

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM JASPER COUNTY
Luke N. Brown, Jr., Special Referee for Jasper County
Case No. 2008-CP-27-481

Cole L. Lawson, III, and Cole L. Lawson, IV, ...Appellants,

v.

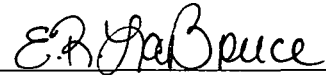
Weldon T. Strahan a/k/a Weldon Travis Strahan
a/k/a W. Travis Strahan, Individually, and in his
capacity as Personal Representative of the Estate
of Ronald J. Strahan,.....Respondents,

Wilson Lee Mixson; Vivian M. Mcalhaney, as
Trustee of the Mcalhaney Family Trust, utd
9/20/2004; Vivian Mixson Mcalhaney; David
A. Shipes; Tony Walter Shipes; Helen S. Kinard
a/k/a Helen Shipes Kinard; Wanda Shipes Casey
a/k/a Wanda S. Casey a/k/a Wanda D. Casey; and
Jacob F. Malphrus,..... Defendants.

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RESPONDENTS' MOTION TO DISMISS APPEAL

for an Order dismissing the within Appeal filed by the Appellants on March 29, 2012. As detailed more fully in Respondents' Rule 240(c)(2), SCACR, Memorandum in support of this Motion, the Appellants' Appeal should be dismissed due to the Appellants' failure to either timely (a) order the transcript of the lower court proceedings pursuant to Rule 207(a)(1), SCACR, within ten days of filing their Notice of Appeal, or, in the alternative, (b) file and serve their Initial Brief pursuant to Rule 208(a)(1), SCACR, within thirty days of filing their Notice of Appeal.



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Jacob F. Malphrus,..... Defendants.

RESPONDENTS' MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS APPEAL

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STATEMENT OF THE CASE:

Weldon Travis Strahan (herein "Strahan") along with his brother, Ronald J. Strahan, were the record owners of an approximately 290 acre parcel of real property in Jasper County and Hampton County, South Carolina, that was contiguous to a land-locked parcel of land of 67.80 acres purchased in 2008 by Cole L. Lawson, III, and Cole L. Lawson, IV (herein collectively referred to as "the Appellants"). As a result of being unable to access their land, on July 31, 2008, the Appellants filed the first of three Complaints against Strahan (and all contiguous boundary owners) demanding, among other causes of action, (a) an Easement by Necessity; (b) an Equitable Easement Due to Extreme Hardship; and, (c) that Strahan and the other adjacent boundary owners pay the Appellants' attorneys' fees and costs of the suit.

On August 20, 2008, the Appellants requested that Strahan delay the filing of an Answer until the Appellants were able to amend their Complaint. The Appellants filed their First Amended Complaint on November 5, 2009, approximately fifteen (15) months after the filing of their original Complaint and sixty-five (65) days past a court-imposed deadline of September 1, 2009. Strahan answered the Appellants' First Amended Complaint five days later on November 10, 2009. On October 18, 2010, two days before the scheduled trial date, the Appellants served Strahan with a fifty-one (51) page Second Amended Complaint, (which document was dated September 20, 2010), and which document again included the Easement by Necessity Cause of Action against Strahan and the Equitable Easement due to Extreme Hardship Cause of Action against Strahan.

As the trial was beginning on the morning of October 20, 2010, Plaintiffs' counsel requested a voluntary non-suit with prejudice against Strahan.

On March 22, 2011, the Honorable Luke N. Brown, Jr., Special Referee for Jasper County, South Carolina, rendered a final Decree in favor of the remaining Defendants on all claims asserted by the Appellants, and all the Defendants were served with written notice of this final Decree on this same date. On March 30, 2011, Strahan filed and served on all parties of record a Notice and Motion for Attorneys' Fees and Costs together with a supporting Brief, pursuant to the South Carolina Frivolous Civil Proceedings Sanction Act.

On September 30, 2011, the morning of the Motion hearing, the Appellants served Strahan with a sixteen (16) page Memorandum of Law in opposition to Strahan's Motion for Attorneys' Fees and Costs. At the hearing, Strahan presented his argument in favor of the Motion, and the Appellants presented their opposition. On December 15, 2011, the trial court entered an order granting Strahan's Motion for Attorneys' Fees and Costs. *See Exhibit A*, Order Granting Strahan's Motion for Attorneys' Fees and Costs.

On December 23, 2011, the Appellants filed a motion for reconsideration with the trial court. *See Exhibit B*, Appellants' Rule 59 Motion to Reconsider. On February 24, 2012, the trial court entered a written order denying the Appellants' Motion to Reconsider. *See Exhibit C*, Order Denying Motion to Reconsider. On March 27, 2012, Strahan was served with the Appellant's Notice of Appeal. *See Exhibit D*, Appellants' Notice of Appeal.

ARGUMENT:

In this case, the Appellants have taken no further action in regards to this Appeal since the filing and service of their Notice of Appeal on March 27, 2012. As over thirty (30) days have passed since Strahan was served with the Appellants' Notice of Appeal, it is indisputable that the Appellants have failed to comply with at least one of the South Carolina Appellate Court Rules. According to Rule 260(a), SCACR, "[w]henver it appears that an appellant or a petitioner has failed to comply with the requirements of these Rules, the clerk **shall** issue an order of dismissal, which shall have the same force and effect as an order of the appellate court." Rule 260(a), SCACR (emphasis added).

I. The Appeal Should Be Dismissed Due to the Failure of the Appellants to Timely Request a Transcript Pursuant to Rule 207(a)(1), SCACR:

Rule 207(a)(1), SCACR, requires that "[w]here a transcript of the proceeding must be prepared by the court reporter, appellant shall, within the time provided for ordering the transcript, make satisfactory arrangements . . . in writing with the court reporter for furnishing the transcript." SCACR 207(a)(1). In appeals from judgments by a special

referee, Rule 207(a)(1) requires that the transcript be ordered within ten (10) days after service of the notice of appeal and that all parties to the appeal be contemporaneously furnished with copies of all correspondence between the appellant and the court reporter. *Id.*

Strahan was served with the Appellants' Notice of Appeal on March 27, 2012. Despite the passing of over thirty (30) days from the date on which Strahan was served, he has not been furnished with any correspondence between the Appellants and the court reporter, as required by Rule 207(a)(1); therefore, the Appellants have either failed to timely request the transcript from the court reporter or have chosen not to request a transcript. In the event that the Appellants failed to order the transcript, Strahan respectfully requests that the Appeal be dismissed pursuant to Rule 260(a), SCACR.

II. The Appeal Should Be Dismissed Due to the Failure of the Appellants to Timely Serve Their Initial Brief Pursuant to Rule 208(a)(1), SCACR:

In the event the Appellants have chosen not to request a transcript, the Appellants have failed to comply with Rule 208(a)(1), SCACR, which mandates an appellant serve a copy of his initial brief on all parties to the appeal "within thirty (30) days after serving the notice of appeal" if no transcript is ordered. Rule 208(a)(1), SCACR. In this case, no transcript was ordered by the Appellants, thus, they were required by Rule 208(a)(1), SCACR, to serve Strahan with their initial brief within thirty days after service of the Notice of Appeal. *Id.* More than thirty days have elapsed since Strahan was served with the Notice of Appeal, yet Strahan has not been served with the Appellants' initial brief. Rule 208(a)(4), SCACR, states, in pertinent part, that "[u]pon the failure of the appellant to file and serve his brief within time prescribed, the clerk of the appellate court shall sign an order dismissing the appeal." Rule 208(a)(4), SCACR. For these reasons, the Respondents respectfully request that the Court dismiss the Appellants' appeal.

CONCLUSION:

It is beyond dispute that the Appellants have failed to comply with the provisions of either Rule 207(a)(1) or Rule 208(a)(1) of the South Carolina Appellate Court Rules. As a result of the Appellants' failure, the Respondents respectfully request that this Appeal be dismissed.

Respectfully submitted, this the 4 day of May, 2012.

_____

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Jacob F. Malphrus,..... Defendants.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below, he served counsel
for the Appellants and all other attorneys of record with a copy of the Respondents' Motion
to Dismiss Appeal by mailing copies of the same by United States Mail with first class
postage prepaid to the following addresses:

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SC Court of Appeals

STATE OF SOUTH CAROLINA)
COUNTY OF JASPER)

IN THE COURT OF COMMON PLEAS
Case No. 2008-CP-27-481

COLE L. LAWSON, III and
COLE L. LAWSON, IV,

Plaintiffs,

vs.

RONALD J. STRAHAN; WELDON T.
STRAHAN; WILSON LEE MIXSON;
VIVIAN M. MCALHANEY, AS
TRUSTEE OF THE MCALHANEY
FAMILY TRUST, UTD 9/20/2004; and
VIVIAN MIXSON MCALHANEY,

Defendants.

ORDER GRANTING STRAHAN'S
MOTION FOR ATTORNEYS'
FEES AND COSTS

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CLERK OF COURT
JASPER COUNTY, SC

A hearing on Weldon T. Strahan's (herein "STRAHAN") Motion for Costs and Attorneys' Fees pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10, et seq. (herein "the ACT") and Rule 11 of the South Carolina Rules of Civil Procedure, was conducted on September 30, 2011. Present at the hearing were J. Thomas Mikell, Esquire, attorney for Mr. Strahan, E. W. Bennett, Jr., Esquire, attorney for the Plaintiffs, and Kevin Brown, Esquire, attorney for the remaining Defendants. Based on the presentations of counsel at the hearing, the Motion, Briefs, Memoranda of Law, and Affidavits submitted to this Court, I make these Findings of Fact and Conclusions of Law:

FINDINGS OF FACT:

1. On February 29, 2008, the Plaintiffs entered into a Contract of Sale to purchase 67.80 acres of land in Jasper County, South Carolina (herein "the PROPERTY") from Hugh Horry and W.J. Getsinger, Jr. The Plaintiffs entered into this Contract of Sale with actual knowledge that no easement or right-of-way of public record existed which would give them access to the PROPERTY because Paragraph VII of the Contract of Sale for the PROPERTY specifically excludes access to the PROPERTY by this language:

Seller does not warrant, covenant, represent, nor certify unto Buyers that there is good and adequate public road and highway access, ingress, and egress to the subject real estate sufficient for the intended use thereof by the Buyers; It will be the responsibility of the Buyer to file any lawsuits necessary to acquire adequate public road and highway access, ingress, and egress to the subject real estate after the closing herein.

2. In addition, in a written Opinion of Title rendered to the Plaintiffs at the time of the

purchase of the 67.80 acres, the attorney for the Plaintiffs explicitly excluded any warranty or representation of public access to the PROPERTY via the following exception:

Other Liens, Reservations, Exceptions: At the present time, there is no easement or right-of-way of the public record giving access to the subject property. A lawsuit will be filed on behalf of the Purchaser herein to obtain access after the title to the real estate has been transferred.

3. By a letter dated April 4, 2008, the Plaintiffs, through their attorney, contacted all the owners of every parcel of real property contiguous to the PROPERTY, including STRAHAN, and demanded that they sign "an original proposed Grant of Easement and Right-of-Way for Ingress and Egress," which was attached to the letter. *See Plaintiffs Letter of April 4, 2008*, attached hereto as Attachment A (emphasis in original). I characterize the letter as a demand for the language in it continued as follows:

If we do not receive the proposed Easement back from you or hear from you by April 11, 2008, then I will assume that you are not interested in voluntarily conveying an easement to my clients as requested. I will at that point, prepare and file a Declaratory Judgment Action for an Easement by Necessity and by Implication with Jasper County Common Pleas Court/Non-Jury Docket as instructed by my client. . . . As you are probably aware, land owners are guaranteed the right to have convenient public access, ingress and egress to their real estate when landlocked which is defined as an Implied Easement by Necessity.

4. By letter dated April 10, 2008 (Attachment B hereto), STRAHAN, through his attorney, responded to the Plaintiffs' letter of April 4, 2008, stating that South Carolina law does not guarantee a land owner the right to convenient access and that "...[t]here are several factors which must be present for an easement by necessity to arise and those factors are not present here..."

5. Notwithstanding the Plaintiffs' prior actual knowledge that the 67.80 acres was landlocked and the written notice from STRAHAN's attorney of the absence of some of the essential elements for an Easement by Necessity, on July 31, 2008, the Plaintiffs filed the first of three Complaints against STRAHAN (and all contiguous boundary owners) demanding (a) an Easement by Necessity (b) an Equitable Easement Due to Extreme Hardship, among other causes of action, and, (c) that STRAHAN (and the other adjacent boundary owners) pay the attorneys fees and costs of the suit.

6. On August 20, 2008, Plaintiff's counsel requested that STRAHAN's counsel delay the filing of an Answer until the Plaintiffs were able to amend their Complaint. For over a

Complaint, (which document was dated September 20, 2010), and which document again alleged the Easement by Necessity Cause of Action against STRAHAN and the Equitable Easement due to Extreme Hardship Cause of Action against STRAHAN, but neither of these Causes of Action contained supporting facts. This Second Amended Complaint continued to seek to have STRAHAN pay the attorney's fees and costs of the Plaintiffs.

13. As the trial was beginning on the morning of October 20, 2010, after two years of delayed pleadings and delayed discovery and delayed pre-trial preparations, Plaintiffs' counsel orally requested a voluntary non-suit with prejudice against STRAHAN on the record. The oral Motion was granted on the condition that STRAHAN reserved the right to file a Motion pursuant to the Frivolous Suit Act (the ACT).

14. A trial was conducted against the other Defendants on October 20, 2010 and on March 22, 2011, this Court rendered a final Decree in favor of all the other Defendants on all claims asserted by the Plaintiffs.

15. On March 30, 2011, within the ten days allowed by the SCRCF, STRAHAN filed and served on all parties of record a Notice and Motion for Attorneys' Fees and Costs together with a supporting Brief pursuant to the ACT.

16. On August 29, 2011, STRAHAN filed and served on all parties of record an Affidavit of James M. Herring, a licensed South Carolina attorney who was not an attorney nor a party to this action (so he was not prejudiced) which Affidavit supported STRAHAN's Motion for Attorneys' Fees and Costs. The Affidavit states that (a) Mr. Herring has been an attorney licensed in South Carolina for forty-seven years, (b) he has experience with the practice of law dealing with easements, (c) he had reviewed the entire file in this case, and (d) he did not believe that the causes of action for an Easement by Necessity or for an Easement Due to Extreme Hardship were reasonable causes of action against STRAHAN.

