

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

THE ST. PAUL FIRE AND MARINE	:	CIVIL ACTION
INSURANCE COMPANY,	:	
Plaintiff	:	
	:	
v.	:	
	:	
THE NOLEN GROUP, INC., et al,	:	
Defendants	:	NO. 02-8601 (lead consolidated case)

ZURICH AMERICAN INSURANCE	:	CIVIL ACTION
COMPANY,	:	
Plaintiff	:	
	:	
v.	:	
	:	
THE NOLEN GROUP, INC., et al,	:	
Defendants	:	NO. 03-3192 (consolidated case)

FEDERAL INSURANCE COMPANY, et al,:	:	CIVIL ACTION
Plaintiffs	:	
	:	
v.	:	
	:	
THE NOLEN GROUP, INC., et al,	:	
Defendants	:	NO. 03-3651 (consolidated case)

MEMORANDUM

Gene E.K. Pratter, J.

March 18, 2005

Before the Court are two Motions for Summary Judgment filed by the Southeastern Pennsylvania Transportation Authority (“SEPTA”) in the above matters.¹ Due to the fact that the

¹ The Motions were filed in The St. Paul Fire and Marine Ins. Co. v. The Nolen Group (Civil Action No. 02-8601) and Zurich American Ins. Co. v. The Nolen Group (Civil Action No. 03-3192). SEPTA is a defendant in both of these matters. In Federal Ins. Co. v. The Nolen Group (Civil Action No. 03-3651), Plaintiffs voluntarily dismissed SEPTA on July 3, 2003. All of these cases were consolidated by Order dated January 20, 2005.

Motions advance either the same or very similar arguments, the Court will address both Motions here.

SEPTA's Motion for Summary Judgment against St. Paul's claims was filed on January 14, 2005. St. Paul filed a response to the Motion on February 1, 2005. An oral argument on this Motion was held on February 18, 2005. SEPTA filed a separate Motion against Zurich's claims on February 22, 2005. In this second Motion, SEPTA did not make any novel arguments, but refined their Motion to address some of the Court's concerns raised during the earlier oral argument. Similarly, St. Paul and Zurich, who are represented by the same counsel, filed a Supplement Memorandum in Response to the Motions on March 8, 2005, in which they addressed the Court's concerns, but raised no different or novel arguments opposing the Motions. Therefore, the Court, for purposes of judicial economy, will address the two Motions for Summary Judgment together in this Memorandum.

The claims by The St. Paul Fire and Marine Insurance Company ("St. Paul") and Zurich American Insurance Company ("Zurich") arise from the same event, namely the flooding of several buildings on June 16, 2001 during Tropical Storm Alison. This flooding occurred after a bridge owned by SEPTA that traversed the Sandy Run Creek collapsed. The collapsed bridge caused or contributed to the Sandy Run Creek rising to a flood level. The flooded buildings were located upstream along Pennsylvania Avenue in Fort Washington, Montgomery County, Pennsylvania. Adjacent to the bridge was the Garrison Greene development site, which had been excavated and from which a strong runoff contributed to or caused the collapse of the bridge.

In its Motions, SEPTA argues that it is entitled to sovereign immunity, because neither St. Paul nor Zurich have raised claims that are cognizable under common law and, even if St.

Paul and Zurich have raised cognizable claims, these claims do not fall within any of the exceptions to sovereign immunity. Additionally, SEPTA contends that neither St. Paul nor Zurich have produced sufficient evidence to prove essential elements of their negligence and nuisance claims, namely there is no evidence that SEPTA violated its common law duty and that it was something SEPTA did or did not do that was the cause of the flood. Finally, SEPTA asserts that St. Paul and Zurich have no statutory claim against SEPTA, because the cited statutes do not create any duty different than the common law “reasonable person” duty.

