FILED
APR 8 - 2009
ORANGE SUPERIOR COURT

STATE OF VERMONT
ORANGE COUNTY

TOWN OF NEWBURY	)	Orange Superior Court
	)	Docket No. 226-10-08 Oecv
v.	)	
	)	on appeal from
JAMES FLAHERTY	)	Docket No. 170-4-08 Oesc

SMALL CLAIMS APPEAL
Decision

Plaintiff Town of Newbury appeals from a judgment of the Small Claims Court in favor of defendant James Flaherty. The Town had sought reimbursement under 10 V.S.A. § 2608(b) for fire department response costs incurred in connection with an unpermitted burn on Mr. Flaherty's property in May 2007. The Small Claims Court entered judgment in favor of Mr. Flaherty, reasoning that the Town's right to bring a civil action under § 2608(b) had been "supplanted" by a later-enacted statute authorizing the imposition of fines for violation of the burn permit statute. The Town appeals from this judgment.

The Small Claims Court hearing was held on July 17, 2008. The Town of Newbury was represented at the hearing by the town fire warden and a member of the selectboard. Mr. Flaherty had notice of the hearing, but did not attend. The Town is represented on appeal by Attorney Robert Fairbanks.

It is not the function of the Superior Court to substitute its own judgment for that of the Small Claims Court. Rather, the role of the Superior Court is to determine whether or not the evidence presented at the hearing supports the facts that the Judge decided were the credible facts, and whether or not the Judge correctly interpreted the law. It is the application of law that is at issue in this appeal.

The following facts were found by the Small Claims Court Judge in his written opinion. The West Newbury Fire Department responded to an unpermitted burn on Mr. Flaherty's property in May 2007. The burn included stumps, wood, and other material that was not appropriate for an outdoor burn, and the fire was set under circumstances that required prior permission from the town fire warden. Mr. Flaherty did not obtain permission. The Fire Department's response costs were $1,379.98.

The Small Claims Court Judge denied the claim. He acknowledged that Mr. Flaherty's fire constituted a violation of the burn permit statute, 10 V.S.A. § 2645(a), and that the Town was seeking to recover its response costs under a statute creating a broad civil action for recovery of "all damages" resulting from unpermitted burns and other conservation-related violations. *Id.* § 2608(b). He reasoned, however, that the broad civil right of recovery had been "supplanted" by a later-enacted statute providing for issuance of a Uniform Fire Prevention Ticket and imposition of a $25.00 fine for violations of the burn permit statute. *Id.* § 2675. He therefore concluded that recovery was not available under § 2608(b), and entered judgment in favor of Mr. Flaherty.

The principle objective of statutory construction is to implement the intent of the Legislature. *In re Estate of Cote*, 2004 VT 17, ¶ 10, 176 Vt. 293. When the legislative intent can be ascertained from the plain language of the statute, courts must enforce the statute according to its terms, so long as doing so does not lead to absurd results. *Id.* In addition, when two or more statutes relate to the same subject matter, courts normally attempt to give effect to the statutory scheme as a whole by construing the statutes "together and in harmony if possible." *Holmberg v. Brent*, 161 Vt. 153, 155 (1993) (quotation omitted).

In this case, the statutes relating to the penalties and remedies for violations of the burn permit statute can be read together as part of a harmonious whole, without producing the silent conflict between statutes that the Small Claims Court Judge found. Each of the statutes that the Judge applied are part of Title 10, chapter 83, which generally promotes the conservation of forests, timberlands, woodlands, soil, and recreational resources. The stated public policy of chapter 83 is the conservation of natural resources, and the specific provisions relevant to fire prevention were meant to lessen the "hazards of forest fires." *Id.* § 2601.

To this end, § 2645(a) prohibits the kindling of open air brush fires under specified circumstances without prior permission from the town fire warden. In this case, the evidence supports the Judge's finding that Mr. Flaherty's fire was set under circumstances that required prior permission, but that Mr. Flaherty did not obtain permission. His unpermitted fire was a violation of § 2645(a).

Chapter 83 contains a general enforcement statute that furthers the policy of conservation of resources. Section 2608(b) establishes that violations of the chapter's conservation provisions subject the actor to the risk of both civil and criminal liability. On the criminal side, violations are punishable by imprisonment of not more than 30 days or a fine of not more than $50.00. On the civil side, the actor "shall be liable for all damages resulting from a violation to be recovered in a civil action under this statute by the person injured." *Id.*

In addition to the general enforcement statute, there is a specific enforcement statute that applies only to violations of the burn permit statute and the slash removal statute. Sections 2671–2676 authorize town fire wardens and other law enforcement officials to issue Uniform Fire Prevention Tickets for violations of those two statutes. The fire prevention tickets are subject to the "exclusive jurisdiction" of the district court, and are punishable by imposition of a $25.00 fine per violation. *Id.* §§ 2671, 2675. However, the fire prevention ticket statutes do not say anything about civil liability.

The fire prevention ticket statutes were enacted ten years after the general enforcement statute, and they relate specifically to the issuance of a ticket and imposition of fines for violations of the burn permit statute. It is therefore apparent that the Legislature meant for the fire prevention ticket statutes to "supplant" the more general enforcement statute, at least with respect to criminal or quasi-criminal liability for unpermitted burns. The result is that individuals who violate the burn permit statute are not subject to potential imprisonment, but rather only a fine of not more than $25.00 per violation.

