

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROYAL INDEMNITY CO., et al.,	:	CIVIL ACTION
Plaintiffs,	:	
	:	
v.	:	
	:	
CALECO, INC., et al.,	:	NO. 03-CV-2281
Defendants.	:	

MEMORANDUM OPINION

LEGROME D. DAVIS, J.

NOVEMBER 9, 2004

Presently before this Court are the Motion for Summary Judgment and a Memorandum of Law in Support of Motion for Summary Judgment filed by Defendants CSX Corporation and Consolidated Rail Corporation on January 21, 2004 (Defs.' Mot., Doc. No. 25), a Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment filed by Plaintiffs on February 20, 2004 (Pls.' Opp., Doc. No. 28), a Supplemental Memorandum of Law in Support of Summary Judgment Motion filed by Defendants CSX Corporation and Consolidated Rail Corporation on November 1, 2004 (Defs.' Supplemental Mem., Doc. No. 39), and a Supplemental Memorandum of Law in Support of Opposition to Defendants' Motion for Summary Judgment filed by Plaintiffs on October 22, 2004 (Pls.' Supplemental Mem., Doc. No. 38). For the following reasons, Defendants' Motion for Summary Judgment (Doc. No. 25) is GRANTED.

**I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

Plaintiff insurance companies Royal Indemnity Co. ("Royal") and the Standard Fire Insurance Company ("Standard") are subrogees of the Scully Company and the Village Green

Apartments, respectively. Plaintiffs provided insurance coverage to these entities with respect to their interests in the Village Green apartment complex, which is located alongside the Pennypack Creek in Hatboro, Pennsylvania. **On June 16 and 17, 2001 the Hatboro area experienced heavy rains as a result of Tropical Storm Allison. On June 16, 2001, flood waters from the Pennypack Creek pooled in front of Village Green, entering the basement of Village Green Buildings A and B and flooding the basement. Pls.' Opp., unnumbered at 1.** The basement flooding caused a gas-powered clothes dryer to move from its original position, severing the gas line running to the dryer. Id. The tear in the gas line caused a buildup of natural gas that eventually ignited; the resulting fire killed several people and completely destroyed Building A. Id. As a result of the fire, Plaintiffs' insured suffered extensive property damages and business losses, for which Plaintiffs have paid them in excess of six million dollars. Id.

Plaintiffs filed this action against Defendant Caleco, Inc., as the installer of the gas-powered dryers in the basement of Village Green, Defendant PECO Energy Company, as the supplier of the natural gas to those dryers, and Defendant railroad companies Norfolk Southern Corporation ("Norfolk Southern"), CSX Corporation ("CSX"), and Consolidated Rail Corporation ("Conrail"), as owners and possessors of a railroad bridge upstream of Village Green along the Pennypack Creek. On April 30, 2004, Plaintiffs' claims against Defendants Caleco and PECO Energy were dismissed pursuant to a settlement agreement between those parties (Doc. No. 33), leaving only the claims against the Defendant railroad companies at issue.

Plaintiffs' amended complaint articulates two claims against Defendants. First, **Plaintiffs proceed on a common law negligence theory, alleging that the bridge, as maintained by railroad Defendants, posed a barrier to the natural flow of water and created an unreasonable risk of**

**flooding at the Village Green site.** Pl. Amended Compl. at 13. Second, Plaintiffs claim the bridge, as maintained by railroad Defendants, constituted a private and public nuisance. Pl. Amended Compl. at 14.

The bridge in question is a stone arch structure that straddles the Pennypack Creek in Upper Moreland Township, Pennsylvania. Pl. Opp. at Ex. 1, Expert Report at 2. The bridge was designed in 1890; a report by the U.S. Army Corps of Engineers reports that the bridge was built in 1915. *Id.*; Pl. Opp. at Ex. 5, U.S. Army Report at 13. Conrail was formed by Congress in 1976, at which time it took possession of the bridge. Conrail sold the bridge to Pennsylvania Lines, LLC on June 1, 1999, approximately two years prior to the events at issue. Pl. Opp. at 2; Defs.’ Mot. at Ex. A, Schwartz Aff. On the same date, Pennsylvania Lines, LLC leased the bridge to Defendant Norfolk Southern Railroad Company, who accordingly took possession and control of that structure. Pl. Opp. at 3; Defs.’ Mot. at Ex. A, Schwartz Aff.

