ORIGINAL

IN THE SUPRME COURT OF OHIO

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

COUNTY ENGINERS ASSOCIATION OF OHIO AMICUS CURIAE BRIEF IN SUPPORT OF APPLELLEE KNOX COUNTY ENGINEER

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STATEMENT OF INTEREST OF AMICUS CURIAE COUNTY ENGINEERS ASSOCIATION OF OHIO (CEAO)

This *Amicus Curie* is the County Engineers Association of Ohio, herein referenced as "CEAO". CEAO is a non-profit corporation comprised of the eighty-eight county engineers, eighty-seven of whom hold office independently of their respective boards of county commissioners. Knox County is one of the eight-seven counties in which the county engineer is elected.

One of the duties of a county engineer is to provide the public with safe and efficient roads and bridges. CEAO works with the public sector, legislators, and state, county, municipal, township and other public officials to secure the necessary funding to create this system of roads and bridges. Sometimes when there are attempts to wrongly divert highway funds intended to help provide that system, CEAO will file *amicus curiae* statement or brief on various legal issues. CEAO does so in this case.

A major purpose of CEAO is to advocate a public policy that results in the county engineers having the necessary revenues to properly construct, maintain, and repair roads and bridges in their respective counties. This advocacy is generally aimed at the public, key constituency groups, the legislature, state executives, local county officials, the news media, and from time to time, by the filing of an *amicus curiae* brief in court to bring to the attention of the courts, the proper interpretation of laws designed to protect the funding for construction, maintenance, and repair of roads and bridges.

In an earlier case involving the same issue, CEAO filed *amicus curiae* briefs in support of the Knox County Engineer in refusing to pay CORSA costs. In that case, the Ohio Supreme

Court held the expenditure of highway revenues to pay CORSA costs was prohibited by Section 5a, Article XII, of the Ohio Constitution.

CEAO files this brief as with the previous amicus briefs, because if the Court of Appeals decision is reversed, necessary motor vehicle fuel and tax revenues may be diverted from construction, maintenance and repair of roads and bridges to another use, namely to pay CORSA costs. This issue is of critical importance to CEAO's members because highway revenues are the largest source of funding that counties receive for the construction, maintenance and repair of county roads and bridges. Every dollar of highway revenues that is permitted to be expended for another purpose means a deterioration in the ability of a county to provide safe and adequate roads and bridges to the public.

CEAO has an additional concern. The public, legislators and others have generally been supportive of highway revenue tax increases because they understand that the revenues will be used to fix pot holes and repair aging bridges and are willing to make those payments because the public can see the direct benefit. When CORSA costs and potentially other costs are authorized by judicial fiat, despite statutory and constitutional limitations, the legislature and the public alike are bound to react negatively and it will be much more difficult to obtain road and bridge revenues.

INTRODUCTION

The sole issue before this Court is whether a portion of the annual cost of belonging to the County Risk Sharing Authority, ("CORSA"), a joint self-insurance pool, incurred for providing financial protection against property and liability losses can be paid from motor vehicle fuel and registration tax revenues ("MVGT revenues" or "MVGT funds"), the use of which are restricted by Ohio Constitution, Article XII, Section 5a ("Section 5a").

The Appellants-Plaintiffs are the members of the Knox County Board of Commissioners acting in their official capacity herein referenced as the "Knox Commissioners" or "Commissioners". The Appellee-Defendant is the Knox County Engineer herein referenced as the "Knox County Engineer" or "County Engineer". The Knox Commissioners seek a declaration that MVGT funds can be used to pay CORSA costs and the Knox County Engineer opposes the declaration as contrary to the Ohio Constitution.

MVGT funds are the revenues generated by tax levies in R.C. 4501, 4503 and 4504 and are distributed to counties for exclusive purposes that do not include payment of CORSA costs.

The Commissioners seek no declaration as to any other source of funding including funding received from CORSA resulting from county losses.

Contrary to the claim in their introduction, the Commissioners offer no evidence that CORSA annual costs "fall squarely within the costs of constructing, reconstructing, maintaining and repairing public roads and bridges or directly connected there to" as required to fall within the exception to the prohibition against the use of MVGT funds in Section 5a. Commissioners Merit Brief, page 1.

