[Cite as *Baker v. Oregon City Schools Bd. of Edn.*, 2012-Ohio-972.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Justen Baker, et al.	Court of Appeals No. L-11-1109
Appellants	Trial Court No. CI0200908917
v.	
Oregon City Schools, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: March 9, 2012

* * * * *

John S. Spore and Joanna M. Orth, for appellants.

Stuart J. Goldberg and Jeffrey M. Stoper, for appellees.

* * * * *

HANDWORK, J.

{¶ 1} This appeal is from the April 14, 2011 judgment of the Lucas County Court of Common Pleas, which granted summary judgment to appellees, Oregon City Schools Board of Education, d/b/a Oregon Career & Technology Center, an accredited institution of higher education, and John Does 1-5, unknown administrators, employees, and/or agents of Oregon City Schools Board of Education (collectively referred to as "OCTC"),

and dismissed the action. Upon consideration of the assignments of error, we affirm the decision of the lower court. Appellants, Justen Baker, Jeffery A. Ferris, Carl L. Christopher, Jerome Nyers, Loren J. Mathile, Shaun Krumm, Gregory D. Benton, Dawn Weinbrecht, Christine Krause, Michael K. Mabrey, Eugene M. McClain, and William Hinkfus, students in the Green Energy, Electrical, & Environmental Specialist Program ("Green Energy Program"), assert the following assignments of error on appeal:

> Assignment of Error I: The trial court erred in determining as a matter of law, that there was no genuine issue of material fact as to the ratification of the contract between Appellee and Appellant students pursuant to R.C. Sec. 3133.33(B) and that if a contract exists that it was not breached.
>
> Assignment of Error II: The trial court erred in determining that the doctrine of Sovereign Immunity protects political subdivisions that violate the Ohio Consumer Sales Practices Act.

{¶ 2} On December 18, 2009, appellants brought suit against OCTC alleging it offered a Green Energy, Electrical, & Environmental Specialist adult education program to run from July 20, 2009, through December 2009, as part of its curriculum to provide education in specific identified areas delineated in the syllabus for the program. Furthermore, appellants alleged that OCTC and its agents made certain representations in brochures and the student handbook that were known to be false and also enticed students to enroll in the program. Appellants were all students who enrolled in the first class to

take the program. Appellants asserted that the program did not live up to the brochure and promises of the agents of OCTC because of the poor facilities provided for classroom instruction, the incompetency of the instructors, the lack of instruction on promised curriculum, the lack of hands-on training, the failure of the program directors to make any changes after the students demanded change, and the lack of promised job shadowing. Therefore, they brought suit against OCTC asserting claims of breach of contract, negligence, fraud, violations of Ohio's Consumer Sales Practices Act ("CSPA"), and unjust enrichment on the ground that OCTC failed to provide appellants with the promised education.

{¶ 3} OCTC moved for summary judgment asserting there is no cognizable claim for educational malpractice in Ohio. Alternatively, OCTC argued it was protected from liability under the law of sovereign immunity, R.C. 2744.02(A). Finally, OCTC argued that all of the claims were unsupported by the undisputed facts and the law. In support of its motion, OCTC filed the affidavit of Steven D. Bialorucki, the Director of the Career Technical and Adult Education program for the board of education for the prior 18 years. He attested the Oregon Career & Technology Center is not a separate legal entity from the Oregon City Schools Board of Education and its primary function is to offer and operate adult education programs. He further attested that the center was accredited by the North Central Association Commission on Accreditation for School Improvement.

{¶ 4} Appellants argued in opposition that they did not assert an educational malpractice claim and OCTC is not protected by sovereign immunity for appellants'

claims of negligence, fraud, or violations of the CSPA because providing adult education is a proprietary governmental function.

{¶ 5} The trial court granted summary judgment to OCTC holding that the claim of negligence was in fact a claim of educational malpractice, which is not a cognizable claim under Ohio law. Second, the court held that the claims of fraud and violation of the CSPA are barred under the law of sovereign immunity. The court found that providing adult education under R.C. 3313.641(A) is a statutorily-authorized governmental activity and, therefore OCTC is protected from liability by sovereign immunity. Furthermore, the court found that even if it found that the act of providing adult education was a proprietary function, appellants have not asserted a viable negligence claim to support the application of the exceptions to statutory immunity. The court also held that fraud and a violation of the CSPA are not negligence actions and, therefore, these claims do not fall under the exceptions. The court held that the breach of contract fails because there was no contract under R.C. 3313.33(B). Finally, the court held that there was no right to recovery under any equitable theory of recovery either because a board of education cannot be held liable unless the agreement complied with R.C. 3313.33(B).