17. On September 29, 2011, one day before the scheduled hearing on the Motion for Attorneys' Fees and Costs, in a continuing delaying manner, Plaintiffs' attorney served STRAHAN with an Affidavit of Plaintiff (Cole L. Lawson, III) which opposed STRAHAN's Motion for Attorneys' Fees and Costs. Mr. Lawson is not an attorney licensed in South Carolina and he is a party to the case.

18. On September 30, 2011, the morning of the hearing, the Plaintiffs then also served STRAHAN with a sixteen (16) page Memorandum of Law in opposition to STRAHAN's Motion for Attorneys' Fees and Costs. It was a rendition of the history of the case.

19. No Affidavit by an attorney licensed in South Carolina was presented by the Plaintiffs in opposition to the Motion for Fees and Costs by STRAHAN.

20. The Motion by STRAHAN has attached to it the attorneys fees and costs incurred by STRAHAN to defend this suit through March 29, 2011 in the amount of \$16,375.00 in attorneys fees and \$94.09 in out of pocket expenses. At the Motion hearing an amendment was made to these out of pocket expenses of \$809.75 for the title research costs that had inadvertently been left off. And, additional attorney's fees of \$7,162.50 and out of pocket expenses of \$258.75 were presented which were incurred after the date of the Motion and until the hearing took place.

CONCLUSIONS OF LAW:

21. This Court has jurisdiction over the subject matter of this action and all of the Parties hereto.

22. To the extent that any Finding of Fact contains a Conclusion of Law, such Conclusion of Law is adopted herein as if set forth verbatim.

23. It has long been the law in this state that a pleading is called "frivolous" when it is clearly insufficient on its face and does not controvert the material points of the opposite pleading and is presumably interposed for mere purposes of delay or to embarrass the opponent. Gray-vs-Gidiere, 35 S.C.L. 438, 4 Strobert 442. That concept has been codified in the ACT.

24. The Section of the ACT which has been breached by the Plaintiffs is 15-36-10(c)(1) which imposes sanctions against a party to a suit. This Section imposes sanctions if "...a reasonable attorney in the same circumstances would believe that under the facts 'the' claim... was clearly not warranted under the existing law...". STRAHAN produced an Affidavit by an attorney licensed in South Carolina which complies with these statutory requirements. The Plaintiffs did not produce any Affidavit by an attorney licensed in South Carolina to either support their position or to refute the position of STRAHAN as to the Motion. The Motion for sanctions is granted against the Plaintiffs because the information contained in the Affidavit of James M. Herring complied with the applicable Section of the ACT as set forth above.

25. In addition, the Court considered these factors in granting the Motion:

- a. The requirement of "unity of title" has been an essential element of an Easement by Necessity under South Carolina law for almost one hundred years, yet the Plaintiffs nonetheless filed this action requesting an Easement by Necessity despite clearly lacking this essential element and after the notice of the attorney of STRAHAN before the suit was brought that this element was missing. See Brasington v. Williams, 143 S.C. 223, 141 S.E. 375 at 382 (1927) and Kennedy v. Bedenbaugh, 352 S.C. 56, 60, 572 S.E.2d 452, 454 (2002) ("The legal requirements of an easement by necessity are: (1) unity of title, (2) severance of title, and (3) necessity. . . . In other words, petitioners have to show that their land-locked tract and respondent's tract were, at one time, owned by the same owner."). Boyd v. Bell South, 369 S.C. 410, 633 S.E.2d. 136 (2006).
- b. The obvious absence of pleading and presenting facts to illustrate "unity of title" was repeatedly reported to the attorney for the Plaintiffs by STRAHAN's counsel, beginning with the letter of April 10, 2008, and then again in Paragraph 4 in the Answer to the original Complaint. Nevertheless, Plaintiffs' counsel continued to include this cause of action in both his First and his Second Amended Complaints without any additional facts in support of the claim.
- c. In like manner, no allegation was made in any of the pleadings of the Plaintiffs that the necessity of the Easement existed at the time of the severance of title as required by our cases. See Boyd v. Bell South, 369 S.C. 410, 633 S.E.2d. 136 (SC 2006- Headnote 10).
- d. It is clear that Plaintiffs' attorney was aware for a very long time that the claim of Easement by Necessity against STRAHAN was destined for failure. On the morning of trial, October 20, 2010, after two years of discovery and pre-trial preparations, Plaintiffs' counsel suddenly requested (orally as the trial was beginning) a voluntary non-suit against STRAHAN, asking for a dismissal of the suit with prejudice. Importantly, this request for a dismissal with prejudice came a mere two days after the Plaintiffs' served STRAHAN's counsel with a 51-page Second Amended Complaint - dated September 20, 2010 but not served until October 18, 2010 - which included the Easement by Necessity Cause of Action against STRAHAN.

- e. In addition to the claim of Easement by Necessity without supporting facts, in its Sixth Cause of Action in the Original Complaint and First Amended Complaint, and in its Seventh Cause of Action in the Second Amended Complaint, Plaintiffs' counsel created a legal fiction by alleging they were entitled to an "Easement Due to Extreme Hardship." Plaintiffs requested that in the event their First Cause of Action failed - an event that was certain to occur - that the Court should grant an equitable easement to the Plaintiffs based on their "extreme, undue, and unfair hardship and great financial burden." The very fact that this cause of action does not and has not existed in South Carolina was repeatedly illustrated by counsel for STRAHAN to the Plaintiffs' counsel in each Answer. However, the Plaintiffs steadfastly refused to either alter or amend their pleadings with additional facts to support their claim. Instead, they chose to continue with this non existent cause of action for two years until they suddenly decided to extinguish it on the morning of trial as they were aware of their lack of foundation in either law or in fact. See Rutland v. Holler, Dennis, Corbett, Ormond & Garner (Law Firm), 371 S.C. 91, 637 S.E.2d 316 (Ct. App. 2006) (upholding trial court's award of sanctions based on plaintiff's repeated assertion of the same frivolous cause of action). The only legal support presented by the Plaintiffs to support this cause of action was the case of Bowers-vs-Hampton County 320 S.C. 360, 465 S.E.2d 354(1995), which the Court finds not relevant in any manner to such a cause of action for an Easement by Hardship..
- f. After the threat of suit if the demand for the execution of an Easement presented to STRAHAN was not executed and returned by the letter of April 4, 2010, the Plaintiffs then had the audacity to ask the Court to award them attorneys fees and costs throughout their several Complaints.
- g. On four separate occasions, the Plaintiff's attorney served upon STRAHAN extremely lengthy documents immediately before an important event (e.g., unsigned discovery responses at the beginning of depositions, a 51 page Second Amended Complaint the day before trial, an Affidavit the day before the Motion hearing, and a Brief on the day of the Motion Hearing). See Findings of Fact 10, 12, 17 and 18. This continued dilatory and sudden manner of service of significant and material documents is not in keeping with the usual and normal practices of the Bar to give opposing parties and their counsel a reasonable opportunity to review, digest, investigate and

respond to those documents and these acts suggest to me that the motive of the Plaintiffs was harassment or intimidation.

26. It is well settled in South Carolina that when a plaintiff continues with a claim despite having acquired clear knowledge that the facts do not support their claim, the trial court's Order of sanctions against the plaintiff's attorney will be upheld. Russell v. Wachovia Bank, N.A., 370 S.C. 5, 633 S.E.2d 722 (2006).

27. South Carolina Code Ann. § 15-36-10 et. seq. of the ACT provides that a person is entitled to recover attorneys' fees and court costs reasonably incurred in litigating the proceedings where an individual initiates, continues or defends any civil proceedings if brought for something other than a proper purpose. The Plaintiffs here not only initiated but continued to prosecute a frivolous claim for several years, the only purpose of which was to attempt to harass or intimidate STRAHAN into providing the Plaintiffs with an easement.

28. The amount of attorney's fees and actual expenses sought by STRAHAN, as described in the fee schedule attached as Attachment B to the Motion and supplemented at the Motion hearing, is reasonable and was necessary to defend the suit and to prosecute the Motion.

29. Section 15-36-10 (E) of the Act lists the following factors for a court to consider when concluding whether a pleading, motion or document is frivolous:

- (1) the number of parties;
- (2) the complexity of the claims and defenses;
- (3) the length of time available to the attorney, party, or pro se litigant to investigate and conduct discovery for alleged violations of the provisions of subsection (A)(4);
- (4) information disclosed or undisclosed to the attorney party, or pro se litigant through discovery and adequate investigation;
- (5) previous violations of the provisions of this section;
- (6) the response, if any, of the attorney, party, or pro se litigant to the allegation that he violated the provisions of this section; and
- (7) other factors the court considers just, equitable, or appropriate under the circumstances.

30. In this case, the factors listed in Subsection 10(E) of the Act strongly support STRAHAN's request for sanctions for these reasons:

- a. This case involved only a few parties and the claims and defenses were not very complex.

- b. Despite the Plaintiffs' delay in serving the Amended Complaint and Second Amended Complaint, the Plaintiffs had over two (2) years to investigate and conduct discovery in this case. Furthermore, it is clear that the Plaintiffs acted with extreme disregard for the South Carolina Rules of Civil Procedure, in particular, the discovery provisions. On March 15, 2010, STRAHAN's counsel served the Plaintiffs' attorney with a written Request for Production of Documents and Interrogatories. Despite the thirty-day time to answer provided by Rules 33 and 34, it was not until June 8, 2010, at the beginning of the Plaintiffs' scheduled depositions and almost two months past the Rules-imposed deadlines, that Plaintiffs responded to the Interrogatories by delivery of unsigned responses to Requests For Documents. Moreover, despite this two-year discovery period, Plaintiffs' counsel failed to conduct valid discovery pursuant to SCRCP 34(a)(2), which affords an opposing party the right to petition the court for entry upon land "for the purpose of inspection and measuring, [and] surveying . . .". In this case, instead of petitioning the Court for permission to enter and survey STRAHAN's land, Plaintiffs' counsel chose to hire a surveyor to trespass onto and inspect STRAHAN's land without his consent. If Plaintiffs had wanted to survey the land, and do so legally and within the bounds of the law, they had a valid method to request it so as to prevent trespassing on private property. But rather than filing a Discovery Motion with this court, they chose to circumvent the Rules of the Court and the laws of South Carolina by hiring a third party to commit a tortuous act of trespass on their behalf.
- c. All of the information needed to potentially establish "unity of title" for the Plaintiffs' Easement by Necessity cause of action was of public record (if it existed) or could have been obtained by the deposition of STRAHAN and could have been in the possession of the Plaintiffs as early as the date of their First Complaint.
- d. Notably, the manner in which the Plaintiffs' responded to the allegations in the Motion that they violated the ACT serve to support STRAHAN's Motion. First, Plaintiffs' counsel served an Affidavit on STRAHAN's attorney on September 29, 2011 - one day before the scheduled hearing, in violation of Rule 6(d) of the South Carolina Rules of Civil Procedure. Second, the Affidavit opposing STRAHAN's Motion for Sanctions was a ten-page statement by Cole L. Lawson, III, one of the Plaintiffs, that he did not

believe the action was frivolous. There was no Affidavit by a licensed attorney in South Carolina which states the filing of the suit against STRAHAN was reasonable. Thirdly, approximately two (2) hours before the scheduled hearing, STRAHAN's counsel was served with a sixteen-page Memorandum of Law in opposition to the Motion, which Memorandum largely consisted of a recitation of the pleadings and the ACT, and it was largely devoid of legal argument. STRAHAN's counsel stated at the hearing that he had not had sufficient opportunity to read or digest the recently served Affidavit and Brief which I accept to be the situation.

- e. I considered the Plaintiffs' Letter of April 4, 2008, wherein counsel for the Plaintiffs provided Strahan with an ultimatum - (it says - sign the attached easement or be sued) in determining whether sanctions are appropriate. This letter threatening a lawsuit clearly evidences the Plaintiffs' intent to harass Strahan into providing the Plaintiffs with an easement which was not justified at law. Then, the Plaintiffs followed up their threat by filing suit and asking STRAHAN to pay their attorney fees and cost in order to litigate their unsupported causes of action.
- f. STRAHAN has been damaged and burdened by having to employ counsel for two years in anticipation of what turned out to be an unnecessary, unwarranted and totally unjustified lawsuit, which Plaintiffs decided without warning to drop the morning of the trial and a mere two days after serving STRAHAN with a 51-page Second Amended Complaint. Clearly, it cannot be reasonably contended that this third pleading was brought for "securing proper discovery, joinder of parties or adjudication of the claim or defense upon which the proceedings [were] based." See S.C. Code Ann. § 15-36-10(A)(3)(d) & (C)(1)(a) + (C)(1)(b) & (C)(1)(c). Rather, these late and lengthy pleadings were intended to harass and intimidate STRAHAN.

31. Under what is commonly referred to as "the American Rule" of legal fees, each party pays its own attorney fees regardless of outcome. In contrast, under "the English Rule," the losing party pays both its own fees and those of the prevailing side. Each system promotes different ideals and purposes of the justice system. For example, defenders of the American Rule emphasize its importance in permitting all types of people to bring lawsuits to protect their interests, without the fear of having to pay the opposition's attorney in the event of a loss. On the other hand, the English Rule discourages unwarranted and unjustified lawsuits. As a consequence, South Carolina, and most every other state in the Union, have enacted

statutes intended to protect litigants from unjustified and unwarranted lawsuits. These statutes, in essence, codify the English Rule of fees and allow that rule to apply when a lawsuit is brought which has no basis in law or fact or is brought for an improper purpose. In this case, it is absolutely clear that the Plaintiffs' action against STRAHAN had no basis in law or in fact, and that the Plaintiffs continued to pursue this action several years despite being repeatedly informed that their claims were without any supporting grounds. The lack of a legal basis for the Plaintiffs' action, when coupled with their intentional late service of pleadings, Affidavits, and Briefs, implies that the sole purpose of this action was to harass STRAHAN and attempt to coerce him to give them an easement when he had no obligation to do so.

