IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

SONIA LEMOS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 01C-01-276 JRS
	)	
WINSTON WILLIS and	)	
GWENDOLYN WILLIS,	)	
	)	
Defendants.	)	

Date Submitted: October 29, 2002
Date Decided: January 23, 2003

Upon Consideration of
Plaintiff's and Defendants' Cross Motions for Summary Judgment.
DEFENDANTS' MOTION IS GRANTED.
PLAINTIFF'S MOTION IS DENIED.

Arthur M. Krawitz, Esquire. DOROSHOW, PASQUALE, KRAWITZ SIEGEL & BHAYA, 1202 Kirkwood Avenue, Wilmington, Delaware 19805.

Robert K. Pearce, Esquire. FERRY, JOSEPH & PEARCE, P.A., 824 North Market Street, Suite 904, P.O. Box 1351, Wilmington, Delaware 19899.

J. SLIGHTS.

I. INTRODUCTION

The plaintiff, Sonia Lemos ("Lemos" or "Plaintiff"), slipped and fell on ice and snow which had accumulated on the sidewalk in front of the property owned by Winston and Gwendolyn Willis ("Mr. and Mrs. Willis" or "Defendants"). Although both parties agree to the basic facts, a legal issue remains to be determined: whether Wilmington City Code §§ 42-417[1] and 42-418[2] ("Sections 42-417 and 42-418") may form the basis of an actionable claim for nuisance *per se*. For the reasons that follow, the Court finds that the ordinances at issue do not impose upon landowners any civil

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[1] WILMINGTON, DE., CODE § 42-417 (2002). Section 42-417 states:

> (a) Every person failing, neglecting or refusing to perform any duty required by sections 42-418 and 42-419(a) of this article or continuing violation on any day succeeding the first conviction thereof shall be guilty of committing and maintaining a nuisance, and shall upon conviction thereof in the municipal court be punished by a fine of $1.00 per linear foot of uncleared sidewalk up to a maximum of $25.00 besides the costs of prosecution.
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> . . .

[2] WILMINGTON, DE., CODE § 42-418 (2002). Section 42-418 states:

> (a) In case any snow shall fall or ice shall be formed on the sidewalk of any public street in the city, it shall be the duty of the occupant, lessee, owner or agent of the property which fronts or abuts upon any such sidewalk to remove, or cause to be removed, all such snow and ice from that one-half of the sidewalk of the property nearest the building line; and also, to make, or cause to be made, a pathway, no less than two feet in width, from such cleared portion of the sidewalk to the street gutter, by the removal of such snow and ice therefrom. The removal of such snow and ice shall be done within 24 hours after such snow may cease to fall or after the formation of such ice.
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> . . .

liability, either sounding in negligence or nuisance, when abutting sidewalks become dangerous by virtue of snow or ice accumulation. Defendants' motion for summary judgment is **GRANTED** and Plaintiff's cross motion for partial summary judgment is **DENIED.**

II. FACTS

The facts are not in controversy. Mr. and Mrs. Willis own the property located at 1128 Read Street in Wilmington, Delaware.[3] On December, 26 1998, Sonia Lemos slipped and fell on the snow and ice which had accumulated on the sidewalk in front of the Willis' property. She sustained personal injuries from the fall. Ms. Lemos' complaint alleges that Mr. and Mrs. Willis were negligent and strictly liable for their failure to clear the sidewalk and for allowing a nuisance to remain unattended.

III. DISCUSSION

A. The Parties' Contentions

In their motion for summary judgment, the Defendants assert they owed no duty to the Plaintiff to remove ice and snow from the sidewalk in front of their property. They contend that the law in Delaware is settled that landowners have no duty to assume the City of Wilmington's responsibility to clear snow and ice from

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[3]The Defendants do not reside in the Read Street property.

City sidewalks. And Plaintiff cannot circumvent the settled law of Delaware by rewriting her negligence claim as a nuisance claim.

