

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

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

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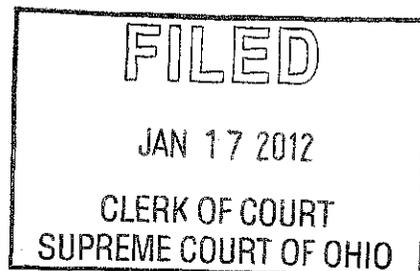
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**TABLE OF CONTENTS**

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ..... ii

INTRODUCTION ..... 1

ARGUMENT..... 1

    A. Section 5a does not impose a “but/for” or “necessity” requirement for the use of MVGT funds..... 1

    B. Section 5a authorizes the use of MVGT funds for CORSA premiums because the risk of liability and loss is *a cost incurred* by the Engineer’s highway department when it constructs, repairs, and maintains roads and bridges..... 5

    C. The payment of CORSA costs from MVGT funds are not precluded by Section 5a simply because CORSA is a joint self-insurance pool instead of an “insurance company” ..... 7

    D. The Engineer’s contention that the factual record here is no different than that in *Knox I* is demonstrably false..... 9

    E. The Engineer’s and amici’s miscellaneous statutory interpretations are unfounded and irrelevant to the constitutional issue presented in this case..... 12

    F. The Engineer provides no meaningful or logical distinction between what is and what is not a highway expenditure for purposes of Section 5a..... 14

CONCLUSION..... 16

CERTIFICATE OF SERVICE ..... 17

APPENDIX..... 18

## TABLE OF AUTHORITIES

### Cases

<i>Grandle v. Rhodes</i> , 166 Ohio St. 197, 140 N.E.2d 897 (1957) .....	3
<i>Grandle v. Rhodes</i> , 169 Ohio St. 77, 157 N.E.2d 336 (1959) .....	3
<i>Hutz v. Gray</i> , 11th Dist. No. 2008-T-0100, 2009-Ohio-3410, 2009 WL 2005361 .....	10
<i>Kauer v. Defenbacher</i> , 153 Ohio St. 268, 91 N.E.2d 512 (1950).....	2, 5
<i>Knox Cty. Bd. of Commrs. v. Knox Cty. Engineer</i> , 109 Ohio St.3d 353, 2006-Ohio-2576, 847 N.E.2d 1206.....	2, 3, 8, 9, 10, 11
<i>Kramer v. Time Warner, Inc.</i> , 937 F.2d 767 (2nd Cir. 1991).....	10
<i>Madden v. Bower</i> , 20 Ohio St.2d 135, 254 N.E.2d 357 (1969).....	3, 5, 6, 8, 13
<i>Scioto Cty. Bd. of Commrs. v. Scioto Cty. Budget Comm.</i> , 17 Ohio St.2d 39, 244 N.E.2d 888 (1969) .....	13
<i>State ex rel. Bell v. Brooks</i> , 130 Ohio St.3d 87, 2011-Ohio-4897, 955 N.E.2d 987.....	7
<i>State ex rel. Coles v. Granville</i> , 116 Ohio St.3d 231, 2007-Ohio-6057, 877 N.E.2d 968 .....	10
<i>State ex rel. Preston v. Ferguson</i> , 170 Ohio St. 450, 166 N.E.2d 365 (1960).....	3, 5
<i>State ex rel. Walter v. Vogel</i> , 169 Ohio St. 368, 159 N.E.2d 892 (1959) .....	2, 5

### Statutes

R.C. 2744.081 .....	7
R.C. 2744.081(A)(4).....	12, 13
R.C. 2744.081(E)(2) .....	7
R.C. 315.12(A).....	13
R.C. 4503.02 .....	13
R.C. 4504.02 .....	13
R.C. 5735.05(A).....	13
R.C. 5735.25 .....	13

R.C. 5735.29 ..... 13

**Other Authorities**

Article XII, Section 5a ..... *in passim*

## INTRODUCTION

This case has nothing to do with the attempted “diversion” of MVGT funds from the highway purposes mandated by Article XII, Section 5a (“Section 5a”) of the Ohio Constitution. Instead, the issue is whether all *costs* incurred by the Engineer’s highway department when it engages in the highway purposes of constructing, repairing, and maintaining roads and bridges can be paid with MVGT funds, or as the Engineer demands, whether some of those costs must be borne by the county’s general revenue fund. The Commissioners submit that *all* costs of constructing and repairing roads and bridges are to be treated the same for purposes of Section 5a. And therefore, the cost of insuring against the risk of liability and loss arising out of the Engineer’s highway operations is a valid highway purpose under Section 5a. The Engineer, however, contends that these costs are to be treated differently for purposes of Section 5a. In so doing, the Engineer fails to explain why the costs of insurance to repair and replace the very vehicles and equipment purchased and maintained by MVGT funds is not a valid highway purposes, let alone provide a justification for such position, either under the law, the undisputed facts, or common sense. Rather, the law, the facts, and common sense all compel a conclusion that the share of the county’s CORSA premium attributable to the cost of insuring the activities of the Engineer’s highway department is a valid highway expenditure and properly payable from MVGT funds pursuant to Section 5a.

## ARGUMENT

### **A. Section 5a does not impose a “but/for” or “necessity” requirement for the use of MVGT funds.**

The Engineer and amicus curiae Ohio Contractors Association (“OCA”) contend that because there is no requirement that the Commissioners seek reimbursement for CORSA costs and because a county can build a road or bridge without participating in any risk sharing program

(and in fact, can “go bare”), the CORSA costs are not a valid highway purpose. *See* Engineer Brief at 9-10; OCA Brief at 4. In fact, the Engineer goes so far as to assert that Section 5a imposes a “but-for” test, which requires MVGT expenditures be “necessary” for highway construction, maintenance, and repair. *See* Engineer Brief at 9-10. The Engineer and OCA are wrong, legally and factually.

First, and foremost, the Engineer’s “but-for” test is not supported by the law. This Court has never held that MVGT funds can pay only for expenditures “necessary” for the construction, maintenance, and repair of roads and bridges. Rather, as this Court specifically stated in *Knox I*, the relevant constitutional question under Section 5a is whether “the CORSA premiums pertained to highway purposes or were directly related thereto.” (Emphasis added.) *Knox Cty. Bd. of Commrs. v. Knox Cty. Engineer*, 109 Ohio St.3d 353, 2006-Ohio-2576, 847 N.E.2d 1206, ¶ 11.