32. While the termination of the case came about by a Voluntary non-suit with prejudice, several decisions have interpreted Subsection C of the ACT to include any adjudication on the merits. See, for example, the case of Wachovia Securities, LLC v. Brand, 2010 WL 3420214, *9 (D.S.C. August 26, 2010), which broadly interpreted the words "court" and "trial" in subsection (C) of the ACT to allow an award of sanctions by an arbitration panel, and the case of Jones v. City of Folly Beach, 326 S.C. 360, 483 S.E.2d 770, 773 (Ct. App. 1997), which held that a voluntary non-suit dismissal with prejudice was an adjudication on the merits.

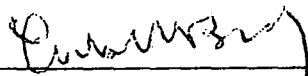
33. Based on the foregoing facts and legal principles, I conclude that STRAHAN is entitled to recover his reasonable attorneys' fees, costs and expenses, as set forth in the itemized statement of attorneys' fees and expenses against each of the Plaintiffs, jointly and severally, due to the violations of the Act, including S.C. Code Ann. Sections 15-36-10(C)(1)(a) and (b) and (c).

ORDER

Therefore, it is hereby **ORDERED** that Cole L. Lawson, III and Cole L. Lawson, IV, are jointly and severally obligated to Weldon T. Strahan for attorneys' fees, costs and actual expenses in the amount of \$24,700.09 for their violation of the South Carolina Frivolous Civil Proceedings Sanction Act.

AND IT IS SO ORDERED.

Ridgeland, South Carolina
December 15, 2011


The Honorable Luke N. Brown, Jr.
Special Referee for Jasper County, S.C.

) IN THE COURT OF COMMON PLEAS
) FOR THE 14th JUDICIAL CIRCUIT
) CIVIL CASE NO: 2008-CP-27-481

) FOR THE 14th JUDICIAL CIRCUIT
) CIVIL CASE NO: 2008-CP-27-481

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issued on 12/15/2011 in this case by The Honorable Luke N. Brown, Jr., as Special Referee for Jasper County and filed on 12/15/2011 with the Clerk of this Court and with all pages of such aforesaid Order with the exception and exclusion therefrom of Page 10 thereof being initially served upon and received by the Plaintiffs' undersigned legal counsel herein on 12/20/2011 from opposing legal counsel herein and with Page 10 of such aforesaid Order having been thereafter served upon and received by the Plaintiff's undersigned legal counsel herein on 12/22/2011 from opposing legal counsel herein.

The grounds for the Plaintiffs' within Rule 59 Motion are hereby stated and set forth and specified and delineated, as follows:

(A.) The Special Referee in this matter erred by issuing and entering on 12/15/2011 the **Order Granting Strahan's Motion For Attorneys' Fees And Costs** in this case awarding the sum of \$24,700.09 in attorney fees and costs unto the Defendant, Weldon T. Strahan, from the above-named Plaintiffs pursuant to the Motion for Attorneys' Fees and Costs previously filed herein by the Strahan Defendants pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act found at and under Section 15-36-10 of the 1976 S.C. Code of Laws, as amended, in that in order for the Defendant, Weldon T. Strahan, to be entitled as a matter of law to recover any attorney fees or costs whatsoever from the above-named Plaintiffs under the South Carolina Frivolous Civil Proceedings Sanctions Act, such moving Defendant has the burden of proof to establish that such underlying litigation was indeed frivolous by proving by a preponderance of the evidence to the satisfaction of the Court all of the statutory elements and factors as required under the express provisions of Section 15-36-10 of the 1976 S.C. Code of Laws, which the Defendant, Weldon T. Strahan, has, as shown and reflected by the record in this case, clearly failed to do as such moving Defendant has not met or complied with the requisite applicable statutory burden of proof of establishing and proving unto this Court by a preponderance or greater weight of the evidence that the underlying litigation and lawsuit filed in the above-captioned matter was purely and simply frivolous on the part of the above-named Plaintiffs and/or meant or intended to be used by such Plaintiffs for the sole purpose of harassing or threatening or intimidating the Strahan Defendants since the record and the overwhelming weight of the evidence in this case actually conversely clearly indicates and leads to only one (1) logical legal conclusion that the only intent of and behind the filing of the within lawsuit by the above-

named Plaintiffs was for the sole and lawful and legitimate purpose of making a good-faith attempt to acquire from the Court, based on various alternative equitable remedies as available and long recognized under good and valid and sound principles and doctrines of South Carolina Law, a perpetual and non-exclusive easement and right-of-way for ingress and egress and public road access to and from the subject landlocked property situate in Jasper County, South Carolina and owned in fee-simple absolute by the above-named Plaintiffs. (Please see the Plaintiffs' Memorandum of Law in support of their Rule 59 Motion attached hereto and filed herewith for a further discussion of these alleged errors on the part of the Special Referee in this case and the relevant legal issues and authorities in regard thereto).

(B.) The Special Referee in this matter also erred by issuing and entering on 12/15/2011 the **Order Granting Strahan's Motion For Attorneys' Fees And Costs** in this case awarding the sum of \$24,700.09 in attorney fees and costs unto the Defendant, Weldon T. Strahan, from the above-named Plaintiffs pursuant to the Motion for Attorneys' Fees and Costs previously filed herein by the Strahan Defendants pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act found at and under Section 15-36-10 of the 1976 S.C. Code of Laws, as amended, in that the Defendant, Weldon T. Strahan, was in no way legally entitled or authorized or justified as a clear and simple matter of law in receiving such requested statutory relief and remedy from this Court because the Strahan Defendants have a very real and serious statutory threshold problem under the existing law of South Carolina with respect to such moving Defendant's Motion for Attorney Fees and Costs and Sanctions previously filed herein pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act in that Section 15-36-10(C)(1) of the 1976 S.C. Code of Laws specifically provides and requires thereunder, as follows: "At the conclusion of a trial and after a verdict for or a verdict against damages has been rendered or a case has been dismissed by a directed verdict, summary judgment, or judgment notwithstanding the verdict, upon motion of the prevailing party, the Court shall proceed to determine if the claim or defense was frivolous." In this particular case none of the above-referenced events occurred or took place as required by the aforesaid express provisions contained in such statute as necessary first to determine who the prevailing party in such litigation was and also as necessary to trigger the right of any litigant thereto to file such a motion thereunder and as further necessary in order for the Court to have the proper subject matter jurisdiction and statutory authority as

required to even hear or consider or determine if the claim or defense was frivolous or to grant a Motion for Attorney Fees and Costs and Sanctions under the South Carolina Frivolous Civil Proceedings Sanctions Act. In the case at hand, the Defendant, Weldon T. Strahan, was clearly not even authorized or justified by law or statute to file his Motion for Attorney Fees and Costs and Sanctions and such Defendant is clearly not entitled to recover any of his attorney fees or costs from the within Plaintiffs under the South Carolina Frivolous Civil Proceedings Sanctions Act and specifically Section 15-36-10(C)(1) of the 1976 S.C. Code of Laws because the Plaintiffs' claims and causes of action and the above-captioned legal proceedings filed against the Defendant, Weldon T. Strahan, were not terminated or ended in favor of such Defendant on the merits or as the result of such Defendant being granted a Motion for Summary Judgment or a directed verdict or a defense verdict as the result of the holding of a merits hearing in regard thereto. The Defendant, Weldon T. Strahan, never filed or had heard in the defense of this case a Rule 12(b)(6) Motion to Dismiss the Plaintiffs' Complaint or a Rule 12 (C) Motion for a Judgment on the Pleadings or a Rule 56 Motion for a Summary Judgment and such Defendant also never received a directed verdict or a defense verdict in this case. The Plaintiffs in this matter, just prior to the non-jury trial held in this matter on 10/20/2010 by Special Referee, Luke Brown, decided to voluntarily non-suit and dismiss with prejudice all of their pending causes of action and claims against the Defendant, Weldon T. Strahan, which was merely a strategic legal decision made by the Plaintiffs after first consulting with their legal counsel herein, knowing that they had good and valid claims and causes of action against the Defendant, Weldon T. Strahan, based on an easement implied by necessity and/or an easement implied by prior use and/or an easement by estoppel and/or an equitable easement due to extreme hardship, and with such decision being made by the Plaintiffs for the purpose of streamlining the reference hearing and in order to simplify the issues for the non-jury trial in this case and to concentrate on their claims and causes of action filed against the Defendants, David A. Shipes and Tony Walter Shipes and Jacob F. Malphrus and Wanda S. Casey and Helen S. Kinard, which also included a different claim and cause of action for the enforcement of the terms and conditions of an express easement for ingress and egress to and from the Plaintiffs' landlocked property as expressly reserved in favor of such Plaintiffs as the ultimate successors and assigns under a prior Deed recorded in Jasper County Deed Book 6, at Page 10, in addition to the Plaintiffs' claims and causes of action

as contained and set forth in this lawsuit based on the granting by the Court of an easement implied by necessity and/or an easement implied by prior use and/or an easement by estoppel and/or an equitable easement due to extreme hardship. (Please see the Plaintiffs' Memorandum of Law in support of their Rule 59 Motion attached hereto and filed herewith for a further discussion of these alleged errors on the part of the Special Referee in this case and the relevant legal issues and authorities in regard thereto).

(C.) The Special Referee in this matter further erred by issuing and entering on 12/15/2011 the **Order Granting Strahan's Motion For Attorneys' Fees And Costs** in this case by awarding the clearly excessive sum of \$24,700.09 in attorney fees and costs unto the Defendant, Weldon T. Strahan, from the above-named Plaintiffs pursuant to the Motion for Attorneys' Fees and Costs previously filed herein by the Strahan Defendants pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act found at and under Section 15-36-10 of the 1976 S.C. Code of Laws, as amended, in that the extremely excessive amount of \$24,700.09 for attorney fees and costs as so awarded by this Court under the aforesaid **Order Granting Strahan's Motion For Attorneys' Fees And Costs** unto and in favor of the Defendant, Weldon T. Strahan, from the above-named Plaintiffs, constitutes a clear abuse of discretion on the part of Jasper County Special Referee, Luke N. Brown, based on a totally and completely undocumented and unsupported and uncorroborated increase of \$8,231.00 for such attorneys fees and costs with no evidentiary basis whatsoever, as compared to the total amount of \$16,469.09 in attorney fees and costs as previously alleged to have been incurred in defending this lawsuit by the Defendant, Weldon T. Strahan, as shown and reflected by Attachment "I" prepared by Attorney Mikell and annexed as an exhibit and incorporated into the Brief in Support of Motion for Sanctions that Attorney Mikell drafted and filed on 3/31/2011 with the Clerk of this Court on behalf of the Defendant, Weldon T. Strahan, and clearly showing and reflecting and indicating that the Defendant, Weldon T. Strahan, was heretofore originally requesting and pursuing an award from this Court for his attorney fees and defense costs incurred in this matter in the total amount of \$16,469.09, and the aforesaid **Order Granting Strahan's Motion For Attorneys' Fees and Costs** issued on 12/15/2011 by Jasper County Special Referee, Luke N. Brown, on Page 5 at Paragraph No. 20 under the Findings of Fact thereof and on Page 8 at Paragraph No. 28 under the Conclusions of Law thereof purports that the total attorney fees and

defense costs in the total amount of \$16,469.09 allegedly incurred in this matter and initially being sought by the Defendant, Weldon T. Strahan, from the above-named Plaintiffs under his prior Motion for Attorneys' Fees and Costs originally filed in this case pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act based on Section 15-36-10 of the 1976 S.C. Code of Laws, as amended, was somehow allegedly amended and supplemented and described in a fee schedule attached as Attachment "B" to the Motion for Attorneys' Fees and Costs at and during the hearing for same conducted in this matter on 9/30/2011 at the Jasper County Courthouse before the Honorable Luke N. Brown, as Special Referee for Jasper County, in a purported attempt by the Strahan Defendants to try to show an increase in the total sum of \$8,231.00 for Strahan's attorney fees and costs, however, it is the contention of the above-named Plaintiffs that the record in this case and for the hearing held on 9/30/2011 to consider such Motion for Attorney Fees' and Costs will clearly show and reflect and indicate that no such purported amendment or supplemental or increased attorney fees or costs or the filing of any such purported revised fee schedule as Attachment "B" to such underlying Motion filed on behalf of the Strahan Defendants ever actually occurred during such Motion hearing conducted herein on 9/30/2011 as stated and set forth in and alleged and purported by the aforesaid **Order Granting Strahan's Motion For Attorneys' Fees And Costs** entered and filed herein on 12/15/2011, it is also contended by the above-named Plaintiffs that the record in this case and for such Motion hearing held herein on 9/30/2011 clearly shows and reflects and indicates that the Plaintiffs' undersigned legal counsel herein was never presented or served with any such purported supplemental or amended fees schedules or attachments or documents by opposing legal counsel for the Strahan Defendants either prior to or during or after such Motion hearing held on 9/30/2011, which aforesaid contentions on the part of the above-named Plaintiffs are also further corroborated by the Jasper County Public Index for this case which does not show the filing of any additional or supplemental documents with the Clerk of this Court by opposing legal counsel for and on behalf of the Strahan Defendants either prior to or during or after the holding of such Motion hearing in this case on 9/30/2011 before Jasper County Special Referee, Luke N. Brown. (Please see the Plaintiffs' Memorandum of Law in support of their Rule 59 Motion attached hereto and filed herewith for a further discussion of these alleged errors on the part of the Special Referee in this case and the relevant legal issues and authorities in regard thereto).

