

OPINION NO. 97-020**Syllabus:**

1. Costs incurred by a county under R.C. 2744.081(A)(4) in funding a joint self-insurance pool that relate to liability that may be imposed against the county as a result of an act or omission attributable to the county engineer or his employees may be allocated and charged to the office of the county engineer on the basis of relative exposure and loss experience, to be satisfied out of whatever funds of the county engineer are otherwise available for that purpose. (1994 Op. Att'y Gen. No. 94-031 and 1988 Op. Att'y Gen. No. 88-067, approved and followed.)
2. Premiums paid for insurance purchased by a joint self-insurance pool pursuant to R.C. 2744.081(E)(1) qualify as "costs of funding" the pool for purposes of R.C. 2744.081(A)(4).
3. Premiums paid for insurance purchased by a joint self-insurance pool pursuant to R.C. 2744.081(E)(1) constitute a "cost of operation of the office of county engineer" for purposes of R.C. 315.12(A) when the coverage provided by that insurance relates to liability that may be imposed against a county as a result of an act or omission of the county engineer or

his employees. Those premiums, therefore, may be allocated and charged to the office of county engineer on the basis of relative exposure and loss experience, and may be paid out of that portion of the county engineer's budget that is funded with motor vehicle fuel excise tax revenues. (1994 Op. Att'y Gen. No. 94-031, approved and followed.)

4. The amount of a settlement or judgment that exceeds the insurance coverage provided to a county by a joint self-insurance pool under R.C. 2744.081(E)(1) constitutes a "cost of operation of the office of county engineer" for purposes of R.C. 315.12(A) when the settlement or judgment relates to liability imposed against the county as a result of an act or omission of the county engineer or his employees. The amount of the settlement or judgment, therefore, may be paid out of that portion of the county engineer's budget that is funded with motor vehicle fuel excise tax revenues.

To: Gregory A. White, Lorain County Prosecuting Attorney, Elyria, Ohio
By: Betty D. Montgomery, Attorney General, April 15, 1997

You have requested an opinion regarding an expenditure of motor vehicle fuel excise tax revenues distributed to the county under R.C. 5735.27. You wish to know whether any of those revenues may be used to pay the amount of a settlement or judgment in connection with a personal injury claim that has been made against the county. In your letter you explain that an employee of the county engineer had an accident while driving a county highway maintenance vehicle. You have concluded that at the time of the accident the employee was acting within the scope of his employment and performing work related to the statutory responsibilities of the county engineer.

The county maintains liability insurance for personal injury claims of this nature through its participation in a joint self-insurance pool with forty-six other Ohio counties. *See* R.C. 2744.081. In this instance, however, the damages that might be imposed against the county, whether by way of a settlement or a judgment, could exceed the limits of the liability coverage that is provided to the county and the county engineer by the joint self-insurance pool's insurance policies. It has been proposed that motor vehicle fuel excise tax revenues distributed to the county under R.C. 5735.27 be used to pay that portion of the plaintiff's damages that exceeds the limits of the county's insurance coverage.

In your letter you suggest that the conclusions and analyses set forth in 1994 Op. Att'y Gen. No. 94-031 and 1988 Op. Att'y Gen. No. 88-067 favor an affirmative response to your inquiry. In Op. No. 88-067 the Attorney General addressed the question of whether R.C. 2744.08(A)(2)(a) would permit a county engineer to pay a portion of costs incurred thereunder with revenues derived from state motor vehicle license taxes or motor vehicle fuel excise taxes;¹

¹ Section 5a of article XII of the Ohio Constitution states as follows:

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

R.C. 2744.08(A)(2)(a) authorizes a political subdivision to "establish and maintain a self-insurance program relative to its and its employees' potential liability in damages in civil actions" for injury or losses caused by acts or omissions of the subdivision or its employees and to allocate the costs of that self-insurance program among the funds in the subdivision's treasury. Op. No. 88-067 advised that revenues from those taxes could be expended for that portion of self-insurance program costs properly attributable to the office of the county engineer. In reaching that conclusion Op. No. 88-067 relied, in part, upon the language of R.C. 315.12(A), which reads as follows:

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 the 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.