In *Kauer v. Defenbacher*, 153 Ohio St. 268, 277, 91 N.E.2d 512 (1950), this Court approved the use of MVGT funds to pay for a feasibility study of the turnpike. Nothing in that opinion suggests, however, that this Court did so because “without a study, presumably a highway could not be constructed.” Engineer’s Brief at 10. In fact, *Kauer* does not clearly articulate what the feasibility study entailed, let alone suggest how the study was necessary for constructing the turnpike.

In *State ex rel. Walter v. Vogel*, 169 Ohio St. 368, 372, 159 N.E.2d 892 (1959), this Court approved the use of MVGT funds to build and maintain a street lighting system along a section of highway. Again, nothing in that opinion indicates that this Court reached this conclusion because street lights are necessary to maintain or repair a highway system. Nor could it, since it is readily apparent that lighting is not a necessary component of a highway.

Likewise, while the purchase of land is certainly necessary for the construction of a highway, the issue in *State ex rel. Preston v. Ferguson*, 170 Ohio St. 450, 462-463, 166 N.E.2d 365 (1960), was not whether MVGT funds could be used to purchase land for constructing a highway, but rather whether such funds could be used to purchase real estate years *before it was needed* and in amounts that were admittedly *not necessary* for the construction of said highways. Significantly, this Court approved the expenditure even though it recognized that the “director may use that part of the tract which he needs for construction and dispose of the remainder to private individuals for commercial or private use.” *Id.* at 462.

And of course, in *Madden v. Bower*, 20 Ohio St.2d 135, 138-141, 254 N.E.2d 357 (1969), this Court approved the use of MVGT funds to pay for health insurance premiums for the employees of the county engineer’s highway department. Significantly, this Court did not find that such expenditures were constitutional because they were necessary for constructing, repairing, and maintaining roads and bridges. Rather, this Court recognized that the health insurance premiums (like CORSA here) were “part of *the cost* of the services rendered by such employees *in the furtherance* of the purposes for which those statutes were enacted and for which those funds were established and are maintained.” (Emphasis added.) *Id.* at 138-141.

Finally, the only cases (other than *Knox I*) in which this Court found that the proposed expenditures were not consistent with Section 5a’s limitations are the companion cases in *Grandle v. Rhodes*, holding that MVGT funds could not be spent on a preliminary study of a parking lot under the Statehouse grounds or the reimbursement of attorney fees incurred by a taxpayer who successfully prosecuted an action to block the disbursement of those funds. See *Grandle v. Rhodes*, 166 Ohio St. 197, 140 N.E.2d 897 (1957) (study); *Grandle v. Rhodes*, 169 Ohio St. 77, 78-79, 157 N.E.2d 336 (1959) (attorney fees). Again, however, nothing in those

cases indicates or even suggests that the Court's conclusions were reached under any "but-for" or "necessary" test. Rather, the study and attorney fees in the *Grandle* cases were prohibited by Section 5a because they were not incurred as a cost of or in furtherance of any highway purpose.

Second, the Engineer's "but-for," "necessary" test is completely unworkable and impractical as a governing legal principle. How is this Court, or any other court, to determine which expenditures are necessary? Will every challenge to an expenditure under Section 5a require an expert analysis of which costs are necessary for the project? Moreover, many completely legitimate highway expenditures would arguably fail any such test. Many expenses are not absolutely necessary for purposes of building roads and bridges, but are instead simply prudent or wise, and/or reflect good management or engineering practices. Are all such expenditures prohibited by Section 5a because they are not necessary? What about new construction methods, new safety-features, and new equipment? How could these expenditures ever satisfy a "but-for" test when history shows that roads and bridges could certainly be constructed without them?

Finally, the Engineer's "necessity" "but-for" test is contrary to his own practice of how he spends MVGT funds. The same MVGT account from which he refuses to reimburse the CORSA premium pays for numerous expenditures that are not necessary to construct, repair, or maintain roads and bridges. For example, the MVGT account pays for the Engineer's and his employees' health insurance, conference and seminar attendance, office supplies, copy machines and printers, and building utilities. [Tr. 100:25-101:15, (Shackle); 153:11-21, 154:14-155:6 (Henry); S-25, 26, 39.]<sup>1</sup> Certainly, not all such expenditures can be deemed "necessary" for construction, maintenance, and repair of the county's highways. In fact, the Engineer admitted

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<sup>1</sup> Citations are to the trial transcript ("Tr.") and corresponding relevant pages of the Supplement to the Merit Brief of Plaintiff-Appellants ("S-\_\_").

that some of these expenditures, including providing health care coverage for his family and travel to conferences, were not expenditures necessary for building, maintaining, and repairing roads and bridges. [Tr. 185:22 – 187:16 (Henry); S-47.]

In short, there is no “necessity” requirement for purposes of satisfying Section 5a, and the fact that a county can build roads and bridges by going bare has no relevance to whether the CORSA premium is a valid highway purpose.

**B. Section 5a authorizes the use of MVGT funds for CORSA premiums because the risk of liability and loss is a cost incurred by the Engineer’s highway department when it constructs, repairs, and maintains roads and bridges.**

Amicus Curiae County Engineers Association of Ohio (“CEAO”) makes much of the fact that Section 5a does not include the words “insurance,” “risk sharing,” “joint-self insurance pool costs,” or “costs of inherent risk of property/casualty loss in construction” in the list of acceptable uses for MVGT funds. *See* CEAO Brief at 8. It should go without saying that the failure of Section 5a to specifically include the words insurance or other similar risk-shifting mechanism does not bar such expenditures.

Section 5a does not specifically include many of the items that this Court has already found to be properly payable out of MVGT funds, including street lighting (*see Kauer*), feasibility studies (*see Walter*), full parcels/tracts of real property (*see Preston*) or employee health insurance premiums (*see Madden*). The fact that Section 5a did not specifically list such items was no impediment to this Court’s approval of such expenditures. Similarly, Section 5a does not specifically list many of the other items the Engineer pays for out of his MVGT account, such as conferences, seminars, office supplies, equipment, and utilities.

More to the point, the text of Section 5a authorizes the expenditure of MVGT funds for any “costs for” construction, repair, and maintenance of public highways and bridges. The cost

of constructing a road or bridge includes the risk of liability or loss resulting from such activity and therefore includes the cost of insuring against such risks.

