[Cite as *Taylor v. Boardman Twp. Local School Dist. Bd. of Edn.*, 2009-Ohio-6528.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

LaSHAWN TAYLOR, et al.,	)	
	)	CASE NO. 08 MA 209
PLAINTIFFS-APPELLANTS,	)	
	)	
- VS -	)	OPINION
	)	
BOARDMAN TOWNSHIP LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, et al.,	)	
	)	
DEFENDANTS-APPELLEES.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Case No. 07 CV 2203.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiffs-Appellants:

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JUDGES:
Hon. Mary DeGenaro
Hon. Joseph J. Vukovich
Hon. Gene Donofrio

Dated: December 1, 2009

[Cite as *Taylor v. Boardman Twp. Local School Dist. Bd. of Edn.*, 2009-Ohio-6528.]
DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court, the parties' briefs, and their oral arguments before this court. Appellants, LaShawn Taylor and Cajian Little, appeal the October 10, 2008 decision of the Mahoning County Court of Common Pleas that granted summary judgment on a negligence and breach of implied warranty of merchantability action in favor of Appellees Boardman Township Local School District Board of Education, et al. ("Boardman"). The trial court found that Boardman's provision of school lunches was part of its governmental function, making Boardman immune from the alleged liability. The trial court further found that Taylor had failed to provide any evidence of breach or causation in order to support her negligence claim.

{¶2} On appeal, Taylor argues that the trial court erred in not finding that the provision of school lunches is a proprietary rather than governmental function, and that Boardman is liable for breach of the implied warranty of merchantability. Taylor does not address how she demonstrated a prima facie case of negligence or how the trial court's finding thereon was erroneous.

{¶3} A school's provision of lunches is an integral part of the provision of an educational program. More specifically, the provision of meals to schoolchildren on school grounds, subject to heavy regulation, is a function not customarily engaged in by nongovernmental entities. Thus, the provision of school lunches, pursuant to R.C. 3313.81 et seq., is a governmental function entitled to immunity under the Political Subdivision Tort Liability Act. Because Boardman was immune from liability in Taylor's action as a matter of law, and because Taylor made no showing of causation to support her claims, the trial court did not erroneously grant Boardman's motion for summary judgment. The decision of the trial court decision is affirmed.

Facts and Procedural History

{¶4} Taylor filed a complaint against Boardman schools on June 19, 2007. Taylor alleged that her daughter, Cajian Little, ate food prepared by the school which was contaminated with ants. Taylor alleged that Little ingested a portion of the contaminated food and suffered adverse physical and emotional effects. Little required emergency medical treatment and missed school for an extended period of time. Taylor claimed

Boardman was liable for a violation of the implied warranty of merchantability, and for the commission of negligence through its agents.

{¶5} Both parties filed and answered interrogatories, and on March 14, 2008, the trial court ordered a mediation between the parties. In its answer to Taylor's interrogatories, Boardman described its processes regarding food preparation, sanitation, safety, and inspection. Boardman stated that no ants were found in Little's food, but that a cafeteria employee saw one ant "on the inside side of Cajian Little's nacho container." On May 30, 2008, Boardman filed a motion for summary judgment, arguing that Boardman was immune to Taylor's claims pursuant to the Political Subdivision Tort Liability Act. Taylor's response argued that Boardman's provision of lunches was a proprietary function, excepting it from political subdivision immunity. Boardman's reply refuted Taylor's claim of proprietary function, and further noted that Taylor failed to establish a prima facie case of negligence.

{¶6} On October 10, 2008, the trial court issued a judgment entry granting summary judgment in favor of Boardman Schools. The trial court found that public schools are political subdivisions subject to sovereign immunity, and that the provision of lunches is an incidental function of providing public education, which is a government function. The trial court noted that, even if the school were engaged in a proprietary function, Taylor had not provided enough evidence to survive summary judgment on her negligence claim. The trial court further noted that, even if Taylor had established proprietary function and a prima facie case of negligence, the suit would still have been barred by the employee-discretion and wanton-misconduct exceptions to liability, pursuant to R.C. 2744.03(A)(3),(5).

Summary Judgment

{¶7} In her sole assignment of error, Taylor asserts:

{¶8} "The trial court erred in granting summary judgment to appellees since the provision of food is a proprietary function for which a school district might be liable under R.C. 1302.27."

{¶9} Taylor claims that a school's provision of food services is a proprietary

rather than governmental function and thus potentially liable for breach of the implied warranty of merchantability. Taylor does not present any argument or analysis as to whether the trial court erroneously rejected her negligence portion of the complaint. Additionally, apart from her unsupported legal conclusion, Taylor does not provide any explanation as to how the implied warranty of merchantability applies to the parties in the suit, nor does she explain how she presented a prima facie case for such a claim.