It is not obvious, however, that the Legislature also meant for the fire prevention ticket statutes to "supplant" the civil cause of action established by § 2608(b). The fire

prevention ticket statutes do not say anything about civil liability for unpermitted burns, and there is no evidence that the Legislature meant to foreclose the possibility that a town may recover a money judgment for damages caused by violations of the burn permit statute. Such an interpretation would not further the purposes of fire prevention. It also does not make sense: why should a private individual be permitted to recover for financial loss resulting from unpermitted burns, but the town be limited to imposition of a $25 fine when an unpermitted fire causes financial loss to the town? Put another way, why should a wrong-doer have to pay compensation to a private individual but not to a town for losses resulting from identical conduct? Unless the Legislature made a clear choice for such a distinction and included it in the statute, the underlying policy of fire prevention through deterrence of unpermitted burning by liability for financial losses applies equally in both situations.

Since the later-enacted fire prevention ticket statutes provide measures related to the imposition of fines in district court, but are silent on the question of civil damages, this court concludes that the fire prevention ticket statutes were not meant to "supplant" the civil cause of action established by § 2608(b). This interpretation harmonizes, and gives maximum effect to, the whole statutory scheme related to fire prevention. It is also consistent with the presumption that subsequent legislative enactments are made with knowledge of prior legislation on a subject, *State v. Read*, 165 Vt. 141, 147 (1996): from the silence of the fire prevention ticket statutes on the question of civil liability, the court infers that the Legislature knew about the civil cause of action established by § 2608(b), and chose not to disturb it.

The question that remains is whether the Town of Newbury is a "person injured" within the meaning of § 2608(b), and whether its fire suppression response costs are the type of "damages resulting from a violation" covered by the statute. The Small Claims Court Judge did not reach these questions, but they are appropriate for resolution here because they are purely legal in nature.

The first question is easily answered because the term "person," when used in a statute, normally includes municipalities, towns, and fire districts. 1 V.S.A. §§ 126, 128. It makes sense that a town may be a "person" for purposes of civil liability for unpermitted burns; it may suffer damages just as easily as another individual or property owner.

The second question is somewhat more complex. Fire suppression response costs are not classic damages in the sense of property loss (such as the value of adjacent woodlands destroyed by fire). Instead, the Town's claim amounts to a request for restitution: to return the Town to the position it occupied before Mr. Flaherty's unpermitted burn. *State v. Irving Oil Corp.*, 2008 VT 42, ¶¶ 9-11, 183 Vt. 393-395.

However, there is nothing in the plain language of § 2608(b) that forecloses recovery of damages representing the costs of response. The statute establishes a cause of action to recover "all damages resulting from a violation" of the burn permit statute. *Id.* Such inclusive language does not warrant the interpretation that some damages should be awarded, and others not: it says that "all damages" may be recovered.

It also makes sense that fire suppression response costs should be recoverable under the circumstances presented here. If they were not, the effect would be to externalize the costs of responding to unpermitted burns, and to pass on the costs of wrongdoing to taxpayers, while shielding the wrongdoer from individual liability. There is nothing in the

text of § 2608(b) or in the public policy of lessening the risks of forest fires that requires such a result.

Finally, the court has considered whether the judgment of the Small Claims Court can be affirmed under the "municipal cost recovery rule" or the "free public services doctrine." Both are judicially-created rules that bar governmental entities from recovering the costs of public services occasioned by a private tortfeasor's wrongdoing. See, e.g., *Portsmouth v. Campanella & Cardi Constr. Co.*, 123 A.2d 827 (N.H. 1956) (holding that fire department could not recover costs of responding to unpermitted burn where firefighters were paid city employees); see also Timothy D. Lytton, *Should Government Be Allowed to Recover the Costs of Public Services from Tortfeasors?: Tort Subsidies, the Limits of Loss Spreading, and the Free Public Services Doctrine*, 76 Tul. L. Rev. 727 (2002) (discussing both doctrines and their relation to fire suppression response costs). However, this court's research has not uncovered any Vermont cases adopting such a rule, nor any indication that the doctrine should apply when there is a statute specifically authorizing recovery of civil damages for violations of a burn permit statute.

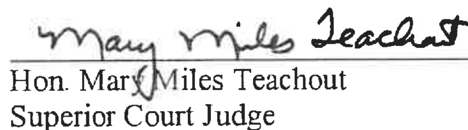
For these reasons, the court concludes that the judgment of the Small Claims Court should be reversed, and judgment should instead be entered in favor of plaintiff Town of Newbury. The evidence presented at the hearing supports the Judge's finding that the Town's response costs amounted to $1,379.98.

ORDER

The decision of the Small Claims Court dated August 7, 2008, is *reversed*, and Judgment is entered in favor of plaintiff Town of Newbury in the amount of $1,379.98.

The oral argument scheduled for April 13, 2009 is cancelled.

Dated at Chelsea, Vermont this 8th day of April, 2009.



Hon. Mary Miles Teachout
Superior Court Judge