for employment and supervision of highway department employees. [JX-10, pg. 182; Tr. 42:1-11 (Brooks); S-11, 76.] Third, automobile liability and physical damage coverage provides defense and indemnification against liability arising out of the use of vehicles to repair and maintain roads and bridges and/or replace and repair those vehicles damaged due to a covered event. [JX-10, pg. 184; Tr. 44:11-14 (Brooks); S-11, 78.] Finally, property coverage replaces or repairs damage to real estate and other equipment used by the Engineer's highway department to maintain and repair roads. [JX-10, pg. 186; Tr. 46:14-18 (Brooks); S-12, 80.]

Given the nature of the work conducted by the Engineer's highway department, it is not surprising that the Engineer's office represents a significant share of the claims submitted to CORSA from Knox County. For the five-year loss period of April 2002 through October 2007, the claims involving the Engineer represented the second highest total incurred amount of any Knox County department, second only to the catch-all of "all others," and represented the highest number of total claims of any department. [JX-7, pg. 116, 118; Tr. 47:1 - 48:25 (Brooks); S-12,

64, 66.] Examples of such claims from the Engineer's highway department include: liability when an Engineer's truck rear-ended another vehicle; liability when an employee negligently struck a third-party's vehicle with a rake; multiple claims for damage due to potholes and defects in roadways; liability when an Engineer's truck went left of center striking claimant's vehicle; and damage claims from rocks being thrown from an Engineer's truck. [See JX-7, pages 0109-0112; Tr. 47:1 – 48:25 (Brooks); S-12, 57-60.]

Finally, a conclusion that the CORSA premium is a highway purpose is compelled by the evidence in the record that shows that all the other costs and expenses incurred by the Engineer's highway department are paid with MVGT funds. The evidence conclusively establishes that MVGT funds pay the salaries and fringe benefits of all the employees who maintain roads and bridges. [Tr. 148:18-24 (Henry); Lamb Stipulation ¶¶1-3; S-37, 51.] MVGT funds pay for the purchase of vehicles and equipment used to maintain and repair roads and bridges. [Lamb Stipulation at ¶6 (indicating that all of the assets assigned to the Engineer's highway department were purchased with MVGT funds); S-53.] If it is appropriate to use MVGT funds to pay for the labor of such employees and the vehicles and equipment used by those employees, how is it then not appropriate to use MVGT funds to pay for the cost of insuring against the risk of liability and loss arising from the very same labor and from the use of those very same vehicles and equipment? The Engineer has never provided an answer to that question.

In short, the evidence firmly establishes that the expenditure for insurance properly attributable to covering the Engineer's highway operations is a highway purpose and properly payable from MVGT funds.

3. The evidence presented below fully addresses the concerns underlying this Court's decision in *Knox I* and conclusively establishes that the CORSA premium sought to be reimbursed out of MVGT funds covers only the highway operations of the Engineer's office.

The instant case was brought specifically to address the concerns underlying this Court's decision in *Knox I* and to comply with its implicit holding that MVGT funds could be used to pay CORSA premiums so long as there was an evidentiary basis to support such a finding.

In *Knox I*, the Commissioners sought reimbursement from the Engineer for a portion of the county's CORSA premium for the years 2002 and 2003. *Knox I,* 109 Ohio St.3d at ¶4. *Knox I* was decided on cross-motions for summary judgment and presented a discrete legal issue that did not necessitate a detailed factual record. Id. at ¶5. In particular, the Commissioners argued in *Knox I* that the payment of the CORSA premium was mandated and constitutional because R.C. 315.12(A) requires that at least two-thirds of the cost of operation of the office of the Engineer be paid from MVGT funds and that the CORSA premium constituted a "cost of operation" of the Engineer's office. Id. at ¶8. Thus, the Commissioners further argued that payment of the CORSA premium with MVGT funds was constitutional under Section 5a's provision that authorizes the expenditure of MVGT funds for "other statutory highway purposes."[4]

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[4] The Commissioner's reliance on R.C. 315.12(A) as providing both the statutory and constitutional grounds for using MVGT funds to pay CORSA premiums was consistent with numerous Ohio Attorney General opinions leading up to the *Knox I* litigation opining that the payment of insurance costs covering the county engineers office were constitutional because such expenses were a cost of operation of the engineer's office and made payable out of MVGT funds pursuant to R.C. 315.12(A). See, e.g., OAG No. 88-067 (costs allocated to county engineer's office for county's self-insurance program properly payable from MVGT funds); OAG No. 94-031 (costs allocated to county engineer's office for insurance premiums covering liability of engineer and staff properly payable with MVGT funds); OAG No. 97-020 (opining that CORSA costs allocated to county engineer were a "cost of operation of the office of county engineer under R.C. 315.12(A), which means that those premiums may be allocated to and paid

Given that the primary issue in *Knox I* was the application of R.C. 315.12(A), the factual record presented by the parties was minimal, consisting of the pleadings, written discovery responses, stipulations, and affidavits. Moreover, this limited record was focused primarily on the issue of whether the CORSA premium was a cost of operation of the Engineer's office, not whether the CORSA premium was independently a highway purpose. Both the trial court and court of appeals in *Knox I* agreed with the Commissioners' view, holding that the CORSA premiums constituted a cost of operation of the engineer's office and could therefore be paid without violating the Constitution. Id. at ¶5.

