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Jun 18 2026
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Circuit Court Judge

Case No. 20-CP-22-00930
Case No. 20-CP-22-00931
Case No. 20-CP-22-00932
Appellate Case No. 2023-001272

Sunset Lodge, LLC,Appellant,

v.

Town of Pawleys Island,Respondent,
and

Franklin D. Beattie, as trustee of the Franklin D. Beattie
Preservation Trust,Appellant,

v.

Town of Pawleys Island,Respondent,
and

M. Baron Stanton,Appellant,

v.

Town of Pawleys Island,Respondent.

RESPONDENT'S PETITION FOR REHEARING

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Respondent Town of Pawleys Island (“Town”), pursuant to Rule 221(a), SCACR, respectfully submit this Petition for Rehearing. Rehearing is appropriate here because this Court’s decision overlooks and/or misapprehends multiple points of fact and law, proper consideration of which would have led to affirming the circuit court’s fee award. See Rule 221(a), SCACR.

ARGUMENT

1. The Court’s Statement that the Easements Are “Extremely Overbroad” Is Not Supported by the Record and Is Outside the Scope of Review

In modifying the attorney fee award, the Court makes a statement critical of the scope of the easements the Town sought to acquire. Specifically, page 7 of the order states that “the Town refused to rule out pursuit of the challenged – *and extremely overbroad* – easements.” (emphasis added). The Town respectfully contends that this statement that the easements are “extremely overbroad” is mistaken and is not supported by the record. The Town requests that, even if the Court declines to change its holding on the amount of the fee award, the opinion be modified to remove the statement. The Town still needs to acquire the easements in order to secure long-term federal funding for beach renourishment and other shore protection (as discussed below, the easement language sought to be condemned is in fact specifically required by the Army Corps). The former Town Administrator estimated that, if these three easements are acquired, the portion of future construction costs that would be the responsibility of the Army Corps, to the benefit of the Town and the public it serves, would be nearly \$65,000,000 (“Challenge 1” R. p.672).¹ Federal funding would also cover post-hurricane restoration to protect the nearly \$15,000,000 investment

¹ To the extent that the Court’s statement that the easements are “extremely overbroad” may possibly be based on consideration of the Challenge 1 (Appellate Case No. 2022-000291) summary judgment order and record on appeal, the Town has no option but to refer to the Challenge 1 record. The Town contends, however, that the review here should instead be limited to the record in this Challenge 2 appeal, and that the record on appeal here certainly does not include anything supporting a statement that the easements are overly broad.

that the Town already made to renourish the beach (“Challenge 1” R. p.672-673).

Appellants will inevitably attempt to use the mistaken language in the Court’s opinion to further object to the Town’s future efforts to take necessary steps to secure this federal funding to protect the Pawleys Island shoreline for the public. The Town urges the Court to grant rehearing to avoid this unintended consequence of its fee review. The Court determined that, in order to review the reasonableness of Appellants’ attorney time, further consideration should be given to how Appellants’ concerns over the scope of the easements influenced the time spent on this litigation. The circuit court never determined or even considered on the merits any issue regarding the scope of the easements, and the litigation never proceeded past early abandonment of the condemnation notices and dismissal of the Challenge 2 actions as moot.² A statement about this issue, sua sponte, is outside the scope of review for this appeal. However, to the extent that it is relevant to consideration in the fee review, all that is needed is to note that Appellants asserted the theory and had the right to devote the reasonably necessary time to litigate their claims.

As a prerequisite to federal funding of beach renourishment and other shore protection work, the Army Corps of Engineers requires these easements and the specific easement language included in the condemnation notices (excluding the footnote language appearing on R. p.269, fn.1, which does not seem to be the source of the Court’s statement about the scope of the easement). The central factual premise underlying all of this litigation is that the Army Corps requires this easement language in order to move forward with a long-term shore protection project

² The fact that the cases were dismissed before discovery should not be held against the Town in the fee review. The dismissal was upheld as proper by the Court of Appeals, which ruled in rejecting Appellants’ separate appeal that (1) the Town properly abandoned the notices, (2) the challenge actions to those notices were therefore moot (capable of repetition, but not evading review), and (3) Appellants’ claims for prospective relief regarding future attempts were not ripe for judicial review. See Appellate Case No. 2021-000757, Unpublished Op. No. 2023-UP-055 (filed February 8, 2023).

with the Town, and that the Appellants do not want to sign off on easements with the language required by the Corps. In plain terms, the Town would have absolutely no reason to go to all this trouble if the Corps did not specifically require it.

Among other things, the Army Corps specifically requires this language regarding “the right of public use and access.” Federal law provides that funds for beach renourishment activities may not be used on private portions of the shoreline. Specifically, the Water Resources Development Act of 1986 requires that “[c]osts of constructing projects or measures for beach erosion control . . . shall be assigned to appropriate project purposes . . . except that all costs assigned to benefits to privately owned shores (where use of such shores is limited to private interests) or to prevention of losses of private lands shall be borne by non-Federal interests[.]” 33 U.S.C.S. § 2213(d)(1). See also § 2213(d)(2)(B) (regarding periodic renourishment funding).

Under these statutes, “the Army Corps has interpreted its responsibility to include requiring public access and use of Project areas funded by federal monies.” State v. N. Beach 1003, Ltd. Liab. Co., 166 A.3d 239, 256 (N.J. App. 2017). While the question of the specific requirements of the Army Corps was not addressed in the circuit court fee proceedings or raised as an issue on appeal, and the record was therefore not developed on this issue, reported opinions from other states recite essentially identical language in easements required for Army Corps renourishment projects. See, e.g., N. Beach 1003 at 256; Freudenberger v. Cty. of Suffolk, 2021 N.Y. Misc. LEXIS 77464, at *6 (N.Y. Sup. Ct. Apr. 5, 2021). This is standard *Perpetual Beach Storm Damage Reduction Easement* “estate” language that the Corps requires for all renourishment projects.

These federal requirements give rise to a determination of necessity under South Carolina law. “A condemnor may comply with any federal statute, regulation, or policy prescribing a condition precedent to the availability or payment of federal financial assistance for any program

or project for which the condemnor is authorized to exercise the power of eminent domain.” S.C. Code Ann. § 28-2-50. A determination of necessity is a legislative question and presumed valid. Timmons v. S.C. Tricentennial Comm'n, 254 S.C. 378, 396, 175 S.E.2d 805, 814 (1970).

The purpose of pursuing the easements was and is to become eligible for long-term federal assistance. With regard to the easements as sought in the Challenge 1 cases, the affidavit of former Town Administrator Ryan Fabbri states that “the easement sought and the proposed easement grant document are a requirement by the Corps The scope of the easement, pursuant to the requirements that were established by the Corps, is what has been determined to be necessary to achieve the public purpose of a 50-year beach renourishment undertaking.” (“Challenge 1” R. p.613). If there was evidence to the contrary and it was relevant to the fee award, the burden of proof was on the Appellants as the parties requesting fees to present it in the record.

With regard to the specific issue of the scope of the easements, also not addressed by the circuit court or raised as an issue on appeal, some element of public use is always part of a proper exercise of eminent domain. Karesh v. City Council of Charleston, 271 S.C. 339, 342, 247 S.E.2d 342, 344 (1978). While the right of individual members of the public to literally, physically use property is not always part of a condemnation (as, for example, in the case of a sewer line easement), it very often is (as in the case of a road right-of-way, a public park, or a multi-use path). Inclusion of a public right to use and access does not render a condemnation overly broad, and condemning authorities instead have significant discretion to determine the scope and nature of property interests condemned. Eldridge v. City of Greenwood, 331 S.C. 398, 425, 503 S.E.2d 191, 205 (Ct. App. 1998). While the scope of a given easement can certainly increase the impact on the market value of the property, that is an entirely separate issue that must be determined not as the basis for a challenge, but instead in the just compensation phase of the condemnation proceedings,

and compensation paid accordingly.

Again, this “overly broad” issue was not considered or determined by the circuit and, because the cases were dismissed as moot as affirmed by the Court of Appeals, the parties did not complete litigation of this issue on the merits. It would be one thing for the Court to state that the Appellants’ *concerns* about the scope of the easements justified increased attorney time in the challenge litigation. It is a very different thing to state that the scope of the easements was “extremely overbroad” when that question was not reached by the circuit court and was not an issue on appeal before this Court.

2. Rehearing Should be Granted for Reconsideration of Modifications to the Fee Award.

a. There was no error of law or abuse of discretion in the circuit court fee analysis.

The Town respectfully asserts that the circuit court committed no error of law or abuse of discretion. “The decision to award or deny attorneys' fees under a state statute will not be disturbed on appeal absent an abuse of discretion.” S.C. Dep't of Transp. v. Revels, 411 S.C. 1, 8, 766 S.E.2d 700, 703 (2014). “An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions.” Id. “Similarly, the specific amount of attorneys' fees awarded pursuant to a statute authorizing reasonable attorneys' fees is left to the discretion of the trial judge and will not be disturbed absent an abuse of discretion.” Id. As the S.C. Supreme Court has explained, “[d]ecisions as to the amount of attorneys' fees should ordinarily be made by trial courts. When a trial court's decision is made on a sound evidentiary basis and is adequately explained with specific findings—as the law requires—we defer to the trial court's discretion.” Horton v. Jasper Cnty. Sch. Dist., 423 S.C. 325, 331, 815 S.E.2d 442, 445 (2018). Where analysis of the six factors identified under Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997), is applied, “an award for attorney's fees will be affirmed so long as sufficient evidence in the record supports each factor.” Id. at 308, 486 S.E.2d at 760.

The Court modified the circuit court award by (1) awarding fees for 7.4 hours claimed in the days immediately subsequent to the abandonment of the condemnation notices and (2) increasing the hours for the fee petition from 8 hours to 15 hours. Respectfully, while the Town understands and appreciates that this does not result in a major increase in the award, it does still arise from an analysis that sets aside the properly exercised discretion of the circuit court in favor of a de novo factual review. The circuit court received conflicting evidence on these issues and had discretion to weigh it (see, e.g., R. p.734, ¶ 28-29), and the fee award order included appropriate findings of fact. Even if this Court disagrees with the circuit court's factual conclusion on these two issues, there is no deficiency in the order that justifies setting aside the required deference to the finder of fact or undertaking de novo factual review of what was reasonable. Appellants were given every possible opportunity to explain how and why attorney time had been spent, and had the burden to do so in a manner that persuaded the finder of fact. Sunrise Sav. & Loan Ass'n v. Mariner's Cay Dev. Corp., 295 S.C. 208, 211, 367 S.E.2d 696, 698 (1988).

Specifically with regard to the award of an additional 7.4 attorney hours following the filing of the notice of abandonment, the Court has misapprehended or overlooked what the record shows regarding this time. The abandonment was filed on February 10, 2021, and the 7.4 hours at issue were claimed for February 11, 12 and 15 and March 12, 2021. (R. p. 748). The opinion states that, “[i]n the affidavit supporting his fee petitions, Stanton indicated this time was devoted to discovery matters, the Town’s motions to dismiss, Landowner’s opposition to dismissal on the ground of mootness, and communications regarding the erroneous Form 4 order.” Initially, it is important to note that virtually all of this is chronologically impossible. There was no discovery to work on during this period (Appellants had previously served discovery requests and deposition notices, but nothing was happening during this period), almost all of this time was before the

motion to dismiss was even filed (except for the 0.9 hours claimed on March 12, 2021, about a week after the motion was filed), and the referenced Form 4 order was not even filed until nearly a year and a half later on July 12, 2022. (R. p.748; R. p.28).

Furthermore, the Landowner's affidavits do not in fact claim that the time was spent in this manner. The affidavits and other submission to the circuit court provide no explanation of how the time during this period time was spent (See R. p.644, ¶ 165 – p.645, ¶ 171; p.649, ¶190 – p.652, ¶ 194). Appellants offered no explanation of this time until making a claim in their Appellants' Brief that the time was spent "in reasonable followup to the putative 'abandonment'". (App. Brief p.34). The claim in that brief that a prior affidavit offered this explanation is patently incorrect, as the relevant explanatory language in the affidavits very clearly relates only to mileage for the motion to dismiss hearing and filing fees for the motion to reconsider dismissal. (See R. p.790, 3/8/23 Stanton Aff. ¶ 190 fn.3; R. p.890, 6/8/23 Stanton Aff. ¶ 190 fn.3). Appellants never provided the circuit court any basis to award this time, and the circuit court committed no abuse or discretion or error of law in declining to do so. Likewise, there is no basis in the record, and no legal basis, for the Court to modify the award by adding fees for this 7.4 hours.

b. The record does not support an increase in the fee award.

Even if the circuit court had committed some abuse of discretion, the Court's interpretation of the record does not support an increase in the fee award. The Town respectfully asserts that, as discussed above, the record does not provide any factual basis for award of the additional 7.4 hours of attorney time or any justification for an increase of the fee petition time from 8 hours to 15 hours. Horton, 423 S.C. at 331, 815 S.E.2d at 445 (fee award must be "adequately explained" by the factual findings).

c. Appellants are not entitled to fees or costs related to unsuccessful opposition to the motion to dismiss.

The Appellants are not entitled to recovery of fees and costs related to their unsuccessful opposition to the Town's motion to dismiss. As discussed above, the motion was granted and affirmed by the Court of Appeals. Even where statutory recovery of attorney fees is triggered, a party is not entitled to fees associated with motions on which it was not successful. Hardaway Concrete Co. v. Hall Contracting Corp., 374 S.C. 216, 232–33, 647 S.E.2d 488, 496 (Ct. App. 2007). Notably, the Appellants generally did not even attempt to claim fees related to opposition to the motion. (R. p.619, ¶ 62; p.649, fn.33). Furthermore, this work was performed after the abandonment, when the challenged condemnation notices were no longer in play, in an attempt by Appellants to continue litigating against the Town on some other, unspecified potential claims. (R. p. 373, 3/31/21 Mem. Opp. M. Dismiss, p.5-6). By the plain language of the eminent domain fee statute, this is clearly beyond the scope of recoverable fees based on an abandonment. S.C. Code Ann. § 28-2-510(C). The circuit court committed no abuse or discretion or error of law in declining to award fees or costs related to opposition to the affirmed dismissal, and the record does not support any modification of the award on this basis.

d. The Court's award of additional fees to pro se Appellant Stanton and calculation of a joint "combined" fee award is not supported by the record or any applicable law.

Because Stanton, as a pro se litigant, was never entitled to an award of attorney fees to begin with, the award should not be modified in a manner that awards him any additional fees. Appellant Stanton represented himself pro se in this matter. (R. p.299, Transcript p.4:21-22). Under South Carolina law, a pro se litigant who is an attorney is not entitled to receive attorney fees under a statute providing for recovery of fees "incurred". Calhoun v. Calhoun, 339 S.C. 96, 100, 529 S.E.2d 14, 17 (2000) ("A *pro se* litigant, whether an attorney or layperson, does not become liable for or

subject to fees charged by an attorney.”). Under the Eminent Domain Procedures Act, recoverable litigation expenses must be “necessarily incurred”. S.C. Code Ann. § 28-2-30(14). At the hearing on the fee petition in this matter, the Town argued that Calhoun precluded pro se Appellant Stanton from recovering litigation expenses. (R. p.327, Transcript p.32:14-33:8). Stanton conceded that while he (through his solo practice law firm) claims to have “sent” himself legal invoices, he had not actually paid himself back for those invoices. (R. p.310, Transcript p.15:21-17:14). Accordingly, as was raised by the Town as an alternate sustaining ground on appeal, this Court should deny Stanton’s request that his portion of the fee award of litigation expenses be increased.

Likewise, there is no factual or legal basis for the Court to treat Stanton’s 1/3 portion of the fees as part of a “combined” total fee award to the other two Appellants. These were three separate challenge actions, and each Appellant had its own separate fee claim. Awarding 100% of fees based on the calculated reasonable hours when only two of the three Appellants are entitled to recover fees means that the Town is being required to pay more than the reasonable fees actually incurred by those two parties. The Appellants were not jointly *obligated* to pay the full hourly fees to Stanton, and so it cannot be said that the full fee was jointly “incurred” as required for an award pursuant to S.C. Code Ann. § 28-2-510(C). See also § 28-2-30(14).

The Town is not aware of any legal authority requiring or even permitting a joint award of 100% of the divided fee in these circumstances. An award of 1/3 to both of the non-pro se Appellants is consistent with the reality of their agreement and the handling of “customary legal fees for similar services.” See Jackson at 308, 486 S.E.2d at 760. The circuit court certainly acted within its discretion in finding that any fee awarded should be based on a 1/3 division instead of a combined, joint award. (R. p.57). Accordingly, whatever is determined to be the increase in reasonable overall time and associated fees for the litigation should be divided into equal thirds,

and the increase in the fee award should be limited to 1/3 each to the Beattie and Sunset Lodge appellants.

e. No increase should have been made to the award because the circuit court did not have subject matter jurisdiction over Appellant's untimely fee petition.