The clear record evidence is that the annual costs incurred for CORSA coverage are for the purpose of providing through a joint self-insurance pool with other counties, a pool of funds for the payment of claims resulting from liability and property loss and for no other statutory purpose. R.C. 2744.081(A) and (E)(1).

The issue of payment of CORSA annual costs was previously determined in litigation between the same parties which rejected the Commissioners position because CORSA costs are not one of the purposes listed in Section 5a or a purpose directly connected there to. *Knox Cty.*

Bd. of Commrs. v. Knox Cty. Engineer, 109 Ohio St.3d 353, 2006-Ohio-2576. The earlier case is referred herein as "*Knox I*" and the case currently before the Court is referred to as "*Knox II*".

The Fifth Appellate District in this case reviewed the record of the and unanimously correctly applied the law as determined by this Court in *Knox I* and other cases.

STATEMENT OF FACTS

Amicus CEAO generally accepts the facts as stated in the Commissioners' Merit Brief that are pertinent to a resolution of the Commissioners' Proposition of Law No. 1 but disagrees with the legal conclusions that the Commissioners have drawn from those facts but appear in the Commissioners Statement of Facts and Case..

The facts accepted are that Knox County is a member of the County Risk Sharing Authority (CORSA) and has been since 1987. CORSA is a joint self-insurance pool established pursuant to R.C. 2744.081. That CORSA is not an insurance company [R.C. 2744.081(E)(2)] and that Knox County jointed CORSA as an alternative to Knox County purchasing insurance or maintaining a self-insurance program of its own pursuant to the authority in R.C. 2744.08(A). Also see the first paragraph of R.C. 2744.081(A). The Knox Commissioners seek a declaration that it is constitutional to use MVGT funds to pay a portion of the annual costs of belonging to CORSA and the Knox County Engineer. This coverage applies to all county offices, including the Engineer and some other related entities not parties to this litigation.

MVGT funds are the revenues generated by tax levies in R.C. 4501, 4503 and 4504 and are distributed to counties for exclusive purposes that do not include payment of CORSA costs. CEAO asserts as fact the tax levy provisions state as a purpose for use of MVGT funds that do not include CORSA costs. R.C. 4503.02; R.C. 4504.02; R.C. 4504.15; R.C. 4504.16; R.C.

5735.05; R.C. 5735.25; R.C. 5735.29. Further that the funds distributed by the state to the county restrict the use of the funds to purposes that also do not include CORSA.

CEAO asserts the fact that the purpose of CORSA pursuant to the authority granted in R.C. 2744.081 is to provide for the payment of judgments, settlements of claims, expense, loss and damage in connection with potential liability for acts or omissions of it or its employees and that joint self-insurance coverage and that coverage includes various forms of property casualty self-insurance for the purpose of covering liabilities or risks of members of the pool.

The Commissioners make the factual statement that CORSA collects amounts to pay its costs from member counties on rates established by an actuary and pays costs associated with covered claims. The costs billed to counties includes a proportional amount of the cost of re-insurance to pay claims over one million dollars and those rates are established by the reinsurer and an allocated administrative cost for managing the program. [Tr. 27:23 to 31:15 (Brooks)].

CEAO specifically disagrees with the Commissioners' statement that the General Assembly by enacting R.C. 2744.081 that granted the Commissioners authority to allocate the costs for participation in CORSA to the various funds or accounts in the treasury of Knox County. Commissioners Statement of the Case and Facts, Merit Brief, page 4. By the very terms of R.C. 2744.081, only a joint self-insurance pool is granted that authority and the allocation must be across all the political subdivisions' accounts and funds. "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. R.C. 2744.081(A)(4). CORSA recommended an allocation formula to be used by the Commissioners to allocate costs to various county agencies but did not require the Commissioners to use the formula. Brooks further testified that the Commissioners in doing

their reallocation of costs to various Knox County Department did not follow the reallocation formula in the R.C. 2744.081 but used a "proportional mathematical comparison". [Tr. 53:30 to 54:21 (Brooks)].

ARGUEMENT

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

CEAO Response:

> Article XII, Section 5a of the Ohio Constitution prohibits the use of MVGT funds to pay a county's annual cost of participating in a joint self-insurance pool.