This Court, however, rejected such an approach. Instead, this Court ruled that "despite the mandate of R.C. 315.12(A) that two-thirds of the cost of operation of the engineer's office shall be paid from these restricted funds, the record before us does not contain any evidence regarding whether the *specific CORSA insurance premiums at issue here* are 'directly connected' with highway purposes." Id. at ¶11.

The key concern underlying the *Knox I* decision was the lack of evidence in the record demonstrating that the specific premium amounts were related to the highway operations of the Engineer's office, as opposed to his non-highway functions. See Id. at ¶¶12-13 (identifying various non-highway activities of the office of the county engineer). This Court quoted extensively from footnote 2 in *Madden* for the proposition that in funding the entire office of the county engineer, a board of county commissioners may not ignore the fact that certain duties of the county engineer involved functions unrelated to highway purposes. Id. 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 & 15.

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out of that portion of the county engineer's budget that is funded with motor vehicle fuel excise tax revenues").

This Court, however, did not hold that MVGT funds could never be used to fund the Engineer's share of the county's CORSA premiums. Tellingly, the syllabus in *Knox I*, which was joined by the entire Court, "simply and generally reassert[ed] the constitutional mandate of Section 5a." Id. at ¶16 (Pfeifer, J., concurring in part and dissenting in part). The *Knox I* syllabus says nothing about insurance premiums or the constitutionality of expending MVGT funds on insurance to cover the Engineer's office, let alone the Engineer's highway department. Rather, 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.

In this case, the Commissioners presented uncontroverted evidence showing that the CORSA premium covering the risk of loss and liability resulting from the Engineer's highway department was a highway purpose. In so doing, the evidence specifically addressed the key concerns raised by this Court in *Knox I*. First, the evidence establishes that the Engineer's entire office is not funded exclusively out of MVGT funds. Rather, only the operations of the Engineer's highway department are paid for with MVGT funds. The Engineer's non-highway operations are paid for by other sources, primarily the county's general fund. Second, and more importantly, the evidence conclusively shows that the CORSA premium at issue relates solely to insuring the highway operations of the Engineer's office, which are themselves paid with MVGT funds.

a. Neither the Engineer's entire office nor the Engineer's highway department is funded exclusively with MVGT funds.

As discussed above, in *Knox I*, the parties stipulated that all of the funding for the Engineer's entire operations were derived from MVGT sources. See 109 Ohio St.3d at ¶15. The

evidence in this case, however, establishes that the non-highway operations of the Engineer's office, such as the Map Department, are funded solely from non-MVGT sources, and that even the Engineer's highway department is not funded solely from MVGT funds.

The Engineer's office is divided into two departments for budgetary purposes: a map department and a highway department. [Tr. 97:10-14 (Shackle); S-25.] The operations of the map department are funded entirely out of the county's general fund. [Tr. 98:6-10 (Shackle); S-25.]

Likewise, while the Engineer serves under separate contracts with the Commissioners as both the county sanitary engineer and as the county storm water engineer, the Engineer is paid separately for his work performed in these roles out of non-MVGT funds. [Tr. 95:10 – 97:9 (Shackle); see also JX-17 and JX-18; S-24-25.] This compensation is in addition to what the Engineer is paid in his role as County Engineer. Id.

Even the Engineer's highway department is not funded exclusively from MVGT funds. Joint Exhibit 21 (S-91-93) reflects the revenue sources that fund all of the expenditures and appropriations related to the Engineer's *highway department*. [Tr. 104:12-18 (Shackle), 148:18-24 (Henry); Lamb Stipulation at ¶1; S-26, 37, 51.] This "MVGT account" consists primarily, but not exclusively, of MVGT funds, which are then commingled with other sources of revenue including fines, interest, and reimbursements from non-MVGT sources. [Lamb Stipulation at ¶2; Tr. 148:25 – 149:18 (Henry); S-37, 28, 51.] It is this MVGT account that pays for all of the expenses incurred by the Engineer's highway department. [Lamb Stipulation at ¶3; Tr. 149:19 – 150:1 (Henry); S-38, 52.] In other words, for each payment made out of this MVGT account on behalf of the operations of the Engineer's highway department, a significant percentage of that payment comes from MVGT funds and a smaller percentage comes from non-MVGT funds. It

is from this MVGT account that the Commissioners seek to have the CORSA premium reimbursed.

b. The allocation methodology used to calculate the Engineer's share of the annual CORSA premium reflects only the Engineer's highway operations.

The CORSA premium sought to be reimbursed from the Engineer's MVGT account relates solely to covering the operations of the Engineer's highway department.

The record conclusively establishes that the allocation methodology used by the Commissioners ensures that the reimbursement being sought out of MVGT funds is solely for that portion of the CORSA premium attributable to the *highway activities* of the Engineer and does not include that portion of the CORSA premium attributable to the Engineer's non-highway activities.

