

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,

Appellants,

v.

JAMES L. HENRY, in his official
capacity as Knox County Engineer,

Appellee.

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: Case No. 11-0859
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: On Appeal from the Knox County Court
: of Appeals
: Fifth Appellate District
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: Court of Appeals
: Case No. 10CA000018
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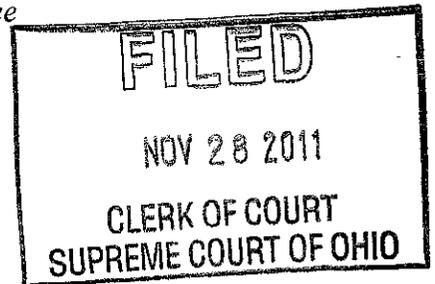
MERIT BRIEF OF AMICI CURIAE COUNTY COMMISSIONERS ASSOCIATION
OF OHIO, COUNTY RISK SHARING AUTHORITY, OHIO MUNICIPAL LEAGUE,
AND OHIO TOWNSHIP ASSOCIATION, AUGLAIZE, WAYNE, CRAWFORD, PIKE,
HANCOCK, CLERMONT, VAN WERT, JACKSON, STARK, AND GREENE
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PRELIMINARY STATEMENT

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

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

The Ohio Municipal League (“OML”) was founded in 1952 by City and Village officials as a statewide association to serve the interests of Ohio municipal government and it has a membership of more than 625 Ohio cities and villages.

The Ohio Township Association (“OTA”) is a state-wide professional organization dedicated to the promotion and preservation of township government in Ohio. Founded in 1928, the OTA is organized in 87 Ohio counties. The OTA has over 5,200 active members, comprised of elected township trustees and fiscal officers from Ohio’s 1,308 townships. The OTA has an additional 3,000 associate members who are dedicated to supporting the causes of the OTA.

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

STATEMENT OF THE CASE AND FACTS

The statement of the case and facts of the Appellant is adopted and incorporated the same as if fully rewritten herein. While these Amici will not repeat the facts outlined in the Appellant's brief, it cannot be over emphasized, that the record is far more complete than it was in *Knox County Board of Commissioners v. Knox County Engineer*, (2006) 109 Ohio St.3d 353, 847 N.E.2d 1206 (*Knox I*) as there is specific testimony delineating the Engineer's highway department's share of the CORSA premium. This specific allocation excluded coverage attributable to non-highway operations of the engineer, and the premium is directly connected to and based on only the highway operations of the Engineer.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

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.

Section 5a does not limit the use of MVGT funds¹ to those expenses incurred solely from the physical construction of highways. See e.g., *State ex rel. Kauer v. Defendbacher* (1950), 153 Ohio St. 268, 91 N.E.2d 512, 41 O.O. 278 (MVGT funds could be expended on study of turnpike project); *State ex rel. Preston v. Ferguson* (1960), 170 Ohio St. 450, 166 N.E.2d 365, 11 O.O.2d 204 (MVGT funds could be used to purchase whole tracts of land when only a part thereof may eventually be used for highway purposes); *State ex rel. Walter v. Vogel* (1964), 169 Ohio St. 368 (building and maintaining street lighting system for urban portion of limited access highways could be paid from MVGT funds).

In *Madden v. Bower* (1969), 20 Ohio St.2d 135, 254 N.E.2d 357, this Court recognized that the payment of health insurance premiums for highway department employees of the office of the county engineer were properly payable from MVGT funds. As this Court recognized, the health insurance premiums were part of the costs of the services of such employees and incurred in furtherance of a highway purpose. In her dissent in *Knox I*, Justice Stratton found that the *Madden* case was dispositive. *Knox I* at ¶ 26.

Most significantly, in *Madden*, this Court made several rulings not only relevant in this case but which squarely support Appellant's and *Amici's* position. First, this Court ruled that "it is readily apparent, if not obvious" that the premium cost paid on behalf of employees of the office of the county engineer is part of the total cost of operation of that office, two-thirds of

¹ "MVGT funds" are motor vehicle license tax revenues distributed to Knox County ("County") pursuant to Revised Code Chapters 4501, 4503 and 4504 and motor vehicle fuel excise tax.

which total cost must be paid by highway funds under R.C. 315.12. *Id.* At 139. Second, the Court reiterated that R.C. 315.12 does not prevent the remaining one-third of the total cost of operation of the Engineer's office, from being paid from the motor vehicle fuel and license tax fund. *Id.* Finally, the Court recognized that "the authority to make the choice as to whether one-third of the total cost of operation of that office is to be paid from those funds, from special road levy funds, or from the county general fund, as well as to make appropriations from those funds within the limits otherwise prescribed by law, is lodged in the board [of county commissioners]." *Id.* The holding in *Madden* reaffirms the authority of the County Commissioners to adopt budgets for their respective counties. The *Madden* case and the other case cited above demonstrate that an expenditure is authorized under § 5a if the evidence shows that it is part of the cost of engaging in one of the enumerated highway purposes or in furtherance thereof.

