

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.

CASE NO. 2011-0859

**On Appeal from the Knox County Court
of Appeals, Fifth Appellate District**

Court of Appeals Case No. 10CA000018

**MERIT BRIEF OF *AMICUS CURIAE* OHIO CONTRACTORS
ASSOCIATION IN SUPPORT OF APPELLEE KNOX
COUNTY ENGINEER JAMES L. HENRY**

Patrick A. Devine (0022919)
Schottenstein Zox & Dunn Co., LPA
250 West Street
Columbus, OH 43215
Telephone: 614-462-5030
Email: pdevine@szd.com

*Attorneys for Amicus Curiae Ohio
Contractors Association*

Gerhardt A. Gosnell, II, Esq. (0064919)
Counsel of Record
James E. Arnold & Associates, LPA
115 W. Main St., Suite 400
Columbus, OH 43215
Telephone: 614-460-1600
Facsimile: 614-221-4012
Email: ggossnell@arnlaw.com

Attorney for Appellants

Luther L. Liggett, Jr. (0004683)
Counsel for Record
Luper Neidenthal & Logan
50 West Broad St., Suite 1200
Columbus, Ohio 43215
Telephone: 614- 229-4423
Email: lliggett@lnlattorneys.com

Attorney for Appellee

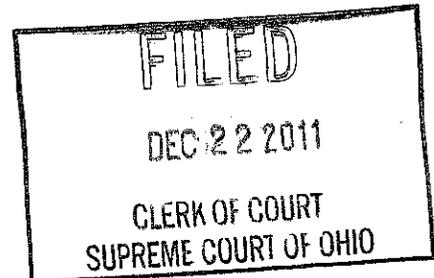


TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
STATEMENT OF FACTS	2
ARGUMENT	2
CONCLUSION	6

TABLE OF AUTHORITIES

Page

Cases

<i>Grandle v. Rhodes</i> (1959), 169 Ohio St. 77.....	3, 4
<i>Knox County Board of Commissioners v. Knox County Engineer</i> (2006), 109 Ohio St.3d 353	3
<i>Madden v. Bower</i> (1969), 20 Ohio St.2d 135	5
<i>Ohio Trucking Association v. Stickrath</i> (Aug. 30, 2011), Franklin App. No. 10AP-673, 2011-Ohio-4361	3
<i>State ex rel. Maurer v. Sheward</i> (1994), 71 Ohio St.3d 513.....	2
<i>Stockberger v. Henry</i> (April 7, 2011), Knox App. No. 10 CA 18, 2011-Ohio-1710	6

Statutes

R.C. 2744.081	5
R.C. 2744.081(A)(4).....	5
R.C. 315.12	6

Other Authorities

Article XII, Section 5a, Ohio Constitution	1, 2, 3, 4, 5, 6
--	------------------

INTRODUCTION

The Ohio Constitution, at Section 5a of Article XII, restricts the expenditure of funds derived from motor fuel taxes and highway license fees solely for highway purposes. This provision of the Ohio Constitution does not authorize the use of motor vehicle and gas tax funds to defray a county's cost of participating in a joint risk sharing pool known as the County Risk Sharing Authority ("CORSA").

This case arises from a lawsuit by the Board of County Commissioners of Knox County demanding that the County Engineer pay with fuel tax and license fee revenues that are limited to highway purposes a share, determined by the Commissioners, of the CORSA premiums. The Fifth Appellate District Court of Appeals held that the Knox County Engineer cannot use funds restricted by the Ohio Constitution for highway purposes to pay his office's share of Knox County's premium for the risk sharing pool.

The Ohio Contractors Association ("OCA") is a trade association comprised of contractors and related businesses that are engaged in construction in the State of Ohio, including the construction of highways and bridges by public owners. The OCA provides a variety of services to its members, including supporting issues for highway construction, seeking gas and use taxes for highways, and working to protect the unlawful diversion of such funds from highway purposes. Its members bid upon county projects throughout the State of Ohio, including Knox County.