As described in the June 26, 2007 invoice (JX-10) and the trial testimony of Mr. Brooks, 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* based upon the highway departments' amount of exposure relative to the county's total exposure components. [Tr. 35:12-25 (Brooks); S-9.] Thus, for both the general liability and public officials liability line of coverages, the amount allocated to the Engineer is determined by dividing the payroll paid to the *highway department* employees by the total Knox County payroll. [JX-10, pg. 179, 181; Tr. 39:16 – 41:25 (Brooks); S-10, 11, 73, 75.] For the auto liability and physical damage line of coverage, the percent allocated to the Engineer is determined by dividing the total number of the Engineer's vehicles *used by the highway department* by the total number of county vehicles. [JX-10, pg. 183; Tr. 42:12 – 43:4 (Brooks), 155:23-156:8 (Henry); S-11, 39, 77.] For the property line of coverage, the percent allocated to the Engineer is determined by dividing the property values *used in the*

Engineer's highway operations by the total of Knox County's property values. [JX-10, pg. 185; Tr. 44:15 – 46:9 (Brooks), 156:9 – 158:2 (Henry); S-11, 12, 39, 40, 79.] None of the costs associated with the law enforcement lines of coverage are allocated to the County Engineer. [Tr. 39:6-12 (Brooks); JX-10; S-10, 72.]

Significantly, only the salaries, equipment, vehicles, and real estate that are used by the Engineer's *highway department* are used in calculating the allocation amount. [JX-23; Tr. 155:7 – 158:2 (Henry); S-39, 40, 94, 95.] As a result, the allocation formula excludes coverage attributable to the Engineer's non-highway operations, such as the Map Department and other 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); S-25, 33, 71-90, 94-95.]

In short, the evidence establishes that the allocation methodology ensures that only the insurance costs directly connected with the operations of the engineer's *highway department* are allocated to the Engineer to be reimbursed out of MVGT funds.

B. The appellate court's decision below is legally flawed and cannot be squared with the undisputed factual record.

Despite the undisputed factual record described above, the Fifth District Court of Appeals held that the Commissioners failed to establish that the CORSA premium constituted a highway purpose. Opinion at ¶61. In so doing, the Court of Appeals based its decision on four grounds: (1) that this Court's *Madden* decision was distinguishable because CORSA is a risk sharing pool, not insurance and not a part of the employee's fringe benefits (Opinion at ¶52); (2) that the allocation method used by CORSA to determine the share payable by the Engineer failed to account for "how much of the engineer's property and personnel actually deal directly related to highway purposes" (Opinion at ¶55); (3) that because CORSA coverage is prospective in nature,

"the share of the premiums paid by the Engineer in effect provide a benefit to persons and offices not directly related to highway purposes" (Opinion at ¶16); and (4) that just because the MVGT funds were commingled with non-MVGT funds did not mean that the Engineer can use MVGT funds for non-highway purposes (Opinion at ¶59). None of these grounds provides a valid basis to support the Court of Appeals' finding that the CORSA premium is not a highway purpose.

First, the Court of Appeals' attempt to distinguish *Madden* is not persuasive. CORSA coverage is insurance. And while CORSA coverage is not a part of an employee's fringe benefits, that does not make the CORSA premium any less a highway purpose, and in fact, just the opposite.

While the Court of Appeals correctly recognized that R.C. 2744.08.081(E)(2) states that "a joint self-insurance pool is not an *insurance company*," the express purpose of this provision is to make it clear that joint self-insurance pools like CORSA are "not subject to the insurance laws of this state." Id. In other words, joint self-insurance pools are exempt from the general regulatory scheme governing private insurance companies.

By any substantive measure, however, CORSA provides insurance coverage to its members, including Knox County and the Engineer's office. "Broadly defined, insurance is a contract by which one party, for a compensation called the premium, assumes particular risks of the other party and promises to pay to him or his nominee a certain or ascertainable sum of money on a specified contingency." *State ex rel. Duffy, v. Western Auto Supply Co.* (1938), 134 Ohio St. 163, 168. The only evidence in the record here conclusively establishes that CORSA operates as an insurance provider to its member counties; CORSA collects premiums from its members based on rates established by an actuary and then pays costs associated with covered claims. [Tr. 19:10 – 20:13 (Brooks); S-5.]

In fact, and consistent with the only evidence presented in this case, this Court has recently recognized that CORSA "operates like an insurance company by providing coverage and risk-management services to its members." *State ex. rel. Bell v. Brooks*, 130 Ohio St.3d 87, 2011-Ohio-4897, ¶3. Significantly, one of this Court's key findings in holding that CORSA was not a "public office" for purposes of Ohio's Public Records Act, R.C. 149.43, was that "providing *insurance* to counties, *which is the function being performed by CORSA*, has not been established to be a historically governmental function." Id. at ¶22 (emphasis added). Other courts in Ohio have likewise recognized that CORSA's self-insurance pool is akin to insurance. See *Ohio Gvt. Risk M't. 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.").

