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**St. Paul Fire & Marine Ins. Co. v. Nolen Group, Inc., No. 02-8601,  
2005 U.S. Dist. LEXIS 4200 (E.D. Pa. Mar. 18, 2005)**

Becky Bye

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St. Paul Fire & Marine Ins. Co. v. Nolen Group, Inc., No. 02-8601, 2005 U.S. Dist. LEXIS 4200 (E.D. Pa. Mar. 18, 2005)

cated he owned the foreshore and that the barges infringed upon his riparian rights,

The court first found Romeo's numerous post-trial submissions inadmissible. The court also found that Romeo did not own the foreshore because Romeo provided no external proof to support his claim. Specifically, the court concluded that the original grant of the property, made in 1687, violated the public trust doctrine and that the 1779 Act of Attainder superseded the grant. Because the court found that Romeo did not own the foreshore, his trespass claim failed. The court determined that riparian rights reflected an owners' reasonable, but not absolute, right to free ingress and egress to abutting navigable waters. The court found the barges blocked access to only 25 percent of Romeo's property, and therefore did not obstruct Romeo from access to the waterway. Romeo's claim of interference with his riparian rights was therefore unsupported. Because the court found the barges did not disturb Romeo's riparian rights, the court dismissed his cause of action in nuisance. The court also found Romeo failed to mitigate his damages when he refused the Garners' offer to move the two steel barges and failed to secure removal permits. The court lastly found that Romeo's claim of adverse possession of the foreshore failed because the New York could only convey the State's sovereign title by grant. The court thus granted judgment in favor of the Garners.

*Laura L. Chartrand*

**St. Paul Fire & Marine Ins. Co. v. Nolen Group, Inc., No. 02-8601, 2005 U.S. Dist. LEXIS 4200 (E.D. Pa. Mar. 18, 2005)** (holding: (1) a government-organized railway company was not entitled to government immunity for alleged negligence in maintaining a bridge; (2) the "real estate" exception did apply where the poor maintenance of the bridge was the direct cause of damages; (3) evidence existed as to whether the railway company violated its duty to maintain the bridge; and (4) enough evidence existed for a private nuisance claim, but the evidence failed to indicate a public nuisance claim).

The St. Paul Fire and Marine Insurance Company ("St. Paul") and Zurich American Insurance Company ("Zurich"), as subrogees, sued the Southeastern Pennsylvania Transportation Authority ("SEPTA") under negligence and nuisance theories, alleging SEPTA improperly maintained a collapsed bridge. St. Paul and Zurich also asserted claims against The Nolen Group, Inc., Michael Anthony Homes, Inc. and Garrison Greene Associates, L.P. as the owners and developers of the site, who allegedly negligently developed the site, which led to excessive stormwater run-off and the collapse of the SEPTA bridge, triggering this lawsuit.

On June 16, 2001, during Tropical Storm Allison, a creek flooded several buildings. The buildings housed several companies that St.

Paul and Zurich covered. According to the insurers, the collapse of a bridge maintained by SEPTA aggravated the conditions. A railway company built the bridge in 1912; when a Pennsylvania statute created SEPTA in 1968, SEPTA acquired the responsibility to maintain the bridge.

First, the United States District Court for the Eastern District of Pennsylvania addressed SEPTA's claim of sovereign immunity. An agency of the Commonwealth of Pennsylvania has sovereign immunity unless the court waives it. To waive immunity, the court looked at the "common enemy" rule that holds a landowner liable to another landowner if the landowner diverted water from a natural channel or unreasonably or unnecessarily changed the water in quality or quantity. The court denied summary judgment to SEPTA, holding SEPTA failed to do "scour protection" to the collapsed bridge, that sufficient evidence that scouring of the bridge caused the collapse of the bridge existed, and SEPTA was aware of the bridge's scour vulnerability and failed to provide any measures.