The same is certainly true for many activities. Thus, for example, while auto insurance is not the act of driving a vehicle, it is a cost incurred for owning and operating a vehicle. While professional liability insurance is not the practice of medicine or law, it is a cost incurred for practicing those professions. While home insurance is not the act of home-ownership, it is a cost incurred for owning a home. And while all of these underlying activities can be done without incurring the specific cost of the insurance, the fact that someone could “go bare” does not mean that cost of insurance is not a cost of engaging in those activities. Similarly, while CORSA is not itself the act of constructing, repairing, or maintaining roads and bridges, it is a cost incurred for engaging in those activities.

This is the very same analysis underlying this Court’s *Madden* decision that held MVGT funds could be used to pay for the health insurance premiums for the Engineer’s highway department employees. In *Madden*, this Court recognized that the health insurance costs were “part of the cost of the services rendered by such employees *in the furtherance* of the purposes for which those statutes were enacted and for which those funds were established and are maintained.” *Madden*, 20 Ohio St.2d at 138, 254 N.E.2d 357. Thus, as the CEOA itself recognizes, “[h]ealth benefits are part of the compensation of the workmen who did construction and therefore could be paid from the same fund and qualified for 5a exemption because [they] were part of construction as that term is used in Section 5a.” CEOA Brief at 22.

*Madden* compels the same result here because its reasoning is even more applicable to the CORSA insurance costs than employee health premiums. CORSA insures the very activities conducted by the Engineer’s highway department employees *during their working hours*, and

insures the property and equipment of the Engineer's highway department used by those employees as part of their work. In short, by refusing to authorize payment of the CORSA costs, the Engineer is simply refusing to pay for the full cost of the operations of his highway department out of MVGT funds.

**C. The payment of CORSA costs from MVGT funds are not precluded by Section 5a simply because CORSA is a joint self-insurance pool instead of an "insurance company."**

The Engineer and OCA make much of the fact that CORSA is a joint self-insurance pool instead of an insurance company and pays claims not related to the construction, repair, and maintenance of roads and bridges. *See* Engineer Brief at 7-8; OCA Brief at 4-5. According to the Engineer, these "facts" compel a finding that reimbursing the county's general fund for the share of the county's CORSA premium allocated to the Engineer's highway department is precluded by Section 5a. The Engineer's position is untenable.

First, the fact that R.C. 2744.081(E)(2) states that CORSA is not an "insurance company" for purpose of Ohio's insurance law is completely irrelevant to whether the reimbursements for CORSA premium costs are consistent with the requirements of Section 5a. As explained in the Commissioners' opening brief, under both the undisputed evidence and this Court's recent pronouncements, CORSA provides insurance coverage to its member counties by any substantive measure. *See* Commissioners' Brief at 3-4, 23-24. Knox County pays its premium to CORSA for the right to participate in the benefits of the pool, i.e., the right to have its liabilities and losses covered. Tellingly, the Engineer and OCA completely ignore this Court's recent decision in *State ex. rel. Bell v. Brooks*, in which this Court specifically recognized that CORSA provides insurance coverage to its member counties. *State ex. rel. Bell v. Brooks*, 130 Ohio St.3d 87, 2011-Ohio-4897, 955 N.E.2d 987, ¶ 22. As the CEAO itself recognizes, "[t]he 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.” CEAO Brief at 13. The Engineer’s share is simply that portion of the county’s total premium attributable to the cost of insuring the Engineer’s highway department.

Likewise, there is no merit to the premise underlying the Engineer’s argument that MVGT funds retain their constitutionally restricted status even after having been spent on a valid highway purpose. Section 5a requires that the MVGT funds be used by the county for a proper highway purpose. Section 5a does not require that the MVGT funds continue to retain their MVGT status after they have left the county’s coffers and pass through the stream of commerce. When the county pays the highway department employees, those employees are not restricted by Section 5a as to how those paychecks may be spent. When the Engineer pays for construction supplies, Section 5a does not limit how the asphalt or road salt supplier uses those funds.

In fact, if the Engineer’s tracing argument were true, no expenditures for any type of insurance could ever be a highway purpose since the very definition of insurance is that it pays future unknown claims. Obviously, this Court has already recognized that MVGT funds can be used to pay insurance costs. *See Madden*, 20 Ohio St.2d 135, 254 N.E.2d 357. Likewise, while this Court in *Knox I* held that the record therein failed to establish the highway purposes of the CORSA costs, it is significant that this Court never suggested in that opinion that insurance costs could not be a valid highway expenditure.

Finally, the Engineer’s argument is contrary to his own practice of paying health insurance and workers compensation premiums with MVGT funds. These premiums are no less prospective, no less commingled with non-highway funds, and no less used to pay claims not related to the operations of the highway department than those at issue in this case. The Engineer cannot have it both ways. If CORSA premiums are invalid under Section 5a, then the premiums

for health and workers compensation insurance are too. Moreover, given the technical nature of the Engineer's tracing argument, it should also be pointed out that *technically* Knox County pays its total annual premium to CORSA from the county's general fund. [Tr. 111:6-10 (Shackle); S-28.] Thus, to the extent tracing is the Engineer's concern, no MVGT funds are actually used to fund the CORSA pool, and thus no MVGT funds are actually used to pay out any claims, let alone any claims arising from other counties or other agencies.

In sum, the relevant inquiry here is whether the reimbursement sought for a portion of the county's CORSA premium (that portion attributable to the cost of insuring the Engineer's highway department) is itself a highway purpose, not whether those exact funds will continue to be used for a highway purpose thereafter.

**D. The Engineer's contention that the factual record here is no different than that in *Knox I* is demonstrably false.**

In an apparent effort to have this Court reach the same result as that in *Knox I*, the Engineer would have this Court believe that the Commissioners "merely proffer[ed] the same evidence" here as they did in *Knox I*. See Engineer Brief at 4. Incredibly, the Engineer goes so far as to say that "[t]he 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." Engineer Brief at 4. The Engineer's desperate attempt to equate the record in this case with that submitted in *Knox I* is telling and false.

First, what was or was not contained in the *Knox I* record as opposed to the record here is ultimately beside the point. The issue accepted for review in this case is whether the CORSA premiums satisfies the requirements of Section 5a given the facts contained in this record. While

the Engineer and his amici would prefer to argue about the constitutionality of paying CORSA premiums based on the limited record contained in *Knox I*, it is the record here that matters.

