THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

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SC Court of Appeals

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Case No. 2011-CP-10-2444

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Stow Away Storage, LLC, MSC MPT LLC ..... Respondents

vs.

George W. Sisson, 4.0, LLC, The Sisson Foundation Limited Partnership, Sweetgrass Hardware, Inc., and Timarand, Inc., Defendants

Of whom George W. Sisson, 4.0, LLC, The Sisson Foundation Limited Partnership, and Sweetgrass Hardware, Inc., are the.....Appellants.

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# APPELLANTS' FINAL BRIEF

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Hardware, Inc.

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## STATEMENT OF ISSUES ON APPEAL

I. THE TRIAL COURT IMPROPERLY GRANTED THE PLAINTIFF THE RIGHT TO SHUT OFF TRAFFIC ENTERING AND/OR CROSSING THE EASEMENT FOR THE PURPOSE OF ENTERING SWEETGRASS' PROPERTY WHERE THE INTENT OF THE GRANTOR OF THE EASEMENT AT ISSUE IN THIS CASE STATES THAT ANY ASSIGNMENT OF THE EASEMENT SHALL NOT BE DEEMED AN UNLAWFUL INCREASE OR BURDEN UPON THE GRANTOR'S PROPERTY

A. THE EASEMENT AGREEMENT BETWEEN STOW AWAY STORAGE AND GEORGE W. SISSON CONTEMPLATED THE MATERIAL INCREASE IN SCOPE OF THE EASEMENT AND SPECIFICALLY STATES THAT THERE WILL BE NO UNDUE BURDEN CREATED IF THE EASEMENT IS ASSIGNED

B. THE LICENSE AGREEMENT BETWEEN 4.0, LLC AND SWEETGRASS IMPLICITLY INCLUDES THE CUSTOMERS OF SWEETGRASS AS LICENSEES AND COMPLIES WITH THE EASEMENT AS THE EASEMENT WAS REQUIRED BY THE SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

## STATEMENT OF THE CASE

On April 4, 2011, the Plaintiff, Stow Away Storage, LLC, filed a declaratory judgment action as to the effectiveness of an easement agreement (the "Access Easement" or "Easement Agreement") between Stow Away Storage, LLC and George W. Sisson (R. pp. 29-82). Additionally, Stow Away Storage, LLC sought to obtain a permanent injunction regarding use of the easement, alleged tortious interference with contract as to a certain license agreement (the "License Agreement") obtained by Sweetgrass Hardware, Inc. from 4.0, LLC, and action for equitable indemnity as to 4.0, LLC and Sisson Foundation. (*Id.*) Stow Away sought an injunction against Sweetgrass Hardware as to the use of an easement agreement previously entered into by Stow Away and George W. Sisson. (*Id.*) The Defendants, George W. Sisson, 4.0, LLC, The Sisson Foundation Limited Partnership and Sweetgrass Hardware, Inc. filed an Answer and Counterclaim asserting that the Easement Agreement contained no restrictions and allowed the easement to be used as contemplated. (R pp.83-95). Stow Away filed a Reply to Counterclaim asserting that the assignment of the Access Easement was improper. (R. pp. 95-100).

Stow Away Storage, LLC moved for and obtained an Order of Default and Judgment against the Defendant, Timarand, Inc., as it failed to answer or otherwise respond. (R. p. 1). Upon notification of the Order of Default, the Defendant, Timarand, Inc., attempted to file a timely Answer and Counterclaim asserting the same rights as the other Defendants under the Easement Agreement and License Agreement. (R. pp. 104-115). In response to the Order of Default and Judgment, the Defendant, Timarand, Inc., filed a Motion to Reconsider Pursuant to Rule 59(e) SCRCP and Motion to Lift Default

Judgment Pursuant to Rule 60(b) SCRCP. (R. pp. 116-123). The Defendant, Timarand, Inc.'s Motion to Reconsider and Motion to Lift Default Judgment was heard on Friday, January 11, 2013 by the Honorable Kristi Harrington. The Motion to Reconsider and Motion to Lift Default Judgment was denied. (R. p. 5).