{¶ 6} In their first assignment of error on appeal, appellants argue that the trial court erred as a matter of law in granting summary judgment because there was a genuine issue of fact as to whether the board of education ratified the Green Energy Program and, therefore, a contract existed between the students of that program and the board of education. Furthermore, appellants argue that the court also erred when it found that

even if a contract existed, appellants did not come forward with any evidence of a breach of the contract. Appellants argue that the trial court failed to consider the evidence that there was more than "educational malpractice" in this case because here appellants had alleged that there was no instruction whatsoever on the geothermal system curriculum, no geothermal install, no solar equipment available, no solar install, no job shadowing, and no job placement as promised.

{¶ 7} The appellate court reviews a trial court's decision to grant summary judgment de novo. *Smiddy v. The Wedding Party, Inc.*, 30 Ohio St.3d 35, 506 N.E.2d 212 (1987). Pursuant to Civ.R. 56(C), a party is entitled to summary judgment if "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, 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." Therefore, summary judgment is appropriate only where: (1) no genuine issue of material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978). Because summary judgment is a procedural device to terminate litigation, it should only be imposed after resolving all doubts in favor of the non-moving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 359, 604 N.E.2d 138 (1992).

{¶ 8} The party moving for summary judgment bears the initial burden of identifying the portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim. *Drescher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264 (1996). In response, the burden shifts to the non-moving party to set forth specific facts demonstrating a genuine issue of material fact does exist and may not merely rest upon the allegations and denials in the pleadings and not submit some evidentiary material showing a genuine dispute over material facts. *Henkle v. Henkle*, 75 Ohio App.3d 732, 735, 600 N.E.2d 791 (1991). If a non-moving party finds that he cannot respond to a motion for summary judgment because he has not had time for adequate discover, the party must seek relief under Civ.R. 56(F) or forfeit his or her right to challenge the adequacy of discovery upon appeal. *Bryant v. Scooter Store*, 6th Dist. No. L-08-1262, 2009 WL 2414111, ¶ 36-37 (2009).

{¶ 9} OCTC argued that appellants have not identified any evidence that supports their claim that a contract existed in this case because there was no evidence that the program was approved by the board of education as required by R.C. 3313.33(B). R.C. 3313.33(B) provides in pertinent part: "No contract shall be binding upon any board unless it is made or authorized at a regular or special meeting of such board." OCTC submitted the affidavit of Bialorucki who attested the board of education never expressly approved the marketing materials and course syllabi at a regular or special meeting.

{¶ 10} Appellants responded by producing the board minutes from 2009. Bialorucki had also attested OCTC began looking into providing alternative energy adult

education in the summer of 2008. Appellants produced a copy of a Request for Proposal 48-2009-RFP-01-WDA prepared by the Lucas County Workforce Development Agency under the Lucas County Board of Commissioners. The agency sought proposals for educational institutions to provide "Group Sized, Short-term Training & Job Placement for High Growth, High Demand Occupations including: 'Green Collar', Healthcare and Construction based fields." The "Request for Proposals" delineated the specific requirements of the proposal and the program expectations, and it also required that the "[t]raining must include all components required for the attainment of the related industry-accepted credential."

{¶ 11} On May 18, 2009, the Oregon City Schools Board of Education voted to approve submission of a response to this proposal. The board further resolved: "Should the response be selected for award, the Adult Workforce Development department will be responsible for fulfillment of the contract." Appellants never obtained a copy of the board's proposal. Furthermore, OCTC asserted in its responsive motion that the contract under the Request for Proposal was issued to Owens Community College. While this statement in a responsive motion was not evidence, OCTC has identified a failure of appellants to prove that the board of education was awarded the contract for which they authorized the submission of a proposal.

{¶ 12} Appellants argue that they are unable to review any minutes prior to July 1, 2008, because they are not available online. Because they have not yet reviewed the minutes, appellants argue that there is a genuine issue of material fact. We disagree. If

appellants were unable to locate the board minutes, they should have compelled the board of education to produce the minutes either through the discovery process or as a public record.

