

[Cite as *Dufner v. Delaware*, 2009-Ohio-5950.]

COURT OF APPEALS  
DELAWARE COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

|                          |   |                              |
|--------------------------|---|------------------------------|
| WILLIAM DUFNER           | : | JUDGES:                      |
|                          | : | Hon. Sheila G. Farmer, P.J.  |
| Plaintiff-Appellee       | : | Hon. John W. Wise, J.        |
|                          | : | Hon. Patricia A. Delaney, J. |
| -vs-                     | : |                              |
|                          | : |                              |
| CITY OF DELAWARE, ET AL. | : | Case No. 09CAE0049           |
|                          | : |                              |
| Defendant-Appellant      | : | <u>OPINION</u>               |

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas,  
Case No. 07CVC05640

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: November 9, 2009

APPEARANCES:

For Plaintiff-Appellee

ALEXANDER ANDREOFF  
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P.O. Box 1966  
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For Defendant-Appellant

DAVID T. PATTERSON  
STEVEN G. CARLINO  
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*Farmer, P.J.*

{¶1} On June 21, 2005, appellee, William Dufner, and appellant, Keith Brown, were working on a trash truck in the city of Delaware. At the time, appellee was working on the truck under a work release program. Appellee received injuries to his right hand when the compactor lever was turned on and the compactor caught his hand.

{¶2} On May 30, 2007, appellee filed a complaint against appellant and others claiming negligence. An amended complaint was filed on July 31, 2007.<sup>1</sup>

{¶3} On July 24, 2008, appellant filed a motion to dismiss pursuant to Civ.R. 12(B)(6), claiming appellee did not state a claim for which relief could be granted because appellant was protected under the immunity statutes of R.C. Chapter 2744. By judgment entry filed April 21, 2009, the trial court denied the motion.

{¶4} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶5} “THE TRIAL COURT ERRED IN FAILING TO GRANT DEFENDANT-APPELLANT KEITH BROWN’S MOTION TO DISMISS BASED UPON THE IMMUNITY PROVIDED TO HIM UNDER CHAPTER 2744 OF THE OHIO REVISED CODE.”

I

{¶6} Appellant claims the trial court erred in denying his motion to dismiss pursuant to Civ.R. 12(B)(6). Specifically, appellant claims he was immune under R.C. Chapter 2744 as he was an “employee” at the time of the incident for purposes of applying the immunity statutes under said chapter. We disagree.

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<sup>1</sup>All other defendants were subsequently dismissed based on statute of limitations and immunity issues. See, Judgment Entries filed May 23, 2008.

{¶7} By judgment entry filed April 21, 2009, the trial court denied appellant's motion to dismiss pursuant to Civ.R. 12(B)(6). Our standard of review on a Civ.R. 12(B)(6) motion to dismiss is de novo. *Greely v. Miami Valley Maintenance Contrs. Inc.* (1990), 49 Ohio St.3d 228. A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 1992-Ohio-73. Under a de novo analysis, we must accept all factual allegations of the complaint as true and all reasonable inferences must be drawn in favor of the nonmoving party. *Byrd. v. Faber* (1991), 57 Ohio St.3d 56.

{¶8} As provided in Civ.R. 12(B), in reviewing such a motion, we can only consider the four corners of the complaint. Civ.R. 12(B) permits a trial court to expand its scope of review by converting a motion to dismiss into a motion for summary judgment, but this was not done sub judice.

{¶9} We note this matter is before this court pursuant to R.C. 2744.02(C) which states, "[a]n order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order."

{¶10} In his amended complaint filed July 31, 2007 at ¶1, appellee claimed he was injured while working on a "work release" program in Delaware County. Appellee was working on a trash truck maintained by the city of Delaware Street Department when the compactor lever was negligently turned on, catching his right hand and causing injuries. See, ¶1 and 2. Appellee averred he was denied a worker's compensation claim because he was not an employee of the city of Delaware. See, ¶6.

Appellee also averred appellant, a worker on the trash truck, was not an employee of the city of Delaware. See, ¶1 and 7. Appellee claimed appellant and others negligently caused the injuries to his right hand. See, ¶2.

{¶11} In its judgment entry filed April 21, 2009 denying appellant's motion to dismiss, the trial court concluded the following:

{¶12} "After considering the parties' memoranda, the Court finds that, construing all material allegations in the complaint and all inferences that may be reasonably drawn therefrom in favor of the nonmoving party, it is not clear that plaintiff can prove no set of facts that would entitle him to relief. The Court is unable to determine as a matter of law that defendant Keith Brown was an employee as defined in R.C. 2744.01(B) based solely on plaintiff's complaint."

{¶13} The gravamen of this case is whether from the language of the amended complaint it is possible to determine if appellant was an "employee" for purposes of immunity under R.C. 2744.01(B). R.C. 2744.01(B) defines "employee" as follows:

{¶14} " 'Employee' means an officer, agent, employee, or servant, whether or not compensated or full-time or part-time, who is authorized to act and is acting within the scope of the officer's, agent's, employee's, or servant's employment for a political subdivision. 'Employee' does not include an independent contractor and does not include any individual engaged by a school district pursuant to section 3319.301 of the Revised Code. 'Employee' includes any elected or appointed official of a political subdivision. 'Employee' also includes a person who has been convicted of or pleaded guilty to a criminal offense and who has been sentenced to perform community service work in a political subdivision whether pursuant to section 2951.02 of the Revised Code

or otherwise, and a child who is found to be a delinquent child and who is ordered by a juvenile court pursuant to section 2152.19 or 2152.20 of the Revised Code to perform community service or community work in a political subdivision.”

{¶15} In his brief at 6-7, appellant argues he was an “employee” as he was performing “community service work in a political subdivision.” From the July 31, 2007 amended complaint, we know (1) appellee was working on a trash truck on a work release program (¶1); (2) appellee was injured when appellant and others negligently turned on the compactor lever and caught his right hand in the compactor (¶1); (3) the negligence resulted in injury to appellant’s hand (¶2); (4) appellee was denied a worker’s compensation claim because he was not an employee of the city of Delaware or any other defendants (¶6); (5) appellant was not an employee of the city of Delaware or any other defendants (¶7).

{¶16} Based upon the limited review on a Civ.R. 12(B)(6) motion, we find unanswered issues remain on appellant’s status as an “employee.” Upon review, we find the trial court was correct in denying appellant’s motion to dismiss.

{¶17} The sole assignment of error is denied.

{¶18} The judgment of the Court of Common Pleas of Delaware County, Ohio is hereby affirmed.

By Farmer, P.J.

Wise, J. and

Delaney, J. concur.

s/ Sheila G. Farmer

s/ John W. Wise

s/ Patricia A. Delaney

JUDGES

SGF/sg 0928

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

|                          |   |                    |
|--------------------------|---|--------------------|
| WILLIAM DUFNER           | : |                    |
|                          | : |                    |
| Plaintiff-Appellee       | : |                    |
|                          | : |                    |
| -vs-                     | : | JUDGMENT ENTRY     |
|                          | : |                    |
| CITY OF DELAWARE, ET AL. | : |                    |
|                          | : |                    |
| Defendant-Appellant      | : | CASE NO. 09CAE0049 |

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Delaware County, Ohio is affirmed. Costs to appellant Keith Brown.

s/ Sheila G. Farmer\_\_\_\_\_

s/ John W. Wise\_\_\_\_\_

s/ Patricia A. Delaney\_\_\_\_\_

JUDGES