This case involves an attempt to improperly expend constitutionally protected funds limited in their application to highway related purposes. The Ohio Constitution, Article XII, Section 5a, mandates that these monies be used exclusively for "highway purposes." The Ohio General Assembly has statutorily defined those highway purposes. The Knox County Commissioners are attempting to redirect funds in complete violation of these constitutional and

statutory prohibitions, ultimately diminishing the availability of these funds for their proper purpose – construction, repair, and maintenance of Ohio’s public highways and bridges.

The continued protection of these monies from improper encroachment by governmental subdivisions is a matter of significant concern to the OCA and its contractor members throughout the State of Ohio.

STATEMENT OF FACTS

The Statement of Facts of the Appellee Knox County Engineer’s Merit Brief is adopted and incorporated herein.

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.

This case should be resolved by looking solely at the plain language of Article XII, Section 5a, which was adopted by initiative petition in 1947. Section 5a provides:

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 funds 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 for hospitalization of indigent persons injured in motor vehicle accidents on the public highways.

“The first step in determining the meaning of a constitutional provision is to look at the language of the provision itself.” *State ex rel. Maurer v. Sheward* (1994), 71 Ohio St.3d 513, 520. As the Tenth Appellate District for Franklin County recently noted, “Here, the plain

language of Section 5a states that fees, excise taxes, and license taxes relating to the registration, operation, or use of a motor vehicle must be expended exclusively for specific purposes contained in the amendment. *Ohio Trucking Association v. Stickrath* (Aug. 30, 2011), Franklin App. No. 10AP-673, 2011-Ohio-4361, para. 28. After describing the history of Section 5a, the Franklin County Court of Appeals said that “the objective of Section 5a was and is to prevent taxes and fees collected from the motoring public from being diverted to non-highway purposes.” *Id. Para. 34*. After Section 5a was enacted, the moneys derived from gasoline and license fees are to be used solely for highway purposes.

In 2006, when faced with the issue of whether CORSA premiums could be paid by the Knox County Engineer from the funds restricted by Section 5a, this Court held:

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

Knox County Board of Commissioners v. Knox County Engineer (2006), 109 Ohio St.3d 353 (“*Knox I*”).

This Court ruled in *Knox I* that there was no evidence that the CORSA premiums submitted to the County Engineer were for highway purposes or were directly connected to such highway purposes. Thus, Section 5a prohibited the County Engineer from paying the CORSA premiums with restricted funds.

After *Knox I*, the Knox County Commissioners renewed their efforts to force the County Engineer to pay a portion of the CORSA premiums by having CORSA devise an allocation formula that is arbitrarily based upon a percentage of quantity for payroll, and not directly related

to highway purposes. The allocation does not include any calculation of the relative risk or loss experience of Knox County compared to the County Engineer.

Nothing has changed since *Knox I* in terms of failing to show a nexus. The Appellants' refrain has been that building and maintaining highways creates a risk and if someone wants to insure that risk, then it must be a cost of operation of the county engineer and a highway purpose. There has been no showing that the payment of CORSA premiums is related to a highway purpose of the Knox County Engineer. The so-called allocation by CORSA is but an equation with no finding that CORSA serves a highway purpose. To build a road or a bridge, the County does not have to pay a CORSA premium for its highway project.

CORSA's allocation formula would require a premium to be paid by the restricted funds based on a projection of the Engineer's payroll to the total payroll, along with the number of the Engineer's vehicles and a property value on gas. CORSA's allocation fails to consider any loss, such as that of other county departments including, for example, the Sheriff, employment litigation, or the losses from the risk sharing pool paid to other counties for non-highway claims.

Article XII, Section 5a of the Ohio Constitution prohibits the use of those funds for the purpose of paying CORSA costs absent a showing that the Constitution's expenditure restrictions are complied with. Section 5a is a restriction on the use of specific tax revenues, not an authorization to expend the funds. As this Court stated in *Grandle v. Rhodes* (1959), 169 Ohio St. 77, Article XII, Section 5a "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."