{¶ 13} Appellants also argue that simply because Owens Community College was awarded a contract does not preclude that OCTC was awarded one as well. We would agree that this is a possibility. Similarly, appellants argue that OCTC presented only affidavits regarding the fact that the board of education did not approve the marketing materials and syllabi and never produced affidavits regarding whether the board of education approved the Green Energy Program. Appellants could indeed be correct in their inference that OCTC deliberately framed their affidavits and chose only the evidentiary material which reflected the facts in their favor. However, it is appellants' duty as the plaintiffs to utilize the rules of discovery to ferret out the truth. Plaintiffs could have proposed interrogatories directly asking the question of whether the board of education approved the program as a whole.

{¶ 14} Appellants also assert that they could not seek relief under Civ.R. 56(F) because they were able to file affidavits. This argument lacks merit as well. Only the minutes of the board of education would disclose the actions of the board and appellants were not foreclosed from seeking copies of the minutes from the board.

{¶ 15} We cannot deny OCTC the right to summary judgment solely because appellants might be able to find some evidence in their favor if the case were allowed to proceed to trial. The burden was upon appellants to find and produce the evidence that

would support their case. Because appellants failed to meet their burden, OCTC was entitled to summary judgment. Having concluded that the trial court did not err in finding that appellants failed to establish a contract existed in this case, we need not address the issue of whether appellants' established a breach of contract as that issue is now moot.

{¶ 16} Appellant's first assignment of error is not well-taken.

{¶ 17} In their second assignment of error, appellants argue that the trial court erred as a matter of law by holding that the law of sovereign immunity protects political subdivisions that violate the CSPA.

{¶ 18} Pursuant to R.C. 2744.02(A), generally, "a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function." Appellants do not dispute that appellee is a political subdivision. R.C. 2744.01(F) (defines a "public subdivision" as a school district) and R.C. 2744.01(C)(2)(c) (specifically identifies "the provision of a system of public education" as a governmental function). Therefore, it is clear that OCTC is entitled to assert the protection of statutory immunity.

{¶ 19} Exceptions to the general grant of immunity are set forth in R.C. 2744.02(B). There are five exceptions, four of which relate to specific claims of negligence, and the final exception relates to "injury, death, or loss to person or property when civil liability is expressly imposed upon the political subdivision by a section of the

Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code." R.C. 2744.02(B). This final exception also provides that "[c]ivil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon a political subdivision, because that section provides for a criminal penalty, because of a general authorization in that section that a political subdivision may sue and be sued, or because that section uses the term "shall" in a provision pertaining to a political subdivision." R.C. 2744.02(B)(5).

{¶ 20} Appellants first argue that a violation of the CSPA is akin to a contract claim and that R.C. 2744.09(A) would apply. We disagree. R.C. 2744.09(A) provides that statutory immunity is not applicable to "[c]ivil actions that seek to recover from a political subdivision * * * for contractual liability." A consumer action under the CSPA is not a contract action and, therefore, R.C. 2744.09 is not applicable.

{¶ 21} Appellants also argue that an exception to statutory immunity applies in this case because the CSPA specifically imposes liability upon political subdivisions for violations of the CSPA. One court has held that since R.C. 1345.01(B) defines a "person" to include a political subdivision, R.C. 2744.02(A) does not provide statutory immunity from claims of violations of the CSPA. *Drexel v. Columbus Technical Inst.*, 10th Dist. No. 88AP-271, 1990 WL 2925, *4 (Jan. 18, 1990). Another court, however, has held that a political subdivision is entitled to statutory immunity from liability for such a violation because there was no express imposition of liability. *Walker v. Jefferson City*, 2003-Ohio-3490, 2003 WL 21505472, ¶ 46, (7th Dist.). We conclude that because

R.C. 2744.02(B)(5) requires liability of a political subdivision to be "expressly imposed," merely defining the term "person" to include a political subdivision is insufficient to hold a political subdivision liable for violations of the CSPA. Had the General Assembly intended such a result, it would have enacted a specific subsection to impose such liability. Therefore, we find that the trial court did not err in finding that statutory immunity protected appellee from the claims asserted in this case. Appellants' second assignment of error is found not well-taken.

{¶ 22} Having found that the trial court did not commit error prejudicial to appellants, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellants are ordered to pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, P.J. _____

Stephen A. Yarbrough, J. _____
CONCUR.

JUDGE

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JUDGE