Second, the Engineer's assertions as to the scope of the record in both *Knox I* and here are simply false. The affidavits submitted by the parties in *Knox I* for purposes of their cross-motions for summary judgment consisted of a total of 16 pages (including attachments) and were submitted on behalf of three total witnesses (Mr. Henry, Mr. Brooks, and Commissioner Stockberger).<sup>2</sup> The substantive testimony contained in those affidavits was minimal, primarily consisting of invoices that contained the premium amounts and the calculations used to generate those invoices. *See* Appendix. As explained in the Commissioners' opening brief, the record in *Knox I* was minimal because the legal arguments advanced in *Knox I* focused on whether the CORSA premiums were a cost of the operation of the Engineer's office and thus a valid "statutory highway purpose" under Section 5a. *See* Commissioners' Brief at 17-18.

Here, however, the record consists of 170 pages of trial testimony, stipulated testimony of another witness, and 33 Joint Exhibits. More importantly, the evidence in this case was presented to specifically address the concerns raised by this Court in *Knox I* and establishes the following, which was not included within *Knox I*:

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<sup>2</sup> Certified copies of all three affidavits submitted in *Knox I* are attached hereto as the Appendix. While not a part of the record in this case, this Court may take judicial notice of these filings as necessary to refute the Engineer's unsupported assertion that the record here is no different from that reviewed by this Court in *Knox I*. *See State ex rel. Coles v. Granville*, 116 Ohio St.3d 231, 2007-Ohio-6057, 877 N.E.2d 968, ¶ 20 ("A court may take judicial notice of a document filed in another court 'not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.'") (quoting *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 774 (2nd Cir. 1991)); *Hutz v. Gray*, 11th Dist. No. 2008-T-0100, 2009-Ohio-3410, 2009 WL 2005361, ¶ 39 (judicial notice of the pleadings in the prior cases is appropriate when pleadings are not being examined for the truth of their contents but instead to determine what was filed in the prior action).

- The allocation methodology used to determine the Engineer's share takes into account only the employees, vehicles, and equipment used by the Engineer's highway department and does not include the employees, vehicles, and equipment, used by the Engineer's non-highway operations, including the map department, or the Engineer's duties as county sanitary and storm-water engineer. *See* Commissioners' Brief at 21-22 and record cites contained therein; *see also* JX-10 (June 26, 2007 invoice) (containing explanation of allocation formula and how CORSA premium was a highway purpose).
- The operations of the Engineer's highway department are funded primarily, though not exclusively from MVGT funds, and all other costs and expenses incurred by the Engineer's highway department are paid for with this MVGT account.<sup>3</sup> *See* Commissioners' Brief at 16, 19-21 and record cites contained therein.
- The allocation method ensures that reimbursement is sought only for the Engineer's share of the CORSA premium that covers the operations of the Engineer's highway department and not those that apply exclusively to other departments, such as the Sheriff's department. *See* Commissioners' Brief at 15 and record cites contained therein.
- The Engineer's highway department represents a significant portion of the total county claims, both in number and expense. *See* Commissioners' Brief at 15-16 and record cites contained therein.

Simply put, unlike in *Knox I*, the uncontroverted evidence presented here establishes that the CORSA premium relates only to the costs of covering the Engineer's highway department and to covering the inherent risk in constructing, maintaining, and repairing roads and bridges.

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<sup>3</sup> The Engineer incorrectly asserts that whether the Engineer's MVGT account is commingled with non-MVGT funds is not relevant to the proposition of law accepted for review by this Court. *See* Engineer Brief at 12-13. The commingled nature of the MVGT account is relevant to the Commissioners' First Proposition of Law, because it is further evidence that, unlike the facts stipulated in *Knox I*, the evidence here establishes that the Engineer's entire operations are not funded solely from MVGT funds and that even the Engineer's highway department is not funded solely from MVGT funds. Moreover, as explained in the Commissioners' opening brief, due to the commingled nature of the MVGT account, at least some portion of the CORSA premium would be paid with non-MVGT funds. *See* Commissioners' Brief at 26-27.

**E. The Engineer's and amici's miscellaneous statutory interpretations are unfounded and irrelevant to the constitutional issue presented in this case.**

In various contexts throughout its amicus brief, the CEAO suggest that there is no statutory authority to pay CORSA costs from MVGT funds and no statutory basis to allocate a portion of the CORSA costs to the Engineer. *See* CEAO Brief at 7, 17-19. Similarly, the Engineer and amici suggest that the allocation formula does not comply with R.C. 2744.081(A)(4). *See* Engineer Brief at 2; OCA Brief at 4; CEAO Brief at 4.

These statutory arguments, however, have no bearing on the constitutional issue presented by this case: whether Section 5a prohibits using MVGT funds to pay the CORSA cost of insuring the operations of the Engineer's highway department. Whether Ohio statutes separately authorize the expenditures of MVGT funds for CORSA costs and whether the allocation formula used by CORSA complies with the statutory requirements are separate and independent legal questions. In short, while the statutory arguments raised by the Engineer and his amici may be relevant to the issue of whether the Commissioners are entitled to a mandatory injunction compelling payment of the CORSA premiums, they are not relevant to whether Section 5a prohibits the expenditures in the first place, which was the Fifth District's holding below.

Even if relevant, the statutory arguments are unfounded. While no statute specifically states that "CORSA premiums" may be paid from MVGT funds, two statutory provisions directly authorize the use of MVGT funds for such purposes. First, R.C. 2744.081(A)(4) states a "joint self-insurance pool may allocate the costs of funding the pool among the funds or accounts in the treasuries of the political subdivisions \* \* \*." Pursuant to this statute, the Ohio General Assembly granted CORSA and its member counties (including Knox County) the authority to allocate the costs for participating in CORSA to the various funds and accounts in the treasury of

Knox County, including the MVGT fund used to pay the costs of the Engineer's highway department.

In addition, R.C. 315.12(A) mandates that at least two-thirds of the "cost of operation" of the office of the county engineer "*shall be paid out*" (emphasis added) of the MVGT funds distributed to the county. Significantly, R.C. 315.12(A) does not preclude the remaining one-third of the Engineer's operating costs from being paid with MVGT funds. *Scioto Cty. Bd. of Commrs. v. Scioto Cty. Budget Comm.*, 17 Ohio St.2d 39, 43, 244 N.E.2d 888 (1969). In fact, the authority to make the choice as to how the remaining one-third is to be paid, and to make appropriations from those funds, is left to the Commissioners. *See Madden*, 20 Ohio St.2d at 139, 254 N.E.2d 357.