Knox II, Fifth Appellate District Opinion:

> The Commissioners did not present evidence establishing a direct nexus between the invoices for the premium or any portion of the premium and highway purposes or operations of the Engineers such as to permit the use of MVGT funds restricted by Article XII, Section 5a. *Stockberger et al. v. Henry*, 2011-Ohio-1750 (5th Dist. April 7, 2011), ¶¶61, 62.

Article XII, Section 5a:

> 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 Commissioners err in the wording of the Proposition of Law No. 1. Article XII, Section 5a does not "authorize" the expenditure of any funds but rather is a prohibition against

the use of MVGT funds unless the funds fall within certain exemptions to the prohibitions against use of the MVGT funds.

"Authorize" is a verb that means: "1. To give legal authority; to empower <he authorized the employee to act for him>. 2. To formally approve; to sanction <the city authorized the construction project>. – authorization, n." Black's Law Dictionary, Seventh Edition, p. 129.

If expenditures fall within one of the exceptions to the general prohibition on expenditures in Section 5a, one must find a statute authorizing the expenditure in order to be able to expend the funds for that purpose.

The Commissioners make no argument that Section 5a authorizes expenditures but rather base their case on an argument that CORSA annual costs fall within an exception to the prohibition against use of MVGT revenue.

Taken at face value, the Commissioners Proposition of Law No.1 should result in a dismissal of the case and under no circumstances can this Proposition of Law No. 1 properly be used in a syllabus in this matter.

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

CEAO Response: The annual cost of CORSA to cover the risk of loss or liability resulting from the operations of a county's highway department is not a purpose permitted by Article XII, Section 5a.

In the cases interpreting Section 5a, "highway purpose" is used as shorthand for the list of highway permitted uses in Section 5a. *Knox I,* 109 Ohio St.3d 353, 2006-Ohio-2576, ¶¶10, 11. The highway purposes are "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". Section 5a.

The Commissioners claim "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." Comm Merit Brief, p. 12. The Commissioners do not contend CORSA costs are for a highway obligation or for an expense of state enforcement of traffic laws.

The 5th District found that "The Ohio Constitution sets out a list of use that are acceptable but does not provide for insurance or risk sharing". *Knox II*, Fifth District Appellate Opinion, ¶ 48. By any reading of this phrase in Section 5a, the words do not include the words "insurance", "risk sharing" or for that matter "joint-self insurance pool costs" or "costs of inherent risk of property/casualty loss in construction" which the Commissioners' claim allows the Section 5a provisions exemption to apply.

The expenditure to pay the annual costs of belonging to a joint self-insurance pool such as CORSA are not expenditures "for construction, reconstruction, maintenance and repair of public highways and bridges".

"Construction" means the "1. The act of building by combining or arranging parts or elements; the thing so built." Applicable definition in Black's Law Dictionary, Seventh Edition, p. 355. As used in Section 5a, the constructing highways and bridges so built, "Reconstruction" would simply be the act rebuilding of that which has been build (highway or bridge), "maintenance' would simply be the keeping the thing built (highway or bridge) from deterioration and repair would be the act of fixing the thing built (highway or bridge).

CORSA costs do not fall within the phrase "other statutory highway purposes" in Section 5a. The statutory purpose of joint self-insurance pools is 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 and may also include any one or more stated 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(A)(E)(1). The words of this statute do not state a "highway purpose".

The statutory purposes for use of MVGT funds are stated in the laws dealing with levying and distribution of MVGT funds to the county which do not include the costs of a joint self-insurance pool.

CORSA annual costs are not costs of construction, maintenance, reconstruction, or reconstruction of highways and bridges but rather are a mechanism to pay damages resulting from liability and recoup the cost of lost property.

Particularly instructive here is this Court's decision *Grandle v. Rhodes,* 169 Ohio St. 77, 157 N.E.2d 336 (Ohio 1959, denying the use MVGT funds to pay attorney fees to attorneys who successfully blocked an illegal expenditure of MVGT funds to pay the costs of preliminary study in contemplation of building an underground parking garage. *Grandle* is not cited by the Commissioner in their Merit Brief. Both this Court in *Knox I* and the Fifth District Court of Appeals found the reasoning in *Grandle,* to be persuasive. *Knox I,* ¶¶ 10, 11, and *Knox II,* Fifth Appellate District Court Opinion ¶¶49, 52, 53.