(D.) The Special Referee in this matter also erred by issuing and entering on 12/15/2011 the **Order Granting Strahan's Motion For Attorneys' Fees And Costs** in this case awarding the sum of \$24,700.09 in attorney fees and costs unto the Defendant, Weldon T. Strahan, from the above-named Plaintiffs pursuant to the Motion for Attorneys' Fees and Costs previously filed herein by the Strahan Defendants pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act found at and under Section 15-36-10 of the 1976 S.C. Code of Laws, as amended, in that it was improper and premature as a matter of law for Jasper County Special Referee, Luke N. Brown, Esquire, to hear and make and render a ruling and decision and determination and adjudication at this point in time as requested by the moving Defendant, Weldon T. Strahan, concerning and pertaining to whether or not this underlying lawsuit and the claims and causes of action contained therein as filed and prosecuted by the above-named Plaintiffs constitutes a frivolous civil proceeding or frivolous litigation under the South Carolina Frivolous Civil Proceedings Sanctions Act pursuant to Section 15-36-10 of the 1976 S.C. Code of Laws, as amended, as alleged and purported by the Motion for Attorneys' Fees and Costs previously filed in this matter by the Strahan Defendants since the merits of the underlying lawsuit have not yet been finally decided or ruled upon as a result of it still being and constituting an active and ongoing case that is presently pending on appeal before the South Carolina Court of Appeals for a final hearing and decision and ruling in this case. (Legal Authority: Section 15-36-10 of the 1976 S.C. Code of Laws.) (Please see the Plaintiffs' Memorandum of Law in support of their Rule 59 Motion attached hereto and filed herewith for a further discussion of these alleged errors on the part of the Special Referee in this case and the relevant legal issues and authorities in regard thereto).

(E.) The **Order Granting Strahan's Motion For Attorneys' Fees And Costs** as issued on 12/15/2011 by the Honorable Luke N. Brown, as Special Referee for Jasper County and filed herein on 12/15/2011 is also clearly erroneous as a result of it being entered contrary to the generally pronounced and widely recognized and proclaimed public policies and the relevant and applicable statutory law and case law of the State of South Carolina with respect thereto and such aforesaid **Order Granting Strahan's Motion For Attorneys' Fees And Costs** entered and filed herein on 12/15/2011 was issued in error by the Honorable Luke N. Brown, as the duly appointed Special Referee for Jasper County, without proper supporting case or statutory or common law

authority and precedents and the Findings of Facts and Conclusions of Law contained therein were incomplete, misstated, inapplicable, and erroneous and without sufficient and adequate evidentiary basis and proof and support as required and defined under the general standards for proof and review in such cases tried at equity with finality before a Special Referee as prescribed by South Carolina Law. (Please see Plaintiffs' Memorandum of Law in support of their Rule 59 Motion attached hereto and filed herewith for a further discussion of these alleged errors on the part of the Special Referee herein and the relevant legal issues and authorities in regard thereto).

In conclusion, the above-named Plaintiffs hereby move and request that The Honorable Luke N. Brown, as Special Referee for Jasper County, in his discretion as he deems fit and proper and as expressly authorized and permitted by the provisions under Rule 59 of the S.C. Rules of Civil Procedure, open and reconsider and set aside and vacate or in the alternative alter and amend and revise and correct the aforesaid **Order Granting Strahan's Motion For Attorneys' Fees And Costs** previously issued and filed in this case on 12/15/2011 after taking such additional testimony and receiving such additional affidavits from opposing legal counsel herein as such Special Referee deems necessary and appropriate and to accordingly direct certain amendments and revisions of the findings of fact and conclusions of law as a result thereof and/or make and render new findings of fact and conclusions of law and direct the entry of a new and appropriate Order in this matter as such Special Referee deems just, fair, equitable, reasonable, and proper under the facts and circumstances of this case and/or issue and enter an Amended Order in this case as such Special Referee in his discretion deems fit and appropriate in accordance and compliance with the findings and conclusions and determinations made after a hearing is held and conducted by such Special Referee herein to consider the Plaintiffs' within Rule 59 Motion to Amend, Alter, Open, Reconsider, Vacate, or Set Aside the prior **Order Granting Strahan's Motion For Attorneys' Fees And Costs** as entered herein on 12/15/2011. The within Motion is based upon and filed pursuant to Rule 59 of the S.C. Rules of Civil Procedure and it is hereby further supported by the Plaintiff's Memorandum of Law attached hereto and filed herewith and incorporated hereunder by reference for the Court's review and consideration in deciding and adjudicating the Plaintiffs' within Rule 59 Motion to Amend, Alter, Open, Reconsider, Vacate, or Set Aside the prior **Order Granting Strahan's Motion For Attorneys' Fees And Costs** as entered herein on 12/15/2011.

Section 15-36-10 (J) of the South Carolina Frivolous Civil Proceedings Sanctions Act specifically provides thereunder, as follows: **"The provisions of this section shall not apply where an attorney or pro se litigant establishes a basis to proceed with litigation, or to assert or controvert an issue therein, that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of the existing law."**

Please Be Present to Participate in and/or to Contest or Object to Such Rule 59 Motion Hearing as You Deem Fit And Appropriate.



E. W. BENNETT, JR. (S.C. Bar No: 656)

Attorney for the Plaintiffs

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Dated: December 23, 2011.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FOR THE 14th JUDICIAL CIRCUIT
COUNTY OF JASPER) CIVIL CASE NO: 2008-CP-27-481
)

COLE L. LAWSON, III and)
COLE L. LAWSON, IV,)

Plaintiffs,)

-vs-)

WELDON T. STRAHAN a/k/a)
WELDON TRAVIS STRAHAN, a/k/a)
W. TRAVIS STRAHAN, INDIVIDUALLY)
AND IN HIS CAPACITY AS PERSONAL)
REPRESENTATIVE OF THE ESTATE)
OF RONALD J. STRAHAN,)
WILSON LEE MIXSON, VIVIAN)
M. McALHANEY, AS TRUSTEE)
OF THE McALHANEY FAMILY)
TRUST, UTD 9/20/2004, VIVIAN)
MIXSON McALHANEY, DAVID A)
SHIPES, TONY WALTER SHIPES,)
HELEN S. KINARD a/k/a HELEN SHIPES)
KINARD, WANDA SHIPES CASEY a/k/a)
WANDA S. CASEY a/k/a WANDA D.)
CASEY, and JACOB F. MALPHRUS,)

Defendants.)

**MEMORANDUM OF LAW IN SUPPORT
OF PLAINTIFFS' RULE 59 MOTION TO
AMEND, ALTER, OPEN, RECONSIDER
OR VACATE THE ORDER GRANTING
STRAHAN'S MOTION FOR
ATTORNEYS' FEES AND COSTS**

The above-named Plaintiffs, by and through their undersigned legal counsel herein, in support of their **Rule 59 Motion to Amend, Alter, Open, Reconsider or Vacate the Order Granting Strahan's Motion for Attorneys' Fees and Costs Entered herein on 12/15/2011**, which Rule 59 Motion was filed with the Clerk of this Court simultaneously and on even date herewith pursuant to Rule 59 of the S.C. Rules of Civil Procedure, hereby states and sets forth their Memorandum of Law in support of the Plaintiffs' within Rule 59 Motion and in conjunction therewith, as follows:

STATEMENT OF FACTS AND PROCEDURAL HISTORY:

1. This action was commenced and initiated by the Plaintiffs filing of a Summons and Lis Pendens and Complaint with the Jasper County Clerk of Court on 8/1/2008 requesting that the Court grant them an easement for ingress and egress and access to their landlocked property.
2. The Plaintiffs thereafter filed their First Amended Summons and First Amended Lis Pendens and First Amended Complaint with the Clerk of this Court on 11/5/2009 requesting that the Court grant them an easement for ingress and egress and access to their landlocked property.
3. The Plaintiffs thereafter filed their Second Amended Summons and Second Amended Lis Pendens and Second Amended Complaint with the Clerk of this Court on 10/18/2010 requesting that the Court grant them an easement for ingress and egress and access to their landlocked property.
4. The Plaintiffs original Lis Pendens was filed in this matter on 8/1/2008 at Lis Pendens Case No. 2008-LP-27-204; and the Plaintiffs First Amended Lis Pendens was filed in this matter on 11/5/2009 at Lis Pendens Case No. 2009-LP-27-360; and the Plaintiffs Second Amended Lis Pendens was filed in this matter on 10/18/2010 at Lis Pendens Case No. 2010-LP-27-267.
5. A First Amended Answer was timely filed in this matter on 11/10/2009 by Attorney J. Thomas Mikell, Esquire on behalf of the Defendant, Weldon Travis Strahan, individually and as the Personal Representative of the Estate of Ronald J. Strahan.
6. An Answer was timely filed in this matter on 01/28/2010 by Attorney Kevin A. Brown, Esquire of the Anderson & Brown Law Firm on behalf of the Defendants, David S. Shipes and Tony Walter Shipes and Jacob F. Malphrus.
7. An Answer was also timely filed in this matter on 2/15/2010 by Attorney Kevin A. Brown, Esquire of the Anderson & Brown Law Firm on behalf of the Defendants, Helen Shipes Kinard and Wanda Shipes Casey.
8. That Attorney Matthew V. Creech, Esquire, of the Peters, Murdaugh, Parker, Eltzroth & Detrick Law Firm signed and executed an Acceptance of Service Form on 11/9/2009 acknowledging and showing and reflecting that on 11/9/2009 he duly and properly as expressly authorized accepted personal service of clocked-in copies of the Plaintiffs First Amended Summons and First Amended Lis Pendens and First Amended Complaint on behalf of his clients in this matter being the Defendants, Wilson Lee Mixson and Vivian Mixson McAlhaney, both

individually and in her capacity as the Trustee for the McAlhaney Family Trust, UTD 9/20/2004.

9. That a reference hearing with finality was held and conducted by the Honorable Luke Brown as the Special Referee in this case on 10/20/2010 at 10:00 a.m. in Jasper County with all parties hereto and their respective legal counsel herein being present for such reference hearing.

10. That as a result of the stipulations entered into by opposing legal counsel in this case just prior to the start of the reference hearing held in this matter on 10/20/2010 and based on the Plaintiffs agreeing to take and enter a voluntary non-suit and dismissal with prejudice of all claims and causes of action contained and set forth in the Plaintiffs' Second Amended Complaint filed with the Clerk of this Court on 10/18/2010 that were asserted against Weldon Travis Strahan, both individually and in his capacity as the Personal Representative for the Estate of Ronald J. Strahan, and against the Defendants, Wilson Lee Mixson, Vivian Mixson McAlhaney, both individually and in her capacity as the Trustee for the McAlhaney Family Trust, UTD 9/20/2004, and that involved the respective tracts of lands owned by such aforesaid Defendants as more fully described and designated as Parcels "A", "B", "C", "D", "E", "F", and "G" in the Second Amended Lis Pendens and the Second Amended Complaint filed herein on 10/18/2010 by the Plaintiffs, the only remaining claims and causes of action that were necessary for the Plaintiffs to present to Special Referee Luke Brown for his review and consideration and decision were as more fully stated and set forth in the Plaintiffs' Second Amended Complaint filed herein on 10/18/2010 and being listed, as follows: The Plaintiffs' **Third (3rd) Cause of Action for an Easement by Necessity** through the Shipers Tracts known and designated herein as Parcel "H" and Parcel "I"; and the Plaintiffs' **Fourth (4th) Cause of Action for an Easement by Necessity** through the Kinard Tract known and designated herein as Parcel "J"; and the Plaintiffs' **Fifth (5th) Cause of Action for an Easement by Necessity** through the Malphrus Tracts known and designated herein as Parcel "K" and Parcel "L"; and the Plaintiffs' **Sixth (6th) Cause of Action for the enforcement of the terms and conditions of a perpetual Express Easement and Right-of-Way for ingress and egress** and public road access to and from Plaintiffs' aforesaid landlocked 67.8+- acre parcel of land running over and through and across certain lands situate in Jasper County, South Carolina being the Shipers Tracts known and designated herein as Parcel "H" and Parcel "I" and the Kinard Tract known and designated herein as Parcel "J" and the Malphrus Tracts known and designated herein as Parcel "K" and Parcel

"L", as was previously expressly reserved in perpetuity pursuant to the provisions contained in a prior Deed from Big Salkehatchie Cypress Company, as Grantor, to Bertha Lee Stanley, A. Walter Stanley, Luella Stanley, Iva Lee Stanley, Lila Marie Stanley, and Lillie Inez Stanley, as Grantees, dated 01/08/1921 and recorded on 01/10/1921 in Jasper County Deed Book 6, at Page 10; and the Plaintiffs' **Seventh (7th) Cause of Action for an Equitable Easement due to Extreme Hardship** over and across the Shipes Tracts known and designated herein as Parcel "H" and Parcel "I" and the Kinard Tract known and designated herein as Parcel "J" and the Malphrus Tracts known and designated herein as Parcel "K" and Parcel "L"; and the Plaintiffs' **Eighth (8th) Cause of Action for a Declaratory Judgment Action** concerning and pertaining only to the Shipes Tracts known and designated herein as Parcel "H" and Parcel "I" and the Kinard Tract known and designated herein as Parcel "J" and the Malphrus Tracts known and designated herein as Parcel "K" and Parcel "L" and being more fully described herein below.

11. That the various tracts of land and parcels of real property that are the subject matter of this lawsuit are all situate in Jasper County, South Carolina, near the Grays Community and being located near and adjacent to and just northeast of Pine Branch Drive near its intersection with Cat Branch Road and being located near and adjacent to and just southwest of the Coosawhatchie River which separates Jasper County from Hampton County.

12. At the time of the reference hearing held in this case on 10/20/2010, the above-named Plaintiffs were the joint owners as tenants in common of a landlocked 67.8 parcel of mostly low land and/or swamp land known in this case as the "Lawson Tract" and designated as Jasper County TMS No. 055-00-00-001 and such property was and still is a completely landlocked tract of land totally and completely cut off from any access to a public road or highway as a means of providing ingress and egress thereto.

13. The Plaintiffs, Cole L. Lawson, III and Cole L. Lawson, IV, previously purchased for hunting and fishing and timber growing purposes the aforesaid landlocked 67.8 acre parcel of land known in this case as the "Lawson Tract" and designated as Jasper County TMS No. 055-00-00-001 from Hugh C. Horry and W.J. Getsinger, Jr. on 3/4/2008 at a total purchase price of \$50,000.00; however, the Plaintiffs have since the recording on 3/11/2008 of their Deed to such landlocked property been unable to enter upon or gain access to or to hunt or fish on or grow timber on or use or enjoy such landlocked property or any portion thereof in any way or manner

or fashion because the Plaintiffs do not have any means or methods for public road access to and from such landlocked property and all of Plaintiffs' prior attempts to acquire a deeded ingress and egress easement from the within Defendants for such landlocked property have been futile.

