IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

NVF COMPANY, ET AL.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CA No. 96C-01-230-JEB
	)	
GARRETT SNUFF MILLS, INC., ET AL.,	)	
	)	
	)	
Defendants.	)	

Submitted: December 31, 2001
Decided: January 30, 2002

Defendants' Motion for Partial Summary Judgment.

Motion Granted in Part; Denied in Part.

Appearances:

M. Malcolm Cochran, IV, Esquire and Chad M. Shandler, Esquire
Attorneys for Plaintiffs.

Daniel P. Bennett, Esquire
Attorney for Defendants.

JOHN E. BABIARZ, JR., JUDGE.

This is the Court's decision on Defendant Garrett Snuff Mills' and Defendant Daniel C. Lickle's motion for summary judgment on Plaintiff NVF's allegations of negligence *per se* and application for punitive damages. For the reasons explained below, Defendants' motion is granted in part and denied in part.

FACTS Defendant Garrett Snuff Mills, Inc. (GSM) owns an office park located at 2858 Creek Road, Yorklyn, Delaware. Defendant Daniel Lickle is the current owner of GSM, as he was at all time pertinent to this action. Plaintiff NVF Company (NVF) operates a manufacturing plant adjacent to the GSM property. The properties are separated by the Red Clay Creek. Between 1988 and 1995, Defendant Lickle undertook various projects on GSM property. He renovated at least two historic buildings, for which he obtained the requisite New Castle County (NCC) permits. He also planted shrubs along the creek and added a new parking lot, the construction of which allegedly elevated the river bank and altered the flow of water down Red Clay Creek. Defendants did not obtain a permit for this activity. David Roser, an excavating contractor who had a longstanding work relationship with Lickle, testified at his deposition that he performed various jobs at GSM as

early as 1988 and as late as 1992.[1] He described working on the parking lot, moving topsoil onto the creek berm and numerous related activities.[2]

All these alterations were made within an area recognized by the County as the regulated flood plain. The County Drainage Code defines the flood plain "as stream flow areas and as retention or storage areas in times of flood."[3] In January 1994, GSM's unauthorized alteration of the berm allegedly diverted the natural flow of the creek after a heavy rainstorm and forced large quantities of water onto N.F.'s property, causing significant damage.

In March 1995, NCC brought criminal charges against Defendants Lickle and GSM for numerous violations of the NCC Code, including altering the flood plain without having obtained permits. On behalf of himself and GSM, Lickle pled *nolo contendere* and paid a $2000 fine.

In January 1996, the unauthorized changes to the flood plain again allegedly caused flooding and extensive damage to Plaintiff's property. As in 1994, Plaintiff suffered damages including lost profits from shutting down operations due to water damage, excessive flood water and solids in its sewer system, clean-up costs,

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[1] Roser Deposition at 7-8.

[2] *Id.* at 19-26.

[3] NCC Drainage Code § 6-8.

contamination of raw materials and damage to its machinery. Plaintiff filed a Complaint against Defendants in 1996 claiming that defendants were negligent in raising the height of the bank in their side of the creek. The Complaint was amended in June 2001 to add allegations of negligence *per se* in the violation of federal, state and county statutes and regulations, and also to add a related claim for punitive damages. Defendants filed a motion for summary judgment in their favor on all counts of negligence *per se*, as well as the claim for punitive damages.

Following oral argument in December 2001, N.F. withdrew its state and federal claims of negligence *per se* to pursue claims of negligence *per se* only in regard to the County ordinances.[4] On request of the Court supplemental memoranda have been submitted, and the issues are ripe for decision.

SCOPE OF REVIEW On a motion for summary judgment, the Court must consider the evidence in a light most favorable to the non-moving party to determine whether

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[4] NVF's federal claims were based on a contention that the Red Clay Creek at Yorklyn was a navigable waterway of the United States. The creek in normal flow at Yorklyn is roughly fifty feet wide and five feet deep. It passes over several small dams and under at least as many low bridges on a journey to confluence with the mighty White Clay Creek a dozen or so miles downstream.