Next, the court looked at the "real estate" exception. A party may sue a Pennsylvania agency if an agency's actions lead to a dangerous condition causing damages. The plaintiff must show the artificial condition or defect of the land itself caused the injury. SEPTA asserted the real estate exception did not apply since the rainfall caused the collapse, and the bridge was safe for its intended purpose. St. Paul and Zurich argued SEPTA's poor maintenance of the bridge was the original source of the flooding. The court determined the ultimate source of the flooding was the scoured condition and collapse of the bridge, allegedly from SEPTA's negligence, so the real estate exception applied to SEPTA.

The court also addressed the negligence claims against SEPTA. St. Paul and Zurich believed SEPTA breached its duty under the "common enemy" rule by negligently maintaining the bridge, which resulted in diverted rainwater. The insurance companies also asserted a statutory duty for the maintenance of the bridge. The court reasoned it could draw a reasonable inference from the record that SEPTA violated its duty to maintain its bridge, and concluded that a genuine issue of material fact existed to the negligence claim; thus, the court denied summary judgment on this issue.

Finally, the court addressed St. Paul and Zurich's public and private nuisance claims. Under Pennsylvania law, a plaintiff must prove: 1) the defendant's conduct was the legal cause of the injury; and 2) that the conduct was negligent, reckless, or abnormally dangerous. A public nuisance claim consists of the same requirements, plus the plaintiff must prove the harm he or she suffered was different from other members of the community. The court concluded no evidence showing the plaintiffs suffered a harm that was different from other plaintiffs and, therefore, the court granted summary judgment for

SEPTA on the public nuisance claims only. Additionally, the court denied summary judgment in all other respects for this action.

*Becky Bye*

**Wyoming Outdoor Council v. United States Army Corps of Eng'rs, 351 F. Supp. 2d 1232 (D. Wyo. 2005)** (holding the Corps violated the National Environmental Policy Act by relying on mitigation measures not supported by substantial evidence to issue a finding of no significant impact, and violated the Clean Water Act by failing to consider the cumulative effect of a permit on non-wetland aquatic environments).

Wyoming Outdoor Council, Powder River Basin Resource Council, and Biodiversity Conservation Alliance ("Environmental Groups") challenged the United States Army Corps of Engineers' ("Corps") decision to issue General Permit 98-08 ("GP 98-08") in the United States District Court for the District of Wyoming. In their petition for review, the Environmental Groups claimed the Corps violated the National Environmental Policy Act ("NEPA") by failing to consider impacts to various resources and by relying on unsupported mitigation measures to issue a finding of no significant impact ("FONSI"). The Environmental Groups also claimed the Corps violated the Clean Water Act ("CWA") by finding GP 98-08 would have minimal adverse effects on the environment.

GP 98-08 authorized discharges of dredge and fill materials related to oil and gas development in Wyoming. GP 98-08 permitted dredge and fill activities on any land in Wyoming so long as the activities met permit specifications. The Corps made six specifications and conditions regarding GP 98-08. First, no activity covered by the permit could fill more than 0.30 acres of wetland. Second, the Corps required permittees to comply with the Wyoming Department of Environmental Quality's water quality certification pursuant to the CWA. Third, the Corps required permittees to give the Corps notice before undertaking activity on non-federal lands with non-federal minerals in certain geographical locations. Fourth, the Corps required permittees to perform wetland mitigation. Fifth, the Corps required permittees to restore temporarily filled wetlands. Lastly, the Corps required permittees to replace permanent fills of more than 0.25 acres at a one-to-one ration.

With regard to the NEPA claim, the Environmental Groups argued the Corps deficiently prepared an environmental assessment ("EA") because GP 98-08 demonstrated a significant impact that necessitated preparation of an environmental impact statement ("EIS"). Specifically, the Environmental Groups claimed the Corps' consideration of several environmental impacts, including impacts on water quality and wetlands, was insufficient to support a finding of no significant impact ("FONSI"). The court explained that NEPA requires agencies to prepare an EIS for any agency action "significantly affecting the quality of