

IN THE SUPREME COURT OF OHIO

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

Appellants, :

v. :

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

Appellee. :

Case No. 11-0859

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

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APPELLEE KNOX COUNTY ENGINEER'S MERIT BRIEF

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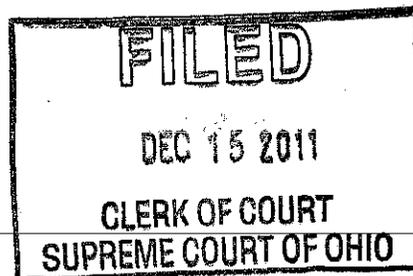
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APPELLEE KNOX COUNTY ENGINEER'S MERIT BRIEF

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## APPELLEE KNOX COUNTY ENGINEER'S MERIT BRIEF

### Introduction

In following this Supreme Court's precedent, the Court of Appeals found that the Commissioners' evidence was insufficient to draw the requisite direct nexus between spending Constitutionally-restricted MVGT funds and a highway purpose. The Court held that CORSA premiums are prospective in nature, create a pool that covers other counties and non-Engineer losses, reflect only the Engineer's proportional share based on the Engineer's assets, and do not account for the Engineer's actual risk or loss. As the record admits that other counties "go bare" neither with insurance nor CORSA pooled funds, highways are built without the CORSA premium.

Whether or not the Engineer must reimburse the Commissioners is not at issue here, but was the proposition of law rejected for review. Only at issue is whether the Engineer may, in his discretion, determine payment of CORSA premiums a Constitutionally-highway purpose.

### Statement of Facts

Appellee Knox County Engineer generally adopts the "Background Facts" of the Knox County Court of Appeals' Opinion. (Appellate Court Record, Document No. 63, ¶23 (hereinafter "Opinion").

Knox County participates in the County Risk Sharing Authority (CORSA). (Opinion, ¶23.) Not insurance but a cash pool, R.C. 2744.081(E)(2), CORSA provides

general liability coverage, automobile liability coverage, errors and omissions coverage and property coverage for all of Knox County's officers, including the Knox County Engineer's Office. (Opinion, ¶23.) Sixty-two counties participate in CORSA, and each county's overall CORSA premium is determined by an actuary employed by CORSA. (Opinion, ¶24.) Each county's premium is "based upon the exposure and loss experienced of the individual counties, but not specifically for each separate department of the county," and not specifically considering the Engineer's actual exposure or loss experience. (Opinion, ¶¶24, 25.)

In June 2007, the County Commissioners sent the Engineer an invoice for \$19,789.00, the amount CORSA purported to be the Engineer's "proportional" share of the CORSA premium for 2007-2008 based on assets, and not based on actual risk or loss. (Opinion, ¶ 27.) This is the identical basis for the claims considered in the precedent *Knox County Board of Commissioners v. Knox County Engineer* (2006), 109 Ohio St.3d 353, 2006 Ohio 2576, 847 N.E.2d 1206.

The Engineer refused to authorize payment of the invoice from the Constitutionally-restricted MVGT funds because the CORSA premiums were not directly-related to a highway purpose. (Opinion, ¶ 27.) The Commissioners sought an order mandating that the Engineer authorize the use of Constitutionally-restricted funds to pay this invoice. Upon the Court of Appeal's decision, this Supreme Court did not accept this issue for review.

At the trial of this matter, the Commissioners presented evidence that they use a “proportional mathematical comparison, using only the exposure component of risk, to determine the engineer’s share of the CORSA premium.” (Opinion, ¶ 25.) The CORSA representative testified that the Engineer’s share “did not reflect actual claims paid out on his [the Engineer’s] office’s behalf...” (Opinion, ¶ 25.) The Commissioners failed to present any evidence of “how much of the Engineer’s property and personnel actually deal directly related to highway purposes.” (Opinion, ¶55.)

The Engineer, on the other hand, presented evidence that he “engages in activities unrelated to highway purposes” for the County. (Opinion, ¶54.) Such services include, but are not limited to, sanitation engineer, storm water engineer, preparation of a district master plan for sanitation and storm water, administration of community block grants, advising and assisting the County airport, advising and assisting at the County air show, and overseeing the inspection of County bike trails. (Opinion, ¶54.)