Even if these specific statutory provisions (R.C. 2744.081(A)(4) and R.C. 315.12(A)) did not exist, the use of MVGT funds to pay CORSA costs is consistent with the general statutory provisions levying such taxes and distributing their proceeds to the counties. R.C. 4503.02 and 4504.02 expressly provide that one of the purposes of the annual motor vehicle license tax includes "paying the counties' portion of the *compensation, damages, costs, and expenses*" of constructing, repairing, and maintaining roads. (Emphasis added.) Those taxes are distributed to the counties for the purpose of paying costs "for the planning, construction, reconstruction, improvement, maintenance, and repair of roads and highways." R.C. 4501.04. Similarly, the statutory purposes for the gas taxes include "to enable the counties of the state properly to plan, maintain and repair their roads." R.C. 5735.05(A); *see also* R.C. 5735.25 (another purpose for the gas tax is "to enable the counties ... to properly plan, construct, widen, reconstruct, and maintain their public highways, roads, and streets."); R.C. 5735.29 (same). Those funds are likewise distributed to the counties for the same purposes. R.C. 5735.27(A)(3) & (4). As

previously explained, the CORSA costs are simply one component in the cost incurred by the county to properly plan, construct, widen, reconstruct, and maintain roads and bridges and thus fall squarely within the statutory provisions governing the use of these funds.

Finally, as to the allocation formula itself, the undisputed evidence establishes that the formula was established by CORSA in consultation with its actuary, takes into account the relative exposure of the Engineer's highway operations, and incorporates (albeit indirectly) the Engineer's loss experience. [Tr. 35:5-25, 37:1-13, 89:14 – 91:6 (Brooks); S-9, 10, 23.] In sum, the allocation formula developed by CORSA fully complies with R.C. 2744.081(A)(4).

**F. The Engineer provides no meaningful or logical distinction between what is and what is not a highway expenditure for purposes of Section 5a.**

At the end of the day, the Engineer's argument amounts to no more than a conclusory statement that CORSA costs are not a valid highway purpose. In so doing, the Engineer provides no meaningful rationale for distinguishing between the CORSA costs at issue here and the myriad of other expenses that the Engineer concedes are a valid highway purpose.

As the Engineer must admit, MVGT funds can be used to pay for health insurance premiums for highway department employees, which cover non work-related weekend accidents (*i.e.* broken bones, sick children). Yet, the Engineer maintains, without explanation, that those very same MVGT funds cannot be used to pay for CORSA insurance that protects the county against lawsuits arising from the negligent construction and/or maintenance of the roadways.

The Engineer admits that MVGT funds can be used to purchase, maintain, repair, and replace trucks and equipment used by the highway department to do its job, but maintains that MVGT funds cannot be used to pay for insurance that defrays those very same costs when incurred after there is an accident during the construction, repair, or maintenance of roads and bridges.

The Engineer has already conceded that MVGT funds may be used to pay for one component of Knox County's CORSA program costs -- the deductible portion of a claim covering the repair to one of his trucks. Yet, he still insists that MVGT funds cannot be used to pay for the premium portion of that same insurance program, which covers the vast majority of the very same repair costs.

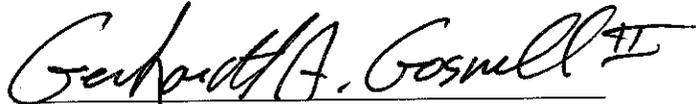
And while the Engineer has repeatedly indicated that MVGT funds could be used to directly pay liabilities and losses resulting from the operations of the highway department as they are incurred, the Engineer insists that MVGT funds may not be used to pay for an insurance policy that shifts these costs from Knox County to CORSA.

Simply put, the Engineer has provided no reasonable explanation as to why MVGT funds cannot be used to pay CORSA premiums, but can be used to pay for the very same expenditures that CORSA insurance covers.

CONCLUSION

The CORSA premium attributable to the cost of insuring the operations of the Engineer's highway department is a cost for or directly connected with a highway purpose and thus properly payable out of MVGT funds pursuant to Article XII, Section 5a of the Ohio Constitution. Accordingly, the decision of the Court of Appeals should be reversed, and this matter should be remanded to the Court of Appeals for resolution of the Commissioners' cross-appeal on whether the Commissioners are entitled to a mandatory injunction requiring the Engineer to pay such premiums.

Respectfully submitted,



Gerhardt A. Gosnell II\* (0064919)

*\*Counsel of Record*

Damion M. Clifford (0077777)  
James E. Arnold & Associates, LPA  
115 W. Main Street, Suite 400  
Columbus, OH 43215  
614-460-1600  
614-469-1093 (facsimile)  
ggosnell@arnlaw.com  
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Thomas A. Luebbbers (0016916)  
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201 East Fifth Street, Suite 900  
Cincinnati, Ohio 45202  
(513) 621-3394  
(513) 621-3813 (facsimile)  
tluebbbers@peckshaffer.com

*Counsel for Appellants*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of the foregoing *Reply Brief of Appellants Allen Stockberger, Theresa A. Bemiller, and Roger Reed, in Their Official Capacity as the Board of County Commissioners of Knox County* was served via regular U.S. Mail, postage prepaid, this 17th day of January, 2012, upon the following:

Luther L. Liggett, Jr.  
Heather Logan Melick  
Luper, Neidenthal & Logan  
50 West Broad Street, Suite 1200  
Columbus, OH 43215

*Counsel for Appellee  
Knox County Engineer*

Patrick A. Devine  
Schottenstein Zox & Dunn  
Co., LPA  
250 West Street  
Columbus, OH 43215

*Counsel for Amicus Curiae  
Ohio Contractors Association*

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

*Counsel for Amicus Curiae  
County Engineers Association of Ohio*

Eugene L. Hollins  
Dale D. Cook  
Wiles Boyle Burkholder  
& Bringardner Co., LPA  
300 Spruce Street, Floor One  
Columbus, OH 43215-1173

*Counsel for Amici Curia  
County Commissioners Association of Ohio  
and County Risk Sharing Authority, et al.*



Gerhardt A. Gosnell II

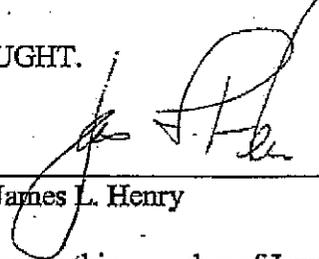
**APPENDIX**

Affidavit of County Engineer James L. Henry (Jan. 29, 2004).....A-1  
Affidavit of Allen Stockberger (Feb. 19, 2004).....A-5  
Affidavit of David W. Brooks (Feb. 23, 2004).....A-10

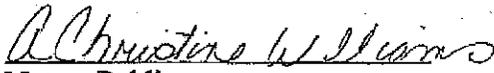


5. The budget for the Engineer's Office typically includes General Funds appropriated by the County Commissioners, as noted in the attached budget summary from January 13, 2003, which is from where the CORSA liability insurance payments also should be paid.