14. The Plaintiffs' landlocked 67.8 acre parcel of land and known herein as the "Lawson Tract" and designated as TMS No. 055-00-00-001 is the same property that was previously known and designated and described as a residual landlocked 62.0 acre parcel of low land and swamp land situate on the southwest bank of the Coosawhatchie River separating Jasper County from Hampton County that was the northeastern portion of the larger 152.0 acre parent parcel of land previously known as the "Bowers Tract", with the southwestern portion thereof being the adjoining and contiguous 90.0 acre parcel of high land, all of which was a portion of the real estate previously conveyed to Big Salkehatchie Cypress Company by Deed of Savannah River Lumber Company dated 01/19/1920 and recorded on 01/31/1920 in Jasper County Deed Book 2, at Page 534; and the aforesaid 152.0 acre parent parcel of land then known as the "Bowers Tract" was a portion of the real property previously conveyed to Savannah River Lumber Company by Deed of Savannah River Timber Company dated 01/19/1920 and recorded on 01/23/1920 in Jasper County Deed Book 2, at Page 524; and the aforesaid 152.0 acre "Bowers Tract" was previously conveyed to Savannah River Timber Company by Deed of A.F. Bowers dated 12/19/1912 and recorded on 12/21/1912 in Hampton County Deed Book D-21, at Page 338; and the aforesaid 152.0 acre "Bowers Tract" was previously conveyed to A.F. Bowers by Deed of Thomas D. Fennell dated 01/07/1909 and recorded on 01/09/1909 in Hampton County Deed Book D-19, at Page 8.

15. The Plaintiffs were previously informed by the late Hugh C. Horry and the late W.J. Getsinger, Jr. that both them and the prior owners of the Plaintiffs' landlocked property, Henry B. Garbade and John P. Wise, had previously cut and harvested and removed timber from the Plaintiffs' landlocked 67.8 acre parcel of land on several occasions by hauling it out through the existing private dirt road located on the adjoining 290.0 acre Strahan Tract in close proximity to the northwest boundary line of the Plaintiffs' landlocked 67.8 acre parcel of land and leading to a public dirt road known as Pine Branch Drive as specifically mentioned in the Final Order and Decree issued in this case on 3/22/2011 by Special Referee, Luke Brown.

16. The public road or highway that is the closest in proximity to the Plaintiffs' aforesaid landlocked 67.80 acre parcel of land known herein as the Lawson Tract and designated as Jasper County TMS No. 055-00-00-001 is the public county dirt road known as Pine Branch Drive, which leads and connects to another public road known as Cat Branch Road a/k/a S.C. Secondary Road No. S-27-108, which leads and connects to another public highway known as U.S. Highway No. 278.

17. All of the adjoining and contiguous landowners with respect to the Plaintiffs' landlocked 67.8 acre parcel of land and who were originally named as Defendants in this lawsuit are listed, as follows: (A.) Weldon T. Strahan a/k/a Weldon Travis Strahan owns the 290.0 acre tract of land known in this lawsuit as Parcel "A" and as Parcel "B" and as Parcel "C" and designated as Jasper County TMS No. 053-00-03-001 that bounds Plaintiffs' landlocked property on the Northwest; (B.) Vivian Mixson McAlhaney and Wilson Lee Mixson, individually, and Vivian M. McAlhaney, as Trustee of The McAlhaney Family Trust, UTD 9/20/2004 (A Revocable Living Trust), own the 239.7 acre tract of land known in this lawsuit as Parcel "D" and as Parcel "E" and as Parcel "F" and as Parcel "G" and designated as Jasper County TMS No. 056-00-03-001 that bounds Plaintiffs' landlocked property on the Southeast; and (C.) David A. Shipes and Tony Walter Shipes own the 43.0 acre tract of land known in this lawsuit as Parcel "H" and designated as Jasper County TMS No. 054-00-00-001 that bounds Plaintiffs' landlocked property on the Southwest.

18. The reference hearing held and conducted in this case on 10/20/2010 by Special Referee, Luke Brown, lasted from 10:13 a.m. until 4:47 p.m. and involved the sworn testimony of eight (8) different witnesses and the introduction of 51 different exhibits and the transcript of this hearing was 282 pages long; and as a result of such contested reference hearing a Final Order and Decree was issued on 3/22/2011 by Special Referee, Luke Brown, denying the request of the Plaintiffs to enforce the terms and conditions of the express easement for ingress and egress as reserved for access their landlocked property by a prior Deed previously recorded in Jasper County Deed Book 6, at Page 10, and also denying the request of the Plaintiffs to be granted by the Court an easement implied by necessity or an easement implied by prior use or an easement by estoppel or an equitable easement for purposes of ingress and egress and access to and from their landlocked property.

19. The Plaintiffs timely filed on 3/31/2011 a Rule 59 Motion For a New Trial and to Amend, Alter, Open, Reconsider or Vacate the Final Decree of the Court with supporting Memorandum of Law and the Plaintiffs also timely filed on 4/26/2011 an Rule 59 Motion For a New Trial and to Amend, Alter, Open, Reconsider or Vacate the Final Decree of the Court with supporting Memorandum of Law, all of which relief as requested by the Plaintiffs pursuant to Rule 59 of the S.C. Rules of Civil Procedure was denied by the Order issued in this case on 5/24/2011 in such regard by Special Referee, Luke Brown.

20. After the filing of the Order issued on 5/24/2011 by Special Referee, Luke Brown denying all of the relief as requested by the Plaintiffs pursuant to Rule 59 of the S.C. Rules of Civil Procedure, the Plaintiff, Cole L. Lawson, IV, transferred and conveyed his one-half (½) undivided interest in and to the subject landlocked 67.80 acre parcel of land to Todd Land.

21. Desa Ballard with the Ballard, Watson, & Weissenstein Law Firm in Columbia, S.C. thereafter timely filed a Notice of Appeal with the South Carolina Court of Appeals on behalf of the Plaintiffs with respect to the prior Final Decree issued in this case on 3/22/2011 by Special Referee, Luke Brown, and as to the Order issued in this case on 5/24/2011 by Special Referee, Luke Brown, which appeal is still ongoing and pending with the South Carolina Court of Appeals and the Appellant's Initial Brief was filed on 8/24/2011 on behalf of the Plaintiffs with the South Carolina Court of Appeals and such case has not yet been scheduled for a final hearing or oral arguments before the South Carolina Court of Appeals.

22. The Defendant, Weldon T. Strahan, filed in this case on 3/30/2011 against the above-named Plaintiffs a Motion for Attorney Fees and Costs seeking an award from this Court of attorney fees and costs in the total amount of \$16,469.09 and opposing legal counsel herein for and on behalf of the Strahan Defendants also filed in this case on 3/30/2011 a Brief in Support of Motion for Sanctions under the South Carolina Frivolous Civil Proceedings Sanctions Act pursuant to Section 15-36-10 of the 1976 S.C. Code of Laws, as amended, and the Affidavit of Attorney James M. Herring in support of the Motion for Attorney Fees and Costs and Sanctions of the Strahan Defendants was filed in this case on 8/25/2011.

23. The above-named Plaintiffs thereafter filed with the Clerk of this Court on 9/30/2011 **"Plaintiffs' Memorandum of Law in Opposition to Motion for Attorney Fees and Costs Filed By Defendant Weldon T. Strahan Under the South Carolina Frivolous Civil Proceedings Sanctions Act"** and the **"Affidavit of Plaintiff Cole L. Lawson, III Opposing Motion For Attorney Fees And Costs Filed By Defendant Weldon T. Strahan Under the South Carolina Frivolous Civil Proceedings Sanctions Act"** was executed on 9/28/2011 by the Plaintiff, Cole L. Lawson, III, and was filed in this case on 9/30/2011.

24. A contested hearing to consider and decide the Motion for Attorney Fees and Costs seeking an award with respect thereto in the total amount of \$16,469.09 as filed in this case on 3/30/2011 by the Defendant, Weldon T. Strahan, pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act under Section 15-36-10 of the 1976 S.C. Code of Laws, as amended, was thereafter held and conducted on 9/30/2011 at the Jasper County Courthouse by The Honorable Luke N. Brown, Jr., as the duly appointed Special Referee for Jasper County with finality in this matter.

25. The above-named Plaintiffs by and through their undersigned legal counsel herein also filed in this case on 11/8/2011 the **"Plaintiffs' Letter Brief to Special Referee Luke N. Brown, Jr. dated 11/7/2011 in Opposition to the Entry of the Proposed Order Granting Strahan's Motion for Attorney Fees and Costs in the Total Sum of \$24,700.09."**

26. As a result of such aforesaid contested motion hearing held and conducted at the Jasper County Courthouse on 9/30/2011, The Honorable Luke N. Brown, Jr., as Special Referee for Jasper County, issued and entered on 12/15/2011 an Order Granting Strahan's Motion For Attorneys' Fees And Costs in this case awarding the sum of \$24,700.09 in attorney fees and costs unto the Defendant, Weldon T. Strahan, from the above-named Plaintiffs pursuant to the Motion for Attorneys' Fees and Costs previously filed herein by the Strahan Defendants pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act under Section 15-36-10 of the 1976 S.C. Code of Laws, as amended.

LEGAL ANALYSIS:

1. When a trial judge makes a general ruling on an issue, but does not address the specific argument raised by the appellant and the appellant does not make or file a Rule 59 Motion to Alter or Amend to obtain a ruling on the argument, the appellate court cannot consider the argument on appeal. (Legal Authority: *Floyd v. Floyd*, 365 S.C. 56, 615 S.E.2d 465 (S.C.App. 2005)). When a trial court does not explicitly rule on an argument raised, and the appellant makes no motion to obtain a ruling, the appellate court may not address the issue. (Legal Authority: *Smith v. NCCI, Inc.*, 369 S.C. 236, 631 S.E.2d 268 (S.C. App. Ct., 2006).

2. Under Rule 59(f) of the S.C. Rules of Civil Procedure, a Rule 59 Motion "may in the discretion of the Court be determined on the briefs filed by the parties without oral argument." (Legal Authority: *Pollard v. County of Florence*, 444 S.E.2d 534, 314 S.C. 397 (S.C. App. Ct., 1994)). In the *Pollard -vs- County of Florence* case, Pollard's notice of motion and motion to alter or amend the judgment contains more than simply a notice of the motion and the motion itself. It consisted of seven typewritten pages, sets forth arguments on the issues raised, and gives citations to legal authority. Although Pollard did not style her notice of motion and motion as a "brief," it nevertheless constitutes one in every sense of the word. Under these circumstances, the circuit court did not abuse its discretion in deciding Pollard's Rule 59(e) motion.

3. Rule 59 of the S.C. Rules of Civil Procedure provides thereunder, as follows:

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in the courts of the State. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. The motion for a new trial shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter. In non-jury actions the motion shall be made not later than 10 days after the receipt of written notice of the entry of judgment or of the filing of an order disposing of the action, if no judgment has been entered.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment, the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order.

(f) Time for Appeal; End of Term. The time for appeal for all parties shall be stayed by a timely motion under this Rule and shall run from the receipt of written notice of entry of the order granting or denying such motions. The time within which to make the motions under this Rule shall not be affected by the ending of a term of court or departure of the judge from the circuit, and the trial judge shall retain jurisdiction of the action for the purpose of hearing and disposing of such motion if not heard and disposed during the term. Except by consent of the parties, argument on the motion shall be heard in the circuit where the trial was held. The motion may in the discretion of the court be determined on briefs filed by the parties without oral argument.

(g) Judge to be Provided with Copy. A party filing a written motion under this rule shall provide a copy of the motion to the judge within ten (10) days after the filing of the motion.

4. The above-named Plaintiffs are now accordingly entitled as a matter of law pursuant to their Rule 59 Motion filed simultaneously herewith to have the **Order Granting Strahan's Motion for Attorneys' Fees and Costs** previously issued and entered on 12/15/2011 by the Honorable Luke N. Brown, Esquire, as the duly appointed Special Referee herein reconsidered and opened and set aside and vacated and/or in the alternative accordingly altered and amended as requested by the Plaintiff in and by their Motion for Reconsideration filed herein on even date herewith pursuant to Rule 59 of the S.C. Rules of Civil Procedure.

5. Section 15-36-10 of the 1976 S.C. Code of Laws commonly known as the South Carolina Frivolous Civil Proceedings Sanction Act is the applicable statute in regard to the Motion for Attorney Fees and Costs filed herein on 3/30/2011 by the Defendant, Weldon T. Strahan, against the Plaintiffs, which statute was last amended in July of 2005 and it is fully stated and set and forth, as follows:

§ 15-36-10. Frivolous lawsuits; signing pleadings; imposition of sanctions; notice and opportunity to respond; reporting violations.

(A)(1) A pleading filed in a civil or administrative action on behalf of a party who is represented by an attorney must be signed by at least one attorney of record who is an active member of the South Carolina Bar or who is admitted to practice in the courts of this State and must include the address and telephone number of the attorney signing the document.

(2) A document filed in a civil or administrative action by a party who is not represented by an attorney must be signed by the party and must include the address and telephone number of the party.

(3) The signature of an attorney or a pro se litigant constitutes a certificate to the court that:

(a) the person has read the document;

(b) a reasonable attorney in the same circumstances would believe that under the facts his claim or defense may be warranted under the existing law or, if his claim or defense is not warranted under the existing law, a good faith argument exists for the extension, modification, or reversal of existing law;

(c) a reasonable attorney in the same circumstances would believe that his procurement, initiation, continuation, or defense of a civil cause is not intended merely to harass or injure the other party; and

(d) a reasonable attorney in the same circumstances would believe his claim or defense is not frivolous, interposed for delay, or brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense upon which the proceedings are based.

