THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Case Nos. 2011-CP-20-0298 and 2011-CP-20-0299
Appellate Case No. 2013-000076

RAWLEY E. SCHOFIELD ..... Respondent,

v.

FAIRFIELD COUNTY, South Carolina, a political subdivision of the State of South Carolina, ... Appellant.

MARY R. MEDLIN ..... Respondent,

v.

FAIRFIELD COUNTY, South Carolina, a political subdivision of the State of South Carolina, ... Appellant.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF ISSUES ON APPEAL

1. DID THE CIRCUIT COURT ERR IN DETERMINING THAT COSTS AND LITIGATION EXPENSES WERE AVAILABLE UNDER S.C. CODE ANN. § 28-2-510(A)?

2. IF NOT, DID THE CIRCUIT COURT ERR IN FINDING THE FEES REASONABLE WITHOUT ADDRESSING THE FACTORS REQUIRED BY THE SUPREME COURT IN *JACKSON v. SPEED,* 326 S.C. 289, 486 S.E.2d 750 (1997)?

STATEMENT OF THE CASE

This condemnation challenge action began with Fairfield County's service of a Condemnation Notice and Tender of Payment for an easement upon property owners Schofield and Medlin on June 30, 2011. The County sought an easement for the purpose of collection and control of wastewater from an adjacent industrial park then under development in Fairfield County. Schofield and Medlin each filed a condemnation challenge action in accordance with S.C. Code Ann. § 28-2-470 on July 25, 2011, and served the County on August 1, 2011. (Summons and Complaint; R. pp. 11-16; pp. 21-26). Schofield and Medlin argued that the proposed condemnations were improper because the County had not utilized the necessary factors in determining the location and construction of the facilities for which it attempted to exercise the power of eminent domain. (Summons and Complaint; R. p. 14; p. 24). The County answered and asserted that the proposed condemnations were proper in all respects. (Answer; R. p. 17; p. 27).

The two matters were consolidated and tried non-jury by the Honorable Paul M. Burch at Winnsboro on February 3, 2012, and taken under advisement pending written closing arguments. The Court entered an order on April 11, 2012, finding that the County had abused its discretion in selecting the proposed route and ordered that "Defendant shall re-evaluate the proposed condemnation by utilizing the above factors

[from *Southern Dev. Land and Golf Co., Ltd. v. S.C. Pub. Serv. Auth.*, 305 S.C. 507, 409 S.E.2d 428 (Ct. App. 1991)], as well as factors it deems appropriate." (Order Requiring Re-evaluation at 3; R. p. 4). On April 16, Schofield and Medlin moved to be awarded fees and costs under S.C. Code Ann. § 28-2-510(A). (Motion for Attorney's Fees and Costs; R. p. 31). At the same time, in accordance with the Court's order, the County hired an additional engineer, had its new engineer and its previous engineer evaluate the proposed route, and re-evaluated the proposed condemnation utilizing the relevant factors. The County filed and submitted its re-evaluation to the Court by affidavit dated May 31, 2012. (Re-Evaluation Affidavit; R. p. 40).

On June 7, 2012, Judge Burch heard the motion seeking fees and costs. At the hearing, the County presented evidence of its re-evaluation of the condemnation plan and argued that a fee award was improper because the Court had not determined that it had "no right to take all or part" of any of the landowner's property but had, instead, ordered a re-evaluation that was now complete. In addition, the County stated that if the Court was inclined to consider the merits of the motion, that is if 2-510 was even available to Medlin and Schofield, the County was prepared to argue that the fees should still not be awarded. In response, the Court indicated that it needed time to "go over all this" and "may have to get y'all back." (R. p. 54, lines 1-11). Without further hearing, the Court awarded $39,880.39 in costs and expenses by order entered July 19, 2012, with written notice received by the County on July 23, 2012. (Order Awarding Attorney's Fees and Costs; R. p. 7).

The County timely moved to alter or amend or, in the alternative, for reconsideration on August 2, 2012, arguing that (1) the Court had never determined that

the County had "no right to take all or part" of the landowner's property, particularly in light of the Court's directive and receipt of the re-evaluation; and (2) the Court had not made the findings required by *Jackson v. Speed* to award attorneys' fees. (Motion to Alter or Amend; R. pp. 43-46). That motion was denied without a hearing by order entered December 6, 2012, with written notice received on December 7, 2012. (Order Denying Motion to Alter or Amend; R. pp. 9-10). The December 6 order did not address *Jackson v. Speed,* but it reiterated that the Court had ordered the County to re-evaluate its condemnation plan and that the plan proposed by the County had not been challenged.

This appeal followed by filing and serving a written Notice of Appeal for each matter on January 4, 2013. (Notice of Appeal). The Notice of Appeal referenced the Order Awarding Attorney's Fees and Costs entered July 19, 2012, and the order denying the motion to alter or amend that order entered December 6, 2012. The two appeals (2013-000075 and 2013-000076) were consolidated by the Clerk of the South Carolina Court of Appeals in Appellate Case No. 2013-000076 on January 16, 2013.

