

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

B. LaVelle UNDERHILL,
as Trustee of the B. LaVelle Underhill
Revocable Living Trust, dated January 20, 2011,
Petitioner-Respondent,

v.

Steven A. PROCK
and Kittie M. Prock,
Trustees of the Steven A. Prock and Kittie M. Prock
Family Trust dated August 2, 2007;
D. Wendell Clodfelter and Joyce E. Clodfelter,
husband and wife,
Respondents-Appellants,
and

Ivan SKORO, et al,
Respondents below.

Sherman County Circuit Court
140010CC; A164671

John A. Wolf, Judge.

Argued and submitted September 17, 2018.

Andrew J. Myers argued the cause for appellants. Also on the briefs was Peachy & Myers, P.C.

Katie Jo Johnson argued the cause for respondent. Also on the brief were McEwen Gisvold, LLP, and Victor W. VanKoten and Annala, Carey, Thompson, VanKoten & Cleveland, P.C.

Before Lagesen, Presiding Judge, and James, Judge, and Sercombe, Senior Judge.

SERCOMBE, S. J.

Affirmed.

SERCOMBE, S. J.

Petitioner filed a petition in circuit court to establish a way of necessity. The court dismissed the action because the county governing body, which in the normal course would hear and determine the petition, had not transferred jurisdiction to establish ways of necessity to the circuit court under ORS 376.200. Respondents appeal from a supplemental judgment denying their request for attorney fees under ORS 376.175(2)(e), a statute that allows attorney fees as part of “an order granting or denying the way of necessity.” The circuit court determined that attorney fees were not authorized under ORS 376.175(2)(e) because, as it had dismissed the action for lack of subject matter jurisdiction, the statutory prerequisite of “an order granting or denying the way of necessity” had not been met. The circuit court also found that it lacked jurisdiction to award the requested fees. For the reasons explained below, we affirm the court’s determination that attorney fees were not authorized by ORS 376.175(2)(e).

A way of necessity proceeding establishes a vehicular or utility access easement from a public road to a landlocked parcel of real estate. *See* ORS 376.150(2). Statutory ways of necessity are governed by ORS 376.150 to 376.200. Those statutes provide for a proceeding before the governing body of the county in which the petitioner’s land is located. ORS 376.150 to 376.195. Under ORS 376.200, however, a county may adopt an ordinance removing jurisdiction over the establishment of ways of necessity from the county governing body to the circuit court of that county.¹

¹ ORS 376.200 provides, in relevant part:

“(1) Notwithstanding any provision of ORS 376.150 to ORS 376.200, a county governing body may adopt an ordinance removing the county governing body from jurisdiction over the establishment of ways of necessity under ORS 376.150 to ORS 376.200.

“(2) If the county governing body adopts an ordinance described in subsection (1) of this section, the circuit court of that county shall have jurisdiction of the establishment of ways of necessity for that county. Except as otherwise provided in this section, a court with jurisdiction of the establishment of ways of necessity under this section shall follow the procedures for establishment of a way of necessity provided under ORS 376.150 to ORS 376.200.”

Petitioner filed an action seeking a statutory way of necessity over properties owned by respondents. The petition alleged that the governing body of Sherman County had adopted an ordinance transferring jurisdiction over the establishment of ways of necessity to the circuit court. The matter proceeded to trial, and, after petitioner had presented her case-in-chief, respondents moved to dismiss for lack of subject matter jurisdiction, contending that the ordinance allegedly transferring jurisdiction from the county governing body to the Sherman County Circuit Court had failed to comply with the requirements of ORS 376.200 and was invalid. Respondents asserted that, therefore, the county's governing body had jurisdiction of the proceeding and not the circuit court.

The circuit court agreed with respondents and entered an order and judgment dismissing the case for lack of jurisdiction. Both the order granting the motion to dismiss and the judgment of dismissal stated that, pursuant to ORS 376.175, respondents could submit a statement of costs and attorney fees.