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 General Assembly has enacted a comprehensive statutory scheme that governs the levy, collection, and distribution of state motor vehicle license taxes and motor vehicle fuel excise taxes. *See* R.C. 4501.03 (the Registrar of Motor Vehicles, with certain exceptions, is to pay money received as motor vehicle license tax revenues to the state treasury auto registration distribution fund for distribution to the counties and districts of registration pursuant to R.C. 4501.03-.043); R.C. 4501.04 (distribution of moneys in the auto registration distribution fund and the purposes for which such moneys may be used by counties and other political subdivisions); R.C. 4501.044 (distribution to the international registration plan distribution fund of revenues of motor vehicle license tax on apportionable vehicles and apportioned registration tax); R.C. 4501.045 (distribution of revenues of the motor vehicle license tax on nonapportionable vehicles); R.C. 4503.02 (levy of the motor vehicle license tax and enumeration of the expenditures for which the tax may be used); R.C. 5735.05 (imposition of a motor vehicle fuel excise tax and statement of the purposes for which the revenues may be used); R.C. 5735.23 (distribution of the revenues of the tax levied by R.C. 5735.05); R.C. 5735.25 (levy of an additional motor vehicle fuel excise tax and description of the purposes for which the revenues may be used); R.C. 5735.26 (designation of the funds into which receipts from the tax imposed by R.C. 5735.25 are to be paid, including the gasoline excise tax fund from which distributions to the counties are made pursuant to R.C. 5735.27(A)(4)); R.C. 5735.27 (creation of the gasoline excise tax fund in the state treasury and payment of certain amounts therefrom to the counties for the road and highway purposes described in the statute).

Op. No. 88-067 expressed the view, at 2-343, that "the language of R.C. 315.12(A) appears to reflect a presumption on the part of the General Assembly that no less than two thirds of the costs of operating the office of county engineer are directly related to the statutorily-enumerated purposes for which state motor vehicle license tax and motor vehicle fuel excise tax revenues may be expended. Included among such costs are the salaries of all the employees of the office of county engineer and the cost of maintaining such office." In support of the latter proposition Op. No. 88-067 cited the decisions of the Ohio Supreme Court in *Madden v. Bower*, 20 Ohio St. 2d 135, 139, 254 N.E.2d 357, 360 (1969) (health insurance premiums 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 the operation of that office, two-thirds of which total cost must be paid as directed by R.C. 315.12) and *Board of County Commissioners v. Scioto County Budget Commission*, 17 Ohio St. 2d 39, 43, 244 N.E.2d 888, 891 (1969) (R.C. 315.12 means that at least two-thirds of the cost of the office of the county engineer must be paid from state motor vehicle license tax and motor vehicle fuel excise tax revenues), and 1960 Op. Att'y Gen. No. 1278, p. 269.

Op. No. 88-067 then proceeded to the question of whether the particular self-insurance program costs attributable to the office of the county engineer could be characterized as a cost of operating the office of county engineer for purposes of R.C. 315.12(A). On that point the opinion reached the conclusion that such payments "do constitute a cost of operating the office of county engineer, for which the county's share of state motor vehicle license tax or motor vehicle fuel excise tax revenues may be expended under R.C. 315.12(A)," and offered the following reasons in support of that conclusion:

The payments in question are to be made to the county self-insurance program, pursuant to R.C. 2744.08(A)(a)(2), for the purpose of insuring the county against tort liability under R.C. 2744.02(B)(3) for its failure to keep the public roads and highways within the county open, in repair, and free from nuisance, which is attributable ultimately to misfeasance or nonfeasance on the part of the county engineer or his employees in the discharge of the various road and highway responsibilities imposed upon them by R.C. Chapters 315 and 5543. To that extent, therefore, I find it reasonable to classify such payments as an expense properly incurred in connection with the operation of the office of county engineer. *See generally* 1942 Op. Att'y Gen. No. 4728, p. 32, at 36 (analyzing G.C. 2782-2, the statutory predecessor of R.C. 315.12, and, with respect thereto, declaring as follows: "The statute appears to be unambiguous and free from doubt. The county engineer has numerous duties to perform. His duties include not only work on public roads and highways but, among other things, county ditch improvements, all of which duties contribute to the cost of operating his office"). Thus, it follows that, pursuant to R.C. 315.12(A), such operating costs may be satisfied out of state motor vehicle license tax revenues that are distributed to the county under R.C. 4501.04, or motor vehicle fuel excise tax revenues that are distributed to the county under R.C. 5735.27. (Footnote omitted.)

