

**Zohlmann Law Offices
P.O. Box 1833
Tombstone, AZ 85638
Telephone: 520-232-2161
E-mail: tombstonejustice@cis-broadband.com**

Robert J. Zohlmann, State Bar No. 019378
Attorney for Appellant

**IN THE ARIZONA COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO**

STATE OF ARIZONA	}	2 CA-CR 2010-0052
Appellee.		
vs.	}	Department A
JAMES CHALES RAY aka JACE RAY		PETITION FOR REVIEW
Appellant.	}	

¶1 **COMES NOW** the Appellant, JAMES CHARLES RAY, by and through the undersigned counsel, and he petitions for review of this Court's Decision dated December 14, 2010 as follows;

ISSUE PRESENTED:

WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT A.R.S. § 13-1709 AUTHORIZED THE CRIMINAL TRIAL COURT TO ORDER MR. RAY TO PAY \$308,506.19 IN FIRE SUPPRESSION COSTS AS PART OF

HIS SENTENCE FOLLOWING CONVICTION ON TWO MISDEMEANOR RECKLESS FIRE CHARGES?

ISSUE PRESENTED TO, BUT NOT DECIDED BY, THE COURT OF APPEALS:

WHETHER THE TRIAL COURT'S ORDER DIRECTING MR. RAY TO PAY \$308,506.19 IN RESTITUTION FOR FIRE SUPPRESSION COSTS AS PART OF HIS SENTENCE FOLLOWING CONVICTION ON TWO MISDEMEANOR RECKLESS FIRE CHARGES WAS AN UNLAWFUL SENTENCE OF RESTITUTION?

WHETHER THE TRIAL COURT'S ORDER DIRECTING MR. RAY TO PAY \$308,506.19 IN RESTITUTION FOR FIRE SUPPRESSION COSTS AS PART OF HIS SENTENCE FOLLOWING CONVICTION ON TWO MISDEMEANOR RECKLESS FIRE CHARGES WAS AN UNLAWFUL FINE?

¶2 Since the Court of Appeals held that the trial court assessment was authorized by A.R.S. § 13-1709, it did not address these issues.

¶3 Because the subject statute is ambiguous, because it is still in effect, because the Court of Appeals published an opinion which may in the future be relied upon to impose substantial monetary burdens upon persons without the benefit of jury trial or due process and because this is a case of first impression, this Court is urged to review the Court of Appeals decision.

FACTS:

¶4 The facts pertinent to this Court's consideration of the Appellant's Petition for Review are as follows;

¶5 Mr. Ray started a fire on his property. The purpose of the fire was to burn brush he collected from his property. The fire rapidly went out of control, with the result that the fire spread and firefighters were called upon to suppress the fire. He was subsequently charged with two misdemeanor reckless fire charges, convicted and sentenced. His sentence included a provision that he reimburse various government agencies for monies expended in fighting the fire. The amount assessed by the trial court was \$308,506.19.

¶6 On October 28, 2009, after a two-day bench trial held in Cochise County Superior Court, the Honorable Donna Beumler found Mr. Ray guilty of the two class one misdemeanor charges contained in a January 29, 2009 indictment. ROA, Transcript, Day Two, p. 182.

¶7 Mr. Ray testified in his own defense. ROA, Transcript, Bench Trial, Day Two, pp. 76-162. He testified that on February 7, 2008 he stopped at Bisbee Fire Department to secure a burning permit. *Id.* at

81. Two firemen inspected the area where he intended to burn in a cement pit. *Id.* at 81. He had a rake, shovel, hose and upon advice of the firemen, he filled a five-gallon bucket with water. *Id.* at 83. He told the firemen he wasn't going to use the permit on that day and they said that was okay. *Id.* A permit was issued, which permit was offered into evidence at trial as State's Exhibit 63. On the face of the permit, it appeared to not be limited to any particular date.

¶8 On March 20, 2008, Mr. Ray decided to conduct his burning. ROA, Transcript, Bench Trial, Day Two, p. 85 *et. seq.* He testified that he did not recall gusts of wind at the time he lit the fire. *Id.* at 95. About 15 minutes into the burn, the heat of the fire caused a nearby bush to "burst into flame." *Id.* at p. 97. Mr. Ray attempted to extinguish the blaze, injuring himself in the process, but the fire went out of control. *Id.*

¶9 Although the indictment alleged A.R.S. §13-1709 in a "string-cite" and the State filed and served Mr. Ray's criminal defense counsel with the *State's Notice of Intent Pursuant to A.R.S. §13-1709*, ROA 14, Mr. Ray was never served with a Summons or Complaint alleging his civil liability pursuant to A.R.S. §13-1709. Subsequent to

the finding of guilt, however, a “restitution” hearing was held before Judge Beumler. There was no jury. The purpose of the hearing ostensibly was to determine a “restitution” amount pursuant to A.R.S. §13-804 and A.R.S. §13-1709. ROA, Transcript, Judgment and Sentence.

¶10 At the hearing, the testimony offered and relied upon by the Court came from various government witnesses who testified that firefighting (suppression) costs incidental to the fire were \$53,485.38 incurred by U.S. Forest Service¹(USF), \$51,521.19 incurred by the Bureau of Land Management (BLM) and \$237,762.81 incurred by Arizona Fire Suppression Fund (AFSF), for a total cost of \$342,769.40. No evidence was adduced that any person or entity suffered direct loss; such as for buildings, vehicles, medical care or the like.

¶11 Upon cross-examination, Mr. Warfield acknowledged that each year the State budgets monies to fight wildfires and that the governor appoints a special fund for that purpose². During his cross-examination testimony, Mr. Warfield said that the various fire-

¹ Although the trial court referred to this entity as U.S. Forestry, it is understood and conceded that it was the U.S. Forest Service.

² Arizona Fire Suppression Fund.

fighting units would respond based upon what the incident commander is requesting on the incident. ROA, Transcript, Judgment and Sentence, p. 11, l. 11.

¶12 Mr. Warfield also testified as to some positive effects of the Moon Canyon fire. For instance, the fire got rid of problem brush which [fire managers] were worried created a very high risk of fire in the home ignition zone existing in Bisbee prior to the fire. *Id.* at p. 20. There was no testimony at the hearing as to the amount of money it would have taken, had this fire not occurred, to have cleared safety zones in and around the area of the fire.

¶13 After hearing extensive evidence on the matter, Judge Beumler specifically found as a matter of law that she was authorized by A.R.S. §13-804 and A.R.S. §13-1709 to “require [Mr. Ray] to reimburse the appropriate people for the costs associated with [your] criminal recklessness.” ROA, Transcript, Judgment and Sentence, p. 75. She then added up the claims from the various fire-fighting agencies, cut it by ten (10%) and ordered “restitution,” pursuant to A.R.S. §§13-804 and 13-1709, in the amounts of \$46,369.19 for BLM, \$214,000.00 for AFSF and \$48,137.00 for USF. ROA 41.

¶14 The criminal trial court made no factual findings in support of its decision and did not find whether or not there was an “appropriate” emergency response or investigation or whether the Bureau of Land Management (BLM) or U.S. Forest Service (USF) were “public agencies” within the meaning of A.R.S. §13-1709(E)(2). Also, there was no finding that there was an “economic loss” by a statutory “victim.” ROA, Transcript, Judgment and Sentence, p. 75 *et. seq.* The Court made no finding of a direct causal connection between the criminal act and the fire suppression expenditures. *Id.*

¶15 The Court assessed and ordered Mr. Ray to pay, as a condition of his misdemeanor probation,

“...*restitution* based on **A.R.S. §§ 13-804 AND 13-1709** in The amount of \$46,369.19 in favor of Bureau of Land Management, \$214,000.00 in favor of the Arizona State Fire Suppression Fund, and \$48,137.00 in favor of U.S. Forestry...” ROA 41. [emphasis supplied].

¶16 Mr. Ray appealed from that portion of his sentence ordering him to pay the total of \$308,506.19. Mr. Ray argued that A.R.S. § 13-1709 provided for civil liability and that the statutory assessment by the criminal trial judge was an unlawful sentence. He also argued, in the alternative, that the assessment was an improper imposition of

restitution or an illegal fine. Predictably, the State argued against Mr. Ray's positions. In its Answering Brief, however, the State neither cited to nor argued the legislative history of the statute.

¶17 Despite the fact that neither the State nor the Appellant raised or argued the legislative history of the subject statute, in rendering its opinion the Court of Appeals relied entirely upon its assessment of the legislative history of A.R.S. § 13-1709. Specifically, the Court of Appeals gave no weight to the statute's section heading and it relied heavily upon a Final Amended Fact Sheet prepared by the Senate staff. *See*, Court of Appeals decision, page 6, paragraph 10.

¶18 By its December 14, 2010 decision, the Court of Appeals held that the criminal trial judge had the authority, pursuant to A.R.S. § 13-1709, to impose the monetary assessment. It is this decision for which Mr. Ray seeks Supreme Court review.

DISCUSSION

¶19 The issue before this Court is whether the Court of Appeals erred as a matter of law in affirming the trial court's application of A.R.S. § 13-1709 in assessing fire suppression costs. Mr. Ray argues that the Court of Appeals did err, and

that it did so by not giving sufficient weight to earlier cases on statutory interpretation and by not giving proper consideration to the legislative history of the statute.

¶20 A.R.S. § 13-1709 provides;

“13-1709. Emergency response and investigation costs; *civil liability*; definitions.

A. A person who commits an act in violation of this chapter that results in an appropriate emergency response or investigation and who is convicted of the violation may be liable for the expenses that are incurred incident to the emergency response and the investigation of the commission of the offense.

B. The court may assess and collect the expenses prescribed in subsection A. The court shall state the amount of these expenses as a separate item in any final judgment, order or decree.

C. The expenses are a debt of the person. The public agency, for profit entity or nonprofit entity that incurred the expenses may collect the debt proportionally. The liability that is imposed under this section is in addition to and not in limitation of any other liability that may be imposed. If a person is subject to liability under this section and is married, only the separate property of the person is subject to liability.

D. There shall be no duty under a policy of liability insurance to defend or indemnify any person found liable for any expenses under this section.

E. For the purposes of this section:

1. "Expenses" means reasonable costs that are directly incurred by a public agency, for profit entity or nonprofit entity that makes an appropriate emergency response to an incident or an investigation of the commission of the offense, including the costs of providing police, fire fighting, rescue and emergency medical services at the scene of the incident and the salaries of the persons who respond to the incident but excluding charges assessed by an ambulance service that is regulated pursuant to title 36, chapter 21.1, article 2.

2. "Public agency" means this state, any city, county, municipal corporation or district, any Arizona federally recognized native American tribe or any other public authority that is located in whole or in part in this state and that provides police, fire fighting, medical or other emergency services.”

Emphasis supplied.

¶21 While Mr. Ray acknowledges that the heading is not part of the law, it is firmly established that statutory titles provide guidance in interpreting statutes. *See, Pleak v. Entrada Prop. Owners' Ass'n*, 205 Ariz. 471, 474, 73 P.3d 602, 605 (App. 2003) *citing, Florez v. Sargeant*, 185 Ariz. 521, 917 P. 2d 250 (1996). In this case, and as noted by the Court of Appeals, the statute itself is silent on what procedure, criminal or civil, may be utilized to impose liability on a defendant for fire suppression costs. It is significant, however, that

the statute heading clearly provides for “civil liability” when a defendant is found guilty of an arson-type crime. Mr. Ray submits that it was the intent of the legislature to create a civil cause of action for the recovery of fire suppression costs where, as here, one is convicted of an arson-type offense.

¶22 In its analysis of this case the Court of Appeals essentially ignored the title of the statutory section. The Court proceeded directly to an analysis based upon parts of the legislative history of the statute. Neither party had raised or argued the legislative history in its brief. That analysis originated with the appellate court.

¶23 Two portions of the legislative history were given weight by the court. The first was an amendment by the Senate Judiciary Committee, *see*, Court of Appeals Decision, Page 6, Paragraph 10, and the second was a document entitled “Final Amended Fact Sheet.” *Id.*

¶24 As to the first part, the amendment, a review of the report of the Senate Judiciary Committee is instructive. It is true that, on February 11, 2004, the amendments referred to by the Court of Appeals were made. The amendments did *not* specifically authorize the criminal

trial court to impose the fire suppression expenses at the time of sentencing.

¶25 That the amendments did not indicate such intent is implicit in the document creating the amendments. *See*, S.B. 1242, Senate Amendments, Comm. On Judiciary, 46th Leg., 2d Reg. Sess. (Feb. 11, 2004). In addition to the amendments cited by the Court of Appeals, the amendment specifically called for “Amend title to conform.” No such amendment was made.