Moreover, while CORSA insurance is not part of an employee's fringe benefits like the health insurance premiums at issue in *Madden*, this difference actually supports a finding that the CORSA premium is directly connected to a highway purpose. The relevant issue here is whether the cost of the CORSA insurance is directly connected to a *highway purpose*, not whether it is part of an employee's fringe benefits. Given that the CORSA insurance covers the *county's* risk of loss and liability caused by the operations of the Engineer's highway department makes the CORSA premium more directly connected to a highway purpose than the health insurance premium at issue in *Madden*, which covers the medical costs incurred *by the employee* wholly independent of any work performed by that employee for the Engineer's highway department. Simply put, how is the insurance premium covering the cost of a broken bone suffered by an

employee while skiing on his day off more directly connected to a highway purpose than the cost of insurance covering the repair of the Engineer's truck and third party liability arising out of an accident involving that truck while fixing a road? It is not. And the Court of Appeals' finding that CORSA was not insurance and not part of an employee's fringe benefits is not a valid basis to distinguish the applicability of this Court's decision in *Madden* either factually or legally.

Second, the Court of Appeals was simply wrong when it ruled that the Commissioners failed to show that allocation method used by CORSA failed to account for "how much of the Engineer's property and personnel actually deal directly related to highway purposes." Opinion at ¶55. As explained in detail above, the allocation formula developed by CORSA and used to determine the premium attributable to the Engineer takes into account only the salaries, property, vehicles, and equipment used by the Engineer's *highway* department. The allocation formula does not include the salaries and equipment used in the non-highway operations of the Engineer's office, such as the map department, and does not include the Engineer's separate compensation while serving as the county's sanitary or storm water engineer. In short, the record here conclusively establishes that the CORSA premium covers only those operations of the Engineer's office that are related to highway purposes.

Third, the Court of Appeals was simply wrong when it concluded that because the CORSA premium is prospective in nature, "[i]f 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." Opinion at ¶57. The premium to be paid by the Engineer does not "in effect" provide a benefit to any other county office. Rather, the premium is the cost that is incurred by the county to insure the Engineer's highway department alone. The remaining premium paid by the Commissioners from the

county's general fund or through reimbursements from other county funds pays for the insurance covering the remainder of the county's other offices, agencies, and departments.

Proof that the Court of Appeal's reasoning in this regard is faulty is demonstrated by the fact that CORSA could separately provide a stand-alone insurance policy covering only the Engineer's highway department and charge a premium for that coverage based upon the same formula used here. Whether the Engineer's highway department ultimately does or does not have any claims against that policy in any given year, however, does not alter the fact that the premium itself *when paid* was a for a valid highway purpose. In other words, the CORSA premium attributable to the Engineer's highway department does not become any less of a highway purpose simply because that premium payment and the coverage provided thereunder are bundled with the premium costs and coverage attributable to the rest of the county.

Fourth, the Commissioners agree with the Court of Appeals that the Engineer cannot use MVGT funds for non-highway purposes just because those MVGT funds are commingled with non-MVGT funds. See Opinion at ¶59. The Commissioners never argued to the contrary. Rather, the Commissioners' reliance on the commingled nature of the Engineer's MVGT account was to show that even the reimbursement sought here would not be paid entirely out of MVGT funds. Instead, because of the commingled nature of the account, at least some portion of the CORSA premium would be paid for out of non-MVGT funds.

In fact, based upon the evidence presented at trial, the commingled nature of the Engineer's highway department fund automatically ensures that payments are not made from MVGT funds in a greater percentage than the highway operations of the Engineer's office. This is because for the years in question, one of the non-MVGT sources of revenue for the MVGT account included reimbursements obtained by the Engineer for payment of operations conducted

by the highway department that he believed did not constitute a highway purpose. [Tr. 126:10 – 128:24 (Shackle), 150:2 – 152:13 (Henry); Lamb Stipulation at ¶2; S-32, 38, 51-52.][5] Thus, every time the Engineer's office conducted a non-highway activity (for example, mowing certain county dikes and ditches), non-MVGT funds were credited to the MVGT account to pay for such activities. In other words, the more the Engineer's office engaged in non-highway work, there was a direct and proportionate increase in non-MVGT funds available to the MVGT account used to pay the expenditures of his office. Accordingly, the CORSA premium reimbursement sought by the Plaintiffs from the Engineer would be paid by non-MVGT funds in a percentage amount at least as high as the non-highway operations of the Engineer's office.

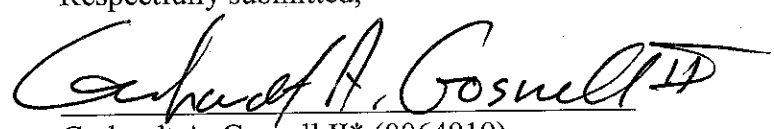
In short, none of the grounds relied upon by the Court of Appeals to hold that the Commissioners failed to show that the CORSA premium was a highway purpose are valid legally or factually.

[5] The Engineer also testified that he stopped seeking such reimbursements because he stopped authorizing any non-highway activities by his highway department in approximately late 2007. [Tr. 152:14-24 (Henry); S-38.]