{¶10} An appellate court reviews a summary judgment decision de novo, applying the same standard used by the court below. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241. Summary judgment may only be rendered if the moving party demonstrates "(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) 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." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 8 O.O.3d 73, 375 N.E.2d 46; Civ.R. 56(C). Summary judgment is appropriate "where the pleadings and the arguments of the party seeking summary judgment clearly establish that the nonmoving party has no legally cognizable cause of action." *Dresher v. Burt*, 75 Ohio St.3d 280, 297-298, 1996-Ohio-107, 662 N.E.2d 264.

{¶11} The Political Subdivision Tort Liability Act, R.C. Chapter 2744, "sets forth the defenses and immunities available to political subdivisions in civil actions for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision in connection with a governmental or proprietary function. R.C. 2744.02(A)(1). The Act also provides exceptions to immunity in specified circumstances. See R.C. 2744.02(B)." *Moore v. Lorain Metro. Hous. Auth*., 121 Ohio St.3d 455, 2009-Ohio-1250, 905 N.E.2d 606, at ¶7.

{¶12} In order for R.C. Chapter 2744 to apply to an entity, it must fall within a category defined as a political subdivision by the code. *Greene Cty. Agricultural Soc. v. Liming*, 89 Ohio St.3d 551, 554, 2000-Ohio-486, 733 N.E.2d 1141. In this case, a school district is explicitly defined a political subdivision, thus the statute applies. R.C.

2744.01(F). Taylor does not dispute the fact that Boardman is a political subdivision, and concedes that the school is generally eligible for immunity through governmental or proprietary functions under the first tier of analysis.

{¶13} In setting out the rule that political subdivisions are not liable in tort suits, R.C. 2744.02(A)(1) classifies the functions of political subdivisions into governmental and proprietary functions. *Greene Cty. Agricultural Soc.* at 557. Pursuant to one of the exceptions to liability immunity set forth in R.C. 2744.02(B), "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. 2744.02(B)(2). Taylor argues that the exception to immunity for negligent performance of a proprietary function applies. Taylor argues that, although the provision of a system of public education is a governmental function, the provision of food services to students is a proprietary function.

{¶14} There are two ways in which a given function may be proprietary: either it is specifically listed as a proprietary function pursuant to R.C. 2744.01(G)(2), or it is not described in R.C. 2744.01(C)(1)(a), (b), or (C)(2) and "promotes or preserves the public peace, health, safety, or welfare and * * * involves activities that are customarily engaged in by nongovernmental persons." R.C. 2744.01(G)(1). A function may be governmental if it is specifically listed as such pursuant to R.C. 2744.01(C)(2), or if it meets one of the three standards listed in R.C. 2744.01(C)(1):

{¶15} "(a) A function that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement;

{¶16} "(b) A function that is for the common good of all citizens of the state;

{¶17} "(c) A function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not specified in division (G)(2) of this section as a proprietary function."

{¶18} The provision of a public education system is listed by the statute as a

governmental function. R.C. 2744.01(C)(2)(c). However, the provision of meals to students is not a listed governmental function. Not every action taken by a political subdivision in conjunction with a governmental function is in itself a governmental function. Thus, the provision of school lunches must meet one of the three standards of R.C. 2744.01(C)(1) in order to be immune from liability.

{¶19} Taylor argues that R.C. 3313.81 gives public schools the discretion, but not the obligation, to provide school lunches. Taylor additionally asserts that providing meals to students is customarily done by nongovernmental persons. Taylor therefore seems to be arguing that Boardman's food service does not constitute a governmental function under either R.C. 2744.01(C)(1)(a) or R.C. 2744.01(C)(1)(c).

{¶20} The facts of this case are analogous to those in *Day v. Middletown-Monroe City School Dist. Bd. of Edn*. (July 17, 2000), 12th Dist. No. CA99-11-186. In *Day*, the function of the political subdivision in question was the provision of transportation services to high school students. The applicable statute sets out a system of transportation for students, which school boards are obligated to provide to students through the eighth grade. R.C. 3327.01. The statute also states that, for high school students, the school has the discretion, but not the obligation to provide a system of transportation. Id. The Twelfth District held that the transportation of high school students fell within R.C. 2744.01(C)(1)(a) because it was a necessary part of the provision of a system of public education, which is an obligation of sovereignty imposed on the state. *Day* at *4, citing *DeRolph v. State*, 78 Ohio St.3d 193, 203-204, 1997-Ohio-84, 677 N.E.2d 733. Thus even though the provision of transportation to high school students was not statutorily mandated, its integral connection to the system of public education allowed it to be considered a governmental function.

