

GERALD SPLAIN, SR.,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 98-01,104
	:	
LYCOMING COUNTY and	:	CIVIL ACTION - LAW
MARK KELLER,	:	
	:	
Defendants	:	SUMMARY JUDGMENT

MEMORANDUM OPINION and ORDER

This Memorandum Opinion and Order are entered in regard to the various Summary Judgment Motions that have been filed before this Court and which were argued on December 8, 1999.

With respect to the Summary Judgment Motion filed by Plaintiff on October 29, 1999, the Court believes that there is a disputed issue of material fact whether the described actions of Defendant Mark Keller, under all the circumstances, are or are not facts constituting negligence. Hence, the Summary Judgment Motion filed by Plaintiff will be denied.

The Court believes that the Summary Judgment Motion of Defendant Lycoming County, filed November 1, 1999, must be granted. The Court finds that the allegations in the Complaint read as a whole clearly allege that Lycoming County's negligence, claimed to be the proximate cause of Plaintiff's injuries, concerns the metal rail located in front of the dumping pit at the transfer station. In his Complaint, Plaintiff claims the rail was unsafe, not correctly placed or designed and of insufficient height. Plaintiff acknowledges, in both argument and briefs, that Plaintiff is without any evidence, including Plaintiff's own expert, to substantiate there was any defect in the design or placement of the rail. Rather, Plaintiff now asserts that,

under the language of paragraph 28 of the Complaint, Plaintiff can pursue a claim against Lycoming County on the basis that Plaintiff's expert indicates the failure to incorporate a warning system on both the truck and dumping pit area, and to provide mirrors in the dumping pit area, was unreasonable and resulted in a dangerous condition. Further, the failure to provide such warning systems both on the truck and in the building was the cause of the accident leading to Plaintiff's injuries. However, this clearly asserts a new cause of action against Lycoming County. Plaintiff's argument that these allegations are no more than an "amplification" of the pleadings set forth in paragraph 28 of the Complaint, permitted under *Connor v. Allegheny General Hospital*, 461 A.2d 600 (Pa. 1983), is rejected. The language relied upon by Plaintiff relates to the second sentence of paragraph 28 of the Complaint stated:

The Lycoming County Transfer Station is not able to afford safety for the activities for which the property was regularly used or for which it is intended to be used or reasonable [sic] foreseen to be used.

This language does not allege a separate theory of negligence, relating to something other than the metal rail, against Lycoming County. The first sentence of paragraph 28 specifically refers to the fact that the metal rail provided was insufficient to protect the safety of people using the transfer station. Paragraphs 29 and 30, the two concluding paragraphs of the Complaint, assert it was the defective condition or design of the rail which was the direct and proximate cause of Plaintiff's falling into the pit and causing injury; but for the defective design of the rail Plaintiff would not have fallen into the pit. It is clear when one reads the entire claim against Lycoming County that the claim is based solely upon the condition of the premises as would relate to the metal rail in front of the dumping pit.

Based upon the foregoing determination, the Court finds it unnecessary to address the other issues raised in the Summary Judgment Motion of Lycoming County and a thorough analysis of those issues has not been undertaken by the Court. The Court does note that Plaintiff has voluntarily admitted that Count II of the Complaint asserted against Lycoming County, based upon Lycoming County's employment and supervision of the operator of the pit, Jim Raemsch, is to be withdrawn. Plaintiff acknowledges that the Complaint and evidence against Lycoming County under this Count cannot sustain a cause of action.

Defendant Mark Keller's Motion for Summary Judgment, filed in response to the Plaintiff's Motion for Summary Judgment, on November 17, 1999, was withdrawn by the Defendant at argument.

In the event it becomes necessary, this Court will enter a further Opinion detailing its reasoning and analysis of the issues involved in the Summary Judgment proceedings.

ORDER

AND NOW, this 13th day of December 1999, the following Order is entered:

1. Motion for Partial Summary Judgment of Plaintiff filed October 29, 1999 against Defendant Mark Keller is ***DENIED***.

2. Defendant Lycoming County's Summary Judgment Motion, filed November 1, 1999, against Plaintiff as relates to Count II of the Complaint is ***GRANTED*** and said Count is ***DISMISSED***. The Motion as relates to Count III is also ***GRANTED*** and Count III of Plaintiff's Complaint against Lycoming County is also ***DISMISSED***.

3. The Partial Summary Judgment Motion by Defendant Mark Keller, filed November 17, 1999, is to be marked and deemed as ***WITHDRAWN***.

BY THE COURT:

William S. Kieser, Judge

cc: Court Administrator
Gregory A. Stapp, Esquire
Robin A. Read, Esquire
Mark Keller
2216 Lincoln Street; Williamsport, PA 17701
Judges
Nancy M. Snyder, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)