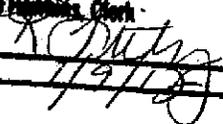
FURTHER AFFLIANT SAYETH NAUGHT.

  
\_\_\_\_\_  
James L. Henry

Sworn to before me and subscribed in my presence this \_\_\_\_ day of January, 2004.

  
\_\_\_\_\_  
Notary Public  
My Commission Expires 6-22-08



This is to certify the foregoing to be a true and correct copy of the original. *affidavit*  
now on file in my office.  
Mary Jo Hopkins, Clerk  
 Deputy  
Date 1/9/04

Law Offices of  
**EDWIN J. HOLLERN CO., L.P.A.**  
51 Dorchester Lane  
Westerville, Ohio 43081

Edwin J. Hollern

*Of Counsel:*  
David A. Goldstein  
Steven E. Herman  
William L. Geary

Telephone: 614.839.5700  
Facsimile: 614.839.4200  
Email: ehollern@cjhlaw.com

*Downtown Office:*  
155 West Main Street, Suite 101  
Columbus, Ohio 43215

November 14, 2002

Steven G. LaForge, Esq.  
Isaac, Brant, Ledman & Teetor  
250 East Broad Street  
Suite 900  
Columbus, Ohio 43215

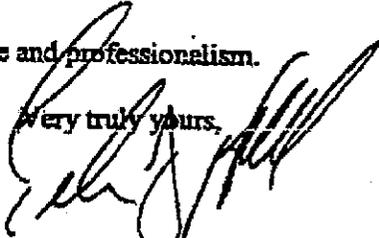
Re: **Carl Perkins, Jr. v. Nationwide Mutual Insurance Co., et al.**  
Franklin County Court of Common Pleas  
Case No.: 01CVC07-07015  
Our File No.: 100-01010

Dear Steve:

This letter shall confirm that Carl Perkins has accepted the sum of \$800,000 to settle his claims against Knox County and Monroe Township in the captioned matter. As I told Dan Downey, we will need several weeks to sort out some internal issues concerning the structure that we are planning to put together. Thus, I cannot yet tell you how to make out the settlement checks. I do know that a portion of the money will be structured, and I will advise you on the numbers in the near future.

I appreciate your continued patience and professionalism.

Very truly yours,

  
Edwin J. Hollern

EJH/her

cc: Robert C. Paxton, II, Esq.  
Gregory A. Beck, Esq. . .



*Jim Henry  
Engineer*

# KNOX COUNTY ENGINEER

422 Columbus Road  
MOUNT VERNON, OHIO 43050

TELEPHONE (740) 397-1590  
FAX (740) 393-6813



*Larry Bechtel  
Assistant*

*January 13, 2003*

*Knox County Board of Commissioners  
117 East High Street, Suite 161  
Mount Vernon, OH 43050*

*Gentlemen:*

*I am pleased to present to you the Annual Report of the Knox County Engineer. This report outlines the activities and work performed by the Engineer's staff, the County Highway Department and the Tax Map Department.*

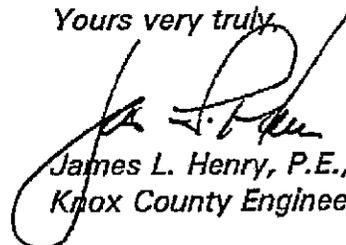
*Receipts from Motor Vehicle License Fees, Fuel Taxes and other sources totaled \$3,931,911.25 available for use in 2002. The breakdown of the expenditures on our roads and bridges is contained herein.*

*The \$5.00 and \$10.00 Permissive License Fees yielded \$194,122.29 and \$423,368.47 respectively. \$58,236.69 from the first was distributed to the townships.*

*Expenditures of these funds totaled \$3,994,394.12. General Fund expenditures for the Tax Map Department totaled \$94,941.20 with \$8,325.00 returned from map sales.*

*Further details on these and other topics are contained in the following report.*

*Yours very truly,*



*James L. Henry, P.E., P.S.  
Knox County Engineer*

*JLH/pc*

**IN THE COURT OF COMMON PLEAS  
KNOX COUNTY, OHIO**

Board of County Commissioners of Knox County,	:	
	:	Case No. 03-OT-090330
<i>Plaintiffs</i>	:	
	:	Judge Otho Eyster
v.	:	
	:	
Knox County Engineer,	:	
<i>Defendant</i>	:	

**AFFIDAVIT OF ALLEN STOCKBERGER**

ALLEN STOCKBERGER, being first duly sworn, says:

1. I am, and have been since January 3, 1993, a County Commissioner of Knox County.
2. Knox County obtains coverage for its liability and property risks and exposures through the County Risk Sharing Authority (CORSA).
3. In 2002, the Board of County Commissioners requested CORSA's assistance in developing a method of appropriating CORSA's charges among the County's departments and agencies which is based on relative exposure and loss experience.
4. CORSA provided recommendations for such a method. We adopted those recommendations. The worksheets attached to this Affidavit as Exhibit A and B show the application of those recommendations to the office of the County Engineer.