This Court reviewed the same legal issue for the same parties in *Knox County Board of Commissioners v. Knox County Engineer* (2006), 109 Ohio St.3d 353, 2006 Ohio 2576, 847 N.E.2d 1206 (hereinafter *Knox I*), for the years 2002-2003. (Opinion, ¶ 30.) In that prior case, this Court found the evidentiary record to be insufficient to tie the CORSA premiums to MVGT funds, and thus did not order the Engineer to reimburse the Commissioners the amount of the CORSA premium for 2002-2003. *Knox I*, 109 Ohio

St.3d at 355-356. This Court allowed, however, that hypothetically if the factual record contained evidence that the CORSA premiums pertained or directly related to highway purposes, “the outcome could be different.” (Opinion, ¶ 33, see also Opinion, ¶ 30; *Knox I, supra*, at 356.) (emphasis added).

In the present case, the Commissioners filed a nearly identical complaint to that in *Knox I*, but for years 2007-2008, merely proffering the same evidence as before. At trial, the Commissioners presented identical evidence to that as was presented in *Knox I* in yet another attempt to demonstrate that CORSA premiums were directly-related to highway purposes. (Opinion, ¶ 31.) The only differences between the evidence presented at trial in *Knox I* and that of this current case were that witnesses testified live (rather than via affidavit in *Knox I*), that the specific monetary figures varied (but not the analysis of those figures,) and that a deductible also became an issue.

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

The Knox County Engineer seeks to uphold the decision of the Fifth District Court of Appeals.

## Argument

Appellants' Proposition of Law No. 1: Article XII, Section 5a of the Ohio Constitution authorizes the use of motor vehicle and gas tax funds to defray a county's cost of participating in a joint self-insurance pool attributable to covering the risk of liability and loss resulting from the operations of a county engineer's highway department.

Appellee's Position to Appellants' Proposition of Law No. I (addressing Appellants' Paragraphs A(1)-A(3), A(3)(b), and (B)): Article XII, Section 5a of the Ohio Constitution closely restricts the use of MVGT funds as directly-related to highway purposes, and CORSA is not a highway purpose under Article XII, Section 5a of the Ohio Constitution.

In *Grandle v. Rhodes*, (1959), 169 Ohio St. 77, 157 N.E.2d 336, this Court held that "Section 5a, Article XII of the Constitution of Ohio, closely restricts the expenditure of the fees and taxes received in relation to vehicles using the public highways to purposes directly connected with the construction, maintenance and repair of highways and the enforcement of traffic laws" *Grandle v. Rhodes* (1959), 169 Ohio St. at 77 (syllabus of the Court). (See also Opinion, ¶ 49).

Article XII, Section 5a, entitled "Use of Motor Vehicle License and Fuel Taxes Restricted," of the Ohio Constitution 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.

The Supreme Court in *Knox I* followed the precedent set in *Grandle*, finding that the Ohio Constitution restricts expenditure of the County Engineer's funds for use for highway purposes. Without evidence of that "direct connection" to a highway purpose, the "state Constitution precludes the engineer from paying the CORSA invoices at issue." *Knox I*, 109 Ohio St.3d at 355-356, 2006-Ohio-2576.

Article XII, Section 5 of the Ohio Constitution similarly restricts how tax monies shall be used: "No tax shall be levied, except in pursuance of law; and every law imposing a tax shall state, distinctly, the object of the same, to which only, it shall be applied." (emphasis added). Nothing in the highway tax implies support of a CORSA pool with other counties.

The Commissioners seek to broaden the interpretation of "directly connected" to a highway purpose beyond what the Ohio Supreme Court has done in both *Grandle* and *Knox I, supra*, and beyond what the Ohio Constitution permits. In seeking such expansion, the Commissioners focus on the *Knox I* language wherein the Ohio Supreme Court stated that, "if the record contained evidence that the CORSA premiums pertained to highway purposes or were directly related thereto...our outcome might not be the same." *Id.* at 356 (emphasis added).

The Commissioners' misinterpretation of this sentence of the *Knox I* decision appears to be that the Ohio Supreme Court required only a proffer of the same

evidence, that the CORSA premiums supported the Engineer in some manner; upon that proffer, the Engineer would be required to pay the CORSA premiums. The Commissioners pretend that this same evidence was not considered by the trial court before. This is not a proper reading of *Knox I*. The excerpt is mere dicta, holding open that there might be other factual scenarios not anticipated by the Supreme Court.

In this case, the Commissioners offered identical evidence to that which they presented in *Knox I* — the only differences between the evidence presented in *Knox I* and this case were: 1) that the Commissioners presented live testimony at trial this time, instead of testimony via affidavit as in *Knox I*, 2) the specific dollar amounts of the figures were different in this case from that of *Knox I*, and 3) a deductible not paid by CORSA was at issue. The methodology for reaching those figures was the same. This Court did not comment on the form of evidence in *Knox I*, but rather on the sufficiency of the evidence presented by the Commissioners in that case. The substance of the Commissioners' evidence has not changed from what was presented previously — and decided upon — in *Knox I*.