(4) An attorney or pro se litigant participating in a civil or administrative action or defense may be sanctioned for:

(a) filing a frivolous pleading, motion, or document if:

(i) the person has not read the frivolous pleading, motion, or document;

(ii) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;

(iii) a reasonable attorney presented with the same circumstances would believe that the procurement, initiation, continuation, or defense of a civil cause was intended merely to harass or injure the other party; or

(iv) a reasonable attorney presented with the same circumstances would believe the pleading, motion, or document is frivolous, interposed for merely delay, or merely brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense upon which the proceedings are based;

(b) making frivolous arguments a reasonable attorney would believe were not reasonably supported by the facts; or

(c) making frivolous arguments that a reasonable attorney would believe were not warranted under the existing law or if there is no good faith argument that exists for the extension, modification, or reversal of existing law.

(B)(1) If a document is not signed or does not otherwise comply with this section, it must be stricken unless it is signed promptly or amended to comply with this section after the omission is called to the attention of the attorney or the party.

(2) If a document is signed in violation of this section, or an attorney or pro se litigant has violated subsection (A)(4), the court, upon its own motion or motion of a party, may impose upon the person in violation any sanction which the court considers just, equitable, and proper under the circumstances.

(C)(1) At the conclusion of a trial and after a verdict for or a verdict against damages has been rendered or a case has been dismissed by a directed verdict, summary judgment, or judgment notwithstanding the verdict, upon motion of the prevailing party, the court shall proceed to determine if the claim or defense was frivolous. An attorney, party, or pro se litigant shall be sanctioned for a frivolous claim or defense if the court finds the attorney, party, or pro se litigant failed to comply with one of the following conditions:

(a) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;

(b) a reasonable attorney in the same circumstances would believe that his procurement, initiation, continuation, or defense of the civil suit was intended merely to harass or injure the other party; or

(c) a reasonable attorney in the same circumstances would believe that the case or defense was frivolous as not reasonably founded in fact or was interposed merely for delay, or was merely brought for a purpose other than securing proper discovery, joinder of proposed parties, or adjudication of the claim or defense upon which the proceedings are based.

(2) Unless the court finds by a preponderance of the evidence that an attorney, party, or pro se litigant engaged in advancing a frivolous claim or defense, the attorney, party, or pro se litigant shall not be sanctioned.

(D) A person is entitled to notice and an opportunity to respond before the imposition of sanctions pursuant to the provisions of this section. A court or party proposing a sanction pursuant to this section shall notify the court and all parties of the conduct constituting a violation of the provisions of this section and explain the basis for the potential sanction imposed. Upon notification, the attorney, party, or pro se litigant who allegedly violated subsection (A)(4) has thirty days to respond to the allegations as that person considers appropriate including, but not limited to, by filing a motion to withdraw the pleading, motion, document, or argument or by offering an explanation of mitigation.

(E) In determining if an attorney, party, or a pro se litigant has violated the provisions of this section, the court shall take into account:

(1) the number of parties;

(2) the complexity of the claims and defenses;

(3) the length of time available to the attorney, party, or pro se litigant to investigate and conduct discovery for alleged violations of the provisions of subsection (A)(4);

(4) information disclosed or undisclosed to the attorney, party, or pro se litigant through discovery and adequate investigation;

(5) previous violations of the provisions of this section;

(6) the response, if any, of the attorney, party, or pro se litigant to the allegation that he violated the provisions of this section; and

(7) other factors the court considers just, equitable, or appropriate under the circumstances.

(F) In determining whether sanctions are appropriate or the severity of a sanction, the court shall consider previous violations of the provisions of this section.

(G) Sanctions may include:

(1) an order for the party represented by an attorney or pro se litigant to pay the reasonable costs and attorney's fees of the prevailing party under a motion pursuant to this section. Costs shall include, but not be limited to, the following: the time required of the prevailing party by the frivolous proceeding, and travel expenses, mileage, parking, costs of reports, and any additional reasonable consequential expenses of the prevailing party resulting from the frivolous proceeding;

(2) an order for the attorney to pay a reasonable fine to the court; or

(3) a directive of a non-monetary nature, including injunctive relief, designed to deter a future frivolous action or an action in bad faith.

(H) If the court imposes a sanction on an attorney in violation of the provisions of this section, the court shall report its findings to the South Carolina Commission of Lawyer Conduct.

(I) This act shall not alter the South Carolina Rules of Civil Procedure or the South Carolina Appellate Court Rules.

(J) The provisions of this section shall not apply where an attorney or pro se litigant establishes a basis to proceed with litigation, or to assert or controvert an issue therein, that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of the existing law.

(K) The provisions of this section apply in addition to all other remedies available at law or in equity.

(L) The amount requested for damages in a pleading may not be considered in a determination of a violation of the provisions of this section.

(M) All violations of the provisions of this section must be reported to the South Carolina Supreme Court and a public record must be maintained and reported annually to the Governor, Senate, and House of Representatives.

6. The determination of whether attorney's fees should be awarded under the South Carolina Frivolous Proceedings Act is treated as one in equity. Legal Authority: Hanahan v. Simpson, 326 S.C. 140, 485 S.E.2d 903 (S.C. Sup. Ct., 1997).

7. Attorneys and individuals who take part in frivolous litigation may be sanctioned by the Court pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act only in strict accordance with all of the requirements and elements and factors and guidelines as stated and set forth under Section 15-36-10 of the 1976 S.C. Code of Laws; and in order for a litigant to recover any attorney fees or costs from the adversary party or parties under the South Carolina Frivolous Civil Proceedings Sanctions Act, the litigant filing such a Motion for Attorney Fees and Costs and Sanctions has the burden of proof to establish that such litigation was indeed frivolous by proving by a preponderance of the evidence to the satisfaction of the Court all of the statutory elements and factors as required under the provisions of Section 15-36-10 of the 1976 S.C. Code of Laws. (Legal Authority: Horry County v. Parbel, 662 S.E.2d 466, 378 S.C. 253 (S.C. App. Ct., 2008) and Section 15-36-10 of the 1976 S.C. Code of Laws).

8. The moving Defendant herein, Weldon T. Strahan, has always had and still has a statutory threshold problem with respect to his Motion for Attorney Fees and Costs and Sanctions filed herein pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act in that Section 15-36-10(C)(1) of the 1976 S.C. Code of Laws specifically provides and requires thereunder, as follows: "At the conclusion of a trial and after a verdict for or a verdict against damages has been rendered or a case has been dismissed by a directed verdict, summary judgment, or judgment notwithstanding the verdict, upon motion of the prevailing party, the Court shall proceed to determine if the claim or defense was frivolous." In this particular case none of the above-referenced events occurred or took place as required by the aforesaid express provisions contained in such statute as necessary first to determine who the prevailing party in such litigation was and also as necessary to trigger the right of any litigant thereto to file such a motion thereunder and as further necessary in order for the Court to have the proper subject matter jurisdiction and statutory authority as required to even hear or consider or determine if the claim or defense was frivolous or to grant a Motion for Attorney Fees and Costs and Sanctions under the South Carolina Frivolous Civil Proceedings Sanctions Act. In the case at hand, the Defendant, Weldon T. Strahan, was clearly not even authorized or justified by law or statute to

file his Motion for Attorney Fees and Costs and Sanctions and such Defendant is clearly not entitled to recover any of his attorney fees or costs from the within Plaintiffs under the South Carolina Frivolous Civil Proceedings Sanctions Act and specifically Section 15-36-10(C)(1) of the 1976 S.C. Code of Laws because the Plaintiffs' claims and causes of action and the above-captioned legal proceedings filed against the Defendant, Weldon T. Strahan, were not terminated or ended in favor of such Defendant on the merits or as the result of such Defendant being granted a Motion for Summary Judgment or a directed verdict or a defense verdict as the result of the holding of a merits hearing in regard thereto. The Defendant, Weldon T. Strahan, never filed or had heard a Rule 12(b)(6) Motion to Dismiss the Plaintiffs' Complaint herein and such Defendant also never filed or had heard a Motion for Summary Judgment in this case and such Defendant also never received a directed verdict or a defense verdict in this case. The Plaintiffs in this matter, just prior to the non-jury trial held in this matter on 10/20/2010 by Special Referee, Luke Brown, decided to voluntarily non-suit and dismiss with prejudice all of their pending causes of action and claims against the Defendant, Weldon T. Strahan, which was merely a strategic legal decision made by the Plaintiffs after first consulting with their legal counsel herein, knowing that they had good and valid claims and causes of action against the Defendant, Weldon T. Strahan, based on an easement implied by necessity and/or an easement implied by prior use and/or an easement by estoppel and/or an equitable easement, and with such decision being made by the Plaintiffs for the purpose of streamlining the reference hearing and in order to simplify the issues for the non-jury trial in this case and to concentrate on their claims and causes of action filed against the Defendants, David A. Shipes and Tony Walter Shipes and Jacob F. Malphrus and Wanda S. Casey and Helen S. Kinard, which also included a different claim and cause of action for the enforcement of the terms and conditions of an express easement for ingress and egress to and from the Plaintiffs' landlocked property as expressly reserved in favor of the Plaintiffs as the ultimate successors and assigns under a prior Deed recorded in Jasper County Deed Book 6, at Page 10, in addition to the Plaintiffs' claims and causes of action as contained and set forth in this lawsuit based on the granting by the Court of an easement implied by necessity and/or an easement implied by prior use and/or an easement by estoppel and/or an equitable easement due to extreme hardship. (Legal Authority: Section 15-36-10(C)(1) of the 1976 S.C. Code of Laws.)

9. The above-named Plaintiffs hereby contend that based on the **"Affidavit of Plaintiff Cole L. Lawson, III Opposing Motion For Attorney Fees And Costs Filed By Defendant Weldon T. Strahan Under the South Carolina Frivolous Civil Proceedings Sanctions Act"** executed on 9/28/2011 and previously filed in this case on 9/30/2011 in regard and opposition to such Motion for Attorney Fees and Costs and Sanctions filed by the Strahan Defendants pursuant to Section 15-36-10 of the 1976 S.C. Code of Laws, as amended, with the contents of such aforesaid Affidavit executed on 9/28/2011 by the Plaintiff, Cole L. Lawson, III, being incorporated hereunder by specific reference thereto, it has been amply and sufficiently proven and established by the preponderance of the evidence as clearly shown and reflected therein and thereby that the claims and causes of action as asserted and prosecuted in this lawsuit by the above-named Plaintiffs were clearly warranted and justified under existing and developing South Carolina Law and that under the facts and circumstances of this case it is obvious that the above-named Plaintiffs did not procure or commence or initiate this civil lawsuit or continue the prosecution thereof with the intent to merely harass or injure or threaten or intimidate the Strahan Defendants and that under the facts and circumstances of this case it is clear that the lawsuit filed in this civil case by the above-named Plaintiffs and the claims and causes of action as contained and set forth therein were not frivolous and were reasonably based and founded in fact and were not interposed merely for purposes of delay and were brought by the above-named Plaintiffs for the lawful and legitimate and proper purposes of attempting to acquire a perpetual and non-exclusive easement for ingress and egress and public road access to and from their landlocked property situate in Jasper County and to secure appropriate discovery and the joinder of necessary and indispensable parties thereto and for the adjudication of all of the claims and causes of action and issues upon which such civil proceedings were based, and the above-named Plaintiffs, based on the entire and complete record in this case to date, have previously established a valid and proper basis to proceed with their litigation in this matter and/or to assert or controvert various issues herein that are not frivolous and which include good faith arguments for extensions or modifications or reversals of the existing and applicable case and statutory law in the State of South Carolina in regard thereto, all as is also further indicated and evidenced by the following excerpts from the supporting Affidavit executed on 9/28/2011 by the Plaintiff, Cole L. Lawson, III, and filed in this case on 9/30/2011: **"After it became clear that nobody was willing to**

deed or grant an easement to me and my son to provide access to and from our landlocked property, we on 4/18/2008 hired our attorney, E.W. Bennett, Jr., Esquire, to handle and file this lawsuit on our behalf as Plaintiffs with the Common Pleas Court for Jasper County for only the proper and lawful purposes of stating several different claims and causes of action for the granting of an easement to our landlocked property and to join and name as Defendants all necessary parties to such lawsuit who we believed to be all of our adjoining landowners lying between our landlocked property and the closest roads that led to a public highway so that after we obtained all documents and evidence and information available through the discovery process we could ask the Court to give us some type of an ingress and egress easement so we could have access to and from our landlocked property which we felt we were entitled to have under the laws and policies of the State of South Carolina concerning the enforcement of the terms and conditions of an express easement previously granted or reserved by a deed and alternatively the granting by the Court of an easement implied by necessity and/or an easement implied by prior use and/or an easement by estoppel and/or an easement by prescription and/or an equitable easement; and it was never the intent of me or my son to try to harass or annoy or intimidate anybody in any manner or fashion by filing our lawsuit for an access easement as we just wanted to be able to get to and from our landlocked property without any problems so we could use and enjoy our property for hunting and fishing and to grow and cut and harvest timber.”

10. The Plaintiffs’ within Memorandum of Law in support of their Rule 59 Motion to Amend, Alter, Open, Reconsider or Vacate the Order Granting Strahan’s Motion for Attorneys’ Fees and Costs Entered herein on 12/15/2011 pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act under Section 15-36-10 of the 1976 S.C. Code of Laws, as amended, which Rule 59 Motion was filed with the Clerk of this Court simultaneously and on even date herewith pursuant to Rule 59 of the S.C. Rules of Civil Procedure, is supported by the record in this case and also by all of the prior pleadings and motions and affidavits and memorandums of law previously filed in this lawsuit by the Plaintiffs with the contents thereof being incorporated herein by specific reference thereto, and is also supported by the South Carolina Case Law and by the South Carolina Statutory Law and by the South Carolina Legal Authorities and by the same facts and arguments and legal analysis as previously stated and cited and set forth in the

“Plaintiffs’ Memorandum of Law in Opposition to Motion for Attorney Fees and Costs Filed By Defendant Weldon T. Strahan Under the South Carolina Frivolous Civil Proceedings Sanctions Act” filed in this case on 9/30/2011 and in the **“Affidavit of Plaintiff Cole L. Lawson, III Opposing Motion For Attorney Fees And Costs Filed By Defendant Weldon T. Strahan Under the South Carolina Frivolous Civil Proceedings Sanctions Act”** filed in this case on 9/30/2011 and in the **“Plaintiffs’ Letter Brief to Special Referee Luke N. Brown, Jr. dated 11/7/2011 in Opposition to the Entry of the Proposed Order Granting Strahan’s Motion for Attorney Fees and Costs”** filed in this case on 11/8/2011 and in the Plaintiffs’ **“Amended Rule 59 Motion For a New Trial and to Amend, Alter, Open, Reconsider or Vacate the Final Decree of the Court”** filed in this case on 4/26/2011 and in the Plaintiffs’ **“Memorandum of Law in Support of the Amended Rule 59 Motion For a New Trial and to Amend, Alter, Open, Reconsider or Vacate the Final Decree of the Court”** filed in this case on 4/26/2011, with all of the contents thereof being incorporated hereunder by specific reference thereto.