Plaintiff’s expert report states that there is a “significant documented history of flooding along the Pennypack Creek . . . in Upper Moreland Township.” Pl. Opp. at Ex. 1, Expert Report at 1. Floods occurred in 1931, 1950, 1967, 1971, 1973, 1975, 1982, 1994, 1996, during Hurricane Floyd in 1999, and during Tropical Storm Allison in 2001. *Id.* The last two floods were the most serious recent floods along the Pennypack Creek. *Id.*

The damaged Village Green buildings are located 1700 feet upstream of the railroad bridge. *See id.* at 2. Plaintiff’s expert witness states that, under normal conditions, the backwater effect of the bridge would not extend to Village Green. *Id.* The expert report also states, however, that during times of flooding, such as during Tropical Storm Allison, the bottleneck in front of the bridge is greatly increased, causing a significant rise in water level that extends the

1700 feet to the Village Green buildings. *Id.* The expert concludes that the backup of water was a "substantial contributing factor" to the flooding at Village Green on June 16, 2001 and that the flooding of the basement and the resulting fire would not have occurred if the bridge had not been present or had been modified by the railroads to prevent a backup of water. *Id.* at 4.

During their ownership and control of the bridge, both Conrail and Norfolk Southern conducted inspections, in accordance with Federal Railroad Administration Rules. Bridge inspector B.C. Lucas, a Norfolk Southern employee, inspected the bridge at least twice after Norfolk took possession of the bridge and prior to the fire, in March 2000 and in February of 2001. Def. Mot. at Ex. K. The forms used by Lucas in his inspections contained a list of items, which were to be marked as "satisfactory" or "unsatisfactory." Categories for inspection included were "vegetation control," "bridge opening/drift condition" and "waterway channel(s)/flowline." *Id.* According to former Conrail bridge inspector John F. Rizzo, Conrail's habit was to inspect its bridges annually, with the exception of timber and open deck bridges, which were inspected every six months. Def. Mot. at Ex. L, Rizzo Depo. at 30. Rizzo testified that the purpose of the inspections was to ensure the structural integrity of the bridge and the safe passage of trains by examining the tracks for defects and walking underneath the bridge to observe any foundation damage. *Id.* at 79. Gilbert R. Stewart, a former Conrail and Norfolk Southern bridge inspector, also testified that, to his knowledge, neither railroad ever inspected the bridge to assess its flood-carrying capability during his employment. Def. Mot. at Ex. J, Stewart Depo. at 103.

## **II. STANDARD OF REVIEW**

In considering a motion for summary judgment, the court must determine whether "the

pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 569(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986). Only facts that may affect the outcome of a case are "material." Anderson, 477 U.S., at 248. All reasonable inferences from the record are drawn in favor of the non-movant. See id. at 256.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. See J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)), cert. denied, 499 U.S. 921 (1991). A plaintiff cannot avert summary judgment with speculation or by resting on the allegations in his pleadings, but rather must present competent evidence from which a jury could reasonably find in his favor. Anderson, 477 U.S. at 248; Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999); Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989); Woods v. Bentsen, 889 F. Supp. 179, 184 (E.D. Pa. 1995).

### **III. DISCUSSION**

#### **A. Defendant CSX**

Before this Court engages in a substantive discussion of premises liability after a transfer of ownership and possession, it notes that there is uncontroverted evidence that Defendant CSX never had any ownership or possessory interest in the railroad bridge at issue in this case. Defs.' Mot. at Ex. A, Schwartz Aff. As such, Plaintiffs do not oppose CSX's motion to dismiss. Pls.'

Opp. at 2. Summary judgment is accordingly granted with respect to Defendant CSX.

## **B. Defendant Conrail**

### **1. Negligence**

Under their common law negligence theory, Plaintiffs argue that Conrail's failure to monitor and maintain the bridge's flood-carrying capacity violated a duty that exists under Pennsylvania common law and Pennsylvania statutory law. Plaintiffs assert that the common law creates a duty for landowners to use and maintain their land so as not to injure adjoining landowners, and that the Pennsylvania Dam Safety and Waterway Management Act creates a duty for bridge owners to ensure that the flood carrying capacity of the structure is sufficient.