Op. No. 88-067 at 2-343 and 2-344.

In Op. No. 94-031 the Attorney General was asked whether any portion of a county's share of state motor vehicle license tax revenues and motor vehicle fuel excise tax revenues could

be used by the county to purchase liability insurance for all motor vehicles operated under the authority of the county engineer. Following the analysis and reasoning set forth in Op. No. 88-067, the Attorney General advised that those revenues could be expended for that purpose. At issue in Op. No. 94-031 was the purchase of insurance for liability that could be imposed against a county under R.C. 2744.02(B)(1) or (2)² in connection with the operation of motor vehicles or heavy road equipment by employees of the county engineer; a political subdivision is granted specific authority to purchase insurance against such liability by R.C. 2744.08(A)(1).³ Relying once more on R.C. 315.12(A), Op. No. 94-031 explained that the cost of purchasing insurance to protect against that liability could reasonably be considered a cost of operation of the office of county engineer, and thus that cost could be paid with the revenues in question:

² R.C. 2744.02(B) provides, in relevant part, as follows:

Subject to [R.C. 2744.03 and R.C. 2744.05], a political subdivision is liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

(1) Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees upon the public roads when the employees are engaged within the scope of their employment and authority....

(2) Except as otherwise provided in [R.C. 3746.24], political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.

R.C. 2744.03 lists various defenses and immunities that may be available to a political subdivision otherwise subject to a claim of liability under R.C. 2744.02(B). R.C. 2744.05 limits the amount of damages that may be awarded against a political subdivision for injury, death, or loss to persons or property caused by an act or omission in connection with a governmental or proprietary function. *See* R.C. 2744.01(F) (defining "[p]olitical subdivision" or "subdivision" as used in R.C. Chapter 2744; "[p]olitical subdivision" includes a county).

³ R.C. 2744.08(A)(1) states that a political subdivision

may use public funds to secure insurance with respect 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 insurance may be at the limits, for the circumstances, and subject to the terms and conditions, that are determined by the political subdivision in its discretion.

The insurance may be for the period of time that is set forth in specifications for competitive bids or, when competitive bidding is not required, for the period of time that is mutually agreed upon by the political subdivision and insurance company. The period of time does not have to be, but can be, limited to the fiscal cycle under which the political subdivision is funded and operates.

Because the liability imposed upon a county under R.C. 2744.02(B)(1) or R.C. 2744.02(B)(2) that would be covered by this insurance would be attributable ultimately to acts or omissions of the county engineer or his employees while operating motor vehicles or other heavy equipment or machinery in connection with the engineer's statutory responsibilities, the cost of that insurance may reasonably be characterized as a "cost of operation of the office of county engineer" for purposes of R.C. 315.12(A). This means that the cost of that insurance may be allocated to and paid out of the portion of the county engineer's budget that is funded with state motor vehicle license tax and motor vehicle fuel excise tax revenues. See R.C. 2744.08(A)(2)(a) (a political subdivision "may allocate the costs of insurance ... among the funds or accounts in the subdivision's treasury on the basis of relative exposure and loss experience").

Op. No. 94-031 at 2-145.

Let us now consider the subject of your inquiry. Either R.C. 2744.02(B)(1) or R.C. 2744.02(B)(2) could provide the basis for a finding of liability on the part of the county as a result of the accident described in your letter. See note two, *supra*. This statement is premised upon your initial representation that, at the time of the accident, the county engineer's employee was acting within the scope of his employment and properly engaged in an activity that is part of the county engineer's statutory responsibilities. See generally R.C. Chapter 315; R.C. Chapter 5543. R.C. 2744.081, in turn, provides an express grant of authority to the county to join with other political subdivisions for the purpose of establishing and maintaining a joint self-insurance pool "to provide for the payment of judgments, settlement of claims, expense, loss, and damage" in connection with that liability. R.C. 2744.081(A). See R.C. 2744.02(B)(1)-(5). As in the case of R.C. 2744.08(A)(2)(a)⁴ concerning the costs of insurance or a self-insurance program maintained by a political subdivision, R.C. 2744.081(A)(4) provides that "[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." (Emphasis added.)