Against SEPTA’s Motions, St. Paul and Zurich argue that sovereign immunity is waived in this case, because St. Paul and Zurich have raised valid common law claims, namely negligence and nuisance claims, and because the failure to properly build and maintain the bridge falls within the “real estate” exception to Pennsylvania’s sovereign immunity. St. Paul and Zurich further assert that SEPTA’s failure to properly build and maintain the bridge that collapsed violated their duty and was a substantial cause of the flooding.

As discussed more fully below, the Court finds that St. Paul and Zurich have produced enough evidence to raise genuine issues of material facts to be resolved by the jury on the issue of whether sovereign immunity has been waived with respect to resolution of the essential elements of the negligence and private nuisance claims. Thus, summary judgment is improper as to the negligence and private nuisance claims. However, there is no record evidence presented to the Court as to one of the essential elements of the public nuisance claim, and summary judgment is proper as to the public nuisance claim.

I. FACTUAL BACKGROUND

These cases arise from flooding on June 16, 2001 during Tropical Storm Allison. During

the storm, the Sandy Run Creek in Whitmarsh Township flooded, causing several buildings to be flooded by several feet of water. Some of the flooded buildings housed the offices of the NCO Group, Inc., NCO Financial Systems, Inc., and Teleflex, Inc. St. Paul insured and provided coverage to NCO Group, Inc. and NCO Financial Systems after the flood, and is now the the subrogee of NCO Group and NCO Financial Systems. Likewise, Zurich insured and provided coverage to Teleflex, Inc after the flood, and is now the subrogee of Teleflex.

This flooding was, according to St. Paul and Zurich, caused or made more severe by the collapse of a bridge owned by SEPTA, the Fort Washington Bridge along the R5 line. This bridge was located over the Sandy Run Creek and was near the Garrison Greene development site. The Garrison Greene site is on a steep hillside leading down into the Sandy Run Creek. The Plaintiffs contend that SEPTA's failure to properly maintain its bridge, along with the excessive run-off of water from the Garrison Greene site, caused SEPTA's bridge to collapse and resulted in a damming of the Sandy Run Creek.

St. Paul and Zurich, as subrogees, sued several defendants, including SEPTA. In their complaints, St. Paul and Zurich allege that SEPTA's improper maintenance of the collapsed bridge was negligent and a nuisance, and SEPTA should be found liable. St. Paul and Zurich also make claims against The Nolen Group, Inc., Michael Anthony Homes, Inc., and Garrison Greene Associates, L.P. as the owners and developers of the Garrison Greene site, who, according to St. Paul and Zurich, negligently developed the Garrison Greene site leading to the excessive storm water run-off that contributed to the collapse of SEPTA's bridge. St. Paul and Zurich also assert that the contractors who cleared and excavated the Garrison Greene site, namely Brubacher Excavation, Inc. and Warren W. Baringer, Jr., were negligent. Finally, St.

Paul and Zurich assert that Andersen Engineering Associates, Inc., as the designer of the development plans, was negligent.

SEPTA's Fort Washington Bridge partially collapsed when the north abutment fell. The bridge was originally built in 1912,² although the abutments existed before then and were from a prior bridge. The bridge's north abutment rested on soil, not on bedrock.³ Additionally, the bridge had "spread footing," which is no longer viewed as a favorable design feature due to its vulnerability to erosion under the "footing." SEPTA has an official procedure to do, at minimum, an annual inspection on all of its bridges. During the inspection, a bridge is given an overall rating and rated separately on various specific conditions.