{¶21} Similarly to the provision of school transportation, the provision of lunches on school grounds facilitates the efficient provision of a system of public education. Although the language of R.C. 3313.81 does not necessarily require a local board of education to establish a food service, R.C. 3313.813(C) does obligate local boards of education to establish food service programs if certain basic conditions apply, as

mandated by the "National School Lunch Act," or the "Child Nutrition Act of 1996." Sections 1751 and 1771, Title 42, U.S. Code. It can therefore be concluded that the provision of lunches is generally a necessary part of the provision of a system of public education, thus part of an obligation of sovereignty imposed on the state of Ohio. Boardman's provision of school lunches is thus a governmental function pursuant to R.C. 2744.01(C)(1)(a).

{¶22} In relation to Taylor's second argument on the inapplicability of 2744.01(C)(1)(c), this court has held that "a court should look to the particular activity the subdivision is engaged in and decide whether that particular activity is of the type customarily engaged in by nongovernmental persons." *Allied Erecting & Dismantling Co., Inc. v. Youngstown*, 151 Ohio App.3d 16, 2002-Ohio-5179, 783 N.E.2d 523, at ¶52. The court in *Day* noted that the transportation of students fell within R.C. 2744.01(C)(1)(c) and was thus a governmental function because it was not an activity normally undertaken by nongovernmental persons. *Day* at *5. The court explained that, although nongovernmental persons (such as parents) may transport individual students to school, only the school board, "or an entity acting at the behest of the Board and licensed by the state, provides transportation available for all students." Id. Thus, the activity in question was not simply the act of driving a student to school, but rather the act of providing a system of transportation that would be available to all resident student attendees of a public school.

{¶23} In the case at hand, Taylor tries to expand the context of Boardman's function by noting that the provision of food to people is customarily engaged in by nongovernmental persons, such as restaurants and grocery stores. However, Boardman is not performing so broad a function. Based on the perspective provided by *Day*, the correct scope for this issue is whether nongovernmental persons customarily provide school lunch programs to students in school facilities. Within this more accurate frame of reference, the answer is no. A board of education is the only entity permitted to create, supervise and regulate the provision of meals to students in school facilities. The provision of food within a school program is subject to strict rules, and is controlled by

statutory mandates in terms of the program's structure and day-to-day functioning. See, e.g., R.C. 3313.81 through 3313.815; R.C. 3314.18; Ohio Adm.Code 3301-37-06, 3301-37-07, and 3301-37-09. Given the foregoing, the provision of school lunches to students in school facilities is an activity not customarily engaged in by nongovernmental persons. Boardman's provision of school lunches is thus a governmental function pursuant to R.C. 2744.01(C)(1)(c).

{¶24} Because Boardman's provision of school lunches can be considered a governmental function under both R.C. 2744.01(C)(1)(a) and R.C. 2744.01(C)(1)(c), Boardman is therefore not subject to the exception to immunity pursuant to R.C. 2744.02(B)(2).

{¶25} Additionally, Taylor has argued that Boardman still may be liable for breach of the implied warranty of merchantability. However, Taylor's failure to present any evidence of causation precluded her claim for breach of implied warranty of merchantability. As noted in the Official Comment to R.C. 1302.27, in action for breach of implied warranty of merchantability, "it is of course necessary to show not only the existence of the warranty but the fact that the warranty was broken and that the breach of the warranty was the proximate cause of the loss sustained." See also, e.g., *Lonzrick v. Republic Steel Corp*. (1966), 6 Ohio St.2d 227, 237, 35 O.O.2d 404, 218 N.E.2d 185.

{¶26} Here, Taylor adequately specified Little's injury, but did not specify how some act or omission by Boardman proximately caused the presence of an ant in Little's food. Taylor therefore failed to sufficiently establish the element of causation in order to survive summary judgment.

{¶27} In summary, due to the applicability of the Political Subdivision Tort Liability Act, Boardman was immune from liability for Taylor's civil action for negligence as a matter of law. Boardman was engaged in a governmental function and entitled to immunity from Taylor's civil action for personal injury that might have been caused by the alleged act or omission in connection with that governmental function. Additionally, Taylor did not make any showing of causation, defeating her action for negligence and for breach of implied warranty of merchantability. The trial court did not err when it granted

summary judgment in favor of Boardman. Taylor's sole assignment of error is meritless. The trial court's decision is affirmed.

Vukovich, P.J., concurs.

Donofrio, J., concurs.