⁴ R.C. 2744.08(A)(2)(a) reads as follows:

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. (Emphasis added.)

In Op. No. 88-067 the Attorney General construed the language of R.C. 2744.08(A)(2)(a) in concert with the language of R.C. 315.12(A), and thereby determined that those two provisions permitted the expenditure of state motor vehicle license tax revenues and motor vehicle fuel excise tax revenues in satisfaction of costs incurred by a county in connection with a self-insurance program under R.C. 2744.08(A)(2)(a). In Op. No. 94-031 the Attorney General similarly construed the language of R.C. 2744.08(A)(1) and R.C. 315.12(A), leading to the conclusion that those two provisions permitted the cost of insurance obtained by a county pursuant to R.C. 2744.08(A)(1) to be allocated to and paid out of that portion of the county engineer's budget that is funded with state motor vehicle license tax revenues and motor vehicle fuel excise tax revenues. Having reviewed the analyses and reasoning set forth in each of those opinions, we concur in their conclusions.

A preliminary question is whether the analyses and reasoning of those opinions should be extended and applied to the costs incurred by a county under R.C. 2744.081(A)(4) in funding a joint self-insurance pool with other political subdivisions, when the costs in question relate to liability imposed as a result of an act or omission attributable to the county engineer or his employees. It is our view that those opinions should be so applied and extended. It is apparent that R.C. 2744.08(A)(2)(a) and R.C. 2744.081(A)(4) employ identical language in addressing the subject of costs allocation, and this means that it is appropriate to read their respective provisions *in pari materia*. Accordingly, costs incurred by a county under R.C. 2744.081(A)(4) in funding a joint self-insurance pool may be allocated and charged to the county engineer's office, on the basis of relative exposure and loss experience, to be satisfied out of whatever funds of the county engineer are otherwise available for that purpose.

As in the case of R.C. 2744.08(A)(2)(a), R.C. 2744.081(A)(4) refers generally to "costs of funding" a joint self-insurance pool, but does not otherwise specify particular types or categories of costs that a political subdivision may properly incur in that regard. R.C. 2744.081(E)(1), however, makes it clear that a joint self-insurance pool, in addition to self-insuring, may purchase separate policies of insurance for the purpose of providing the necessary financial resources to a member political subdivision that incurs liability under R.C. Chapter 2744.⁵ It is apparent, therefore, that premiums paid for that insurance qualify as "costs of

⁵ R.C. 2744.081(E)(1) reads as follows:

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:

- (a) Public general liability, professional liability, or employees liability;
- (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;
- (c) Aircraft liability and protection against other liability and loss associated with the ownership, maintenance, and use of aircraft;
- (d) Fidelity, surety, and guarantee;
- (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

funding" the pool for purposes of R.C. 2744.081(A)(4).

In Op. No. 94-031 it was determined that the cost of insurance purchased under R.C. 2744.08(A)(1) to protect the county against liability ultimately attributable to acts or omissions of the county engineer or his employees could be characterized as a "cost of operation of the office of county engineer" for purposes of R.C. 315.12(A). This finding has equal application with respect to premiums paid for insurance purchased by a joint self-insurance pool pursuant to R.C. 2744.081(E)(1), when the coverage provided by that insurance relates to liability that may be imposed against the county as a result of an act or omission of the county engineer or his employees. In that situation those premiums constitute a "cost of operation of the office of county engineer" under R.C. 315.12(A), which means that those premiums may be allocated to and paid out of that portion of the county engineer's budget that is funded with motor vehicle fuel excise tax revenues.