In *Grandle*, this Court found:

> 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; and the words, 'other statutory highway purposes,' as used in such section cannot be extended to comprehend the payment of fees to attorneys of a taxpayer who in an action

> brought for such purpose successfully blocks the disbursement of a sum of money appropriated by the General Assembly for a preliminary study in connection with the contemplated construction of a parking garage underneath the Statehouse grounds in Columbus. (*Grandle* Syllabus 1, at page 77)

In this case to describe what is included in the list of permissible highway uses, this Court used the phrase "directly connected". This phrase was not used to expand the exemptions but merely to explain what was within the exemptions. To make sure that there was no misunderstanding of this phrase, the Court indicated that Section 5a "closely restricts the expenditures" to those in Section 5a.

The Commissioners appear to be arguing that phrases like "highway purpose" and "directly connected" can be interpreted to expand the list of expenditures. At best, payment of CORSA costs is an indirect highway use and certainly cannot fall within the Court's determination that the expenditures are closely restrict to those with Section 5a.

The logic of this case denying the potential misuse of MVGT funds applies to the logic of the case under review. Both involve the potential replacement of what might have been available to the county for purposes listed in Section 5a except for certain occurrences. Both are simply alternative funding mechanisms to the use of MVGT funds. There is no requirement in Section 5a that only MVGT funds can be expended for the purposes listed in Section 5a and other funds can be spent for these purposes absent some specific limitation.

In the earlier case which considered whether or not spending of MVGT funds could be spent on studies and surveys relative to building an underground parking garage, a majority of the Court found that such an expenditure would by forbidden by Section 5a as the MVGT funds would not be used in conjunction with the construction of a state highway or as part of any integrated highway project. *Grandle v. Rhodes*, 166 Ohio St. 108, 110, 139 N.E.2d 328 (Ohio 1956). In this case, the Court majority's decision was cast as a dissent because the Court

declared a statute unconstitutional and under the Ohio Constitution at the time, holding a statute unconstitutional required all but one judge to make the finding. The majority were short the necessary votes. On rehearing the same case, the Court determined that it was not necessary to hold the statute unconstitutional. The Court needed only to prohibit the expenditure of the MVGT funds proposed for the study of the underground garage. Under the decision on rehearing, the initial dissent by a majority of the judges became the majority decision of this Court because the super majority was no longer needed. *Grandle v. Rhodes* 166 Ohio St. 197, 140 N.E.2d 897 (Ohio 1957),

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

   CEAO Response: Article XII, Section 5a requires that expenditures of MVGT revenues be for purposes listed in the exceptions contained in Section 5a or directly connected there. CORSA costs are not one of those purposes.

The Commissioners argue that the opinions in four cases support their position that MVGT revenues can be used to pay CORSA costs: *State ex rel. Kauer v. Defenbacher*, 153 Ohio St. 268, 91 N.E.2d 512 (Ohio 1950), *State ex rel. Walter v. Vogel*, 169 Ohio St. 368, 159 N.E.2d 892 (Ohio 1959), *State ex rel. Preston v. Ferguson*, 170 Ohio St. 450, 166 N.E.2d 365 (Ohio 1960) and *Madden v. Bower* (1969), 20 Ohio St.2d 135, 49 O.O.2d 469, 254, None of these cases support the Commissioners' position and are clearly distinguishable from this case.

In *Kauer*, supra, at pp 276-277, this Court held:

> The next question to be considered is whether the General Assembly had power to appropriate moneys for such a purpose by reason of the provisions of Sections 5 and 5a of Article XII of the Constitution. These sections read:
>
> "Section 5. 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.

"Section 5a. 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 portions of Amended House Bill No. 654 hereinbefore quoted disclose that the highway improvement fund, sought to be encumbered by relator in the instant case, consists of moneys appropriated from the highway construction fund. The principal source of moneys in the highway construction fund is the gasoline tax levied by Section 5541, General Code. That section provides in part:

"For the purpose of providing revenue for supplying the state's share of the cost of constructing, widening and reconstructing the state highways of this state * * * an excise tax is hereby imposed * * *."