Respondents submitted that statement, and petitioner objected, arguing that the circuit court was not authorized and lacked jurisdiction to enter an order awarding attorney fees and costs under ORS 376.175. That statute provides, in relevant part:

“(1) Upon consideration of the matters and issues presented under ORS 376.150 to 376.200, the county governing body shall determine whether or not a need has been demonstrated for the granting of a way of necessity under ORS 376.150 to 376.200 and shall enter an order granting or denying the way of necessity.

“(2) Any order entered under this section shall:

“(a) State whether the way of necessity is granted or denied;

“*****

“(e) Direct the petitioner to pay costs and reasonable attorney fees incurred by each owner of land whose land was subject to the petitioner's action for a way of necessity under ORS 376.150 to 376.200.”

The circuit court determined that fees were not authorized under ORS 376.175(2)(e) because, in the court's view, an order dismissing the petition for lack of subject matter jurisdiction is not "an order granting or denying the way of necessity" within the meaning of ORS 376.175(1). The court also found that once it dismissed the matter for lack of subject matter jurisdiction, it lacked jurisdiction to award fees. Accordingly, the circuit court denied respondents' request for costs and attorney fees in a supplemental judgment.

On appeal, respondents argue that the court's denial of their fee request was based on an erroneous interpretation of ORS 376.175. As noted, ORS 376.175(1) provides that a way of necessity order can issue "[u]pon consideration of the matters and issues presented under ORS 376.150 to 376.200 ***." Respondents assert that ORS 376.175 provides the trial court authority to grant an attorney fee order even when a case is dismissed for lack of subject matter jurisdiction. They contend that because the jurisdictional statute, ORS 376.200, is referenced by ORS 376.175, a circuit court is required to consider jurisdiction when entering a judgment under ORS 376.175. According to respondents, by including jurisdictional considerations in ORS 376.175, the legislature provided that dismissal for lack of subject matter jurisdiction qualifies as an order entered pursuant to ORS 376.175. Respondents also emphasize case law holding that the legislature intended parties subject to an action to establish a way of necessity to recoup their costs. *See, e.g., Pike v. Wyllie*, 103 Or App 30, 33, 795 P2d 1097, *rev den*, 310 Or 791 (1990) ("[T]he legislature expressly provided for the payment of attorney fees to a party put to the burden of defending against a claim for a way of necessity, regardless of the result."); *Morgan v. Hart*, 325 Or 348, 356, 937 P2d 1024 (1997) ("[T]he legislature intended to require a plaintiff to pay costs and reasonable attorney fees to each landowner put to the burden of defending against a claim for a way of necessity.").

In response, petitioner argues that the trial court correctly interpreted the plain text of the statute, which specifically allows an award of costs and attorney fees in connection with an order "granting or denying the way of

necessity.” See ORS 376.175. Because the circuit court never entered an order granting or denying the way of necessity, petitioner asserts that ORS 376.175 does not provide any basis to award respondents their costs and attorney fees.²

We conclude that the circuit court did not enter an order pursuant to ORS 376.175 that would authorize an award of costs and attorney fees. In determining the meaning of ORS 376.175, this court follows the familiar statutory construction framework established in *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009), and *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). We begin by examining the text and context of the statute.

The text of ORS 376.175(1) states three predicates to the entry of an order directing petitioner to pay costs and attorney fees under subsection (2)(e). First, the order must be entered “[u]pon consideration of the matters and issues presented under ORS 376.150 to 376.200.” ORS 376.175(1). Here, respondents argue that consideration “of the matters and issues presented under ORS 376.150 to 376.200” could include only consideration of an ORS 376.200 jurisdictional issue, without consideration of the other matters and issues included in the referenced statutes. Regardless of whether respondents are correct or whether the predicate was met, the other statutory prerequisites were not.