For purposes of this memorandum, SEPTA has conceded that the abutment fell due to rapid displacement of the soil at the abutment's foundation. This erosion of soil, known as scour, was noted as a potential problem in the December 2000 inspection report by SEPTA, which stated that the bridge was in fair condition, but the "scour/flood" components of the bridge were poor and "scour protection" was recommended. SEPTA admits that it did not perform any means of "scour protection" between December 2000 and the collapse of the bridge on July 16, 2001. Furthermore, St. Paul and Zurich note that Francesco Russo, P.E., SEPTA's expert,

² The bridge was designed and built by Philadelphia & Reading Railway Company in 1912. SEPTA was created by statute in 1968 and is not a successor in interest to the Philadelphia & Reading Railway Company. Thus, the Court only considers whether SEPTA properly maintained the bridge, not the negligence for its design or construction. Although the Court does recognize that Septa could argue that the negligence design or construction was the cause of the collapse, that issue was not raised by SEPTA in its Motions for Summary Judgment, so the Court will not discuss it here.

³ An abutment rested on soil has a greater risk of being weakened by erosion of the soil under the abutment than an abutment rested on bedrock.

opined that the location of the bridge made it more vulnerable to scouring. However, Edward LaGuardia, P.E., SEPTA's Assistant Chief Engineer of Bridges and Buildings, stated that scour issues often correct themselves and the normal procedure is to monitor the scouring before doing scour protection. Furthermore, SEPTA argues that regardless of the lack of scour protection, the expert reports state that the cause of the collapse was the excessive run-off from the Garrison Greene site, which is not the fault of SEPTA.

St. Paul's and Zurich's expert, Roger W. Ruggles, Ph.D., P.E., opined that the scour was caused by the lateral flow of storm water from the Garrison Green project. Dr. Ruggles specifically stated that the "failed abutment was undermined due to erosion.... [T]he lateral flow from the Garrison Greene construction site resulted in the enhancement of the erosion of the material around and under the north abutment either from supercritical flow or from increased normal velocities resulting in the collapse of the structure." (Ruggles Expert Report, at 7-8).

St. Paul and Zurich argue, and SEPTA concedes, that the collapse of the bridge, along with the accumulation of various debris, resulted in a damming of the Sandy Run Creek. The Creek quickly flooded the areas upstream of the bridge, including the leased properties of NCO Group, Inc., NCO Financial Systems, Inc., and Teleflex, Inc.

In 1999, a stronger storm (8.61 inches of rain compared to Alison's 7.43 inches) also hit this area, but the flooding was significantly less, and SEPTA's bridge survived this flood. SEPTA emphasizes that the major change in the region between the storms was the work on the Garrison Greene development site. In response, St. Paul and Zurich counter that another difference is the noticed vulnerability to scouring of SEPTA's bridge that had been detected by SEPTA's own inspectors in December 2000.

II. STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). Reviewing the record, the Court is obliged to "resolve all reasonable inferences in [the non-moving party's] favor." Jones v. Sch. Dist. of Phila., 198 F.3d 403, 409 (3d Cir. 1999). The moving party, here SEPTA, bears the burden of showing that the record reveals no genuine issue as to any material fact and that they are entitled to a judgment as a matter of law. FED. R. CIV. P. 56(c). Once the moving party has met its burden, the non-moving parties, here St. Paul and Zurich, must go beyond the pleadings to set forth specific facts showing that there is a genuine issue for trial. Id. The parties opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts," but must produce *competent evidence* supporting their opposition. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

To defeat a motion for summary judgment, disputes must be both material and genuine. Andersen v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue is material if it is predicated upon facts that are relevant and necessary and that may affect the outcome of the matter pursuant to the underlying law. Id. An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Id. at 248-49. Summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, because such a failure as to an essential element necessarily renders all other facts immaterial. Celetox Corp. v. Catrett, 477 U.S. 317,

322-23 (1986). Thus, if there is only one reasonable conclusion from the record regarding the potential verdict under the governing law, judgment must be awarded to the moving party.

Andersen, 477 U.S. at 250. Otherwise, summary judgment is not appropriate.

III. DISCUSSION

SEPTA asserts that summary judgment should be granted for two reasons. First, SEPTA claims it is entitled to sovereign immunity. Second, even if sovereign immunity does not apply, Septa argues that neither St. Paul nor Zurich has produced sufficient evidence to prove essential elements of either the negligence or nuisance claims against SEPTA.