*Allen Stockberger*  
\_\_\_\_\_  
Allen Stockberger

Sworn to and subscribed before me this 19 day of February, 2004



*Linda L. Montgomery*  
\_\_\_\_\_  
LINDA L. MONTGOMERY  
NOTARY PUBLIC, STATE OF OHIO  
MY COMMISSION EXPIRES DECEMBER 21, 2005

This is to certify the foregoing to be a true and correct copy of the original affidavit now on file in my office.  
Mary Jo Hawkins, Clerk  
*M. J. Hawkins*  
\_\_\_\_\_  
Deputy  
Date 1/19/04

COMMISSIONERS:

Robert D. Durbin

Thomas C. McLarnan

Allen Stockberger

CLERK / ADMINISTRATOR

Rochelle Shackle

KNOX COUNTY BOARD OF COMMISSIONERS

117 East High Street, Suite #161

Mount Vernon, Ohio 43050

Telephone: 740-393-6703 Fax: 740-393-6705

Email: rochelle@ecr.net

www.knoxcountyohio.org



September 19, 2002

REVISED INVOICE

TO: KNOX COUNTY ENGINEER

FROM: BOARD OF KNOX COUNTY COMMISSIONERS

RE: SHARE OF CORSA INSURANCE PREMIUM FOR 2002

Amount Due:	\$ 23,331.10
Less Payment Received:	\$ <u>8,170.00</u>
Total Amount Due:	\$ 15,161.10

PLEASE REMIT TO:

Board of Knox County Commissioners  
 117 East High Street, Suite 161  
 Mount Vernon, Ohio 43050

1160

**Basis : Allocation for Engineer's Department**  
*All values based on 2000 figures*

Property – Buildings/Contents Value

Total Buildings/Contents Value           \$ 57,138,077  
Engineer's Buildings/Contents Value       2,549,732  
(find percentage of Total Buildings Value and multiply by  
the Coverage Allocation for B/CV)

**\$51,879 x 4% = 2,075.16**

Auto – Number of Vehicles

Total Number of Vehicles                   134  
\*Engineer's Number of Vehicles           36  
(divide premium in this category by the total  
number of vehicles to derive the cost per vehicle)

$\$50,324 / 134 = 375.56$   
**\$375.56 x 36 vehicles = 13,520.10**

\*number does not include trailers and the price per vehicle is a  
standard figure which does not reflect actual value

General Liability Payroll

Total of All Covered Departments       \$ 8,421,904  
Engineer's Department Total Payroll     1,210,706.53  
(find percentage of total payroll and multiply by the Coverage  
Allocation for G.L.)

**\$29,340 x 14% = 4,107.60**

\*Public Officials Liability Payroll

Total Payroll                               \$ 8,421,904  
Engineer's Department Total Payroll     1,210,706.53  
(find percentage of total payroll and multiply by the Coverage  
Allocation for P.O.L.)

**\$25,916 x 14% = 3,628.24**

\*this includes all employees' "Errors and Omissions" coverage

**Total due from Engineer's Department   \$ 23,331.10**

**1161**

COMMISSIONERS:

Thomas C. McLarnan

Allen Stockberger

Robert S. Wise

CLERK/ADMINISTRATOR

Rochelle Shackie

KNOX COUNTY BOARD OF COMMISSIONERS

117 East High Street, Suite #161

Mount Vernon, Ohio 43050

Telephone: 740-393-6703 Fax: 740-393-6705

Email: rochelle@ecr.net

www.knoxcountyohio.org



June 10, 2003

I N V O I C E

TO: KNOX COUNTY ENGINEER

FROM: BOARD OF KNOX COUNTY COMMISSIONERS

RE: SHARE OF CORSA INSURANCE PREMIUM FOR 2003

TOTAL AMOUNT DUE: \$23,595.63

PLEASE REMIT TO: BOARD OF KNOX COUNTY COMMISSIONERS  
117 EAST HIGH STREET, SUITE 161  
MOUNT VERNON, OHIO 43050

1162

Basis of Allocation for Engineer's Department  
All values based on 2000 figures

Engineer

Property - Buildings/Contents Value

Total Buildings/Contents Value \$57,438,077 ~~56,703,278~~  
~~Engineer's Buildings/Contents Value~~ 2,549,732  
 (find percentage of Total Buildings Value and multiply by  
 the Coverage Allocation for B/CV) ~~3,266,165~~ ~~3,569,432~~  
~~2,564,432~~  
 $51,879 \times \frac{5\%}{4\%} = 2,075.16$  ~~1,966.56~~ 2,458.20

Auto - Number of Vehicles

Total Number of Vehicles 134  
 \*Engineer's Number of Vehicles ~~36~~ 39  
 (divide premium in this category by the total  
 number of vehicles to derive the cost per vehicle)  
 $54,766$   $408.70$   
 $50,324 / 134 = 375.56$   
 $375.56 \times 36$  vehicles = 13,520.10  $15,939.30$   
 $408.70$   $39$

\*number does not include trailers and the price per vehicle is a standard figure which does not reflect actual value

General Liability Payroll

Total of All Covered Departments \$8,421,904 ~~13,453,704.00~~  
 Engineer's Department Total Payroll 4,210,706.53 ~~1,221,340.34~~  
 (find percentage of total payroll and multiply by the Coverage  
 Allocation for G.L.) ~~2002 P241011~~  
 $25,916$   $9$   
 $29,340 \times 14\% = 4,107.60$   $2,602.44$

\*Public Officials Liability Payroll

Total Payroll \$8,421,904 ~~13,453,704.00~~  
 Engineer's Department Total Payroll 4,210,706.53 ~~1,221,340.34~~  
 (find percentage of total payroll and multiply by the Coverage  
 Allocation for P.O.L.)  
 $25,916$   $9.70$   
 $25,916 \times 14\% = 3,628.24$   $2595.69$

\*this includes all employees' "Errors and Omissions" coverage

Total due from Engineer's Department

\$23,331.10

1163

~~23,595.63~~

23,595.63



5. In an informal survey of our members, we found that, in approximately 54 per cent of them, the Commissioners charged the Engineer's share of self-insurance pool charges to the motor vehicle license fee and motor vehicle fuel tax funds without objection by the Engineer. In the remainder, the Commissioners paid the Engineer's share of those charges from the county's general fund, either because the Engineer would not approve payment from license fee or fuel tax moneys or because the Commissioners simply did not request such payment.

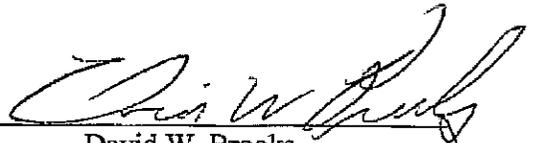
6. In 2002, the Knox County Commissioners requested our advice as to an appropriate method of allocating CORSA's charges to the County's departments and agencies, so as to achieve an apportionment which is based on relative exposure and loss experience.