CONCLUSION

For the foregoing reasons, this Court should hold that the CORSA premium attributable to the cost of insuring the operations of the Engineer's highway department is a highway purpose and properly payable out of MVGT funds pursuant to Section 5a. The decision of the Court of Appeals should be reversed, and this case should be remanded to the Court of Appeals for resolution of the Commissioner's cross-appeal on the issue of whether the Commissioners are entitled to a mandatory injunction requiring the Engineer to pay the premium.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing *Brief 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 28th day of November, 2011, upon the following:

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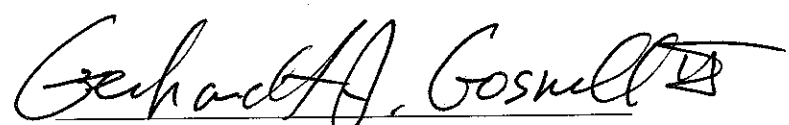

Gerhardt A. Gosnell II

APPENDIX

Ex. 1 Notice of Appeal of Plaintiffs-Appellants Allen Stockberger, Theresa A. Bemiller, and Roger Reed, in Their Official Capacity as the Board of County Commissioners of Knox County (May 20, 2011) A-1

Ex. 2 Fifth District Court of Appeals Judgment Entry (April 7, 2011) A-4

Ex. 3 Fifth District Court of Appeals Opinion (April 7, 2011) A-5

Ex. 4 Knox County Court of Common Pleas Amended Judgment Entry (Oct. 5, 2010) A-23

Ex. 5 Knox County Court of Common Pleas Judgment Entry (Nov. 19, 2009) A-25

Ex. 6 Knox County Court of Common Pleas Findings of Fact (Nov. 19, 2009) A-26

Ex. 7 Ohio Constitution, Article XII, Section 5a A-32

Ex. 8 R.C. 2744.081 ..... A-33

Ex. 9 R.C. 315.12 ..... A-37

EXHIBIT
1

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.	:	

NOTICE OF APPEAL 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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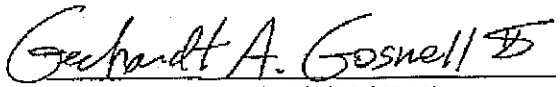
FILED
MAY 20 2011
CLERK OF COURT
SUPREME COURT OF OHIO

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

Appellants Allen Stockberger, Theresa A. Bemiller, and Roger, Reed, in their official capacity as the Board of County Commissioners of Knox County, hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Knox County Court of Appeals, Fifth Appellate District, entered in Court of Appeals case no. 10CA000018 on April 7, 2011.

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

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing *Notice of Appeal 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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Gerhardt A. Gosnell II
Attorney at Law

EXHIBIT
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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

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EXHIBIT
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FILED
APR -7 2011
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:

APPEARANCES:

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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

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.

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{¶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

WSG:clw 0309

EXHIBIT
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FILED
KNOX COUNTY
COURT OF COMMON PLEAS
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MARY JO HAWKINS
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
KNOX COUNTY, OHIO

ALLEN STOCKERBERGER, ET. AL. KNOX COUNTY COMMISSIONERS	:	
PLAINTIFFS,	:	
-vs-	:	Case No. 08OT02-0109
JAMES L. HENRY KNOX COUNTY ENGINEER	:	Judge Otho Eyster
DEFENDANT.	:	**AMENDED JUDGMENT ENTRY**

This matter came on for hearing on August 24, 2009, requesting a declaratory judgment and a mandatory injunction.

Pursuant to the Findings of Fact filed by separate entry on November 19, 2009, it is

ORDERED Plaintiffs' request for a declaratory judgment is granted and MVGT Funds can be used to pay a portion of the annual CORSA premium and on deductibles and the Defendant is authorized to make payment of the two invoices at issue, and it is further

ORDERED Plaintiffs' request for a mandatory injunction is denied.

Costs to the Defendant. This is a Final Appealable Order, and there is no just reason for delay.

IT IS SO ORDERED.

Otho Eyster, JUDGE

KNOX COUNTY COURT OF COMMON PLEAS, MOUNT VERNON, OHIO 43050

cc:
Thomas A. Luebbers, Esq.
Gerhardt A. Gosnell, II, Esq.
Charles R. Saxbe, Esq.
Frederick A. Vierow, Esq.
Anthony M. Sharett, Esq.
Luther L. Liggett, Jr. Esq.

EXHIBIT
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cc: GAG

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COURT OF COMMON PLEAS
2009 NOV 19 AM 9:45
MARY JO MAYNARD
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
KNOX COUNTY, OHIO

ALLEN STOCKERBERGER, ET. AL. KNOX COUNTY COMMISSIONERS PLAINTIFFS, -vs- JAMES L. HENRY KNOX COUNTY ENGINEER DEFENDANT.	Case No. 08OT02-0109 Judge Otho Eyster **JUDGMENT ENTRY**

This matter came on for hearing on August 24, 2009, upon the complaint of Plaintiffs filed February 13, 2008, requesting a declaratory judgment.

Pursuant to the Findings Of Fact (filed by separate entry), it is

ORDERED Plaintiffs' request for a declaratory judgment is granted and MVGT Funds can be used to pay a portion of the annual CORSA premium and on deductibles and the Defendant is authorized to make payment of the two invoices at issue. Costs to Defendant.

IT IS SO ORDERED.