In our opinion, moneys to be expended for the study of a turnpike project, pursuant to Section 1220, General Code, come within the definition of "the state's share of the cost of constructing & & & the state highways of this state," within the meaning of those words, as found in Section 5541, General Code; and moneys so used would be used for the stated object of the tax imposed by Section 5541, General Code.

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.

The *Kauer* Opinion clearly places the cost of the turnpike planning within the meaning of "construction" and for a statutory highway purpose found in the tax provisions levying the taxes as required by another provision of the Ohio Constitution, Article XII, Section 5. CORSA costs are not incurred for the construction of highways or bridges and are not listed among the tax provisions levying the statute. Neither R.C. 315.12 nor R.C. 2744.081 is a tax levying statute.

In *Walter,* supra, at pp 371-372, this Court held that the cost of electricity to light a limited access highway could be paid with MVGT funds. The Court based its decision on its

conclusion that a lighting systems is an "appurtenance" to a limited access highway and therefore part of the limited access highway. Because MVGT funds can be used to construct, reconstruct, repair or maintain the appurtenance, the cost of electricity to maintain is part of the cost of maintaining the highway which is a permitted by the use of the term "maintenance" in Section 5a.

It is obvious that the payment of annual CORSA costs do not fall within the term "maintenance" of highways and bridges as used in Section 5a but payments are rather expenditures for the purpose of paying liability and property losses.

In *Preston v. Ferguson*, supra, at pp. 461-463, this Court held that the advance acquisition of highway rights of way pursuant to a statute that authorize the director of highways to purchase real property that he deems will be necessary for the improvement of the state highway system is a statutory highway purpose within the meaning of Section 5a and MVGT revenues could be used.

The purpose of joining CORSA, a joint self-insurance pool created under R.C. 2744.081, is to shift the responsibility for paying liability and property claims to the self-insurance pool. There is nothing in R.C. 2744.081 that requires the payment of CORSA costs for the purpose of developing a highway system. CORSA payments do not have the same nexus to highway systems as that of purchasing necessary rights of way upon which to construct a highway.

In *Madden*, supra, pp 135-142, the Summit County Commissioners sought a writ of mandamus to require the County Auditor to pay the cost of health insurance procured pursuant to specific statutory authorization to funds other than the general fund. The statute granting commissioners the right to procure health insurance was silent on the source for funding the purchase just as R.C. 2744.081 is silent as to the source of fund to pay annual CORSA costs.

The Court found that health insurance was the part of compensation of an employee and must be charged to the same account from which employees regularly paid. The Court found that County Engineer's employees who are engaged directly in the work on county roads and are compensated pursuant to specified statutes from certain funds, and therefore those funds must be charged the health insurance costs related to their compensation. The funds charged include R.C. 4501.04 and R.C. 5735.27 which state the purposes for which MVGT funds are to be used by the county. The Court also stated the in reviewing the expenditure of MVGT funds, one must consider not only the statutory limits but also the restrictions in Section 5a.

Madden provides no support for the Commissioners because neither R.C. 4501.04 and R.C. 5735.27 nor Section 5a list annual CORSA costs as a purpose for which the MVGT revenues may be expended.

The Knox Commissioners claim that the provisions of Section 5a should be strictly construed because the restrictions in Section 5a are an exception to the legislature's authority to spend state revenue for general purposes. While that expression represents a long held view of county commissioners as the appropriating authorities, the citizens who crafted this citizen initiated constitutional amendment wanted to make sure that no MVGT funds would be diverted back into general fund. By the very terms and any interpretation of the terms in Section 5a, MVGT funds can only be spent for one of the purposes listed in Section 5a or not spent at all. There is no rule of interpretation of Section 5a that would result in MVGT funds being spent for general fund purposes. The citizens clearly wanted their road taxes spent on roads and narrowly crafted the exceptions to fit that desire. The Commissioners state that Article 5a must be strictly construed and cite several cases supporting strict construing of constitutional and statutory provisions. The general prohibition against using MVGT funds except for certain purposes is

plain on its face and is absolute. "No moneys *** shall be expended for other than ***." Any sentence that begins with "no", clearly states that which follows is prohibited except for any exceptions.