A. SEPTA's Entitlement to Sovereign Immunity

SEPTA, as an agency of the Commonwealth, is entitled to immunity, unless that immunity has been waived. 42 Pa. C.S.A. § 8521; Jones v. SEPTA, 772 A.2d 435, 437 (Pa. 2001). For a waiver of sovereign immunity to be recognized, a plaintiff must show: (1) the defendant committed a negligent act for which damages are recoverable under common law; and (2) the act falls within one of the eight exceptions enumerated in 42 Pa. C.S.A. § 8522(b).

SEPTA asserts that St. Paul and Zurich have failed to provide evidence to meet either requirement.

1. SEPTA's alleged negligent act

Pennsylvania adheres to the “common enemy” rule that “regards surface waters as a common enemy which every landowner must fight to get rid of as best he may.” Tom Clark Chevrolet, Inc. v. Department of Environmental Protection, 816 A.2d 1246, 1251 (Pa. Commw. Ct. 2003), app. denied, 831 A.2d 601 (Pa. 2003). According to this rule, a landowner is only liable to another if the landowner “diverted the water from its natural channel” or if the

landowner “unreasonably or unnecessarily changed in quantity or quality” the water. Lucas v. Ford, 69 A.2d 114, 116 (Pa. 1949). A landowner who owns a bridge that unreasonably dams or interferes with the flow of a stream can be liable under the “common enemy” rule. Metzgar v. Lycoming Township, 39 Pa. Super. 602, 607-08 (1909). However, the plaintiff must show that the alleged interference diverted water from its natural flow. See Torrey v. City of Scranton, 19 A. 351, 351 (Pa. 1890) (holding that there is “no liability on the part of a municipal corporation for the flooding of private property from the inadequacy of gutters, drains, culverts,⁴ or sewers,” but there is liability if the municipal corporation “[threw] a body of water upon the property of one of its citizens which would not naturally have flowed there”).

SEPTA argues that the area in question was prone to flooding, so the actions of SEPTA cannot be seen as “diverting” or “changing” the flow of water in the area. Furthermore, SEPTA has never cleaned, dredged, or changed in any way the course of the Sandy Run Creek. Therefore, SEPTA asserts that St. Paul has provided no evidence that SEPTA’s actions would allow recovery under the “common enemy” rule.

St. Paul and Zurich assert that SEPTA’s failure to properly maintain its bridge, and the collapse of the bridge due to scouring was foreseeable. Tropical Storm Alison was a foreseeable event and the increased scouring due to that event was equally foreseeable. As such, St. Paul and Zurich argue that SEPTA’s failure to do the recommended “scour protection” was negligent and resulted in the collapse of the bridge, which undeniably diverted the water. Therefore, according to St. Paul and Zurich, SEPTA’s actions are actionable under the “common enemy” rule, and

⁴ A culvert is a channel or conduit through which water can pass. In the case of a bridge, a culvert is simply the space under the bridge where the water flows.

sovereign immunity does not apply in this case.

The Court finds the arguments of St. Paul and Zurich to be supported by enough evidence to defeat summary judgment and to permit a jury to weigh that evidence. There is ample evidence from which a reasonable juror could conclude that SEPTA was aware that its bridge was vulnerable to scouring and that scouring could lead to a collapse of the bridge. In fact, SEPTA has conceded that the bridge was vulnerable to scouring, and St. Paul and Zurich have provided evidence that the bridge's collapse was caused by scouring. Although no expert opines that SEPTA's failure to address the scour problems that SEPTA's own investigators reported substantially contributed to the bridge's eventual collapse, the Court finds that a reasonable inference from the evidence is that SEPTA, aware of its vulnerability to scour problems, did nothing to prevent or correct those conditions. The collapse of the bridge certainly "diverted" or "changed" the course of the Sandy Run Creek by damming it.