The questions of whether those duties exist and whether Defendants breached those duties are secondary to the threshold question of whether Conrail retained any legal duty to Plaintiffs at all under Pennsylvania law once it completed its sale of the bridge to Norfolk Southern. Defendants claim that Conrail did not owe a legal duty to Plaintiffs' insured, as their possession of the railroad bridge ended prior to June 16, 2004. Plaintiffs claim that Defendants therefore should not be allowed to sidestep liability by transferring a bridge that posed an unreasonably dangerous risk of flooding to those along the Pennypack Creek before any serious damage from flooding was, in fact, done to Village Green.

A federal court sitting in a diversity case must apply substantive forum state law as decided by that state's courts. Pennsylvania adheres to the well-accepted rule that premises liability flows from control over the property. See, e.g., *Palmore v. Morris*, 37 A. 995, 998-99 (Pa. 1879). In *Palmore v. Morris*, a young boy standing on the public sidewalk in front of a foundry was injured when a partially opened gate fell on him. The boy sued the both the current

and previous possessors of the foundry and gate, on the theory that the previous owners were negligent for failing to maintain a gate adjacent to a public sidewalk. In reversing a jury determination that the previous possessor was liable, the Pennsylvania Supreme Court found that even though the transfer of possession had only happened the day prior to the accident, “[f]rom the moment [the vendee] took possession under his deed the duties theretofore incumbent on [the vendor] were transferred to him, and he became answerable to the public for neglect in their performance.” Palmore, 37 A., at 999. The Court refused to find an implied covenant on the part of the vendor that they would remain “answerable to third parties for defects in the building for a reasonable time after the grantee takes possession,” stating that public policy militates against imposing such a “clog on the transfer of real estate.” Id.

Pennsylvania courts, however, have recognized at least one exception to this general rule, and the Restatement (Second) of Torts (“Restatement”) provides for two exceptions. First, in Palmore, the Pennsylvania Supreme Court stated that an prior owner could be held liable for injury that resulted from a dangerous condition “where a grantor conceals from a grantee a defect in a structure known to him alone, and not discoverable by careful inspection.” Id. at 999. This holding is consistent with Restatement § 353, which states that:

(1) A vendor of land who conceals or fails to disclose to his vendee any condition, whether natural or artificial, which involves unreasonable risk to persons on the land, is subject to liability to the vendee and others upon the land with the consent of the vendee or his subvendee for physical harm caused by the condition after the vendee has taken possession, if

(a) the vendee does not know or have reason to know of the condition or the risk involved, and

(b) the vendor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to believe that the vendee will not discover the condition or realize the risk.

(2) If the vendor actively conceals the condition, the liability stated in Subsection (1) continues until the vendee discovers it and has reasonable opportunity to take effective precautions against it. Otherwise the liability continues only until the vendee has had reasonable opportunity to discover the condition and to take such precautions.

Restatement (Second) of Torts § 353 (1965). Second, Restatement § 373 provides for post-transfer liability where a vendor creates or negligently permits a structure or artificial condition that poses any unreasonable risk of harm to third parties outside the land:

(1) A vendor of land who has created or negligently permitted to remain on the land a structure or other artificial condition which involves an unreasonable risk of harm to others outside of the land, because of its plan, construction, location, disrepair, or otherwise, is subject to liability to such persons for physical harm caused by the condition after his vendee has taken possession of the land.

(2) If the vendor has created the condition, or has actively concealed it from the vendee, the liability stated in Subsection (1) continues until the vendee discovers it and has reasonable opportunity to take effective precautions against it. Otherwise the liability continues only until the vendee has had reasonable opportunity to discover the condition and to take such precautions.

Restatement (Second) of Torts § 373 (1965).

The Pennsylvania Supreme Court has not explicitly adopted either one of these provisions as the law of that state, though Pennsylvania courts have cited Restatement § 353 approvingly.

See, e.g., Welz v. Wong, 605 A.2d 368, 370 (Pa. Super.1992). The Pennsylvania Supreme Court has stated, however, that it “has not hesitated to adopt sections of the Restatement (Second) of Torts (1965) when our common-law precedents varied from the Restatement or when the Pennsylvania common law provided no answer.” Gilbert v. Korvette, Inc. 327 A.2d 94, 100 n.25 (Pa. 1974).