Section 5a has a number of exceptions in the nature of permitted uses of MVGT funds. However, the exceptions in Section 5a appear plain on their face and the courts have consistently closely interpreted their meaning. Rather than a strict construing of the exceptions, the Commissioners appear to be advocating a more liberal interpretation that includes CORSA costs as part of "construction, reconstruction, maintenance and repair of public highways and bridges" or a new exception created by judicial fiat. Plain or strict, the common use of these words does not include the costs of belonging to a joint self-insurance poll such as CORSA in construction, reconstruction, maintenance and repair of public highways and bridges.

Commissioners attempt to bolster their argument by analogy to other expenditures that may be within Section 5a permitted uses, None of these other uses are under litigation in this matter and the Commissioners seek no declaration as to the whether or not the other expenditures violate Section 5a. According to the Commissioners logic, if this Court would find that MVGT funds could not be spent for payment of CORSA costs, no other expenditures could be expended with MVGT funds. Their argument on this point is untenable.

In their argument, the Commissioners clearly error by implying that the payment of costs for CORSA coverage is payment for insurance coverage. By their own admission, the Commissioners did not procure insurance as allowed by R.C. 2744.08 but instead joined a multi-county self-insurance pool pursuant to R.C. 2744.081.

At the beginning of their argument, the Commissioners make two claims, (1) that Section 5a is similar to provisions in other states and (2) some voters in supporting passage of the citizen

initiated Section 5a, did so because passage would enable the states to receive federal funds. Both are irrelevant to the issue at hand, whether or not CORSA costs can be paid with MVGT funds. (1) "Similar" does not mean "same". Each state constitutional provision would need to be consulted to see if the language of that provision given its terminology and history would allow the payment of annual self-insurance costs under the provision of their constitution. Commissioners claim that provisions in the constitutions of other states that are analogous to Ohio Constitution Article XII, Section 5a support the claim that similar treatment would occur in Ohio and cites two cases in support of the claim. Neither of the two cases support their claim. Any reading of two cases clearly shows that the provisions in the two states are different from Ohio and the difference allow for the cost.

In the first case, *Michigan Road Builders Ass'n v. Department of Management and Budget,* 197 Mich.App. 636, 643-648,495 N.W.2d 843 (Mich.App. 1993), leave to appeal to the Michigan Supreme Court denied, 443 Mich. 852 (Mich. 1993)), the Court found the words "transportation services" and "administering" in the phrase "exclusively for the transportation purposes of planning, administering, constructing, reconstructing, financing, and maintaining" highways" allowed the expenditures. The Court did not find that the allowance resulted because the costs were part of the "constructing, reconstructing and maintenance of a highway or bridge" which is the substance of the Commissioners argument currently before this Court. The Michigan case provides not support for the Commissioners position in this case.

In the second case, *Smith et al v Coffey*, 37 S.W.3d 797, 797-798 (Mo.banc 2001), the court held that since the Missouri Highways and Transportation Department claims are paid prior to the decision to earmark any money for the state highway funds under their Constitution, no unconstitutional diversion of appropriated highway funds takes place. The Ohio Constitution

The Ohio Constitution limits the use of the revenues received from a tax to the uses listed in the tax levying statute. Article XII, Section 5 provides that "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."

Neither R.C. 2744.081 nor R.C. 315.12 which are provisions cited by the Commissioners in the Merit Brief are statutes that levy taxes.

In each case, the highway revenues received from the highway taxes are distributed by the state to recipients for uses consistent with the tax levying statute purpose but which may be further restricted as to use by the recipient. The revenues distributed to counties list such more limited purposes and declare that the taxes used may only be used for the purposes listed in the distribution statutes. R.C. 4501.04(A), (B), (C), R.C. 4504.02, R.C. 5735.27(A) (3) and (4), R.C. 5735.29. Like with the tax levying statutes, payment of a portion of the annual costs of belonging to a joint self-insurance pool is not one of the purposes listed in the distribution taxes.

A county is required to establish a special fund for receipt of the highway revenues distributed to it and place the highway revenues in the special fund. R.C. 5705.09(F), R.C. 5705.10(D). .The revenues placed in such a special fund may only be used for the purposes for which the fund was established. R.C. 5705.10(H).