Moreover, there is an issue whether, in the words of St. Paul's and Zurich's expert, Dr. Ruggles, the "supercritical flow" from the Garrison Greene project was the primary cause of the scouring, and, if so, if SEPTA could have foreseen this additional scouring. However, questions of foreseeability are generally left to the ultimate trier of facts, instead of the Court at this stage. To be sure, the apparent lack of specific evidence showing that SEPTA's failure to provide scour protection actually caused the collapse of the bridge certainly will be an important issue at trial. Nonetheless, it is not the role of the Court to guess how the jury will weigh what evidence there is but rather to determine if the evidence, and the reasonable inferences from that evidence, demonstrate a genuine issue of material fact for the jury's consideration.

In this case, there is a sufficient quantum of evidence (or reasonable inferences from the

evidence) that scouring caused the collapse of the bridge and that SEPTA was aware of the bridge's scour vulnerability, but failed to provide any protective measures. A reasonable juror could conclude from this evidence that SEPTA was a substantial cause of the bridge's collapse and the bridge's collapse "diverted" or "changed" the course of the Sandy Run Creek. As the Court is obligated to make all reasonable inferences in favor of St. Paul and Zurich at this juncture, the Court finds there is a genuine issue of material fact as to whether SEPTA committed a negligent act under common law.

2. "Real Estate" exception

Under 42 Pa. C.S.A. § 8522(b)(4), the Commonwealth or an agency thereof can be sued if damage is caused by a "dangerous condition of Commonwealth agency real estate." Like all supposed waivers of sovereign immunity, the Court is to strictly construe the language of the "real estate" exception. Jones, 772 A.2d at 440. This strict construction means that the dangerous condition must "derive[], originate[] or [have] as its source the Commonwealth realty itself." Id. at 443. To have the real estate exception apply, a plaintiff must show "that the artificial condition or defect of the land itself causes the injury, not merely when it facilitates the injury by the acts of others." Mascaro v. Youth Study Center, 523 A.2d 1118, 1124 (Pa. 1987). A plaintiff cannot rely solely on a hypothetically "better" design, but must show that the real estate at issue was unsafe for the purpose for which it was intended. Dean v. Department of Transportation, 751 A.2d 1130, 1134 (Pa. 2000).

Nonetheless, the real estate exception does apply if a Commonwealth entity can be found to be *jointly liable* with another tortfeasor. See Powell v. Drumheller, 653 A.2d 619, 622 (Pa. 1995) (holding the real estate exception applies when "a defendant's actions were a substantial

factor in bringing about the harm, the fact that there is a concurring cause does not relieve the defendant of liability”); Crowell v. City of Phila., 613 A.2d 1178, 1184 (Pa. 1992) (holding “the governmental unit can be subjected to liability despite the presence of an additional tortfeasor if the governmental unit’s actions would be sufficient to preclude it from obtaining indemnity from another for injuries rendered to a third person”).

The “real estate” exception has been applied to bridges owned by Commonwealth agencies. Commonwealth, Department of Transportation v. Weller, 574 A.2d 728, 730-31 (Pa. Commw. Ct. 1990). Pennsylvania courts have also recognized that this exception can apply to unnatural conditions on Commonwealth property that have caused flooding on a neighboring property. See Bonsavage v. Borough of Warrior Run, 676 A.2d 1330, 1332 (Pa. Commw. Ct. 1996) (recognizing that the “real estate” exception could apply where storm sewers and sanitary pipes became blocked when improperly maintained and cleaned); Lutzko v. Mikris, Inc., 410 A.2d 370, 373 (Pa. Commw. Ct. 1979) (holding PennDOT’s failure to maintain proper drainage along a highway combined with the changing of the grade of the road that caused continuous flooding to neighbors fell within the “real estate” exception).