The Plaintiff has moved for partial summary judgment. She acknowledges that a landowner does not have a common law duty to remove snow and ice from the sidewalk abutting his property. She argues, instead, that Wilmington City Code §§ 42-417 and 42-418 defines conditions, including snow and ice accumulation, which, if left unattended, will constitute a nuisance *per se*. A nuisance *per se*, according to the Plaintiff, may be established without regard to duty. And once a nuisance *per se* has been established, Plaintiff argues that the Defendants must be held strictly liable for allowing the nuisance to exist and for failing to correct it. She contends that the snowy/icy condition of the Willis' sidewalk at the time of her fall was a nuisance *per se*.

B. Standard of Review

Although the parties have made cross motions for summary judgment, the summary judgment standard does not change:

> T]he existence of cross motions for summary judgment does not act *per se* as a concession that there is an absence of factual issues. Rather, a party moving for summary judgment concedes the absence of a factual issue and the truth of the nonmoving party's allegations only for purposes of its own motion, and does not waive its right to assert that there are disputed facts that preclude summary judgment in favor of the other party. Thus, the mere filing of a cross motion for summary

judgment does not serve as a waiver of the movant's right to assert the existence of a factual dispute as to the other party's motion.[4]

When both parties move for summary judgment, "neither party's motion will be granted unless no genuine issue of material fact exists and one of the parties is entitled to judgment as a matter of law."[5] If there is any disagreement about the inferences that may be drawn from the facts, then summary judgment must be denied.[6] And when determining whether material issues of fact exist, the Court will look to the pleadings, affidavits, and any products of discovery which have been made a part of the record.[7] Here, the parties agree that the material facts are not in dispute; the Court is called upon to determine whether either party is entitled to judgment as a matter of law.

C. Sections 42-417 and 42-418 Do Not Codify a Nuisance *Per Se*

The ultimate question the Court must address is whether a landowner in the City of Wilmington may be held liable for failing to remove snow and ice from the sidewalk abutting his property. The Court already has concluded that Plaintiff may

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[4] *United Vanguard Fund, Inc. v. Takecare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997)(citations omitted).

[5] *Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 745 (Del. 1997).

[6] *Empire of America Relocation Servs., Inc. v. Commercial Credit Co.*, 551 A.2d 433, 435 (Del. 1988).

[7] *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. 1973).

not sustain a claim for negligence on these facts.[8] Settled Delaware law mandated that result: "[I]t appears that almost uniformly it is held that an ordinance requiring lot owners to keep the sidewalks free from snow and ice and imposing a penalty for the failure to do so imposes no civil liability on the lot owner in favor of a third person injured by reason of violation of the ordinance."[9] *Burns* held that the same City ordinances at issue *sub judice* do "not purport to establish a general standard of care to be imposed upon the abutting lot owner for the protection of the public generally."[10]

Upon concluding that Plaintiff's negligence claim was not viable, the Court granted leave to the Plaintiff to amend her complaint to assert nuisance *per se.* Plaintiff argued that a recent decision of this Court[11] supported the notion that the Defendants could be held strictly liable for violating an ordinance which codified a nuisance *per se.* In *Latchford*, the court discussed Wilmington City Code § 42-42, which mandates that landowners maintain the sidewalk abutting their property by

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[8]The Court's oral ruling in this regard was announced at the conclusion of the hearing on the cross motions. (D.I. 31, at 17)

[9]*Burns v. Boudwin*, 282 A.2d 620, 621 (Del. 1971)(duty will not be imposed based upon statute that purports "to impose upon the actor the performance of a service which the state or any subdivision of it undertakes to give the public").

[10]*Id*. at 622.

[11]*Latchford v. Schadt*, 2001 WL 392254 (Del. Super.).

keeping it free from "obstructions and defective conditions."[12] Section 42-42 also provides that the failure to maintain the sidewalk "shall be deemed to be a nuisance" and that the landowner "shall be solely responsible for any damage that may result to persons or property by reason of ... any defective condition of such sidewalk."[13] *Latchford* interpreted this language as creating a "nuisance *per se*," rendering the landowner strictly liable.