In Knox County, the special fund established to hold highway revenues, is the MVGT Fund and the highway revenues are placed in that fund by the Knox County Treasurer and the Knox County Auditor. Because as previously described, motor vehicle funds are levied and distributed to the county for purposes other than defray a part of a county's cost of participating in a joint self-insurance pool, MVGT funds placed in the Knox County MVGT Fund cannot be used to pay joint self-insurance annual costs.

In addition to prohibiting expenditures of MVGT funds to the defray CORSA costs from the MVGT Fund, Knox County is prohibited from transferring MVGT funds to the Knox County General Fund. R.C. 5705.14-.15. R.C. 5705.14 prohibits all transfers to the general fund except as otherwise authorized in R.C. 5705.14 and joint self-insurance costs are not a listed as one of the exceptions to the prohibition. R.C. 5705.15 provides additional exceptions to the provisions in R.C. 5705.14 but prohibits the transfer of the proceeds or balances of revenues derived from any excise tax levied by law for a specified purpose, and prohibits the transfer of proceeds or balances of any license fees imposed by law for a specified purpose from the special fund in which they have been deposited to the general fund. Thus these R.C. Sections prohibit transfer of highway revenues from the MVGT Fund to the County General Fund.

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

   CEAO Response: The evidence presented by the Commissioners merely is an elaboration about the nature of joint self-insurance used to pay liability and property loss and resulting claims and is not part of any of the persuasive uses of MVGT funds by Section 5a.

3. Commissioners Argument: 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 Engineers.

   CEAO Response: The *Knox I* decision expresses no concern in arriving a a decision and was a final order setting forth its reasoning. The *Knox II*, Fifth Appellate District Opinion fully supports a finding that annual CORSA costs have no nexus to the purposes or operation of the Engineer's office in line with the decision in Knox I.

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

   CEAO Response: While neither the Engineer's entire office nor the Engineer's highway department is funded exclusively with MVGT funds, the Commissioners' are only seeking a declaration about the use of MVGT funds and the other sources of revenues are not at issue.

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

CEAO Response: The allocation methodology used to calculate the Engineer's share of the annual CORSA premium does not reflect the Engineers' highway operations.

These subdivisions present evidentiary questions but the only evidence in both *Knox I* and *Knox II* is that the Commissioners joined CORSA and tried to allocate a portion of the annual CORSA costs to the County Engineer. The only purpose for the entire endeavor is to take MVGT funds and pay them into the county general funds and for reasons previously stated, CORSA costs are incurred to pay claims for liability and property loss, which is not an expenditure for which MVGT funds may be expended.

There is no new evidence regarding the outcome in *Madden* and its legal consequences are fully argued in the previous section.

This Court expressed no concern about its findings. It merely seemed to say that having stipulated that no other funds were in the fund, then the outcome might (not would) have been different if other funds were available.

There is no issue about the expenditure of other funds in the MVGT account and none have been examined to determine if statutory authority is available to authorize the expenditure of these funds for the payment of annual CORSA costs. The Commissioners only seek a declaration regarding the constitutional availability of MVGT funds to pay CORSA costs. The Court found that the CORSA costs were ascertainable and he could make a declaration about the availability of the MVGT fund.

R.C 2744.081 governing CORSA costs does not provide for allocation on the basis of the items contained in Section 5a and the statutory highway policy for expenditure of MVGT funds are the MVGT tax levying and distribution statutes.

The allocation processes are not as represented as presented. The Court of Appeals found the Commissioners used a proportional formula for calculating the allocation among county agencies that does not reflect claims with a resulted in a benefit to some agencies at the expense of other agencies and the formula was used because there are not enough claims per department from which the actuary could establish an accurate estimate or rate for each county department, and further the premiums were prospective in nature, not simply reimbursement for past payouts, *Knox II*, Fifth Appellate District Opinion, ¶¶24 and 58.

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

CEAO Response: CEAO Response: The *Knox II,* Fifth Appellate District Court's decision, follows the precedent of earlier decisions by this Court and the Appellate Court correctly applied the law to the facts in the record.