SEPTA argues that the condition that caused the flooding here, namely the heavy rainfall, did not “derive, originate, or have as its source” SEPTA’s bridge. SEPTA refers to a series of cases in which the real estate exception did not apply. See Jones, 772 A.2d at 444 (finding that when a plaintiff slipped on rock salt found on defendant’s train platform, the real estate exception did not apply because the salt did not derive, originate, or have as its source the platform); Snyder v. Harmon, 562 A.2d 307, 311-13 (Pa. 1989) (holding that the real estate exception was inapplicable when a plaintiff fell into a mine shaft adjacent to a Commonwealth road despite the

Commonwealth's failure to install lights or a barrier because the absence of lights or a barrier were not an artificial condition or defect of the real estate); Lingo v. Phila. Hous. Auth., 820 A.2d 859, 863 (Pa. Commw. Ct. 2003) (holding real estate exception did not apply where a plaintiff was injured by debris on stairs exacerbated by recent rainfall, since neither the debris nor rainfall derived, originated, or had as its source the property itself); Kosmack v. Jones, 807 A.2d 927, 933 (Pa. Commw. Ct. 2002), app. denied, 847 A.2d 1289 (Pa. 2003) (finding that allegations that a road was improperly designed where the design facilitated loss of visibility in severe snowstorm do not satisfy the requirements of the real estate exception because the snow cannot be considered to have derived, originated, or had as its source the road itself); Hicks v. SEPTA, 624 A.2d 690, 692 (Pa. Commw. Ct. 1993) (holding real estate exception does not apply where plaintiff is injured by debris on Commonwealth property, but debris was deposited on the property by third party).

SEPTA further contends that no evidence shows that prior to its collapse, the bridge failed to properly pass flood water. Instead, SEPTA argues that the bridge was safe for its intended purpose as a water crossing and a culvert to allow water to flow through. In this case, SEPTA asserts that the evidence shows the bridge was weakened by a lateral flow that was unrelated to the real estate and was not connected to the intended purpose of the bridge.

St. Paul and Zurich disagree with SEPTA that the flooding did not "derive, originate, or have as its source" the bridge, because, according to St. Paul and Zurich, the improper design and maintenance of the bridge led to its eventual failure. Since this failure was the direct cause of the flooding, St. Paul and Zurich argue that SEPTA's poor maintenance of the bridge was the original source of the flooding. Further, it is clear, according to St. Paul and Zurich, that because

the bridge collapsed, it was not safe for its intended purpose. St. Paul and Zurich also argue that, even though the flood is partially the result of Mother Nature, SEPTA has the burden to show that the flood would have occurred independent of SEPTA's alleged negligence. See Carlson v. Corrugated Box Corp., 72 A.2d 290, 293 (1950) (holding defendant is liable "if damage results from the concurrence of the defendant's negligence with the act of God and the damage would not have occurred in the absence of such negligence").

There is little doubt that at least one of the contributing "parties" to the flood was a *force majeure*, namely Tropical Storm Alison. Nonetheless, it is a fact that the bridge survived for nearly ninety years, even surviving a more severe storm just two years prior to Tropical Storm Alison. Thus, there is a reasonable inference that the negligence of some other actor, beyond "Mother Nature," was a contributing cause of the bridge's collapse. Thus, the issue is whether any record evidence demonstrates a genuine issue of material fact as to SEPTA's joint liability, which the Court does find exists.

SEPTA's position appears to depend on the argument that, because St. Paul's and Zurich's expert opines that the lateral water flow from the Garrison Greene property was the "mechanism" that caused the collapse, the alleged negligent development of the Garrison Greene sites supercedes any negligence of SEPTA. However, this argument fails to acknowledge that the issue is not whether SEPTA was solely responsible, or even primarily responsible, but whether there is a genuine issue of SEPTA's alleged negligence being a substantial factor in the collapse of the bridge. As discussed more fully above, the Court finds that the evidence can support a reasonable inference that SEPTA's failure to perform scour protection, while being aware of the bridge's scour vulnerability, was a substantial factor in the collapse of the bridge.