Whether the Pennsylvania Supreme Court would explicitly adopt Restatement § 353 is

not a question this Court must answer today, as only Restatement § 373 provides any basis for holding Defendant Conrail liable if it did not own or possess the bridge at the time of the flooding. Restatement § 353 concerns the liability of prior possessors whose negligent behavior creates an “unreasonable risk to persons on the land.” Plaintiffs assert that Defendant’s negligent maintenance of the bridge created an unreasonable risk to persons upstream at Village Green, not to persons on the railroad property. As such, Restatement § 353, even if binding upon this Court, is inapplicable to the facts of this case.

**As for Restatement § 373, it might be that the Pennsylvania Supreme Court would consider overruling the result in Palmore by adopting the position of Restatement § 373.** However, even if this was the case, liability under that section of the Restatement does not continue indefinitely. Plaintiff recognizes, in its original response to Defendants’ Summary Judgment Motion, that Subsection (2) of § 373 limits the liability of the vendor to the time before the vendee has a reasonable opportunity to discover the preexisting dangerous condition and to take effective precautions against it. Pls.’ Opp. at 9-10; see also Restatement (Second) of Torts § 373, cmt. c. Therefore, if Conrail did not possess or control the bridge on June 16, 2001, the only potential question of material fact is whether Norfolk Southern had a reasonable opportunity to discover the bridge’s obstruction of waterflow along the Pennypack Creek. There is no Pennsylvania case law to guide this Court as to what a “reasonable opportunity” might be, but courts in other jurisdictions have examined the concept in cases where a plaintiff attempts to hold a vendor liable for negligence or nuisance after possession and ownership have passed to another. At least one court considered eleven months to constitute a reasonable opportunity for discovery, and no case law that the Court could uncover found that a period of time in excess of one year

was not a reasonable opportunity for discovery. See, e.g., Tri-Boro Bowling Center v. Roosevelt Eighty-Fifth Estates, 77 N.Y.S.2d 74 (N.Y. Sup. Ct. 1947) (four years is a reasonable time); Cavanaugh v. Pappas, 222 A.2d 34 (N.J. Union County Ct.1966) (five days was not a reasonable opportunity); Hut v. Antonio v. Guth, 229 A.2d 823 (N.J. Super. Ct. Law Div. 1967)(almost four years a reasonable opportunity); Narsh v. Zirbser Brothers, Inc., 268 A.2d 46 (N.J. Super. Ct. App. Div.1970) (eleven months a reasonable opportunity); O'Connor v. Altus, 335 A.2d 545, 549 (N.J. 1975) (nine years a reasonable opportunity).

It is undisputed that Defendant Conrail transferred possession of the bridge prior to the events of June 16, 2001. Pls.' Opp. at 2; Defs.' Mot. at Ex. A, Schwartz Aff. Defendant Norfolk Southern has possessed and controlled the bridge since June 1, 1999. Pls.' Opp. at 2; Defs.' Mot. at Ex. A, Schwartz Aff. During those two years, a Norfolk Southern bridge inspector conducted at least two inspections of the bridge, inspections which were expected to include an evaluation of the bridge opening and drift conditions, as well as the waterway channel and flowline. Defs.' Mot. at Ex. K. In addition, Plaintiff's expert report states that Hurricane Floyd **caused major flooding along the portion of the Pennypack Creek at issue in 1999. The record does not reflect the exact timing of Hurricane Floyd, but counsel for Defendants noted at oral argument that Hurricane Floyd took place in August of 1999. This Court's research indicates that Hurricane Floyd traveled up the East Coast of the United States from September 14 to 18, 1999, and the Court takes judicial notice of that fact. In any case, the flooding associated with Hurricane Floyd occurred after Norfolk Southern had taken possession of the bridge.** Given this context, this Court does not believe that a genuine issue of material fact exists with regard to whether Norfolk Southern had a reasonable opportunity to discover any impediments the bridge posed to water

flow along the Pennypack Creek prior to June 2001.

Because there is no question of material fact as to whether Conrail owned the bridge at the time of the flooding at Village Green and there is no question of material fact as to whether Norfolk Southern had a reasonable opportunity to discover the preexisting dangerous condition, Plaintiff's common law negligence claims must be dismissed. Therefore, the Court does not reach Plaintiff's arguments as to Conrail's duty to adjoining landowners nor its duty as a bridge owner under the Pennsylvania Dam Safety and Waterway Management Act.