Let us now consider your specific question, which asks about a settlement or judgment that exceeds the insurance coverage provided by a joint self-insurance pool, and that relates to liability imposed against a county as a result of an act or omission of the county engineer or his employees. That particular question was not asked or addressed in either Op. No. 88-067 or Op. No. 94-031. Nonetheless, for the following reasons, it is our opinion that in such a situation the amount of the settlement or judgment that exceeds the insurance coverage otherwise provided to an individual county by a joint self-insurance pool may be paid out of that portion of the county engineer's budget that is funded with motor vehicle fuel excise tax revenues.

While the provisions of R.C. Chapter 2744 authorize a political subdivision to purchase liability insurance as a method of paying a judgment or settlement in connection with an action brought against the political subdivision under that chapter, no provision within R.C. Chapter 2744 makes the payment of a judgment or settlement contingent upon the purchase and maintenance of liability insurance by the political subdivision. To the contrary, R.C. 2744.06(A) explicitly provides, in pertinent part, and without further qualification, that a judgment rendered against a political subdivision under R.C. Chapter 2744 "shall be paid from funds of the political subdivision[] that have been appropriated for that purpose." When the liability represented by such a judgment is attributable to an act or omission of the county engineer or his employees, it logically and reasonably follows that the amount of that judgment may be satisfied out of funds earmarked for the budget of the county engineer.

Among such funds are motor vehicle fuel excise tax revenues distributed to the county under R.C. 5735.27. Pursuant to R.C. 315.12(A), those revenues, and state motor vehicle license tax revenues distributed to the county under R.C. 4501.04, must be used to fund two thirds of the "cost of operation of the office of county engineer." We have concluded above that premiums

risk;

(f) Marine, inland transportation and navigation, boiler, containers, pipes, engines, flywheels, elevators, and machinery;

(g) Environmental impairment;

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

paid for insurance purchased by a joint self-insurance pool pursuant to R.C. 2744.081(E) constitute a cost of operation of the office of county engineer when the coverage provided by that insurance relates to liability that may be imposed against the county as a result of an act or omission of the county engineer or his employees. Even as those premiums constitute a "cost of operation of the office of county engineer" for purposes of R.C. 315.12(A), we are of the opinion that the same must be said for the amount of a settlement or judgment that exceeds that insurance coverage. In that circumstance we discern no reasonable basis for distinguishing the amount of the settlement or judgment from the premiums that are paid for insurance to protect a county from such liability. The amount of that settlement or judgment, therefore, may be allocated to and paid out of that portion of the county engineer's budget that is funded with motor vehicle fuel excise tax revenues.

Based upon the foregoing, therefore, it is my opinion, and you are advised that:

1. Costs incurred by a county under R.C. 2744.081(A)(4) in funding a joint self-insurance pool that relate to liability that may be imposed against the county as a result of an act or omission attributable to the county engineer or his employees may be allocated and charged to the office of the county engineer on the basis of relative exposure and loss experience, to be satisfied out of whatever funds of the county engineer are otherwise available for that purpose. (1994 Op. Att'y Gen. No. 94-031 and 1988 Op. Att'y Gen. No. 88-067, approved and followed.)
2. Premiums paid for insurance purchased by a joint self-insurance pool pursuant to R.C. 2744.081(E)(1) qualify as "costs of funding" the pool for purposes of R.C. 2744.081(A)(4).
3. Premiums paid for insurance purchased by a joint self-insurance pool pursuant to R.C. 2744.081(E)(1) constitute a "cost of operation of the office of county engineer" for purposes of R.C. 315.12(A) when the coverage provided by that insurance relates to liability that may be imposed against a county as a result of an act or omission of the county engineer or his employees. Those premiums, therefore, may be allocated and charged to the office of county engineer on the basis of relative exposure and loss experience, and may be paid out of that portion of the county engineer's budget that is funded with motor vehicle fuel excise tax revenues. (1994 Op. Att'y Gen. No. 94-031, approved and followed.)
4. The amount of a settlement or judgment that exceeds the insurance coverage provided to a county by a joint self-insurance pool under R.C. 2744.081(E)(1) constitutes a "cost of operation of the office of county engineer" for purposes of R.C. 315.12(A) when the settlement or judgment relates to liability imposed against the county as a result of an act or omission of the county engineer or his employees. The amount of the settlement or judgment, therefore, may be paid out of that portion of the county engineer's budget that is funded with motor vehicle fuel excise tax revenues.