11. It was improper and premature as a matter of law for Jasper County Special Referee, Luke N. Brown, Esquire, to hear on 9/30/2011 the Motion for Attorneys Fees and Costs filed in this case by the moving Defendant, Weldon T. Strahan, pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act under Section 15-36-10 of the 1976 S.C. Code of Laws, as amended, and to make and render a ruling and decision and determination and adjudication thereon at this point in time by issuing and entering on 12/15/2011 the Order Granting Strahan’s Motion for Attorney Fees and Costs as previously requested by the moving Defendant, Weldon T. Strahan, concerning and pertaining to whether or not this underlying lawsuit and the claims and causes of action contained therein as filed and prosecuted by the above-named Plaintiffs constitutes a frivolous civil proceeding or frivolous litigation under the South Carolina Frivolous Civil Proceedings Sanctions Act pursuant to Section 15-36-10 of the 1976 S.C. Code of Laws, as amended, as alleged and purported by the Motion for Attorneys’ Fees and Costs previously filed in this matter by the Strahan Defendants since the merits of the underlying lawsuit have not yet been finally decided or ruled upon as a result of it still being and constituting an active and ongoing case that is presently pending on appeal before the South Carolina Court of Appeals awaiting on a final hearing and oral arguments to be set up and scheduled and for the rendering

of a final decision and ruling and adjudication in this case by the South Carolina Court of Appeals and if an unfavorable ruling and decision were to be rendered in the future in such appellate court, then in such event, the above-named Plaintiffs would at such point in time be lawfully entitled to file and apply for a Writ of Certiorari to have this case appealed to and heard by the South Carolina Supreme Court as the final and supreme legal authority in this State in regard thereto. (Legal Authority: Section 15-36-10 of the 1976 S.C. Code of Laws).

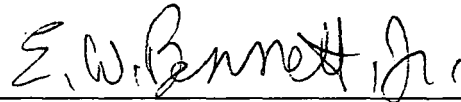
12. It is also certainly an interesting question and an enlightening inquiry to say the least as to how the total attorney fees and costs incurred in this matter by the Defendant, Weldon T. Strahan, could have possibly increased and gone up by 49.98% in the sum of \$8,231.00 as purported at Paragraph No. 20 under the Finding of Fact on Page 5 of the **Order Granting Strahan's Motion for Attorneys' Fees and Costs** issued and entered and filed in this case on 12/15/2011 by Jasper County Special Referee, Luke N. Brown, Jr., between the date of the filing on 3/31/2011 by opposing legal counsel herein of Strahan's Motion for Attorneys Fees and Costs and Sanction and Strahan's Brief in Support of such Motion for Attorney Fees and Costs and Sanctions and the date of the hearing held and conducted in this matter on 9/30/2011 in regard thereto by Jasper County Special Referee, Luke N. Brown, Jr., when the only additional document filed with the Court by opposing legal counsel herein for and on behalf of the moving Defendant, Weldon T. Strahan, between 3/31/2011 and 9/30/2011, according to the Jasper County Public Index for this case, was a four (4) page supporting Affidavit executed on 8/23/2011 by Attorney James M. Herring and filed on 8/29/2011 with the Clerk of this Court; and it is apparent that as a direct and proximate result thereof that the **Order Granting Strahan's Motion for Attorneys' Fees and Costs** issued and entered and filed in this case on 12/15/2011 by Jasper County Special Referee, Luke N. Brown, Jr., should now accordingly be revised and altered and amended and corrected by this Court pursuant to and as alternatively requested by the above-named Plaintiffs under their Rule 59 Motion for Reconsideration filed simultaneously on even date herewith by reducing the current extremely excessive and unreasonable and incorrect attorney fees and costs in the amount of \$24,700.09 as now provided in the **Order Granting Strahan's Motion for Attorneys' Fees and Costs** issued and entered and filed in this case on 12/15/2011 by The Honorable Luke N. Brown, Jr., as Special Referee for Jasper County, down to the somewhat less excessive and more reasonable amount of

\$16,469.06 as originally shown and reflected by the Brief in Support of Motion for Sanctions filed in this matter on 3/31/2011 with the Clerk of this Court by opposing legal counsel herein for and on behalf of the moving Defendant, Weldon T. Strahan.

CONCLUSION:

For all of the various reasons as stated and set forth herein above it is abundantly clear that neither of the above-named Plaintiffs nor their undersigned legal counsel herein have heretofore engaged in advancing the litigation of a frivolous claim in this matter, and that neither the Plaintiffs nor their undersigned legal counsel herein should be sanctioned in any way or manner or fashion whatsoever by this Court as requested by the moving Defendant, Weldon T. Strahan, in his Motion for Attorney Fees and Costs and Sanction previously filed in this matter pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act under Section 15-36-10 of the 1976 S.C. Code of Laws, as amended, and that instead the aforesaid Order Granting Strahan's Motion for Attorneys' Fees and Costs issued and entered and filed in this case on 12/15/2011 by The Honorable Luke N. Brown, Jr., as Special Referee for Jasper County, should now accordingly as a matter of statutory law be immediately opened and reconsidered and set aside and vacated as being null and void and of no further legal force or effect and/or in the alternative altered and amended and revised and corrected as requested by the above-named Plaintiffs in their Rule 59 Motion to Reconsider and Open and Set Aside and Vacate and Alter and Amend the Order Granting Strahan's Motion for Attorneys Fees and Costs entered in this case on 12/15/2011 and filed simultaneously herein on even date herewith pursuant to Rule 59 of the S.C. Rules of Civil Procedure. (Legal Authority: Rule 59 of the S.C. Rules of Civil Procedure and Section 15-36-10 of the 1976 S.C. Code of Laws).

It is important to note at this point in these proceedings that Section 15-36-10 (J) of the 1976 S.C. Code of Laws, as amended, known as the South Carolina Frivolous Civil Proceedings Sanctions Act specifically provides thereunder, as follows: **"The provisions of this section shall not apply where an attorney or pro se litigant establishes a basis to proceed with litigation, or to assert or controvert an issue therein, that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of the existing law."**



E. W. BENNETT, JR. (S.C. Bar No: 656)

Attorney for the Plaintiffs

148 S. Jefferies Boulevard

Post Office Box 693

Walterboro, S.C. 29488

Telephone: (843) 549-9225

Facsimile: (843) 549-8566

E-Mail: bop@lowcountry.com

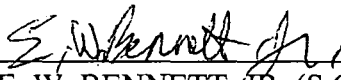
Dated: December 23, 2011.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE 14th JUDICIAL CIRCUIT
COUNTY OF JASPER	)	CIVIL CASE NO: 2008-CP-27-481
	)	
COLE L. LAWSON, III and	)	
COLE L. LAWSON, IV,	)	
	)	
Plaintiffs,	)	
	)	
-vs-	)	CERTIFICATE OF SERVICE BY FAX
	)	AND MAIL
	)	
WELDON T. STRAHAN a/k/a	)	
WELDON TRAVIS STRAHAN, a/k/a	)	
W. TRAVIS STRAHAN, INDIVIDUALLY	)	
AND IN HIS CAPACITY AS PERSONAL	)	
REPRESENTATIVE OF THE ESTATE	)	
OF RONALD J. STRAHAN,	)	
WILSON LEE MIXSON, VIVIAN	)	
M. McALHANEY, AS TRUSTEE	)	
OF THE McALHANEY FAMILY	)	
TRUST, UTD 9/20/2004, VIVIAN	)	
MIXSON McALHANEY, DAVID A	)	
SHIPES, TONY WALTER SHIPES,	)	
HELEN S. KINARD a/k/a HELEN SHIPES	)	
KINARD, WANDA SHIPES CASEY a/k/a	)	
WANDA S. CASEY a/k/a WANDA D.	)	
CASEY, and JACOB F. MALPHRUS,	)	
	)	
Defendants.	)	

I, E.W. Bennett, Jr., Esquire, as legal counsel herein for the above-named Plaintiffs do hereby certify that I served copies of the **PLAINTIFFS' RULE 59 MOTION TO AMEND, ALTER, OPEN, RECONSIDER OR VACATE THE ORDER GRANTING STRAHAN'S MOTION FOR ATTORNEYS' FEES AND COSTS** and also the attached **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' RULE 59 MOTION** by faxing same and by mailing same by depositing in the regular United State Mail at the U.S. Post Office in Walterboro, SC, with sufficient pre-paid first class postage affixed thereto and a return address clearly indicate thereon, copies of all such aforesaid legal document on the 23rd day of December, 2011, to the **Honorable Luke N. Brown, Esquire, as Special Referee for Jasper County** and also to **J. Thomas Mikell, Esquire of the Mikell, Weidner, Wegmann & Harper Law Firm** as legal counsel of record herein for the Defendant, Weldon T. Strahan, as stated and set forth, as follows:

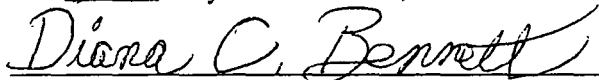
J. Thomas Mikell, Esquire
Mikell, Weidner, Wegmann & Harper Law Firm
P.O. Box 1727
Beaufort, S.C. 29901
Fax No: (843) 524-4995

The Honorable Luke Brown, Jr.
Special Referee for Jasper County
Post Office Box 879
Ridgeland, SC 29936
Fax No: (843) 726-8971



E. W. BENNETT, JR. (S.C. Bar No: 656)
ATTORNEY FOR THE PLAINTIFFS

SWORN to and subscribed before me
this 23rd day of December, 2011.



NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires: 6/7/2012

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF JASPER) Case No. 2008-CP-27-481

2012 FEB 24 PM 2:40

COLE L. LAWSON, III and)
COLE L. LAWSON, IV,) MARGARET KESICK
CLERK OF COURT
Plaintiffs,) JASPER COUNTY SC

vs.)

RONALD J. STRAHAN; WELDON T.
STRAHAN; WILSON LEE MIXSON;
VIVIAN M. MCALHANEY, AS
TRUSTEE OF THE MCALHANEY
FAMILY TRUST, UTD 9/20/2004; and
VIVIAN MIXSON MCALHANEY,

Defendants.)

) ORDER DENYING PLAINTIFFS'
) RULE 59 MOTION TO AMEND,
) ALTER, OPEN, RECONSIDER
) OR VACATE THE ORDER GRANTING
) STRAHAN'S MOTION FOR
) ATTORNEYS' FEES AND COSTS

The Plaintiffs filed a Motion in this matter styled as a "Rule 59 Motion to Amend, Alter, Open, Reconsider or Vacate the Order Granting Strahan's Motion for Attorneys' Fees and Costs" (herein referred to as "Motion to Amend") dated December 23, 2011, asserting five alleged errors. Based upon the Motion, Briefs, Memoranda of Law, and Affidavits submitted to this Court, and a hearing in which both counsel appeared on February 16, 2012, the Plaintiffs' Motion to Amend is denied for the following reasons:

ERROR 1. Strahan Failed to Establish That the Plaintiffs' Litigation Was Frivolous for the Purposes of the South Carolina Frivolous Civil Proceedings Sanction Act:

Plaintiffs' first assignment of error in their Motion to Amend is that Strahan failed to establish that "the underlying litigation and lawsuit filed in the above-captioned matter was purely and simply frivolous on the part of the above-named Plaintiffs and/or meant or intended to be used by such Plaintiffs for the sole purpose of harassing or threatening or intimidating the Strahan Defendants". See Plaintiffs' Motion to Amend ¶ 2. As their lone support for this contention that Strahan was required to prove that the underlying litigation was for the sole purpose of harassment or intimidation, the Plaintiffs rely on Horry County v. Parbel, 662 S.E.2d 466, 378 S.C. 253 (Ct. App. 2008), *overruled by* State v. Oxner, 705 S.E.2d 51, 391 S.C. 132 (2011), which is a case that interprets the **predecessor** to the current and controlling version of the South Carolina Frivolous Civil Proceedings Sanction Act (herein "the Act"). As stated by the Court in Parbel:

-1- *evb*

We note that section 15-36-10 was completely revised and became effective on July 1, 2005, and sections 15-36-20 through -50 were repealed effective March 21, 2005. Because Horry County filed their motion of appeal to the circuit court on March 9, 2005, the original Act still governed the circuit court's decision. For purposes of this analysis, we reference the former version of the Act.

Id. at 266, 378 S.C. at 473 n.1. Under the previous version of the Act, a litigant, in order to recover attorneys' fees and costs, had the burden of establishing that the primary purpose of the litigation was "other than that of securing the proper discovery, joinder of parties, or adjudication of the civil proceedings." S.C. Code Ann. § 15-36-40 (2005) (amended by S.C. Code Ann. § 15-36-10 (2007)).

On the other hand, according to the current and controlling version of the Act (amended in 2007) that was in effect during this suit, "a party . . . may be sanctioned for filing a frivolous pleading, motion or document if . . . a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law." See S.C. Code Ann. § 15-36-10(C)(1)(a) and also section (A)(4)(a)(ii); see generally Kilcawley v. Kilcawley, 312 S.C. 425, 440 S.E.2d 892 (Ct. App. 1994) (upholding trial court's award of sanctions against ex-wife who tried to set aside divorce action where the facts clearly undercut her theory of the case). Defendant Strahan met the requirement of these Code Sections by providing an Affidavit of an Attorney. No opposing Affidavit was presented by the Plaintiffs.