The second predicate to an attorney fee order is that it is entered after a determination of “whether or not a need

² Petitioner additionally contends that the circuit court did not have jurisdiction to enter an order pursuant to ORS 376.175 because the matter was dismissed for lack of subject matter jurisdiction. See, e.g., *Polygon Northwest v. NSP Development, Inc.*, 194 Or App 661, 666, 96 P3d 837 (2004) (“An order or judgment entered by a court that lacks subject matter jurisdiction is void and not merely voidable.”). Petitioner also argues that respondents did not assign error to the alternative basis for the circuit court’s ruling and, therefore, that the circuit court’s ruling must be affirmed. See, e.g., *Roop v. Parker Northwest Paving Co.*, 194 Or App 219, 236, 94 P3d 885 (2004), *rev den*, 338 Or 374 (2005) (“[W]here [the] plaintiffs fail to challenge the alternative basis of the trial court’s ruling, we must affirm it.”); *State v. Stoudamire*, 198 Or App 399, 403, 108 P3d 615 (2005) (“It is axiomatic that, when a trial court bases a decision on multiple grounds, an appellant may prevail on appeal only after demonstrating that *all* of the bases for the court’s decision were erroneous.”) (Armstrong, J., concurring) (emphasis in original). In light of our conclusion that an attorney fee award was not authorized by statute, we need not decide whether the circuit court’s determination that it lacked subject matter jurisdiction was a separate and alternative basis for its ruling and whether respondents failed to assign it as error.

has been demonstrated for the granting of a way of necessity.” ORS 376.175(1). No such determination was made in this case. The circuit court did not consider, much less determine, whether petitioner had established the absence of an existing easement, the lack of enforceable access to a public road, or any of the other required evidence to establish the way of necessity. *See* ORS 376.155(2) (providing the requirements for a petition to establish a way of necessity).

Finally, and most importantly, the order must “grant[] or deny[] the way of necessity.” ORS 376.175(1). In this case, the matter was dismissed due to an invalid transfer of jurisdiction to the circuit court. Because the order did not grant or deny the way of necessity, the statutory prerequisite to an award of fees was not met.

Thus, a substantive determination of the way of necessity petition is a predicate for the issuance of a final order, including an award of attorney fees. That conclusion is supported by the decision in *Morgan*. In *Morgan*, the plaintiff sought access to a public road over neighboring property under three alternative theories: express easement, prescriptive easement, and a statutory way of necessity. 325 Or at 351. The trial court found that the plaintiff prevailed on the express easement theory, dismissed the prescriptive easement and way of necessity claims, and denied attorney fees to the respondent on the ground that the claim seeking a statutory way of necessity was an “alternative claim” that the trial court did not need to reach. *Id.* at 353. The Supreme Court reversed the trial court’s denial of attorney fees, holding that, in the circumstances of that case, the dismissal of the way of necessity claim represented a denial of the claim *on the merits*. *Id.* at 355.

The court explained that ORS 376.175 requires the circuit court to perform two acts with respect to a way of necessity claim: (1) to “determine whether or not a need has been demonstrated for the granting of a way of necessity” and (2) to “enter an order granting or denying the way of necessity.” *Id.* at 354. When the trial court determined that the plaintiff had an express easement, the trial court also determined that there was no need for the granting of a way of necessity, because ORS 376.180(8) conditions the need for

a way of necessity in part on the absence of an express easement to a public road. *Id.* at 354-55. Accordingly, the trial court's determination on the merits that the plaintiff had an express easement, together with the judgment of dismissal, denied the way of necessity within the meaning of ORS 376.175(1), and required that the plaintiff pay the respondent's costs and attorney fees under ORS 376.175(2)(e). *Id.* at 355-56.

Although both cases involve dismissal of a way of necessity claim, this case is unlike *Morgan*. *Morgan* requires that a circuit court determine the merits of the way of necessity claim and enter an order that either grants or denies the way of necessity. As noted, in this case, the circuit court did not determine the merits of the way of necessity petition or enter an order granting or denying the petition. Accordingly, the dismissal in this case was not an order within the meaning of ORS 376.175, and an award of costs and attorney fees was not authorized under ORS 376.175(2)(e).

Affirmed.