Following *Grandle* and *Knox I*, the Court of Appeals required that the Commissioners' evidence demonstrate an actual nexus between CORSA and highway purposes. (Opinion, ¶¶55-58, 61.) The appellate Court found that the Commissioners failed in their burden to draw that connection. *Id.*

CORSA is a cash pool. The CORSA representative who testified for the

Commissioners acknowledged that the pool premiums were prospective in nature: the CORSA pool premiums cover possible, future payouts of any county's loss, rather than reimbursements for actual, past costs incurred specifically by the Knox County Engineer. (Opinion, ¶56.)

Moreover, CORSA protects not only the Engineer's office, but any department and employee of Knox County. (Opinion, ¶57.) If another department suffers a loss, but the Engineer's office does not, the share paid for by the Engineer's office (from Constitutionally-restricted highway monies) is paid to benefit those other County offices, rather than directly-related costs of highway purposes explicitly required by Article XII, Section 5a of the Ohio Constitution. (Opinion, ¶57.)

Under the Commissioners' plan, not only would the Constitutionally-restricted monies not come back to the Knox County Engineer's Office, but that money may never return to Knox County, as CORSA money covers losses in the 61 remaining counties which participate in CORSA. [Tr. 65: 17-25 (Brooks), S-17]. If such is the case, why have Constitutionally-restricted funds at all?

In the years in which this issue has existed, there has never been an effort by either the Commissioners or CORSA to tie the CORSA premiums to a highway purpose. No CORSA actuary has ever interacted with — much less worked with or talked to — the Knox County Engineer in an effort to determine what expenditures are directly connected with a highway purpose. [Tr. 52: 12-16 (Brooks), S-13]. The CORSA

actuary does not conduct a risk allocation per department for each of the 62 counties within the CORSA risk-sharing pool. [Tr. 53:17-19 (Brooks), S-15]. In fact, the calculation upon which the Commissioners rely is simply a proportional comparison. [Tr. 54:19-21 (Brooks), S-14; Tr. 64: 24-25, 65: 1-11 (Brooks), S16-17].

Finally, there is no requirement — either by law or regulation — that the County Commissioners seek reimbursement for CORSA from the county offices. [Tr. 76:7-10 (Brooks), S-19].

Based on the evidence presented at trial by the Commissioners, the appellate Court found that the Commissioners' evidence was speculative, and failed to establish "a nexus between CORSA and highway purposes or the operation of the Engineer's office." (Opinion, ¶47.)

In an effort to broaden the interpretation of "directly connect" to a highway purpose on appeal to this Supreme Court, the Commissioners analogize the facts from a series of Ohio Supreme Court cases, so that Constitutionally-restricted monies might be used to pay CORSA premiums. In all of the cases cited by the Commissioners, however, the highway purposes seeking the use of restricted funds were necessary to the actual, physical development, construction, maintenance and repair of the highways — directly connected to highway purposes per the plain language of Article XII, Section 5 of the Ohio Constitution. In those cases, a highway could not be built "but-for" payment from the Constitutionally-restricted funds.

That is not the case here. There is no requirement that a county participate in CORSA at all. [Tr. 57:16-20 (Brooks), Appellants' Supplement (hereinafter "S") 15]. Furthermore, there is no requirement that a county purchase highway insurance, or participate in CORSA, in order to construct, reconstruct, maintain, and/or repair a highway. [Tr. 57:21-25 (Brooks), S-15]. In fact, a county may choose to "go bare" — meaning to go without coverage — or could choose to self-insure, as larger Ohio counties choose to do. [Tr. 56-57 (Brooks), S-14-15]. So if self-insured counties construct highways without insurance or CORSA, then the CORSA pool cannot meet the "but for" test.

The first case the Commissioners cite is *Kauer v. Defenbacher* (1950), 153 Ohio St. 268, in which this Court determined that restricted funds could be expended on a study for a turnpike project, specifically noting:

[M]oneys to be expended for the study of a turnpike project...come within the definition of 'the state's share of the cost of constructing \* \* \* the state highways of this state,' ...and moneys so used would be used for the stated object of the tax... We are further of the opinion that moneys so expended would be 'expended for \* \* \* costs for construction \* \* \* of public highways and bridges and other statutory highway purposes,' within the meaning of Section 5a, Article XII of the Constitution. *Id.* at 277.

"Construction" is specifically listed in the language of Article XII, Section 5a of the Ohio Constitution. Without a study, presumably a highway could not be constructed. Such a study was a permissible use of the Constitutionally-restricted funds, and therefore directly connected to a highway purpose.