NVF's state claims were based on 7 Del.C. Ch. 72 which regulates subaqueous lands. The statute specifically provides that it "shall not change the law of this State relating to existing property, riparian, or other rights of the State or other persons in submerged, tidelands or filled lands."

It is possible that plaintiff withdrew these claims in response to some skepticism expressed by the Court at oral argument.

genuine issues of material fact exist.[5] Summary judgment will not be granted when the record indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.[6]

DISCUSSIONGSM argues that the negligence *per se* claims should be dismissed for the following reasons. First, the County ordinances are not the types of legislative enactments which typically give rise to claims of negligence *per se*. Second, the ordinances do not provide for a private cause of action and therefore cannot give rise to a claim of negligence *per se*. Third, the ordinances do not set forth a standard of care, as required for a finding of negligence *per se*. Fourth, the ordinances grant discretionary powers to the County Council and are therefore not compatible with claims for negligence *per se*. Finally, to the extent that the ordinances impose a strict liability standard against the violator, the ordinances cannot serve as a basis for a claim of negligence *per se*. On the issue of punitive damages, Defendants argue that the Complaint is based solely on allegations of negligence and that merely stating that Defendants' conduct was reckless, wilful and wanton does not meet accepted pleading standards.

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

[6] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

NVF argues that Delaware courts have found that local ordinances similar to the one at issue in this case an give rise to claims for negligence *per se*. NVF also argues that GSM clearly violated at least four New Castle County ordinances, and that each such ordinance contained a clear standard of care. Finally, NVF argues that it sufficiently pleaded its claim for punitive damages in the Second Amended Complaint.

On a claim for negligence *per se*, the plaintiff must make a four-part showing. First, the plaintiff must show that the statute in question was enacted for the safety of others.[7] Plaintiff must also show a causal connection between the statutory violation and the injury, and, that he was a member of the class of persons the statute set out to protect.[8] In addition, the plaintiff must show that the statute set forth a standard of conduct which was designed to avoid the harm plaintiff suffered.[9] Finally, the plaintiff must show that the defendant violated the statute by failing to comply with that standard of conduct.[10]NVF alleges that Defendants violated §6.9 of the NCC Drainage Code, § 23-106© and § 23-108(c)(2) of the

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[7]*Sammons v. Ridgeway*, 293 A.2d 547, 549 (Del. 1972).

[8]*Id.*

[9]*D'Amato v. Czajkjowsksi*, 1995 WL 945562 (Del. Super.) (citing *Wealth v. Renai*, 114 A.2d 809, 810-11 (Del. Super. 1955)).

[10]*Carroll v. Getty Oil Co.*, 498 F. Supp. 409-412-13 (D.Del. 1980).

NCC Code and Article 10 of the NCC Unified Development Code ("the UDC"). The UDC, however, was enacted in 1997, subsequent to any allegations of Defendants' misconduct or damage to plaintiff's property. It therefore cannot provide the basis for a claim of negligence *per se*.

The remaining ordinances are in the ones to which Lickle pled *nolo contendere*. The Drainage Code, which was adopted to preserve the flood plain, requires approval by County Council for any development within the designated flood plain.[11] Section 6-9(a) provides in part as follows:

> No development shall be permitted within the limits of any flood plain area having special flood hazards except upon approval of county council. Such flood plain includes the maximum area that, on the average, is likely to be flooded once every one hundred (100) years. Any proposal for such approval shall be accompanied by recommendations from the directors of public works and planning.

Further: § 6-9(j) provides: "Any development in the floodway that would cause an increase in flood heights shall be prohibited. No variance shall be granted to this restriction."

Plaintiff also relies on Defendants' violation of § NCC 23-106(C), which provides as follows:

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[11]NCC Drainage Code § 6-8 and § 6-9.

> *Compliance*. Except as provided in subsections (A) and (B) above, no structure, land or water shall hereafter be used or developed and no structure shall be located, relocated, constructed, reconstructed, extended, enlarged, converted or structurally altered without full compliance with the terms of this article, the New Castle County Drainage Code and other applicable regulations.

The third section Plaintiff relies on is NCC § 23-108(c)(2), which provides a list of conditional uses which may be permitted in the flood plain "only after department of planning approval," which Lickle did not obtain.