Stow Away Storage, LLC filed a Motion for Temporary Injunction and Motion for Partial Summary Judgment and Permanent Injunction as to the Defendant Sweetgrass Hardware, Inc.'s use of the Access Easement. (R. p. 124-124A). The Motion was heard by the Honorable J. Markley Dennis on February 11, 2013. Judge Dennis denied Stow Away's Motion for Injunction and Partial Summary Judgment. (R. p. 7).

The Defendants, George W. Sisson, 4.0, LLC, The Sisson Foundation Limited Partnership, and Sweetgrass Hardware, Inc. filed a Motion for Summary Judgment as to the assignment of the Access Easement to Sweetgrass Hardware, Inc. (R. pp. 224-295). The Motion for Summary Judgment was not heard separately by the trial court. The matter went to trial before the Honorable J.C. Nicholson, Jr. on August 14, 2013. Judge Nicholson ruled in favor of Stow Away, granting Stow Away the right to shut off traffic entering and/or crossing the Easement for the purpose of entering the Defendant Sweetgrass Hardware, Inc.'s property and asserting that the License Agreement was improper because it materially increased the burden on the servient estate, thus expanding the dominant estate and materially increasing the scope of the Easement. (R. pp. 9-20).

The Defendants, George W. Sisson, 4.0, LLC, The Sisson Foundation Limited Partnership, and Sweetgrass Hardware, Inc., by their counsel, received Judge Nicholson's Order on December 3, 2013. The Defendants filed a Motion to Reconsider the Order on December 4, 2013. (R. pp. 296-301). Judge Nicholson denied the Defendants' Motion to

Reconsider by an Order dated December 10, 2013 and filed December 11, 2013. (R. pp. 21).

The Defendants, George W. Sisson, 4.0, LLC, The Sisson Foundation Limited Partnership, and Sweetgrass Hardware, Inc., by their counsel, received the Order Denying Motion to Reconsider on December 17, 2013. The Defendants filed their Notice of Appeal on January 14, 2014. (R. p. 302).

## STATEMENT OF FACTS

The Plaintiff, Stow Away Storage, LLC (hereinafter "Stow Away"), is a South Carolina limited liability company which owns two adjoining tracts of land on the north side of U.S. Highway 17 North in Mt. Pleasant, South Carolina. (R. pp. 32-33). The Defendant, George W. Sisson, is a resident of Charleston County and the former owner of the real property now owned by Stow Away. (R. p. 33). The Defendant, 4.0, LLC, is a South Carolina limited liability company with George W. Sisson as its sole member. (*Id.*) 4.0, LLC owns a ninety-nine percent (99%) interest in the 5.862 acre tract of land abutting the Plaintiff's property on the east. (*Id.*) The Defendant, The Sisson Foundation Limited Partnership (hereinafter "Sisson Foundation"), is a South Carolina limited partnership created by George W. Sisson. (R. p. 34). The Sisson Foundation owns the remaining one percent (1%) interest in the 5.862 acre tract of land abutting the Plaintiff's property on the east. (*Id.*) The Defendant, Sweetgrass Hardware, Inc., is a corporation organized and existing under the laws of the State of South Carolina and operates a hardware store as the tenant on the 1.93 acre tract owned by Timarand, Inc. (*Id.*) The Defendant, Timarand, Inc., is a corporation organized and existing under the laws of the State of South Carolina, and the owner of a 1.93 acre tract of land to the east of the tract owned by the Defendants, 4.0, LLC and Sisson Foundation. (R. p. 35).

Mr. Sisson entered in to an agreement for an access easement (hereinafter "Access Easement" or "Easement Agreement") with Stow Away on October 17, 2000, involving property on Highway 17 North in Mt. Pleasant, South Carolina, at the intersection of Porchers Bluff Road. (R. pp. 46-54). In exchange for the Access Easement, Mr. Sisson agreed to abandon the pre-existing access to his property under an

encroachment permit granted to Mr. Sisson by the South Carolina Department of Transportation (hereinafter the "SCDOT"). (R. p. 794; R. pp. 46-54).