7. We recommended that based on the program cost allocation that was established by our actuary, the County utilize the following factors to determine relative exposure and loss experience:

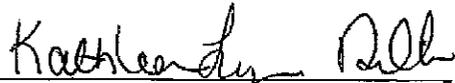
- As to property – building/contents value;
- As to auto – number of vehicles;
- As to general liability and public officials liability – dollar amount of payroll.

8. The county allocated its charges including its charges to the Engineer in 2002 and 2003 based on our recommendations.

9. I have reviewed the worksheets attached to this Affidavit as Exhibits A and B. In my opinion, they constitute a reasonable allocation to the Engineer, based on relative exposure and loss experience, of CORSA's charges for 2002 and 2003.

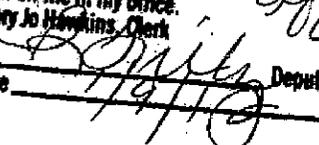
  
David W. Brooks

Sworn to and subscribed before me this 23 day of February, 2004.

  
Notary Public



KATHLEEN LYNN DILLON  
Notary Public, State of Ohio  
My Commission Expires 03-31-04  
Franklin

This is to certify the foregoing to be a true and correct copy of the original. *Affidavit*  
now on file in my office.  
Mary Jo Hawkins, Clerk  
 Deputy  
Date 2/23/04

COMMISSIONERS:

Robert D. Durbin

Thomas C. McLarnan

Allen Stockberger

CLERK / ADMINISTRATOR

Rochelle Shackle

KNOX COUNTY BOARD OF COMMISSIONERS

117 East High Street, Suite #161

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September 19, 2002

REVISED INVOICE

TO: KNOX COUNTY ENGINEER

FROM: BOARD OF KNOX COUNTY COMMISSIONERS

RE: SHARE OF CORSA INSURANCE PREMIUM FOR 2002

Amount Due:	\$ 23,331.10
Less Payment Received:	\$ <u>8,170.00</u>
Total Amount Due:	\$ 15,161.10

PLEASE REMIT TO:

Board of Knox County Commissioners  
 117 East High Street, Suite 161  
 Mount Vernon, Ohio 43050

1160

**Basis of Allocation for Engineer's Department**

*All values based on 2000 figures*

Property -- Buildings/Contents Value

Total Buildings/Contents Value           \$ 57,138,077  
Engineer's Buildings/Contents Value       2,549,732  
(find percentage of Total Buildings Value and multiply by  
the Coverage Allocation for B/CV)

**\$51,879 x 4% = 2,075.16**

Auto -- Number of Vehicles

Total Number of Vehicles                   134  
\*Engineer's Number of Vehicles           36  
(divide premium in this category by the total  
number of vehicles to derive the cost per vehicle)

$\$50,324 / 134 = 375.56$   
 **$\$375.56 \times 36 \text{ vehicles} = 13,520.10$**

\*number does not include trailers and the price per vehicle is a  
standard figure which does not reflect actual value

General Liability Payroll

Total of All Covered Departments       \$ 8,421,904  
Engineer's Department Total Payroll     1,210,706.53  
(find percentage of total payroll and multiply by the Coverage  
Allocation for G.L.)

**$\$29,340 \times 14\% = 4,107.60$**

\*Public Officials Liability Payroll

Total Payroll                               \$ 8,421,904  
Engineer's Department Total Payroll     1,210,706.53  
(find percentage of total payroll and multiply by the Coverage  
Allocation for P.O.L.)

**$\$25,916 \times 14\% = 3,628.24$**

\*this includes all employees' "Errors and Omissions" coverage

**Total due from Engineer's Department       \$ 23,331.10**

**1161**

EXHIBIT B

COMMISSIONERS:

Thomas C. McLarnan

Allen Stockberger

Robert S. Wise

KNOX COUNTY BOARD OF COMMISSIONERS

117 East High Street, Suite #161

Mount Vernon, Ohio 43050

Telephone: 740-393-6703 Fax: 740-393-6705

Email: rochelle@ecr.net

www.knoxcountyohio.org



CLERK / ADMINISTRATOR

Rochelle Shackle

June 10, 2003

I N V O I C E

TO: KNOX COUNTY ENGINEER  
FROM: BOARD OF KNOX COUNTY COMMISSIONERS  
RE: SHARE OF CORSA INSURANCE PREMIUM FOR 2003

TOTAL AMOUNT DUE: \$23,595.63

PLEASE REMIT TO: BOARD OF KNOX COUNTY COMMISSIONERS  
117 EAST HIGH STREET, SUITE 161  
MOUNT VERNON, OHIO 43050

1162

*WOB*

**Basis of Allocation for Engineer's Department**

All values based on 2000 figures

*2002 2001*

Engineer

**Property - Buildings/Contents Value**

Total Buildings/Contents Value \$57,138,077 ~~56,703,278~~

~~Engineer's Buildings/Contents Value 2,549,732~~

(find percentage of Total Buildings Value and multiply by the Coverage Allocation for B/CV)

~~3,246,158~~  
~~3,567,432~~  
2,564,432

~~\$51,879 x 4%~~ <sup>5%</sup> = 2,075.16

~~1966.56~~ 2,458.20

**Auto - Number of Vehicles**

Total Number of Vehicles 134

\*Engineer's Number of Vehicles ~~28~~ 39

(divide premium in this category by the total number of vehicles to derive the cost per vehicle)

~~54,766~~ 408.70

~~\$50,324 / 134 = 375.56~~

~~\$375.56 x 36 vehicles = 13,520.10~~

~~408.70~~ 39 15,939.30

\*number does not include trailers and the price per vehicle is a standard figure which does not reflect actual value

**General Liability Payroll**

Total of All Covered Departments \$8,421,904 ~~13,453,704.00~~

Engineer's Department Total Payroll 4,210,706.53 ~~1,221,340.34~~

(find percentage of total payroll and multiply by the Coverage

Allocation for G.L.)

~~28,916.9~~ 2002 payroll  
~~\$29,340 x 14% = 4,107.60~~ = 2,602.44

**\*Public Officials Liability Payroll**

Total Payroll \$8,421,904 ~~13,453,704.00~~

Engineer's Department Total Payroll 4,210,706.53 ~~1,221,340.34~~

(find percentage of total payroll and multiply by the Coverage

Allocation for P.O.L.)

~~25,841.97~~ 2595.69  
~~\$25,916 x 14% = 3,628.24~~

\*this includes all employees' "Errors and Omissions" coverage

Total due from Engineer's Department

\$ 23,331.10

1163

~~23,331.10~~  
23,595.63