The next issue is whether the flood conditions were “derived, originated, or had as their source” SEPTA’s alleged negligence. SEPTA cited a series of cases that discuss this issue, but the Court finds this situation noticeably distinguishable from those cases. All of the cases cited by SEPTA dealt with an injury caused by a force beyond the control of the Commonwealth party. See Jones, 772 A.2d at 444 (finding the rock salt tripped on by the plaintiff did not originate, derive, or have as its source the Commonwealth train property, but was *brought onto* the property by a third-party); Snyder, 562 A.2d at 313 (holding the failure to install lights or a barrier *was not an artificial condition or defect* of the real estate, so the real estate exception was inapplicable); Lingo, 820 A.2d at 863 (holding debris littering Commonwealth property that was *caused by* rainfall, not a defect in the property itself, was not within the real estate exception); Kosmack, 807 A.2d at 933 (finding snow was the cause of the accident, not the alleged defect in the design of the road, and the snow clearly did not originate, derive, or have as its source the road itself); Hicks, 624 A.2d at 692 (holding real estate exception does not apply where plaintiff is injured by debris on Commonwealth property, but debris was deposited on the property by third party).

However, in this case, the collapse of the bridge is alleged to be the direct cause of the flooding. In the cases referenced by SEPTA, the cause of the harm was debris or other foreign objects brought or dropped on the property from a foreign source. Here, the bridge collapsed, allegedly partially caused by SEPTA’s negligence, which caused the harm, namely the flooding. In other words, the flood “had as its source” the unattended scour condition and the collapse of the bridge.

B. The Negligence and Nuisance Claims

1. Negligence

A cause of action in negligence requires evidence that establishes the breach of a legally recognized duty or obligation that is causally connected to damages suffered by the complainant. Sharpe v. St. Luke's Hospital, 821 A.2d 1215, 1218 (Pa. 2003). The “common enemy” rule discussed above defines the duty held by one landowner to another regarding surface water. SEPTA argues that there is clearly no evidence that shows SEPTA either diverted or changed the flow of rainwater produced by Tropical Storm Allison. SEPTA also asserts that there is no evidence that any alleged negligence by SEPTA was the cause of the flooding. SEPTA notes that the unprecedented “lateral flow” from the Garrison Green property was the cause of the collapse of the bridge.

As discussed above, St. Paul and Zurich believe that SEPTA breached its duty under the “common enemy” rule by negligently maintaining its bridge, which resulted in the rainwater being diverted. Further, SEPTA’s negligent maintenance was the direct cause of the bridge collapse. St. Paul and Zurich also argues that SEPTA had a statutory duty to ensure that the structural integrity and flood carrying capacity of its culvert was properly maintained, even during hurricane conditions. See Dam Safety and Encroachments Act (“Dam Act”), 32 Pa. C.S.A. § 693.13(a).⁵ Additionally, the Pennsylvania Code requires the owner of a bridge or

⁵ The Dam Act states:

(a) The owner of any dam, water obstruction or encroachment shall have the legal duty to:

(1) monitor, operate and maintain the facility in a safe condition in accordance with the regulations, terms and conditions of permits, approved operating plans and orders of the department issued pursuant to this act;

(2) conduct periodic inspections and analyses, as reasonably required by the

culvert to maintain the structure's flood carrying capacity in good order. 25 Pa. Code § 105.171.⁶ St. Paul and Zurich argue that, although these provisions do not create a negligence *per se* situation,⁷ they do establish a duty that was breached by SEPTA in this case.