Three factors in particular appeared to influence the outcome in *Latchford.* First, there is no question but that Section 42-42 is a public health and safety statute, thereby meeting that prerequisite for nuisance *per se.*[14] Second, the ordinance clearly states that failure to maintain the abutting sidewalk in the manner prescribed by the ordinance "shall be deemed a nuisance." Finally, and most importantly, the court noted that the preamble to the ordinance[15] stated that the ordinance was amended specifically to impose civil liability on the abutting landowner in response to two

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[12] WILMINGTON, DE., CODE § 42-42 (2002)("SECTION 42-42").

[13] *Id.*

[14] *See Hylton v. Shaffer's Market, Inc.*, 343 A.2d 627, 629 (Del. Super. 1975)(stating that nuisance *per se* exists "when there is a violation of a safety statute").

[15] The Preamble to Ordinance No. 89-014, which amended an earlier version Section 42-42, states: "two recent Delaware Superior Court decisions have ruled that because abutting property owners were not provided notice by Licenses and Inspections, individuals injured on sidewalks in disrepair had no remedy" and declared that "the Council deems it necessary and proper to protect the public health and safety to require that abutting property owners repair sidewalks and curbs without prior notice from the City to do so."

decisions of the Superior Court that declined to impose civil liability on property owners even though the courts determined that the property owners had violated the ordinance.[16]

Two of the factors that compelled the result in *Latchford* are missing here. First, Section 42-418 makes no mention of the term "nuisance." The term does appear in Section 42-417, but in a context quite different than its use in Section 42-42. Section 42-417 provides that when property owners do not clear snow and ice from the sidewalks in front of their properties they will "be guilty of committing and maintaining a nuisance." This language defines a crime for which criminal liability (a fine) will be imposed. On the other hand, Section 42-42 uses the term "nuisance" to define a condition, not a crime: "defective conditions [on sidewalks] shall be deemed to be a nuisance." Contrary to Section 42-417, Section 42-42 is not a municipal fine section; it is a substantive section defining proscribed conduct and conditions.

The second and more critical distinction does not involve subtle interpretations of context, but rather a clear and deliberate omission of key language which appears in 42-42 but does not appear in Sections 42-417 or 42-418. In the preamble to Section 42-42, the Wilmington City Council made clear its intent to modify the

[16] *Latchford* at *3.

common law rule by imposing civil liability on a landowner who fails to repair or remove an obstruction from the sidewalk abutting his property. To this end, City Council amended Section 42-42 to declare that the landowner "shall be solely responsible for any damage that may result to persons or property by reason of any hole, excavation, or obstruction in or upon such footways, or from any defective condition of such sidewalk, footway, or curb." In contrast, Sections 42-417 and 42-418 contain no such indication of a legislative intent to alter the common law. And settled tenets of statutory construction direct the Court to conclude that the omission was intentional.[17]

Based on the foregoing, the Court concludes that *Latchford* does not apply here.[18] City Council has not expressed its intent to codify an actionable nuisance *per se* in Section 42-417 or 42-418. And the Court can discern no other justification to depart from the prevailing view that a landowner will not be held civilly liable for

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[17]Wilmington City Council chose not to amend Sections 42-417 and 42-418 when it amended Section 42-42. The Court will deem Council's inaction with respect to 42-417 or 42-418 as knowing and intentional. *See Monroe Park v. Metropolitan Life Ins. Co.,* 457 A.2d 734, 737 (Del. 1983)(stating that "[i]n terms of legislative intent it is assumed that whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter").

[18]The Court finds it unnecessary to determine whether *Latchford* can be squared with *Burns*. Defendant has argued that *Burns* stands for the proposition that a landowner owes no duty to pedestrians to keep City sidewalks clear of obstruction or hazard and that *Latchford,* nevertheless, imposed a duty on the defendant, albeit in terms of nuisance rather than negligence. The resolution of this apparent conflict in the case law will not alter the outcome here so it will have to await another day.

failing to clear sidewalks abutting their property of ice and snow.[19]

[19] *Burns*, 282 A.2d at 622.

IV. CONCLUSION

Based on the foregoing, the Defendants' motion for summary judgment is **GRANTED** and the Plaintiff's motion for partial summary judgment is **DENIED.**

IT IS SO ORDERED.

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Judge Joseph R. Slights, III

Original to Prothonotary