Similarly, in *State ex rel. Walter v. Vogel* (1959), 169 Ohio St. 368, the second case the Commissioners cite, the issue was whether Constitutionally-restricted funds could pay for highway lighting systems. This Court recognized lighting as an appurtenance and a part of the highway, and applied it as part of maintaining and repairing of the highway. "Maintenance" and "repair" are specifically listed in the language of Article XII, Section 5(a) of the Ohio Constitution, and, thus, this Court determined that funds derived from fuel and gas taxes were permitted to establish and maintain the lighting on highways. *Id.* at 373.

The third case the Commissioners cite is *State ex rel. Preston v. Ferguson* (1960), 170 Ohio St. 450, in which this Court found that Constitutionally-restricted fuel and license taxes may fund the purchase of land for the construction of a highway, as the purchase of land is directly-related to the "development of the highway system." The Court stated:

With the mushrooming of metropolitan areas and the expansion of suburban living, it is not only necessary but essential that plans be developed and rights of way acquired far in advance of actual construction, not only to obviate the increase in cost due to the development of areas through which highways must pass but also to afford an opportunity for the planned development of the communities themselves....Clearly the prior acquisition of property deemed necessary for the improvement of the state highway system constitutes a statutory highway purpose within the meaning of Section 5a of Article XII of the Ohio Constitution. *Id.* at 462-463.

Finally, the Commissioners try to analogize the CORSA premiums to that of health insurance premiums as part of the highway employees' wage package,

addressed in *Madden v. Bower* (1969), 20 Ohio St.2d 135. This Court, in *Madden, supra*, found the group health insurance plan procured for county highway employees of a county engineer who were “engaged directly in work on county roads is a part of the cost of services rendered by such employees” and therefore properly payable by MVGT funds. (Opinion, ¶51) (emphasis added).

The appellate Court herein specifically distinguished *Madden* from the facts at hand, and found that the CORSA risk-sharing pool is neither part of employees’ fringe benefits, nor that CORSA is insurance, as acknowledged by the Commissioners in their Merit Brief. (Opinion, ¶52.) R.C. 2744.081(E)(2) expressly states that a joint self-insurance pool is not insurance, but rather is a risk sharing pool. See Appellants’ Merit Brief, p. 23; (Opinion, ¶52.)

Appellee’s Position to Appellants’ Subparagraph A(3)(a): The issue was raised in this subsection was not accepted by this Court for review, and should not be addressed.

The appellate Court found it irrelevant that the Knox County Engineer’s account contains both MVGT funds and non-restricted funds. (Opinion, ¶59.) While the Commissioners address this issue in their Merit Brief (see Appellants’ Merit Brief, pp. 23, 26-27,) nevertheless this issue was raised in Appellants’ Second Proposition of Law in Appellants’ Jurisdictional Brief, which was not accepted by this Court. Thus, this argument should not be addressed in this Proposition of Law.

Similarly, the “new” issue the Commissioners address in this section is related to

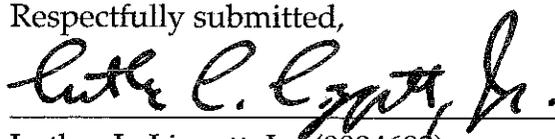
Appellants' Second Proposition of Law from Appellants' Jurisdictional Brief to this Court, which Proposition of Law was not accepted by the Court for review.

Specifically, Appellants' Second Proposition of Law sought review of R.C. 315.12(A) and the authority of how one-third of the Engineer's operating costs are to be spent, and that R.C. 2744.081(A)(4) and R.C. 315.12(A) "provide specific statutory authority to have the CORSA costs at issue in this case allocated to and paid out of the county's MVGT account." Appellants' Jurisdictional Brief, p. 12. That issue was not accepted by the Supreme Court on appeal. This "re-worked" argument by Appellants should not be addressed by this Court in the Proposition of Law accepted by it.

#### Conclusion

Essentially the Commissioners bring a fact appeal based on a misinterpretation of this Supreme Court's precedent. The Fifth District Court of Appeals closely and thoroughly examined the evidence before it on review, and found that the Commissioners' evidence failed to demonstrate a nexus between the CORSA risk-sharing premiums and a direct highway purpose. Rather, the reimbursement for CORSA premiums is prospective in nature, and not payment for actual loss related to highways. As such, the Knox County Engineer respectfully requests that this Court affirm the decision of the appellate Court.

Respectfully submitted,

  
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Certificate of Service

I hereby certify that on this 15<sup>th</sup> day of December, 2011, a copy of Appellee Knox

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