Otho Eyster, JUDGE

Close Code 6

cc:
Thomas A. Luebbers, Esq.
Gerhardt A. Gosnell, II, Esq.
Charles R. Saxbe, Esq.
Frederick A. Vierow, Esq.
Anthony M. Sharett, Esq.
Luther L. Liggett, Jr. Esq.

KNOX COUNTY COURT OF COMMON PLEAS, MOUNT VERNON, OHIO 43050

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EXHIBIT
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RECEIVED 11-20-09

cc: GAG JCN

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2009 NOV 19 AM 9:45
MARY JO HAWKINS
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS, KNOX COUNTY, OHIO

ALLEN STOCKBERGER, et al., KNOX COUNTY COMMISSIONERS,	:	
Plaintiffs,	:	CASE NO. 08OT02-0109
vs.	:	JUDGE OTHO EYSTER
JAMES L. HENRY, KNOX COUNTY ENGINEER	:	FINDINGS OF FACT
Defendant.	:	

KNOX COUNTY COURT OF COMMON PLEAS, MOUNT VERNON, OHIO 43050

This matter came on for hearing on August 24, 2009 upon the Complaint of Plaintiffs ("Commissioners") filed February 13, 2008, requesting Declaratory Judgment and a Mandatory Injunction.

Plaintiffs were represented by Charles R. Saxbe, Gerhardt A. Gosnell, II, and Thomas A. Luebbers. Defendant ("Henry") was represented by Luther L. Liggett, Jr. and Anthony M. Sharett.

A dispute exists between the Knox County Commissioners and the Knox County Engineer regarding Henry's refusal to pay of a portion of the annual cost of the County Risk Sharing Authority ("CORSA" – a risk sharing pool created by O.R.C. §2744.08) related to the coverage period May 1, 2007, through April 30, 2008, and his refusal to reimburse the Commissioners for a $2,500.00 deductible that arose from repairs to a county owned vehicle which was damaged while plowing snow from county roads.

The dispute between the Commissioners and Henry has been the subject of prior litigation. This issue was addressed by the Ohio Supreme Court in *Knox County Board of Commissioners v. Knox County Engineer*, [1] ("*Knox I*"). At issue in Knox I was the propriety

[1] 109 Ohio St.3d 353; 2006-Ohio-2576.

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of the expenditures for CORSA premiums by the Engineer due to the nature of the funding for his department. The highway department is funded, in part, by funds derived from the registration, operation, and use of vehicles and fuel ("MVGT"). The Supreme Court affirmatively found that the Ohio Constitution restricted the use of the MVGT funds for highway purposes or to purposes directly connected thereto.

The Supreme Court also found that there was NO EVIDENCE that payment of CORSA premiums is for highway purposes or is directly connected with construction, maintenance, and repair of highways or the enforcement of traffic laws. In addressing this issue, the Court went on to say, "However, 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.*

The Commissioners seek a determination that using MVGT funds to reimburse the County's general fund for the portion of the CORSA premium that covers the Engineer's Office and to pay a deductible related to repairs for a vehicle used by the Engineer that was damaged, would be appropriate under Ohio's Constitution. In short, the Commissioners seek a finding from the Court that payment of CORSA premiums and the deductible for the vehicle are expenditures for a highway purpose or directly related to a highway purpose and therefore payable from MVGT funds.

The trial court in Knox I ruled on behalf of the Commissioners on Summary Judgment, which was affirmed by the Court of Appeals. The Fifth District Court of Appeals' ruling was based on its finding that CORSA premiums were within the meaning of "costs of operations" as set forth in O.R.C.§315.12, and therefore the use of the MVGT funds was not

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constitutionally prohibited. The Ohio Supreme Court overruled the Court of Appeals. This is the first evidentiary hearing presented to the Court regarding these issues.

The Court finds that the stipulation filed by the parties relating to the trial testimony of the County Deputy Auditor, Sharon Lamb, demonstrates that the Engineer's highway department is funded by various sources. These sources consist of MVGT revenues and non-MVGT funds (T. at 149). The reimbursement line represents some monies that come from the County's general fund and are paid to the Engineer's MVGT account for work done by the highway department for the county and/or township (T. at 151). These are items that relate to invoices that the Engineer sends to the Commissioners and other county offices for work performed by the Engineer that he does not consider to be related to a highway purpose. As of late 2007, Henry stopped authorizing non-highway activities by the highway department employees and has not sought reimbursement from the Commissioners due to his concern about the proper procedures for reimbursement (T. at 152-153).

The MVGT fund is a single account and the Auditor does not segregate the revenue funds in this account (T. at 149 -157). Henry testified the MVGT account contains both MVGT funds and non-restricted funds (T. at 148-150, Joint Exhibit 21). He indicated that the non-restricted funds were from Federal projects (FEMA) (T. at 151 – 152), Court fines (T. at 173), and reimbursements from other county departments (T. at 150-153). Shackle also testified that the Commissioners reimbursed monies to the MVGT fund (T. at 105-109).

The Engineer acknowledged that the deductible amount for the damaged vehicle could in his opinion be paid with MVGT funds, but not the portion of the CORSA premium (T. at 160-161). In essence, the vehicle that was damaged was being used for a highway purpose.

