



A FINANCIAL BOOST FOR ENVIRONMENTAL STEWARDS

Statute allows private parties filing suits to collect attorneys' fees

By **DIANE W. WHITNEY**

Tucked into Conn. Gen. Stat. § 22a-18, an odd little statute entitled “Powers of Court,” is section (e), which states in its entirety:

“The Court may award any person, partnership, corporation, association, organization or other legal entity which maintains an action under section 22a-16 or intervenes as a party in an action for judicial review under section 22a-19, and obtains declaratory or equitable relief against the defendant, its costs, including reasonable costs for witnesses, and a reasonable attorney’s fee.”

This article is an examination of when this statute has been invoked and under what circumstances funding has been awarded pursuant to it – a brief but informative history.

Conn. Gen. Stat. § 22a-16 is broadly worded, to permit just about anyone to bring an action against just about anyone “for the protection of the public trust in the air, water, and other natural resources of the state, from unreasonable pollution, impairment or destruction.” The only exception has to do with urban sites acquired by the state for remediation under Conn. Gen. Stat. § 22a-133m.

Conn. Gen. Stat. § 22a-19 includes intervention in administrative, licensing or judicial proceedings or the judicial review of such proceedings by one filing a verified pleading that alleges unreasonable pollution. Both statutes are the sort referred to as “private attorney general” actions, empowering private citizens and businesses,

along with public entities, to pursue those causing pollution in Connecticut.

Conn. Gen. Stat. § 22a-18(e) gives such private attorneys general a right to attorneys’ fees for bringing such an action. Notably, one bringing such an action does not need to prove that his own land was contaminated; he only need prove that any natural resource of the state was contaminated. *50 Day Street Associates v. Norwalk Housing Authority*, 2005 WL 1394772 (“Day Street I.” Note that virtually all decisions interpreting Conn. Gen. Stat. 22a-18(e) are unpublished, but all are available through Westlaw.) In *Day Street I*, Judge Taggart Adams explains that though the plaintiff did not prove that contamination on its property was caused by the defendant, it did prove that the defendant caused contamination elsewhere which would not have been addressed but for claims brought by the plaintiff. Due to that achievement and because the court issued an injunction to Norwalk Housing Authority to remediate the pollution it had caused, the plaintiff was entitled to reimbursement of fees and costs.

In general, to receive reimbursement for fees and costs, the plaintiff must bring an action under Conn. Gen. Stat. § 22a-16 or 22a-19, must be one of the entities listed in 22a-18(e) (“person, partnership, corporation, association, organization, or other legal entity”), must prove that the defendant caused unreasonable pollution of the natural resources of the state, and must obtain declaratory or equitable relief. There are only a few decisions that interpret the statute, but they contain a fairly complete anal-



ysis of what is required to recover costs.

Reimbursement Criteria

Clearly, at the most basic level, no award of fees or costs will be made if neither declaratory nor equitable relief is obtained. *Coco v. Town of Wethersfield*, 1995 WL 684819 (Conn. Super.) Also, the language in 22a-18(e) does not mirror the language in 22a-16 and 22a-19. 22a-18(e) omits “the Attorney General, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof,” so on that basis, Judge Samuel Sferrazza ruled that DEP could not be awarded fees and costs even though successful in its case regarding clear cutting of trees at Goodspeed Airport. *Rocque v. Mellon*, 2007 WL 1297236 (Conn. Super.) Even though DEP “indisputably prevailed,” the statute did not authorize an award of fees and costs for a state agency. The court found that logical because bringing claims like those brought

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in that case is the job of DEP and the attorney general's office; no incentive is needed to encourage them to bring such cases.

Several other decisions reinforce the concept that the goal of 22a-18(e)'s reimbursement scheme is to encourage people to bring actions to protect Connecticut's environment. Judge Sferrazza made that point when denying fees and costs to DEP in *Rocque*, and also in *Ventres v. Goodspeed Airport*, 2007 WL 1299252 (Conn. Super.), which comes from the same facts as *Rocque*.

In *Ventres*, cross-claimants the East Haddam Land Trust and the Nature Conservancy sought attorneys' fees. Judge Sferrazza found that the CEPA claim was decided in their favor but that the attorney general's office did most of the work. Also relevant to the decision on fees was that the cross-claimants did not succeed on several of their claims, such as a CUTPA claim and their claim for replacement value of the felled trees, and a significant amount of legal time was spent on unsuccessful claims. Fees for work on the unsuccessful issues and for paralegals were omitted, and the court awarded reduced fees based on these factors.

Once the court determines that the entity requesting fees is an appropriate applicant that succeeded in obtaining equitable or declaratory relief, the next question is how the court determines what expenses are reasonable. The first good analysis of this is in *50 Day Street Associates Limited v. Norwalk Housing Authority*, 2006 WL 1893836 (Conn. Super.) ("Day Street II"). In this action, the plaintiff proved that a

leaking underground storage tank owned by the housing authority had contaminated land owned by the housing authority, but not land owned by the plaintiff. Judge Adams found that the plaintiff proved damage to natural resources of the state, thus satisfying the goal of the statute, which is to encourage private litigants to bring litigation for the good of the public.

In analyzing the fee request, Judge Adams said that the court retains discretion making a fee determination and the fees must be reasonable. The court looked to *Johnson v. Georgia Highway Express Inc.*, 488 F.2d 714 (5th Cir. 1974) as interpreted by *Steiger v. J.S. Builders, Inc.*, 39 Conn. App. 32 (1995) for guidance. *Johnson* set out 12 factors to be considered: (1) time and labor involved, (2) novelty and difficulty of the questions, (3) skill required to perform the legal work properly, (4) preclusion of other work by the attorney in order to do this work, (5) customary fee for similar work in the community, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or circumstances, (8) amount involved and results obtained, (9) experience, reputation and ability of the attorneys, (10) "undesirability" of the case, (11) nature and length of the professional relationship with the client, and (12) awards in similar cases

Reasonable Fees

In defending its request for fees, the plaintiff cited *Simms v. Chaison*, 277 Conn. 319 (2006). In that case only nominal damages were awarded for hostile actions by a

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neighbor against a new mixed-race family, but an award of significant attorneys' fees was made and sustained on appeal. The *Simms* decision held that an award of attorneys' fees is necessary to support the goal of the statute and the amount of the award for fees is not dictated by the amount of damages won in the case. The court also mentioned in passing Rule 1.5(a) of the Rules of Professional Conduct, which calls for reasonable fees and includes factors for determining reasonableness similar to those in *Johnson*.

Judge Adams found that the contamination in Day Street II would not have been discovered if not for this litigation, the rates charged were reasonable and the quality of the work was good, particularly for such technical subject matter. Noting that much of the attorneys' work was spent on issues on which they did not prevail, the court reduced the amount requested, but awarded more than it technically felt was required to prove the 22a-16 claim because the plaintiffs' efforts "vindicated an important goal of maintaining environmental quality..."

Though there are only a handful of decisions interpreting Conn. Gen. Stat. § 22a-18(e), the analysis of the factors to be considered by the court in making an award of costs and fees authorized by that statute is fairly well developed in the few cases brought in the last three years. At this time, however, they are all at the Superior Court level. ■