The Commissioners have failed to show the decision and opinion below is erroneous on the law and further failed to show the factual record requires reversal of the *Knox II*, Fifth Appellate Court's decision. The Commissioners fail to show payment of annual CORSA costs are for one of the purposes listed in Section 5a or that the county's share of CORSA costs or any costs the Commissioners attribute to the office of county engineer or the highway operations of the office are for one of the purposes listed in Section 5a. The Fifth District followed the precedents of this Court in *Knox I*, *Grandle* (attorney fees) and *Madden* and correctly applied those precedents to this case. *Knox I* and *Grandle* hold that Section5a closely restricts the expenditure of MVGT funds to purposes directly connected with the construction, maintenance

and repair of highway. *Madden* stands for the proposition that to be considered part of the construction, reconstruction, maintenance or repair of a highway or bridge, the activity must be part of that construction, etc. in order to be compliant with both Section 5a and the statutes distributing MVGT funds to the county. All the cases cited that find the MVGT funds can be used, find that the activity is part of the allowed use under Section 5a.

Madden is discussed in prior sections of CEAO's Merit Brief. It is sufficient here to say that the health benefits are part of the compensation of the workmen who did construction and therefore could be paid from the same fund and qualified for the 5a exemption because were part of construction as that term is used in Section 5a. CORSA's paying of claims is not construction or a statutory purpose. CORSA sole purpose is to protect the county against liability and property loss as stated in R.C. 2744.081 and therefore does not qualify as a permissive used of MVGT funds.

In the midst of its *Madden* discussion, there is a long discussion about whether or not CORSA is an insurer or exercises insurance powers or issues policies. None of the three cases cited, stand for the proposition that CORSA, a joint self-insurance pool, authorized by and operating with the authority granted by R.C. 2744.081, is an insurer or exercise powers as an insurer. In *State ex rel. Duffy v. Western Auto Supply Co.*, 134 Ohio St. 163, 16 N.E.2d 256 (Ohio 1938), an auto supplier seller of tires offered a warrant that acted as insurance. Western Auto was not offering the product pursuant to any other statute and was found to be action as insurer and in essence required to stop offering the product. In the case at bar, R.C. 2744.081 authorizes CORSA's activities and its offering is not insurance. *Ohio Govt. Risk Mgt. Plan v. Cty. Risk Sharing Auth., Inc.*, 1999-Ohio-63, 130 Ohio App.3d 174, 719 N.E.2d 992 (Ohio App. 6 Dist. 1998) and *State ex rel. Bell v. Brooks*, 2011-Ohio-4897, 130 Ohio St.3d 87 refer to joint

self-insurance companies as like insurance but not as insurance. While it may be convenient to refer to CORSA's costs, agreement and activities as involving insurance as many of the brief's and opinions in this area do in order to describe CORSA various endeavors, such references do not covert CORSA into an insurer or grant CORSA insurance powers. The entire insurance discussion is irrelevant to a determination if CORSA costs can be paid with MVGT funds.

The Commissioners fail to show both the amount paid to cover any portion of the annual Cost costs and the claims paid are anything more than a payment to resolve liability and property loss claims. Neither of these items constitutes the construction, reconstruction, maintenance or repair of a road or bridge or for a statutory highway purpose or any of the other permissive uses listed in Section 5a. Even if CORSA had the authority to limit its coverage to the highway department and CEAO does not believe they have that authority in R.C. 2744.081, the annual costs and claims would still be for the purpose of resolving liability and property losses and not for a Section 5a permissible use.

The Commissioners make another irrelevant argument at the end of their brief. The Commissioners only seek reimbursement from MVGT funds and not other sources. What other sources might be available are irrelevant to a decision to use MVGT funds to reimburse the Commissioners. If this Court finds that MVGT funds are unavailable, the Knox County Commissioners can continue to pay from the county general fund as they currently pay without MVRT reimbursement.

Finally to repeat, the Commissioners have failed to prove that CORSA costs are a cost for which MVGT funds may be spent.

CONCLUSION

For the reasons discussed in this Merit Brief above, CEAO requests the Court affirm the Fifth Appellate District and find that the Knox County Commissioners are not entitled to a declaration that Article XII, Section 5a permits annual CORSA costs or any portion thereof to be paid or reimbursed from motor vehicle registration and motor vehicle fuel tax revenues.

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