At least one of the requirements for negligence *per se* has clearly been met. Although Lickle pled *nolo contendere* to violation of the ordinances, Defendants do not dispute the violation. However, they do dispute every other prong of the negligence *per se* test.Defendants argue first that local ordinances do not typically give rise to private rights of action for negligence *per se*. Plaintiff contends that not only legislative enactments but also administrative regulations and local ordinances can support a claim of negligence *per se* if there is a statutory mandate for the local body to create such causes of action. The Court agrees, but the case Plaintiff relies on for this position also illustrates the distinction between the type of ordinance that supports a claim for negligence *per se* and one that does not. In *Sammons v. Ridgeway*, the Delaware Supreme Court held that violation of a State School Board of Education ordinance regulating safety conditions for children

disembarking from a school bus could serve as the basis for a claim of negligence *per se* where the plaintiff was a child who was injured when the safety ordinances were not followed.[12] The *Sammons* Court found that the School Board's safety regulations had been given the force and effect of law by mandate of the General Assembly.[13] The Court stated that its holding, which "extend[ed] the negligence *per se* doctrine to regulations of an administrative agency, is expressly limited to regulations having the statutory basis and the purpose of the regulations here involved."[14]

The *Sammons* case differs from the case at bar in one determinative way. Although the General Assembly has conferred broad powers on New Castle County, the enabling statute, 9 Del. C. § 1101, specifically states that "this grant of power does not include the power to enact private or civil law concerning civil relationships, except as incident to the exercises of an expressly granted power...."The Supreme Court of Delaware has had occasion to consider the import of this language with regard to the County drainage code. In *Weldin Farms, Inc. v. Glassman*, the Court held that the approval of drainage plans by the County did not

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[12]293 A.2d 547 (Del.1972).

[13]*Id.* at 549.

[14]*Id.* at 550.

insulate a developer from common law liability. In construing §1101, the Court said that "it could not have been reasonably intended by the General Assembly that the County, by exercising its authority on subdivision matters could foreclose a private cause of action which exists at common law."

If the County cannot foreclose a private cause of action, it also cannot create one. The alleged violation of County ordinances by defendants, therefore, cannot provide the basis for a claim of negligence *per se*. Defendants' motion for partial summary Judgment on plaintiff's claims of negligence *per se* is granted.

Finally, Defendants argue for summary judgment on the issue of punitive damages. Defendants assert that the Complaint does not allege the basis for an award of punitive damages with sufficient particularity, but merely states in the penultimate paragraph that "Defendants' conduct was reckless, willful and wanton, warranting an award of punitive damages."[15] Defendants further assert that if the claim for punitives is based on any alleged misrepresentations made by Defendant Lickle to County officials, Plaintiff has set forth no evidence to support such a claim.The record shows that the parties disagree as to Lickle's state of mind during his excavation activities and his subsequent interaction with County officials. The Complaint implies that Lickle deliberately failed to obtain the required permits

[15]Second Amended Complaint at 11, ¶ 30.

even after he was charged with Code violations,[16] while Lickle has averred that he was unaware of any wrongdoing.[17] Pursuant to Delaware's rules of notice pleading,[18] the Court concludes that the allegations made in the Complaint, and the inferences to be drawn therefrom, are sufficient to withstand a motion to dismiss at this time.[19] Under the usual standard, the issue of punitive damages, like the issue of negligence, is typically reserved for the finder of fact.[20] Defendants' request to dismiss the claim for punitive damages will be revisited at the appropriate time at trial.

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[16]Second Amended Complaint at 9, ¶ 27.

[17]*See* Appendix to Plaintiff's Response, Exh. B-2 (draft of letter from Lickle to NCC officials, dated May 16, 1995).

[18]*Branson v. Exide Electronics Corp.*, 1994 WL 164084 (Del.Supr.).

[19]*See Jardel Co. v. Hughes*, 523 A.2d 518, 527 (Del.1987).

[20]*Id.*

CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment in regard to negligence *per se* is ***Granted*** and its motion for summary judgment in regard to punitive damages is ***Denied.***

It Is So ORDERED.

Judge John E. Babiarz

JEB,jr/rmp/bjw
Original to Prothonotary