Insurance is a cost of operating the office of County Engineer, and the payment of such costs is specifically authorized by Ohio Revised Code § 315.12(a). (*See, Knox I dissenting opinion of Justice Stratton at pp. 358 – 359*) It makes no sense and forces counties to pay much more in these lean budgeting times, to pay for a judgment but not for insurance or a similar mechanism to protect against such judgments.

The *Madden* analysis also applies to the CORSA premium. Constructing, maintaining, and repairing roads creates a risk of liability and/or loss, and those risks are a cost of performing such activities. These costs are not discretionary expenditures of the Engineer, but rather, they are additional costs that are inherent in such operations.

In fact, the Attorney General in Opinion 97 – 020 opined that the County Engineer's share of the CORSA premium could be paid out of highway funds allocated by the County

Commissioner to the County Engineer. This Attorney General's opinion was referenced by Justice Pfeifer in his dissent. *Knox I* at ¶ 18.

These costs will inevitably be borne by the counties, and CORSA provides mechanism to pay such costs and provide protection to both the county and those who might be injured by such activities. See *Ohio Govt. Risk Mgt. Plan v. Cty. Risk Sharing Auth., Inc.* (6th Dist. 1998), 130 Ohio App.3d 174, 180, 719 N.E.2d 992 (“CORSA’s self-insurance pool is undoubtedly akin to insurance, in that its terms of coverage are derived from an insurance policy and, in exchange for a premium, CORSA agrees to indemnify its assureds for loss or damage from stated causes in a definite or ascertainable amount.”). 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*, (2011) 2011 Ohio 4897 at ¶ 3. In fact, the Engineer’s suggestion below (and in apparent agreement by the Court of Appeals) that it would be constitutional to use MVGT funds to pay the actual damages and liabilities as they are incurred proves the point. If MVGT funds can pay such costs as they are incurred out of pocket, there is no principled basis to suggest that the very same MVGT funds cannot be used to purchase insurance to more efficiently defray such costs.

Similarly, if MVGT funds can pay the salaries of the Engineer’s employees who maintain roads and bridges (including health insurance for such employees); can pay for the purchase of vehicles and equipment used to maintain and repair roads and bridges; and can pay for the maintenance and repairs of such vehicles and equipment. Then MVGT funds can and should be used to pay for the cost of insuring against the risk of liability arising out of the work activities of those employees and the use of those vehicles and equipment. Likewise, it is only logical that MVGT funds can be used to pay for the cost of insurance that pays for the repair and/or

replacement of such property, vehicles, and equipment if damaged and/or destroyed. The payment of the CORSA premium is simply another mechanism for ensuring the repair and/or replacement of the vehicles, equipment, and the property that the Engineer needs to perform its highway operations.

The Amici which include both organizations and individual counties are concerned that the Court of Appeals analysis, if allowed to stand, will force counties to adopt the much more expensive and riskier strategy of paying judgments as opposed to guarding against them. Such a rule also undermines the longstanding policy that encourages insurance and other risk-sharing arrangements as a means to protect the public. The Court of Appeals analysis places both the counties and any injured parties at risk by eliminating a key source of funding for a portion of CORSA premiums. It benefits nobody if counties are forced to go “bare” and hope that they can pay any potential judgments arising out of the operation of the Engineer’s office.

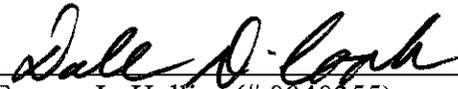
Nothing in *Knox I* precludes this analysis. As explained above, the undisputed evidence in this case, as opposed to the sparse record in *Knox I*, conclusively establishes that the allocation methodology used to determine the CORSA premium ensures that reimbursement is sought solely for costs attributable to covering the highway department activities of the Engineer. Only the salaries, property, vehicles, and real estate that are used by the Engineer’s highway department are used in calculating the allocation amount. The allocation formula excludes coverage attributable to the Engineer’s non-highway operations, such as the Map Department and work performed by the Engineer as county sanitary engineer or county storm water engineer. In short, the allocation methodology ensures that only the insurance costs associated with operations of the Engineer’s *highway department* are to be paid from MVGT funds. The

payment of its share of the premiums by the Engineer will also create an incentive for the Engineer to reduce its costs through efficient risk management.

CONCLUSION

The Amici request that this Court reverse the Court of Appeals and hold that the Ohio Constitution authorizes the payment of motor vehicle gas tax revenues to defray the costs of participation in a joint insurance pool attributable to the risk of liability and loss from the operation of the County Engineer's highway department.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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