Because any "pool" by nature co-mingles more than one purpose, more than one liability, it is impossible to segregate out those funds used only for Knox County "highway purposes." A

pool of any sort obliterates any trace to the constitutional test, absent exposure and loss experience. Knox County's risk is co-mingled with at least sixty-one other Ohio counties. There is no effort to distinguish Knox County's own exposure, let alone "highway purposes" from the other participants.

The Knox County Commissioners used general funds to pay into the CORSA pool on behalf of all Knox County agencies, including the Board of Commissioners' own liability. The statutes pertaining to CORSA provide for coverage risks to the county in its entirety or to its employees, but do not specify that the use is for highway purposes. R.C. 2744.081 does not authorize CORSA or the County Commissioners to demand that the County Engineer pay CORSA premiums.

R.C. 2744.081(A)(4) does permit CORSA to allocate the pool's premiums to each county based on actuarial principles, but it does not authorize the use of highway tax funds to pay for any and all premiums a County chooses to assess against the County Engineer. There has been no showing made that CORSA premiums and coverage relate to the highway purposes set forth in Article XII, Section 5a of the Ohio Constitution.

The appellant relies upon the case of *Madden v. Bower* (1969), 20 Ohio St.2d 135, for the proposition that CORSA costs are similar to the cost of employee health insurance for County Engineer employees who perform highway operations. As this Court recognized in *Knox I*, the *Madden* case involved a different issue. In *Madden*, the county provided the employees a group health insurance plan as an incentive to continue their public service. The Court held that the health insurance premium cost paid on behalf of county engineer employees who are engaged in the construction and improvement of county roads and bridges as an incentive to continue their

public service is a cost of operation of the office and must be paid in accordance with R.C. 315.12.

CORSA premiums are not fringe benefits provided to county engineer employees who are engaged in the construction or maintenance of county roads and bridges. As the court of appeals below noted, the county engineer engages in many non-highway related activities. The CORSAs premiums attributed to the engineer are not broken down to “estimate how much of the Engineer’s property and personnel actually deal directly related to highway purposes.” *Stockberger v. Henry* (April 7, 2011), 2011-Ohio-1710, para. 55.

Neither Article XII, Section 5a of the Constitution, nor R.C. 315.12 provides that CORSAs premiums are an acceptable expenditure of the restricted highway funds. If coverage for the risk of liability from the operations of a county engineer’s office was intended to be paid from the restricted funds then Section 5a and R.C. 315.12 would so provide.

CONCLUSION

The Ohio Contractors Association respectfully request this Court find that Article XII, Section 5a of the Ohio Constitution does not authorize the use of motor vehicle and gas tax funds to defray a county’s cost of participating in a joint self-insurance pool otherwise known as CORSAs.

Respectfully submitted,



Patrick A. Devine (0022919)
Schottenstein, Zox & Dunn
250 West Street
Columbus, Ohio 43215
Phone: (614) 462-5030
Fax: (614) 222-3488

*Attorneys for Amicus Curiae
Ohio Contractors Association*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that copy of the foregoing has been served upon the following persons by placing the original in the U.S. Mail, postage pre-paid, this 22nd day of December 2011.

Gerhardt A. Gosnell, II, Esq.
Chester Wilcox & Saxbe
65 East State Street
Suite 1000
Columbus, Ohio 43215

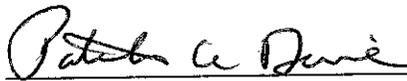
*Counsel for Plaintiff
Knox County Commissioners, et al.*

Eugene L. Hollins
Wiles, Boyle, Burkholder
& Bringardner Co., L.P.A.
300 Spruce Street
Columbus, Ohio 43215-1173

Luther L. Liggett, Jr.
Luper Neidenthal & Logan
50 W. Broad St., Suite 1200
Columbus, Ohio 43215

*Counsel for Defendant
County Engineer*

Frederick A. Vierow
6870 Haymore Avenue West
Worthington, Ohio 43085



Patrick A. Devine

(0022919)