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The Engineer testified (T. at 159, 175) that he does not believe he has the discretion to pay the CORSA premiums from the MVGT funds because such reimbursements would not be "necessary" for the construction, maintenance, and repair of roads and bridges.

The Engineer, however, pays for his and his employees' health insurance premiums, payment for travel to county engineer conferences and seminars, office supplies, copy machines and printers, and utilities (T. at 153-155). The Engineer admitted that the payment of family health insurance is, in fact, not related to a highway purpose. (T. at 187).

Ohio Revised Code Section 315.12 authorizes the payment of 2/3 of the cost of the operation of the County Engineer be paid from MVGT funds. It allows for the payment of salaries and the cost of operating the office. In *Madden v. Bower,*[2] the Court established that paying 2/3 of the cost of health insurance premiums for the County Engineer's office must be paid by MVGT funds.

The CORSA premium is determined by a formula developed by an actuary employed by CORSA. It is based upon exposure and loss experience of the County (T. at 30). It is not based on performing a risk allocation for each department of the County (T. at 53). There are two components considered in establishing a premium for the County, one is loss experience and the other is exposure (T. at 31, 32).

Loss experience looks at the claims made against the County in the previous five years (T. at 32-33). Exposure refers to the risk of each member based upon property values, number of vehicles, and the payroll for offices other than the Sheriff (T. at 31). When a county has more vehicles, a higher payroll, and more property, it has a greater exposure level (T. at 32).

[2] (1969) 20 Ohio St.2d 135

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The formula used to determine the Engineer's portion of the CORSA premium is essentially a proportional mathematical comparison using only the exposure component of risk (T. at 54, 92). It would be against actuarial principles to use individual office losses to establish the rate of the premium according to the Commissioners' expert (T. at 90-92). It is the contention of the Commissioners that the Engineer's historical loss experience is an indirect component of the portion allocated to the Engineer since the Engineer's loss history is used to determine the County's total CORSA premium (T. at 89).

Asking the Engineer to pay a portion of the CORSA premium is not the same as asking him to directly pay County liabilities and property damage with MVGT funds. Paying a premium for CORSA coverage obligates CORSA to pay future claims, just as the payment of premiums for health insurance is a payment that obligates the health insurer to pay future claims. The Court found paying health insurance premiums to be a valid expenditure of MVGT funds in *Madden v. Bower*[3].

The Clerk Administrator ("Shackle") for the Knox County Board of Commissioners testified the formula for allocating health insurance premiums and worker's compensation is the same as the formula for allocating CORSA premiums (T. at 101-102). Shackle acknowledged that the Commissioners reimbursed monies to the Engineer (T. at 105-109).

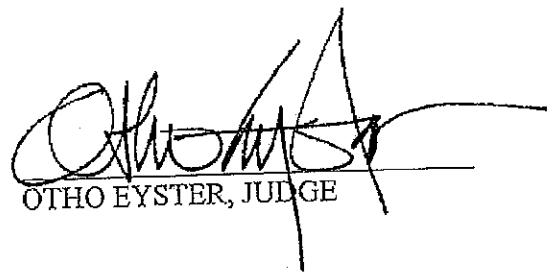
The Court finds no difference between premiums for health insurance and costs for CORSA. Further, the Court finds that the MVGT funds are commingled with non-MVGT funds.

The Court finds that the payment of the CORSA premium by the Engineer is directly connected to a highway purpose and as such the payment is a cost of operation contemplated

[3] *Id.*

by O.R.C. Section 315.12 and does not violate the Ohio Constitution. The Court further finds that the MVGT account is commingled.

The Court further finds that payment of the deductible related to the repair of damages to a vehicle plowing snow on the County roads is also a highway purpose.



OTHO EYSTER, JUDGE

cc:

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EXHIBIT
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OHIO CONSTITUTION, ARTICLE XII, SECTION 5a: Use of motor vehicle license and fuel taxes restricted.

No moneys 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 costs of administering such laws, statutory refunds and adjustments provided therein, payment of highway obligations, costs for construction, reconstruction, maintenance and repair of 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 highways.

(Adopted November 4, 1947; effective January 1, 1948.)

2744.081 Joint self-insurance pool - risk-management.

(A) 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, expense, 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.

All of the following apply to a joint self-insurance pool under this section:

(1) Such funds shall be reserved as are necessary, in the exercise of sound and prudent actuarial judgment, to cover potential political subdivision and employee liability, expense, loss, and damage. A report of amounts so reserved and disbursements made from such funds, together with a written report of a member of the American academy of actuaries certifying whether the amounts reserved conform to the requirements of this division, are computed in accordance with accepted loss reserving standards, and are fairly stated in accordance with sound loss reserving principles, shall be prepared and maintained in the office of the pool administrator described in division (A)(2) of this section. The report shall be prepared and maintained on or before the last day of March for the preceding calendar year or, if the joint self-insurance pool's fiscal year is other than a calendar year, not later than ninety days after the close of the pool's fiscal year.

The report required by this division shall include, but not be limited to, disbursements made for the administration of the pool, including claims paid, costs of the legal representation of political subdivisions and employees, and fees paid to consultants.