As noted above, in the First Cause of Action of the Plaintiffs' Complaint, First Amended Complaint and Second Amended Complaint, Plaintiffs alleged in a generally worded manner that they were entitled to an Easement by Necessity through the Strahan tract of land. Yet nowhere in these three Complaints did they include any facts or produce any documents in support of two of the essential elements of an Easement by Necessity, which are (a) unity of title (a common grantor), and, (b) that the necessity off access existed at the time of separation. See Brasington v. Williams, 143 S.C. 223, 141 S.E. 375 at 382 (1927). Further, the Plaintiffs continually asserted an Easement Due to Extreme Hardship claim against Strahan despite being repeatedly informed that such a cause of action did not and has never existed in South Carolina.

In fact, the Plaintiffs continue to contend, at this time, despite their request for a Voluntary Nonsuit with Prejudice at the trial and after the Court's award of sanctions, "that they had good and valid claims and causes of action against the Defendant, Weldon T. Strahan, based on an easement implied by necessity and/or an easement implied by prior use and/or an easement by estoppel and/or an equitable easement." See Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion to Amend, ¶ 8. For these reasons, among others, it is clear that the Plaintiffs' initiation and continuation of this litigation qualifies as "frivolous" for the purposes of the current and controlling Act. The only argument asserted to the contrary relies solely on the repealed version of the Act. For these reasons, the Plaintiffs' first assignment of error is without merit and is denied.

ERROR 2. The Special Referee Erred in Awarding Attorneys' Fees and Costs Following a Voluntary Nonsuit With Prejudice:

As their second assignment of error, the Plaintiffs once again raise the issue that Strahan has a "very real and serious statutory threshold problem" under Section 15-36-10(C)(1) of the Act, due to the fact the legal proceedings "were not terminated or ended in favor of such Defendant on the merits." See Plaintiffs' Motion to Amend, ¶ B. This same objection was raised by the Plaintiffs prior to the Court's Order of December 15, 2011, and was summarily rejected by the Court. As noted in Paragraph 32 of the Court's Order Granting the Motion for Sanctions:

While the termination of the case came about by a Voluntary non-suit with prejudice, several decision have interpreted Subsection C of the ACT to include any adjudication on the merits. See, for example, the case of *Wachovia Securities, LLC v. Brand*, 2010 WL 3420214, *9 (D.S.C. August 26, 2010), which broadly interpreted the words "court" and trial" in subsection (C) of the ACT to allow an award of sanctions by an arbitration panel, and the case of *Jones v. City of Folly Beach*, 326 S.C. 360, 483 S.E.2d 770, 773 (Ct. App. 1997), which held that a voluntary non-suit dismissal with prejudice was an adjudication on the merits.

(Emphasis in original). The Plaintiffs have provided no additional legal authority to support their contention that a voluntary dismissal with prejudice does not constitute an adjudication on the merits. See also Rule 41(b), SCRPC (providing that absent a court order otherwise, all dismissals act as adjudications on the merits other than (1) an involuntary dismissal pursuant to Rule 41(b), SCRPC; (2) a dismissal for lack of jurisdiction; (3) a dismissal for

improper venue; and (4) a dismissal for failure to join a party under Rule 19).

Moreover, Strahan's consent at the trial to the voluntary dismissal with prejudice was conditioned upon Strahan's right to bring a motion for sanctions against the Plaintiffs being preserved, which condition was made known to the Court before the Court granted the Plaintiffs' voluntary dismissal, and which condition was not objected to by the Plaintiffs, i.e., the Plaintiffs consented to the condition that Strahan could bring the Motion for Sanctions. This information is in the Trial Transcript. For these reasons, among others, it is clear that the Court had the power and authority to render an award of attorneys' fees and costs pursuant to the Act following the Plaintiffs' voluntary dismissal with prejudice.

ERROR 3. The Special Referee Erred By Awarding Excessive Attorneys' Fees:

The Plaintiff's third assignment of error is that the Special Referee erred by granting excessive attorneys' fees to Strahan. Subsection (G)(1) of the Act provides that sanctions may include:

An order for the party represented by an attorney or pro se litigant to pay the reasonable costs and attorney's fees of the prevailing party under a motion pursuant to this section. Costs shall include, but not be limited to, the following: the time required of the prevailing party by the frivolous proceeding, and travel expenses, mileage, parking, costs of reports, and any additional reasonable consequential expenses of the prevailing party resulting from the frivolous proceeding.

The total amount claimed as attorneys' fees and costs by the attorney for Strahan includes the amount spent defending and preparing to litigate the claim for a period of almost four (4) years. While the sum of \$16,469.09 was stated in the Brief in Support of the Motion dated March 31, 2011, Strahan incurred additional attorneys' fees and expenses after that date, including but not limited to the time it took to draft the Order, and attend a hearing. Now, there is even the additional time necessary to defend this Motion to Amend. According to the Act, it is within the Court's discretion to determine what it deems "the reasonable costs and attorney's fees" of Strahan, which Strahan's attorney asserts was \$24,700.09 — the actual amount of costs and attorneys' fees incurred by Strahan by December 15, 2011. This same objection was raised by the Plaintiffs prior to the Court's Order of December 15, 2011, and was summarily rejected by the Court. For these reasons, the Plaintiffs' third assignment

is without merit and is denied.

ERROR 4. The Special Referee Erred By Prematurely Granting the Motion for Sanctions:

As their fourth assignment of error, the Plaintiffs once again contend that the Special Referee erred in awarding sanctions "since the merits of the underlying lawsuit have not yet been decided or ruled upon as a result of it still being and constituting an active and ongoing case that is presently pending on appeal before the South Carolina Court of Appeals for a final hearing and decision and ruling in this case." See Plaintiffs' Mot. to Amend, ¶ D. The issues on appeal have to do with parties to the suit and decisions made by the Court other than Strahan.

As noted above, South Carolina considers a voluntary dismissal with prejudice to be an adjudication on the merits; therefore, all claims against Strahan were adjudicated on the merits.

For this reason, among others, it is clear that this Court had the power and authority to render an award of attorneys' fees and costs pursuant to the Act following the Plaintiffs' voluntary dismissal with prejudice. As a result, the Plaintiffs' fourth assignment of error is without merit and is denied.

ERROR 5. The Order Granting Strahan's Motion for Sanctions Lacked a Foundation in Law:

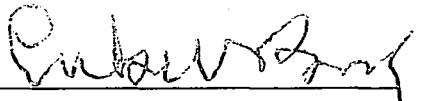
As their final assignment of error, the Plaintiffs broadly allege that the Order of the Court granting Strahan's Motion for Sanctions was "incomplete, misstated, inapplicable and erroneous and without sufficient and adequate evidentiary basis and proof and support." The Plaintiffs provide no legal authority in support of their contention, nor have they attempted to pinpoint which Findings of Fact and Conclusions of Law were inadequate. Therefore, the Plaintiff's fifth and final assignment of error is entirely without merit and is denied.

ORDER:

Therefore, it is hereby ORDERED that the Plaintiffs' Motion to Amend and/or Reconsidered be, and it hereby is, denied for the reasons stated above.

AND IT IS SO ORDERED.

Ridgeland, South Carolina
February 24, 2012


The Honorable Luke N. Brown, Jr.
Special Referee for Jasper County, S.C.

COPY

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

CERTIFICATE OF MAILING

2012 FEB 29 AM 8:53
MARGARET ROSS JCK
CLERK OF COURT
ASPER COUNTY SC

FILED

Name of Case: Cole L. Lawson, III and Cole L. Lawson, IV
vs. Ronald J. Strahan, et al.

Calendar Number: 2008-CP-27-481

Date: February 27, 2012

Documents: Order Denying Plaintiff's Rule 59 Motion to Amend,
Alter, Open, Reconsider or Vacate the Order
Granting Strahan's Motion for Attorneys' Fees
and Costs.

Addressee(s): E.W. Bennett, Jr.
P.O. Box 693
Walterboro, SC 29488

The undersigned hereby certifies that she placed true and accurate copies of the Document(s) named above to the Addressee(s) named above on the Date stated above in an envelope with prepaid first class U.S. postage thereon and delivered the same to the U.S. Postal Service.



Angela Landon
Secretary to J. Thomas Mikell

File No. 4602.0000

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM JASPER COUNTY
Honorable Luke N. Brown, Jr., Special Referee for Jasper County
Case No. 2008-CP-27-481

Cole L. Lawson, III and Cole L. Lawson, IV

Appellants,

v.

Weldon T. Strahan a/k/a Weldon Travis Strahan, a/k/a W. Travis Strahan, Individually and in his capacity as Personal Representative of the Estate of Ronald J. Strahan (**Respondents**); and Wilson Lee Mixson, Vivian M. Mcalhaney, as Trustee of the Mcalhaney Family Trust, Utd 9/20/2004, Vivian Mixson Mcalhaney, David A. Shipes, Tony Walter Shipes, Helen S. Kinard a/k/a Helen Shipes Kinard, Wanda Shipes Casey a/k/a Wanda S. Casey a/k/a Wanda D. Casey, and Jacob F. Malphrus (**Defendants**),

Respondents.

NOTICE OF APPEAL

The Appellants Cole L. Lawson, III and Cole L. Lawson, IV, hereby appeal the **Order Granting Strahan's Motion for Attorneys' Fees and Costs** issued on 12/15/2011 by the Honorable Luke N. Brown, Jr., as Special Referee for Jasper County, and filed on 12/15/2011 with the Clerk of the Common Pleas Court for Jasper County, and also the subsequent **Order Denying Plaintiffs' Rule 59 Motion to Amend, Alter, Open, Reconsider Or Vacate the Order Granting Strahan's Motion for Attorneys' Fees and Costs** issued on 2/24/2012 by the Honorable Luke N. Brown, Jr., as Special Referee for Jasper County, and filed on 2/24/2012 with the Clerk of the Common Pleas Court for Jasper County. Copies of each of the above-referenced Orders on appeal are attached hereto and incorporated herein by reference.

E. W. Bennett, Jr.

E.W. Bennett, Jr. (S.C. Bar No. 656)
 Attorney for Appellants
 148 S. Jefferies Blvd.
 Post Office Box 693
 Walterboro, S.C. 29488
 Telephone: (843) 549-9225
 Facsimile: (843) 549-8566
 E-mail: bop@lowcountry.com

Dated: March 26, 2012.

ATTORNEY FOR APPELLANTS

Other Legal Counsel of Record:

J. Thomas Mikell, Esquire
Mikell, Weidner, Wegmann & Harper Law Firm
Attorney for the Respondents being the Strahan Defendants
P.O. Box 1727
Beaufort, S.C. 29901

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM JASPER COUNTY
Honorable Luke N. Brown, Jr., Special Referee for Jasper County
Case No. 2003-CP-27-481

Cole L. Lawson, III and Cole L. Lawson, IV

Appellants,

v.

Weldon T. Strahan a/k/a Weldon Travis Strahan, a/k/a W. Travis Strahan, Individually and in his capacity as Personal Representative of the Estate of Ronald J. Strahan (**Respondents**); and Wilson Lee Mixson, Vivian M. Mcalhaney, as Trustee of the Mcalhaney Family Trust, Utd 9/20/2004, Vivian Mixson Mcalhaney, David A. Shipes, Tony Walter Shipes, Helen S. Kinard a/k/a Helen Shipes Kinard, Wanda Shipes Casey a/k/a Wanda S. Casey a/k/a Wanda D. Casey, and Jacob F. Malphrus (**Defendants**),

Respondents.

PROOF AND CERTIFICATE OF SERVICE

I, Diana C. Bennett, an employee and the Office Manager with the Law Office of E.W. Bennett, Jr., Attorney at Law, do hereby certify that on **March 27, 2012**, I served copies of the within **Notice of Appeal** in the above-captioned case on the following individuals by United States Mail, with sufficient first-class postage affixed, addressed as follows:

**The Honorable Margaret Bostick
Clerk of the Jasper County Common Pleas Court
Post Office Box 248
Ridgeland, S.C. 29936**

03/27/2012 14:00 0430420000
EXHIBIT FOR FURNITURE PAGE 00/11

J. Thomas Mikell, Esquire
Mikell, Weidner, Wegmann & Harper Law Firm
Attorney for the Respondents
Post Office Box 1727
Beaufort, S.C. 29901


Diana C. Bennett

Dated: March 27, 2012.

At: Walterboro, South Carolina

MIKELL, WEIDNER, WEGMANN & HARPER, LLC

J. Thomas Mikell
Larry W. Weidner, II (SC & PA)
James J. Wegmann (SC & TX)
Frampton L. Harper, II
E. Richardson LaBruce

Mailing Address
Post Office Box 1727
Beaufort, South Carolina 29901

From the Desk of:
E. Richardson LaBruce
labruce@beaufortlaw.com
Telephone (843)524-2110
Fax (843)524-4995

Mikell Office
14 Professional Village Circle
Beaufort, South Carolina 29907

Weidner, Wegmann, Harper Office
6 Professional Village Circle
Beaufort, South Carolina 29907

May 4, 2012

The Honorable Tanya A. Gee
Clerk of South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Cole L. Lawson, III, and Cole L. Lawson, IV, v. Weldon T. Strahan, et al., Civil Case
Number 2008-CP-27-481
Our File No. 4602.0000 — Respondents' Motion to Dismiss Appeal

Dear Madame Clerk:

Enclosed for filing is the Respondent's Motion to Dismiss the above-referenced appeal due to the Appellants' failure to comply with either Rule 207(a)(1), SCACR, or Rule 208(a)(1), SCACR. Please also find enclosed:

- (1) Proof of Service of the Respondents' Motion to Dismiss Appeal;
- (2) Six copies of the Respondents' Motion to Dismiss Appeal to be clocked in by your office;
and,
- (3) The motion filing fee of \$25.00.

Should you have any questions, or require anything further, please do not hesitate to contact me. I thank you for your time and look forward to your response.

With best regards, I am,

Very truly yours,



E. Richardson LaBruce
MIKELL, WEIDNER, WEGMANN & HARPER, LLC

Enclosures: Listed

- cc: (1) E.W. Bennett, Jr., Esquire
(2) Kevin Brown, Esquire
(3) Matthew Creech, Esquire

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SC Court of Appeals