¶26 After passage by the Senate, the bill went on to the House of Representatives for its consideration. The “Current Status” reference in the house third-read made no mention of an intent to amend the statute to permit imposition of fire suppression costs “at the time of sentencing” of a criminal defendant and did not remove the phrase “civil liability” from the bill’s heading. *See, See*, S.B. 1242, Third Read, House of Representatives, 46th Leg., 2d Reg. Sess. (March 25, 2004). The same is true for the report of the House Committee on the Judiciary, *see*, S.B. 1242, Comm. On Judiciary, 46th Leg., 2d Reg. Sess. (March 18, 2004), the bill passed by the House of Representatives, *see*, S.B. 1242, As Passed in the House, , 46th Leg.,

2d Reg. Sess. (March 29, 2004), the legislation transmitted to the governor, *see*, S.B. 1242, House of Representatives, As Transmitted to the Governor, , 46th Leg., 2d Reg. Sess. (Apr. 20, 2004), and the bill as engrossed in the house. *See*, S.B. 1242, House Engrossed Senate Bill, ,46th Leg., 2d Reg. Sess.

¶27 The legislation then was transmitted to the governor on April 12, 2004 and signed into law on April 16, 2004. *See*, S.B. 1242, Bill Status Overvie, 46th Leg., 2d Reg. Sess. The “Final Amended Fact Sheet,” relied upon by the Court of Appeals in its determination of legislative intent, was not prepared until nearly a month *after* the bill was signed by the governor. *See*, SB1242, Final Amended Fact Sheet, 46th Leg., 2d Reg. Sess. (May 6, 2004).

The subject legislation simply did not provide for assessment of expenses by a criminal court at the time of sentencing.

CONCLUSION

¶28 It is respectfully submitted that the Court of Appeals erred as a matter of law in affirming Judge Beumler’s assessment of expenses against Mr. Ray as a part of the sentence in his criminal case. A.R.S.

§ 13-1709 clearly states, in its heading, that it created “civil liability.” Although the word “civilly” was removed from the statute by the Senate Judiciary Committee, there was no adjustment to the heading or title of the legislation. There is no way a defendant was to know that he may be subject to repayment of substantial hundreds of thousands of dollars in expenses as a part of his misdemeanor sentence. Although the Final Amended Fact Sheet prepared by Senate Staff indicated that the bill provided for assessment of expenses at the time of sentencing, that document was prepared by staff *after* the bill was signed by the governor and cannot be fairly said to be relevant on the issue of legislative intent. There is no reference to assessment of such expenses at the time of sentencing in the House of Representatives records or in the bill which was transmitted to the governor for execution.

¶29 It cannot be fairly said that it is “clear” that the legislature intended to provide for assessment of fire suppression costs against a defendant in a criminal case. Indeed, the legislative intent clearly seems to be that *civil liability* may lie when a defendant is convicted of an arson-related crime.

¶30 This Court is urged to reverse the Court of Appeals and trial court and order that the sentencing assessment against Mr. Ray of \$308,506.19 constituted an illegal sentence and must be vacated.

RESPECTFULLY SUBMITTED this _13th day of January, 2011.

//S.//
Robert J. Zohlmann
Attorney for Defendant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 31.13, Arizona Rules of Criminal Procedure, undersigned counsel hereby certifies that Appellant's Opening Brief is double-spaced in part and single-spaced in part, and, using 14-point proportional typeface, contains 2932 words.

//S.//
Robert J. Zohlmann

CERTIFICATE OF SERVICE

¶1 COMES NOW Robert J. Zohlmann and hereby certifies that he is attorney for Appellant JAMES CHARLES RAY 2 CA-CR 2010-0052, and that he caused to be delivered the following:

PETITION FOR REVIEW

Via E-filing on the 13th day of January, 2011:

Clerk of the Court
Arizona Court of Appeals – Division Two
400 West Congress
Tucson, Arizona 85701

Via U.S. Postal Service, on the 13th day of January, 2011 one copy to:

Kent Cattani, Esq.
Chief Counsel, Criminal Appeals Section
Arizona Attorney General’s Office
1275 West Washington
Phoenix, AZ 85007
ATTORNEY FOR THE APPELLEE

//S.//

ROBERT J. ZOHLMANN
ATTORNEY FOR APPELLANT