The pool administrator described in division (A)(2) of this section shall make the report required by this division available for inspection by any person at all reasonable times during regular business hours, and, upon the request of such person, shall make copies of the report available at cost within a reasonable period of time.

(2) A contract may be awarded, without the necessity of competitive bidding, to any person, political subdivision, nonprofit corporation organized under Chapter 1702. of the Revised Code, or regional council of governments created under Chapter 167. of the Revised Code for purposes of administration of a joint self-insurance pool. No such

contract shall be entered into without full, prior, public disclosure of all terms and conditions. Such disclosure shall include, at a minimum, a statement listing all representations made in connection with any possible savings and losses resulting from such contract, and potential liability of any political subdivision or employee. The proposed contract and statement shall be disclosed and presented at a meeting of the political subdivision not less than one week prior to the meeting at which the political subdivision authorizes the contract.

(3) A joint self-insurance pool shall include a contract with a member of the American academy of actuaries for the preparation of the written evaluation of the reserve funds required under division (A)(1) of this section.

(4) 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.

(B) Two or more political subdivisions may also authorize the establishment and maintenance of a joint risk-management program, including but not limited to the employment of risk managers and consultants, for the purpose of preventing and reducing the risks covered by insurance, self-insurance, or joint self-insurance programs.

(C) A political subdivision is not liable under a joint self-insurance pool for any amount in excess of amounts payable pursuant to the written agreement for the participation of the political subdivision in the joint self-insurance pool. Under a joint self-insurance pool agreement a political subdivision may, to the extent permitted under the written agreement, assume the risks of any other political subdivision, including the indemnification of its employees. A joint self-insurance pool, established under this section, is deemed a separate legal entity for the public purpose of enabling the members of the joint self-insurance pool to obtain insurance or to provide for a formalized, jointly administered self-insurance fund for its members. An entity created pursuant to this section is exempt from all state and local taxes.

(D) Any political subdivision may issue general obligation bonds, or special obligation bonds which are not payable from real or personal property taxes, and may also issue notes in anticipation of such bonds, pursuant to an ordinance or resolution of its legislative authority or other governing body for the purpose of providing funds to pay judgments, losses, damages, and the expenses of litigation or settlement of claims, whether by way of a reserve or otherwise, and to pay the political subdivision's portion of the cost of establishing and maintaining a joint self-insurance pool or to provide for the reserve in the special fund authorized by division (A)(2)(a) of section 2744.08 of the Revised Code.

In its ordinance or resolution authorizing bonds or notes under this section, a political subdivision may elect to issue such bonds or notes under the procedures set forth in Chapter 133. of the Revised Code. In the event of such an election, notwithstanding Chapter 133. of the Revised Code, the maturity of the bonds may be for any period authorized in the ordinance or resolution not exceeding twenty years, which period shall be the maximum maturity of the bonds for purposes of section 133.22 of the Revised Code.

Bonds and notes issued under this section shall not be considered in calculating the net indebtedness of the political subdivision under sections 133.04, 133.05, 133.06, and 133.07 of the Revised Code. Sections 9.98 to 9.983 of the Revised Code apply to bonds or notes authorized under this section.

(E)(1) A joint self-insurance pool, in addition to its powers to provide self-insurance against any and all liabilities under this chapter, may also include any one or more of the following forms of property or casualty self-insurance for the purpose of covering any other liabilities or risks of the members of the pool:

(a) Public general liability, professional liability, or employees liability;

(b) Individual or fleet motor vehicle or automobile liability and protection against other liability and loss associated with the ownership, maintenance, and use of motor vehicles;

(c) Aircraft liability and protection against other liability and loss associated with the ownership, maintenance, and use of aircraft;

(d) Fidelity, surety, and guarantee;

(e) Loss or damage to property and loss of use and occupancy of property by fire, lightning, hail, tempest, flood, earthquake, or snow, explosion, accident, or other risk;

(f) Marine, inland transportation and navigation, boiler, containers, pipes, engines, flywheels, elevators, and machinery;

(g) Environmental impairment;

(h) Loss or damage by any hazard upon any other risk to which political subdivisions are subject, which is not prohibited by statute or at common law from being the subject of casualty or property insurance.

(2) 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.

(F) A public official or employee of a political subdivision who is or becomes a member of the governing body of a joint self-insurance pool in which the political subdivision participates is not in violation of division (D) or (E) of section 102.03, division (C) of section 102.04, or section 2921.42 of the Revised Code as a result of the political subdivision's entering under this section into the written agreement to participate in the pool or into any contract with the pool.

(G) This section shall not be construed to affect the ability of any political subdivision to self-insure under the authority conferred by any other section of the Revised Code.

Effective Date: 10-06-1994

315.12 Office to be maintained partially from motor vehicle taxes.

(A) 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, 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.

(B) Where employees of the county engineer are temporarily assigned to perform engineering and plan preparation work on a bond-financed project, their salaries and expenses for such work may be paid from the proceeds from the sale of such bonds, instead of from the fund as provided in division (A) of this section, from whence their salaries and expenses are ordinarily paid.

Effective Date: 11-09-1959