ARGUMENT

I. STANDARD OF REVIEW

"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. Dept. of Transportation v. Revels,* 399 S.C. 423, 427, 731 S.E.2d 897, 898-99 (Ct. App. 2012) (quoting *Kiriakides v. School Dist. of Greenville Cnty.,* 382 S.C. 8, 20, 675 S.E. 2d 439, 445 (2009). "An abuse of discretion occurs when the conclusions of the [circuit] court are either controlled by an error of law or are based on unsupported factual conclusions. Similarly, the specific amount of attorneys' fees is left to the discretion of the trial judge and will not be disturbed absent an abuse of discretion." *Id.* (citations omitted, alteration in original).

II. THE CIRCUIT COURT ERRED: ATTORNEYS' FEES AND COSTS WERE NOT AVAILABLE UNDER S. C. CODE ANN. § 28-2-510(A) BECAUSE THE COURT NEVER DETERMINED THAT THE COUNTY WAS NOT ENTITLED TO TAKE THE LAND; INSTEAD IT ORDERED A RE-EVALUATION LEAVING THE POSSIBILITY OF TAKING OPEN.

Section 28-2-510(A) of the South Carolina Code governs the award of costs and litigation expenses in condemnation challenge actions. This code section applies and fees and costs may be awarded ***if*** "the court determines that the condemnor has no right to take all or part of any landowner's property...." S.C. Code Ann. § 28-2-510(A). (It is not a "prevailing party" analysis.) "In interpreting statutory language, words are generally given their common and ordinary meaning." *Jennings v.* Jennings, No. 27177, 2012 WL 4808545, at *1 (S.C. Oct. 10, 2012) (quoting *Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund v. Allen*, 152 F.3d 283, 288 (4th Cir. 1998)). "Where the language of the statute is unambiguous, the Court's inquiry is over, and the statute must be applied according to its plain meaning." *Id.* Thus, the court's determination that the condemnor "has no right to take" is a prerequisite to the award of fees and costs.

The Order Awarding Attorney's Fees and Costs was entered on July 19, 2012. The Order twice noted that as a result of the trial of the condemnation challenge, the Court required the County to re-evaluate the proposed condemnation. (Order Awarding Fees and Costs at 2 and 3; R. pp. 5-7). Notably, the Court did *not* determine the County "has no right to take" the property at issue or that the condemnation would not be allowed or that the County had to start the entire condemnation process over. Instead, as the Court noted, it ordered a re-evaluation. *Id.*

The Court recognized that it was presented "an affidavit from Tiffany S. Harrison, Director of Fairfield County Economic Development, swearing that after re-evaluating the condemnation plan consistent with the factors established in *Southern Development*, the 'preferred, best, and most appropriate route to serve the wastewater needs of Fairfield Commerce Center' remains the proposed condemnation route through Plaintiff's [sic] property." (Order Awarding Fees and Costs at 2; R. p. 6). However, the Order makes no further reference to the required re-evaluation. Instead, the Court concluded that its order of April 11, 2012, "prevented the county from taking the Plaintiffs' land under its original condemnation plan, and ordered it to re-evaluate its plan pursuant to the analysis employed by *Southern Development*." (Order Awarding Attorney's Fees and Costs at 3; R. p. 7).

The County argued in opposition that the fee request was improper and, in fact, was not ripe. After all, the statute provides for costs and fees in a challenge action only if "the court determines that the condemnor *has no right to take* all or part of any landowner's property...." S.C. Code Ann. § 28-2-510(A) (emphasis added). Contrary to the Court's order, the Court never made that determination. In its April 11 Order, the Court (1) decided the County had abused its discretion in selecting the route; and (2) ordered the County to re-evaluate the proposed condemnation in light of the outlined factors as well as other factors it deems appropriate. At no point then or since did the Court indicate, find, or hold that the County had "no right to take all or part of any landowner's property." (Order Requiring Re-Evaluation at 3; R. pp. 2-4). The Court has specifically contemplated a re-evaluation, noted that the re-evaluation had been received,

and indicated that the re-evaluation had not been challenged. (Order Denying Motion to Alter or Amend at 1-2; R. pp. 9-10).

A re-evaluation is predicated on the possibility that the proposed condemnation would be allowed with additional justification. Certainly, the court has not determined that the County had "no right to take all or part of any landowner's property." Thus, S.C. Code Ann. § 28-2-510(A) was not available to the landowners. A fee request could not be granted and, in fact, was not ripe. The Circuit Court erred in determining otherwise and must be reversed.

III. THE CIRCUIT COURT ERRED: EVEN IF S.C. CODE ANN. § 28-2-510(A) WAS AVAILABLE, THE COURT WAS REQUIRED TO ADDRESS THE FACTORS IN *JACKSON v. SPEED* BUT DID NOT.