Appellants' fee petition was not timely submitted and, therefore, the circuit court lacked subject matter jurisdiction and should have denied it outright. While Respondent did not appeal the circuit court award and has already satisfied it, the lack of jurisdiction should have barred any increase in the award on appeal. An appellate court has the power to affirm a lower court ruling based on alternate sustaining grounds appearing in the record. Rule 220(c), SCACR; l'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 417, 526 S.E.2d 716, 722 (2000). Additionally, defects in subject matter jurisdiction may not be waived and can be raised even if not preserved or be invoked *sua sponte*. In re Bluffton Town Council Election, 385 S.C. 632, 637, 686 S.E.2d 683, 686 (2009).³

The Rules of Civil Procedure in effect at the time of the fee petition provided that “[a] motion for costs, supported by an affidavit that the costs are correct and were necessarily incurred in the action, may be filed by the prevailing party within 10 days of the receipt of written notice of the entry of final judgment.” SCRCP 54(d) (subsequently amended). Where an attorney fee statute does not provide for a period of time for submission of a fee petition, the petition is only timely and within the subject matter jurisdiction of the Court if it is filed within the time specified for Rule 59(e) post-trial motions. Pitman v. Republic Leasing Co., 351 S.C. 429, 432, 570 S.E.2d 187, 189 (Ct. App. 2002) (citing Rule 59(e), SCRCP (subsequently amended)) (applying Frivolous Proceedings Sanctions Act fee provision). Fee requests are subject to the limitation that, pursuant to Rule 59, SCRCP, “a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed.” Id at 433, 570 S.E.2d at 190. The implausible alternative, as noted by the

³ Respondent did in fact raise this argument in its opposition to the fee petition. (R. p. 780).

Court in Pitman, would be that the trial court would retain, in perpetuity, unlimited jurisdiction to consider a fee petition, subject only to the defenses of laches and estoppel. Id. at 432, 570 S.E.2d at 189.

In this litigation, following the Town's abandonment of the subject condemnation notices, Judge Culbertson entered Orders of Dismissal confirming the abandonment on April 22, 2021, and subsequently denied Appellant's Motions to Reconsider on June 3, 2021. (R. p. 24, 6/3/21 Form 4). Appellants filed a Notice of Appeal of those orders on July 2, 2021, (R. [Appx.], 7/2/21 N. Appeal), thereby necessarily taking the position that the orders were final, but they did not file their fee petition until more than a year later on October 21, 2022. The circuit court did not have subject matter jurisdiction over this late filed petition. Extension of time for post-trial motions generally cannot be granted by the circuit court, and even if a fee petition were arguably eligible for post-expiration extensions the Appellants cannot show any "good cause" for such an extension in this matter. Rule 6(b), SCRCR. To the extent that the circuit court still retained jurisdiction over other post-dismissal clerical motions, it was based on the status of those motions as "matters not affected by the appeal." Rule 241(a), SCACR.

It is true that the Court of Appeals has held that a trial court may retain jurisdiction over fees through an order that "specifically invite[s] future proceedings on the issue of fees." Brawley v. Richland Cty., 445 S.C. 80, 101, 911 S.E.2d 156, 167 (Ct. App. 2024). However, Brawley is distinguishable because, in that case, the circuit court's merits order "addressed attorney's fees by ruling that Brawley was entitled to fees but leaving the amount of fees open." Id. at 89, 911 S.E.2d at 161. In other words, the circuit court had already determined that the fee claimant was *entitled* to an award of fees, and simply retained jurisdiction over proceedings to determine the *amount*. Here, by contrast, the circuit court's order of dismissal merely states that each Appellant "may

assert any claim it may have herein to reasonable attorney fees, litigation expenses, and costs[.]” (R. p.20). The court did not actually rule that Appellants were entitled to fees until the fee award order was issued many months later. The Town asserts that the jurisdictional question in this matter is therefore distinguishable from the holding in Brawley.

Because Appellants’ untimely fee petition did not give rise to subject matter jurisdiction in the circuit court or any other court, the award of fees and costs should not have been increased on appeal.

CONCLUSION

For the reasons set forth above, Respondent Town of Pawleys Island respectfully requests rehearing of the appeal and modification of the Court’s Opinion of June 3, 2026.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the *Respondent's Petition for Rehearing* by causing a copy to
be e-mailed on **June 18, 2026**, to counsel of record as listed below:

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s/ William C. Dillard, Jr.
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