## **2. Nuisance**

Plaintiffs alleges that Defendants' failure to maintain the bridge creates both a public and private nuisance. Consistent with their position on Plaintiff's negligence claim, Defendants assert that such claims can only be brought successfully against the possessor of the land or the creator of the nuisance. Defs.' Supplemental Mem. at. 2.

As was true with the negligence claim, prior to reaching the issue of whether there are any genuine material issues of fact as to Plaintiff's public and private nuisance claims, the Court must examine whether Pennsylvania law imposes any liability for nuisance on a party once their ownership and possession of the allegedly offensive structure has ended. The rule articulated in Palmore indicates that, as a general matter, it does not. Palmore clearly states that all liability related to the condition of the land passes from the vendor at the time of sale. Palmore v. Morris, 37 A. 995, 999 (Pa. 1879).

There is support, however, in both Pennsylvania case law and the Restatement for the proposition that liability for nuisance can continue beyond a party's sale of the land. In Smith v. Elliott, 9 Pa. 345 (1848), the Pennsylvania Supreme Court noted that a party who creates a

nuisance is liable for any resulting damages and that this liability continues for as long as the nuisance does – even after the creator’s possessory interest has terminated. Restatement § 840A echoes this principle and additionally imposes a limited liability on vendors who did not initially create the nuisance:

(1) A vendor or lessor of land upon which there is a condition involving a nuisance for which he would be subject to liability if he continued in possession remains subject to liability for the continuation of the nuisance after he transfers the land.

(2) If the vendor or lessor has created the condition or has actively concealed it from the vendee or lessee the liability stated in Subsection (1) continues until the vendee or lessee discovers the condition and has reasonable opportunity to abate it. Otherwise the liability continues only until the vendee or lessee has had reasonable opportunity to discover the condition and abate it.

Restatement (Second) of Torts § 840A (1965). Comment (a) to Restatement § 840A states that the section “parallels § 373, on liability for physical harm resulting from conditions on the land after transfer.” Subsection (1)’s reference to “nuisance” refers to both public and private nuisance. Restatement (Second) of Torts § 840A, cmt. (b) (referring to Restatement (Second) § 834, which applies to both kinds of nuisance).

Both parties agree that Conrail did not create the bridge. Therefore there is no question of material fact as to whether Conrail could be held liable for nuisance under the theory articulated in Smith v. Elliott. Restatement § 840A would provide grounds for nuisance liability if this Court found that the Pennsylvania Supreme Court would adopt it as Pennsylvania law, but, as above, these grounds exist only until the vendee has had a reasonable opportunity to discover the condition and abate it. The Restatement explicitly states that liability under § 840A parallels that under § 373, and this Court sees no reason why the analysis of what a “reasonable opportunity to discover” under § 373 should differ from that under § 840A. The Court found above that

Plaintiff's claim on a § 373 theory of liability must be dismissed because there is no genuine question of material fact as to whether Norfolk Southern had a reasonable opportunity to discover the condition of the bridge with respect to its flood-carrying capacity. Under the same reasoning, the same is true with respect to a § 840A theory of liability, the only theory on which Plaintiff's public and private nuisance claims could conceivably proceed. Therefore, Plaintiff's nuisance claims are dismissed.

#### **IV. CONCLUSION**

As a threshold matter, under the general rule stated in Palmore, Defendants owed no duty under any theory of tort liability to protect third parties from any unreasonably dangerous risk of flooding from the railroad bridge and no liability for either a public or private nuisance. This Court can find no exception to this rule under which Plaintiffs can assert a genuine dispute of material fact as to Conrail's liability with respect to either its negligence or nuisance claims. As such, Defendants' Motion for Summary Judgment is GRANTED. An appropriate Order follows.

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Plaintiffs,	:	
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v.	:	
	:	
CALECO, INC., et al.,	:	NO. 03-CV-2281
Defendants.	:	

ORDER

AND NOW, this 9th day of November 2004, it is hereby ORDERED that the Motion for Summary Judgment filed by Defendants CSX Corporation and Consolidated Rail Corporation on January 21, 2004 (Defs.' Mot., Doc. No. 25) is GRANTED.

The Clerk of Court is hereby ORDERED to statistically close this matter with respect to Defendants CSX Corporation and Consolidated Rail Corporation. The matter will remain open with respect to Defendant Norfolk Southern Corporation.

BY THE COURT:

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Legrome D. Davis, J.