In *Jackson v. Speed,* the Supreme Court held that the following six factors should be considered when determining a reasonable attorney's fee awarded under a statute: (1) the nature, extent, and difficulty of the case, (2) the time necessarily devoted to the case, (3) professional standing of counsel, (4) contingency of compensation, (5) beneficial results obtained, and (6) customary legal fees for similar services. *Id.* at 308, 486 S.E.2d at 760.

At the hearing on the motion for attorneys' fees, after presenting the County's re-evaluation and arguing that a request under § 2-510(A) was not proper, the County stated that, should the Court believe the issue to be ripe and was ready to decide the issue of fees themselves, the County had additional substantive arguments against a fee award. The Court did not hear those additional arguments, took the matter under advisement, and informed the parties that the Court may need to reconvene.

THE COURT: Anything else for the record?

> MR. FLOYD: Your Honor, only to the extent if we reach the merits for plaintiffs motion for attorneys fees in this case then the county would suggest to you that there's no reason to reach those merits. To the extent that the Court wishes to consider those merits the county is prepared to argue why even if the motion is appropriate or is allowed under 2-510 that attorneys fees should not be awarded. I would be happy to argue that now should the Court even consider it.
>
> THE COURT: Let me take a little time to go over all of this and I may have to get y'all back. * * * *

(Transcript of June 7, 2012 hearing at 5-6; R. p. 53, line 25 – p. 54, line 11).

No further argument was heard from either side.

In its order, the Court generally found that the amounts requested were reasonable and ordered the County to pay fees and the costs to Plaintiffs in the full amount requested of $39,880.39. The Court did not make any specific findings of fact regarding the reasonableness of the fees and, notably, did not address the factors required by the Supreme Court in *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997). (Order Awarding Attorney's Fees and Costs at 3; R. p. 7).

The County moved to alter or amend or, in the alternative, to reconsider the Court's decision and allow the further argument in light of the arguments reserved by the County but not heard by the Court including, specifically, substantive arguments based upon the *Jackson v. Speed* standards. (Motion to Alter or Amend at 2-4; R. pp. 44-46). The County also raised a number of factual questions regarding the affidavit in support of fees that would be relevant under the *Jackson v. Speed* analysis:

> In addition to the required factors, counsel's affidavit in support of Plaintiffs' motion for fees leaves a number of required questions unanswered including, but not limited to (a) Was this engagement taken on an hourly or contingency basis? (b) If the engagement was hourly, what have the Plaintiffs actually paid or been billed by their attorneys? (c) Where are the back-up documents justifying costs? (d) Where is the invoice and itemized costs for $8,950.00 for an engineering expert and what was the nature of the engagement? (e) Why would the County be

> responsible for repaying $699.97 for attorney time and deposition cancellation fees for a duly noticed deposition that Plaintiffs' counsel chose to cancel after the County's attorney and court reporter had appeared?

(Motion to Alter or Amend at 4; R. p. 46).

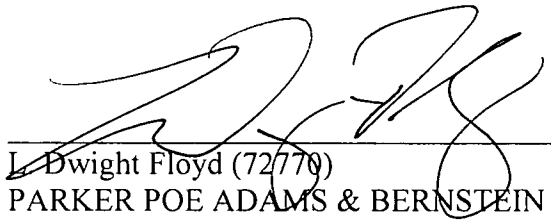
In the order denying the Rule 59(e) motion, the Court again made note of the re-evaluation and the lack of any challenge to it (thus making it even more clear that the County was not prevented from taking this property). (Order Denying Motion to Alter or Amend at 1-2; R. pp. 9-10). Otherwise, the Court made no new findings or explanation regarding the availability of 2-510, and the Court did not cite, acknowledge, or make any findings required by *Jackson v. Speed.*

The Court's failure to make findings with respect to attorney's fees as required by the Supreme Court in *Jackson v. Speed*, particularly after attempts to argue the issue before the Court and later raised in a Rule 59(e) motion, is an error of law and an abuse of discretion. The lower court's order awarding attorney's fees should be reversed.

CONCLUSION

For the reasons stated above, Fairfield County respectfully requests that this Court review the matters raised herein and reverse the judgment of the Circuit Court awarding fees and costs under S.C. Code Ann. § 28-2-510(A) because the prerequisite of that section has not been met and is not available: the Court has not determined that the County "has no right to take" all or part of the property. Therefore, a fee award is improper. In addition, the Circuit Court has not addressed the reasonableness factors required by the Supreme Court on awarding attorney's fees under a statute. In either case, the Circuit Court's order and judgment should be reversed.

Respectfully submitted,



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May 24, 2013

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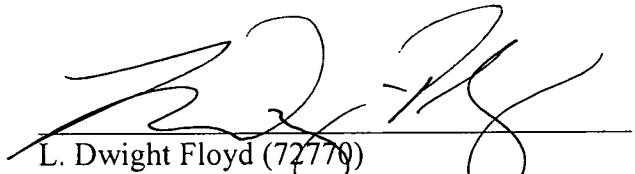
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the foregoing Brief of Appellant complies with Rule 211(b) SCACR.



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