As discussed above, the Court finds that there is a reasonable inference to be drawn from the record evidence that SEPTA violated its duty to maintain its bridge by not providing scour protection, despite knowledge of the danger, and that this failure was a substantial factor in the collapse of the bridge. Therefore, the Court finds a genuine issue of material facts exists as to whether the essential elements of a negligence claim have been demonstrated by St. Paul and

department considering the type of facility and degree of potential hazard, and as required submit certified reports regarding the condition of the facility to the department: Provided, That in lieu of certified reports from the owner, the department may accept reports of equivalent inspections prepared by governmental agencies; (3) immediately notify the department and responsible authorities in downstream communities of any condition which threatens the safety of the facility, and take all necessary actions to protect life and property, including any action required under an emergency plan or department order issued pursuant to this act; and (4) prior to discontinuing use or abandonment, remove all or part of the facility and take other actions necessary to protect safety and the environment in a manner approved by the department.

32 Pa. C.S.A. § 693.13(a).

⁶ Section 105.171 provides, in relevant part, that:

(a) the owner or permittee of a culvert or bridge is responsible for maintaining the structure opening thereof in good repair and assuring that flood carrying capacity of the structure is maintained. The owner or permittee shall inspect the opening and approach... at regular intervals of not less than once each year and shall, after obtaining the verbal or written approval of the Department, remove silt and debris which might obstruct the flow of water through the structure.

⁷ In Shanoski v. PG Energy, 858 A.2d 589 (Pa. 2004), the Pennsylvania Supreme Court considered the standard of care implied in the Dam Act, and determined that the legislature was not expanding the liability to a *per se* standard, but maintained the common law “reasonable man” standard. Id. at 602.

Zurich.

2. Nuisance

St. Paul and Zurich each raise both public and private nuisance claims. The definition of a private nuisance is a “non-trespassory invasion of another’s interest in the private use and enjoyment of land.” Philadelphia Electric Co. v. Hercules, Inc., 762 F.3d 303, 315 (3d Cir. 1985). Under Pennsylvania law, to recover under a private nuisance claim, a plaintiff must prove that: 1) the defendant’s conduct was the legal cause of the plaintiff’s injury; and 2) the defendant’s conduct was negligent, reckless, or abnormally dangerous. Folmar v. Elliot Coal Mining Co., 272 A.2d 910, 912 (Pa. 1971). A public nuisance has the same requirements as a private nuisance, with the additional requirement that the plaintiff must show the harm suffered is of a different kind from that suffered by other members of the public. Philadelphia Electric, 762 F.3d at 315.

The arguments related to the private nuisance are substantially the same as discussed above, since the requirements hinge upon whether SEPTA was negligent and whether its conduct was the legal cause of the flood conditions. As explained above, the Court finds that there is a reasonable inference from the record that SEPTA was negligent and the legal cause of the flood conditions.

On the other hand, the Court finds that St. Paul and Zurich have not produced any evidence that shows they (or their insureds) suffered a harm that was of a different kind from the harm suffered by other members of the public, an essential element of a public nuisance claim. Thus, the Court finds that summary judgment for SEPTA should be granted as to the public nuisance claims.

IV. CONCLUSION

For the foregoing reasons, the Court denies SEPTA's Motions for Summary Judgment, except as to the public nuisance claim as to which the Motions are granted. An appropriate Order consistent with this Memorandum follows.

BY THE COURT:

/S/

GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE

SEPTA's Statement of Uncontested Material Facts (Docket No. 97), SEPTA's Motion for Summary Judgment in Civil Action No. 03-3192 (Docket No. 106 (lead case), Docket No. 52 (member case)), St. Paul's and Zurich American Insurance Company's Supplemental Memorandum of Law in Opposition to SEPTA's Motions for Summary Judgment (Docket No. 110 (lead case), Docket No. 54 (member case)), and the statements made at oral argument on February 18, 2005, it is hereby ORDERED that the Motions for Summary Judgment (Docket Nos. 92 & 110 (lead case), Docket No. 54 (member case)) are GRANTED IN PART only as to the public nuisance claims which is hereby DISMISSED, and the Motions are DENIED IN PART as to all other claims.

BY THE COURT:

/S/ _____
GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE