[Cite as *Knox Cty. Commrs. v. Knox Cty. Engineer*, 2004-Ohio-6680.]

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

KNOX COUNTY COMMISSIONERS,	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiffs-Appellees	:	Hon. John W. Wise, J.
	:	Hon. John F. Boggins, J.
-vs-	:	
	:	Case No. 04-CA-000010
KNOX COUNTY ENGINEER,	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Knox County Common Pleas Court Case No. 03-OT-090330
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	DECEMBER 10, 2004

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
THOMAS A. LUEBBERS ERIN A. SUTTON 201 E. Fifth St., Ste. 900 Cincinnati, OH 45202 (513) 621-3394	LUTHER L. LIGGETT, JR. MARIA J. ARMSTRONG 100 South Third Street Columbus, OH 43215-4291 (614) 227-2399

Boggins, J.

{¶1} This appeal from a decision of the Knox County Court of Common Pleas involves the attempted application by Appellees to require utilization of motor vehicle license fees and fuel taxes received by Appellant for a share of liability insurance costs

resulting from Knox County's participation through a self-insurance pool under R.C. 2744.08-.081 (CORSA).

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant Knox County Engineer initially complied with the directions from Appellee Knox County Commissions but then asserted a claim of Constitutional prohibition as to the use of such funds for such purpose.

{¶3} Appellee then commenced a declaratory judgment action seeking a determination to the effect:

{¶4} "***charges billed by Plaintiffs to Defendant for Defendant's share of the cost of the County's participation in CORSA for 2002 and 2003 are a cost of operation of the Defendant's office; (2) Revised Code Section 315.12 requires that state motor fuel excise tax revenues be used to pay at least two-thirds of such costs of operation, and permits the use of such revenues to pay one hundred percent of such costs if no other funds are available to the Defendant; (3) use of such revenues for such purpose is constitutional; and (4) the charges billed by Plaintiffs to Defendant for the Defendant's share of the cost of the County's participation in CORSA for 2002 and 2003 are reasonable;

{¶5} "***a mandatory injunction ordering Defendant to (1) transfer funds in the amount of $46,926.73, representing $23,331.10 for 2002 costs and $23,595.63 for 2003 costs, from state motor vehicle license tax and motor vehicle fuel excise tax returns under his control to Plaintiffs for application to the cost of Defendant's share of the County's participation in CORSA's self-insurance pool for such years; and (2) pay

reasonable charges billed by Plaintiffs for Defendant's share of the County's participation in CORSA's self-insurance pool for future years."

{¶6} As both sides agreed that no disputed facts were in issue, Appellant filed for summary judgment with Appellee also filing its own Civ.R. 56 Motion.

{¶7} The Court ruled:

{¶8} "Denied Defendant Knox County Engineer's Motion for Summary Judgment finding that 'there are no genuine issues of material fact' but that the Defendant is not entitled to summary judgment as a matter of law.

{¶9} "Granted Plaintiffs' Cross-Motion for Summary Judgment, finding 'there are no genuine issues of material fact and that Plaintiffs are entitled to judgment as a matter of law' and

{¶10} "Made the finding that 'payment of the County Engineer's share of CORSA charges to Knox County is a cost of operation of the County Engineer's office."

{¶11} The three Assignments of Error raised by Appellant relative to such ruling are:

ASSIGNMENTS OF ERROR

{¶12} "I. THE TRIAL COURT ERRED IN DETERMINING THAT THE BOARD OF COUNTY COMMISSIONERS COULD SPEND HIGHWAY AND GASOLINE TAXES, RESERVED FOR HIGHWAY PURPOSES PURSUANT TO OHIO CONSTITUTION ARTICLE II, SECTION 5A, FOR GENERAL OPERATING EXPENSES OVER THE OBJECTIONS OF THE COUNTY ENGINEER.

{¶13} "II. THE TRIAL COURT ERRED IN FINDING THAT THE BOARD OF COUNTY COMMISSIONERS' ALLOCATION OF CORSA PREMIUMS TO THE COUNTY ENGINEER WERE PROPER UNDER STATE LAW.

{¶14} "III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR THE BOARD OF COUNTY COMMISSIONERS WHERE ITS ADMITTED FACTS CONTRADICT THE BOARD'S COMPLAINT AND PRIMA FACIE CASE."

{¶15} We shall address the First and Second Assignments of Error simultaneously.

I., II.

{¶16} In reviewing the legal issues involved, we have reviewed Amici Curae briefs received from the County Commissioners Association of Ohio and County Risk Sharing Authority, County Engineers Association of Ohio and Ohio Contractors Association in addition to the briefs of Appellant and Appellee.

{¶17} The issue involved rests upon the applicability of R.C. 315.12(A) and Article XII, Section 5A of the Ohio Constitution. Other statutes are cited but are not pertinent to this opinion. Such statutes are R.C. 2744.08(A)(2)(a), R.C. 2744.081 and R.C. 315.08, R.C. 4501.04 and R.C. 5735.27.

{¶18} Article XII, Section 5A of the Ohio Constitution states:

{¶19} "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."

{¶20} R.C. 315.12(A) states:

{¶21} "(A) Two thirds of the cost of operation of the office of county engineer, including the salaries of all of the employees and the cost of maintenance of such office as provided by the annual appropriation made by the board of county commissioners for such purpose, shall be paid out of the county's share of the fund derived from the receipts from motor vehicle licenses, as distributed under section 4501.04 of the Revised Code, and from the county's share of the fund derived from the motor vehicle fuel tax as distributed under section 5735.27 of the Revised Code."

{¶22} The duties of a county engineer are set forth in R. C. 315.08 and R.C. 5543.01 which provide:

{¶23} "The county engineer shall perform for the county all duties authorized or declared by law to be done by a registered professional engineer or registered surveyor, except those duties described in Chapters 343., 6103., and 6117. of the Revised Code. He shall prepare all plans, specifications, details, estimates of cost, and submit forms of contracts for the construction, maintenance, and repair of all bridges, culverts, roads, drains, ditches, roads on county fairgrounds, and other public improvements, except buildings, constructed under the authority of any board within and for the county. The engineer shall not be required to prepare plans, specifications, details, estimates of costs, or forms of contracts for emergency repairs authorized under section 315.13 of the Revised Code, unless he deems them necessary."

{¶24} R.C. 5543.01 states:

{¶25} "(A) Except as provided in division (B) of this section, the county engineer shall have general charge of the following:

{¶26} "(1) Construction, reconstruction, improvement, maintenance, and repair of all bridges and highways within the engineer's county, under the jurisdiction of the board of county commissioners, except for those county roads the board places on non-maintained status pursuant to section 5541.05 of the Revised Code;

{¶27} "(2) Construction, reconstruction, resurfacing, or improvement of roads by boards of township trustees under sections 5571.01, 5571.06, 5571.07, 5571.15, 5573.01 to 5573.15, and 5575.02 to 5575.09 of the Revised Code;

{¶28} "(3) Construction, reconstruction, resurfacing, or improvement of the roads of a road district under section 5573.21 of the Revised Code.

{¶29} "(B) For any particular project, after notifying the county engineer, the board of township trustees of a township that has adopted a limited home rule government under Chapter 504. of the Revised Code may hire an independent professional engineer to be in charge of those activities listed in division (A)(2) of this section. The county engineer shall review all of the independent professional engineer's plans for improvements and provide the board of township trustees with comments on those plans within ten working days after receiving them. The county engineer shall monitor all plans for improvements in order to maintain compliance with existing construction standards and thoroughfare plans, and coordinate construction timelines within the county.

{¶30} "(C) The county engineer may not perform any duties in connection with the repair, maintenance, or dragging of roads by boards of township trustees, except that, upon the request of any board of township trustees, the county engineer shall inspect any road designated by it and advise as to the best methods of repairing, maintaining, or dragging that road."

{¶31} R.C. 2744.081 states:

{¶32} "(A) Regardless of whether a political subdivision, under section 2744.08 of the Revised Code, secures a policy or policies of liability insurance, establishes and maintains a self-insurance program, or enters into an agreement for the joint administration of a self-insurance program, the political subdivision may, pursuant to a written agreement and to the extent that it considers necessary, join with other political subdivisions in establishing and maintaining a joint self-insurance pool 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.

{¶33} "All of the following apply to a joint self-insurance pool under this section:

{¶34} "(1) Such funds shall be reserved as are necessary, in the exercise of sound and prudent actuarial judgment, to cover potential political subdivision and employee liability, expense, loss, and damage. A report of amounts so reserved and disbursements made from such funds, together with a written report of a member of the American academy of actuaries certifying whether the amounts reserved conform to the requirements of this division, are computed in accordance with accepted loss reserving

standards, and are fairly stated in accordance with sound loss reserving principles, shall be prepared and maintained in the office of the pool administrator described in division (A)(2) of this section. The report shall be prepared and maintained on or before the last day of March for the preceding calendar year or, if the joint self-insurance pool's fiscal year is other than a calendar year, not later than ninety days after the close of the pool's fiscal year.

{¶35} "The report required by this division shall include, but not be limited to, disbursements made for the administration of the pool, including claims paid, costs of the legal representation of political subdivisions and employees, and fees paid to consultants.

{¶36} "The pool administrator described in division (A)(2) of this section shall make the report required by this division available for inspection by any person at all reasonable times during regular business hours, and, upon the request of such person, shall make copies of the report available at cost within a reasonable period of time.

{¶37} "(2) A contract may be awarded, without the necessity of competitive bidding, to any person, political subdivision, nonprofit corporation organized under Chapter 1702. of the Revised Code, or regional council of governments created under Chapter 167. of the Revised Code for purposes of administration of a joint self-insurance pool. No such contract shall be entered into without full, prior, public disclosure of all terms and conditions. Such disclosure shall include, at a minimum, a statement listing all representations made in connection with any possible savings and losses resulting from such contract, and potential liability of any political subdivision or employee. The proposed contract and statement shall be disclosed and presented at a

meeting of the political subdivision not less than one week prior to the meeting at which the political subdivision authorizes the contract.

{¶38} "(3) A joint self-insurance pool shall include a contract with a member of the American academy of actuaries for the preparation of the written evaluation of the reserve funds required under division (A)(1) of this section.

{¶39} "(4) 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.

{¶40} "(B) Two or more political subdivisions may also authorize the establishment and maintenance of a joint risk-management program, including but not limited to the employment of risk managers and consultants, for the purpose of preventing and reducing the risks covered by insurance, self-insurance, or joint self-insurance programs.

{¶41} "(C) A political subdivision is not liable under a joint self-insurance pool for any amount in excess of amounts payable pursuant to the written agreement for the participation of the political subdivision in the joint self-insurance pool. Under a joint self-insurance pool agreement a political subdivision may, to the extent permitted under the written agreement, assume the risks of any other political subdivision, including the indemnification of its employees. A joint self-insurance pool, established under this section, is deemed a separate legal entity for the public purpose of enabling the members of the joint self-insurance pool to obtain insurance or to provide for a formalized, jointly administered self-insurance fund for its members. An entity created pursuant to this section is exempt from all state and local taxes.

{¶42} “(D) Any political subdivision may issue general obligation bonds, or special obligation bonds which are not payable from real or personal property taxes, and may also issue notes in anticipation of such bonds, pursuant to an ordinance or resolution of its legislative authority or other governing body for the purpose of providing funds to pay judgments, losses, damages, and the expenses of litigation or settlement of claims, whether by way of a reserve or otherwise, and to pay the political subdivision's portion of the cost of establishing and maintaining a joint self-insurance pool or to provide for the reserve in the special fund authorized by division (A)(2)(a) of section 2744.08 of the Revised Code.

{¶43} “In its ordinance or resolution authorizing bonds or notes under this section, a political subdivision may elect to issue such bonds or notes under the procedures set forth in Chapter 133. of the Revised Code. In the event of such an election, notwithstanding Chapter 133. of the Revised Code, the maturity of the bonds may be for any period authorized in the ordinance or resolution not exceeding twenty years, which period shall be the maximum maturity of the bonds for purposes of section 133.22 of the Revised Code.

{¶44} “Bonds and notes issued under this section shall not be considered in calculating the net indebtedness of the political subdivision under sections 133.04, 133.05, 133.06, and 133.07 of the Revised Code. Sections 9.98 to 9.983 of the Revised Code apply to bonds or notes authorized under this section.

{¶45} “(E)(1) A joint self-insurance pool, in addition to its powers to provide self-insurance against any and all liabilities under this chapter, may also include any one or

more of the following forms of property or casualty self-insurance for the purpose of covering any other liabilities or risks of the members of the pool:

{¶46} "(a) Public general liability, professional liability, or employees liability;

{¶47} "(b) Individual or fleet motor vehicle or automobile liability and protection against other liability and loss associated with the ownership, maintenance, and use of motor vehicles;

{¶48} "(c) Aircraft liability and protection against other liability and loss associated with the ownership, maintenance, and use of aircraft;

{¶49} "(d) Fidelity, surety, and guarantee;

{¶50} "(e) Loss or damage to property and loss of use and occupancy of property by fire, lightning, hail, tempest, flood, earthquake, or snow, explosion, accident, or other risk;

{¶51} "(f) Marine, inland transportation and navigation, boiler, containers, pipes, engines, flywheels, elevators, and machinery;

{¶52} "(g) Environmental impairment;

{¶53} "(h) Loss or damage by any hazard upon any other risk to which political subdivisions are subject, which is not prohibited by statute or at common law from being the subject of casualty or property insurance.

{¶54} "(2) A joint self-insurance pool is not an insurance company. Its operation does not constitute doing an insurance business and is not subject to the insurance laws of this state.

{¶55} "(F) A public official or employee of a political subdivision who is or becomes a member of the governing body of a joint self-insurance pool in which the

political subdivision participates is not in violation of division (D) or (E) of section 102.03, division (C) of section 102.04, or section 2921.42 of the Revised Code as a result of the political subdivision's entering under this section into the written agreement to participate in the pool or into any contract with the pool.

{¶56} "(G) This section shall not be construed to affect the ability of any political subdivision to self-insure under the authority conferred by any other section of the Revised Code."

{¶57} R.C. 2744.08(A)(2)(a) states"

{¶58} "(2)(a) Regardless of whether a political subdivision procures a policy or policies of liability insurance pursuant to division (A)(1) of this section or otherwise, the political subdivision may establish and maintain a self-insurance program relative to its and its employees' potential liability in damages in civil actions for injury, death, or loss to persons or property allegedly caused by an act or omission of the political subdivision or any of its employees in connection with a governmental or proprietary function. The political subdivision may reserve such funds as it deems appropriate in a special fund that may be established pursuant to an ordinance or resolution of the political subdivision and not subject to section 5705.12 of the Revised Code. The political subdivision may allocate the costs of insurance or a self-insurance program, or both, among the funds or accounts in the subdivision's treasury on the basis of relative exposure and loss experience. If it so chooses, the political subdivision may contract with any person, other political subdivision, or regional council of governments for purposes of the administration of such a program."

{¶59} The essential issue is the meaning of and the inclusions and exclusions as provided within the language of Article XII, Section 5A of the Ohio Constitution.

{¶60} The Ohio Supreme Court has considered these questions previously in other respects than CORSA premiums.

{¶61} In *Madden v. Bower* (1969), 20 Ohio St.2d 135, a case involving the expenditure of group health premiums provided for county engineer employees from those funds referenced by such Constitutional provision, the Ohio Supreme Court held:

{¶62} "It is readily apparent, if not obvious that the premium cost paid on behalf of employees of the office of the county engineer as an incentive to continue their public service is part of the total cost of operation of that office, two-thirds of which total cost must be paid as directed by the statute. Neither the county auditor nor the board of county commissioners has any discretion in the matter.

{¶63} "On the other hand, Revised Code Section 315.12 does not prevent the remaining one-third of the total cost of operator of that office, with certain exceptions, from being paid from the motor vehicle fuel and license tax funds. *Bd. of County Commrs. V. Budget Comm.*(1969)*,* 17 Ohio St.2d 39.

{¶64} The case cited in such decision, to-wit: *Board of County Commissioners v. Budget Comm.* (1969), 17 Ohio St.2d 39, did not deal with whether Article XII, Section 5A prohibited the application of R.C. 315.12.

{¶65} In *Grandel v. Rhodes* (1959), 169 Ohio St. 77, the Ohio Supreme court did review such Constitutional Article and concluded that the term "other statutory highway purposes" did not permit such funds to be utilized for the payment of legal fees in

conjunction with a successful taxpayer's suit to prevent utilization of such funds for a study relating to the construction of the Statehouse underground parking.

{¶66} Essentially we are faced with whether a CORSA premium contribution is attributable to the costs of operation of the engineer's office under the language of Article XII, Section 5A of the Ohio Constitution. Regardless of the language of statutory authority, if such conflicts with a Constitutional mandate, it would be unenforceable.

{¶67} Even though this contribution differs from that of *Madden v. Bower*, supra, in that it is not a fringe benefit provided to employees, it is nonetheless an integral necessity to the operation of the engineer, and the protection of he and his employees, particularly with reference to highway construction and maintenance.

{¶68} To hold otherwise would ignore the realities of the operation of such office. Merely because CORSA is not mentioned in the Constitution does not change those aspects if encompasses.

{¶69} We find that Appellant's arguments and those made in support thereof not convincing.

{¶70} We find as did the trial court, that the expenditure of CORSA premiums from highway use and fuel taxes received by Appellant is a cost of operation of such office related to public highways and is not prohibited by Article XII, Section 5A of the Ohio Constitution.

{¶71} The First and Second Assignment of Error are rejected.

III.

{¶72} As to the Third Assignment of Error, we must first review the applicable standard as to a motion for summary judgment.

{¶73} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36. Civ.R. 56(C) states, in pertinent part:

{¶74} Summary Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law....A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor.

{¶75} Pursuant to the above rule, a trial court may not enter a summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of

material fact for trial. *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280.

{¶76} It is based upon this standard we review appellant=s assignment of error.

{¶77} We find that the question involved for the trial court was one of law, not controverted material facts.

{¶78} The argument that the amount apportioned to the engineer for CORSA premiums being unrelated to the risk factors lacks merit as one lawsuit involving serious injuries against the engineer can easily affect the sums available through such program or the general fund itself. Past risks do not necessarily guide potential future risks.

{¶79} Whether appropriate sums have been supplied to the engineer from the general fund is a question of abuse of discretion.

{¶80} “The Supreme Court has held that an abuse of discretion in budgetary matters means, as in other areas of law, that the action ‘implies an unreasonable, arbitrary, or unconscionable attitude.’ *State ex rel. Wilke v. Hamilton Cty. Bd. of Commrs.* (2000), 90 Ohio St.3d at 61, 734 N.E.2d 811.”

{¶81} We cannot agree with the Third Assignment of Error.

{¶82} The judgment of the Knox County Common Pleas is affirmed at Appellant's costs.

By: Boggins, J.

Gwin, P.J. and

Wise, J. concur.

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JUDGES

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FIFTH APPELLATE DISTRICT

KNOX COUNTY COMMISSIONERS,	:	
Plaintiffs-Appellees	:	
-vs-	:	JUDGMENT ENTRY
KNOX COUNTY ENGINEER,	:	
Defendant-Appellant	:	CASE NO. 04CA000010

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Knox County Common Pleas, is affirmed. Costs assessed to appellants.

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JUDGES