> Mr. Pooser: As we discussed, I enclose a form of Easement Agreement to be given by Stow Away Storage, LLC. The easement would give you a perpetual right to utilize Stow Away's driveway, at no cost and expense, to access U.S. Highway 17. The preliminary plans for our driveway and the location of the drive easement for you are attached to the easement. As these plans are finalized, a complete definitive description of the easement will be attached to the easement and it will be recorded. **In connection with our [Stow Away] granting the drive easement, you will be abandoning and terminating your drive cut on Highway 17.** The easement has appropriate language for this purpose in it, as well. If you are agreeable to terminating and abandoning your drive cut in exchange for the easement to be granted by us as described in the easement document, please acknowledge the same by signing a copy of this letter where indicated below and returning it to me at your earliest convenience...

(R. p. 714).

The SCDOT required the new Access Easement between Stow Away and Mr. Sisson so that the pre-existing Encroachment Permit granted to Mr. Sisson could be abandoned. (R. p. 708).

> Grantee [Sisson] does hereby agree to **abandon and terminate any rights** Grantee may have to access U.S. Highway 17 by any means other than the Access Easement. It is **specifically understood and agreed by Grantee** that the grant of the Access Easement **shall terminate any rights** Grantee may have to access Grantee's property **from U.S. Highway 17 by any means other than the Access Easement.**

(R. pp. 46-54) (emphasis added).

The Easement Agreement is a "...non-exclusive and perpetual easement....for the purposes of access, ingress, and egress by any and all pedestrian and passenger and delivery vehicular means between Grantee's property and U.S. Highway 17." (R. pp. 46-54). The Easement Agreement "...shall entitle all parties to enjoy the benefits hereby

granted and shall **not** be deemed to be **an unlawful increase or burden** upon the Grantor's property or Grantee, as applicable." (*Id.*) (emphasis added).

Frank Fletcher is the owner of Sweetgrass Hardware, a hardware store on the property owned by Timarand, Inc. (R. pp. 835-836). After the opening of the hardware store, customers of Sweetgrass utilized the access over Sisson's pre-existing easement granted by the SCDOT. (R. pp. 9-20; R. pp. 836-837).

> Mr. Turner: Upon a recent site visit to your area, it was noted that a gate had been constructed on a driveway that was agreed to be a shared access during the SCDOT encroachment permitting process. This action has lead [*sic*] to the paving of an unapproved driveway access at the intersection of US-17. The location of this access point is **dangerous to the travelling public** given its close proximity to US-17 and its location within a signalized intersection. One of the special provisions on your approved permit, March 29, 2000, **required you to remove the unpaved drive** during construction of the new access point into the property. This permit package also included an agreement letter dated March 21, 2000 stating that the unpaved drive would be removed and the new access would serve as shared access point for you and Mr. George Sisson's businesses. The SCDOT is requiring that you reopen the agreed upon access point...

(R. p. 727) (emphasis added).

The SCDOT eventually shut-off the pre-existing access, and customers of Sweetgrass began to utilize the Access Easement granted by Stow Away to Mr. Sisson. (R. pp. 9-20).

By correspondence dated August 20, 2008, counsel for Stow Away contacted the President of Sweetgrass demanding that he notify his customers to cease using the Access Easement to reach the hardware store. (R. pp. 9-20; R. p. 728). In response to the August 20, 2008 correspondence, counsel for Sweetgrass advised that Sweetgrass is an assignee of Mr. Sisson and entitled to the full benefit of the Easement. (R. pp. 9-20; R. p. 730).

On November 13, 2008, 4.0, LLC and Sweetgrass memorialized their assignment of the non-exclusive, perpetual Access Easement by way of a License Agreement. (R. pp. 9-20; R. pp. 741-744). From 2008 to the present, the Plaintiff, by and through its members, employees, representatives and agents, without cause of legal basis, attempted to block the use of the Access Easement by the Defendants. (R. pp. 83-92).

The Plaintiff installed a locking gate on the driveway of the Access Easement in an attempt to block access to Sweetgrass. (R. pp. 83-92). By blocking access to Sweetgrass via the locking gate, Stow Away created significant safety concerns for the SCDOT. (R. pp. 745-746). The SCDOT took issue with the locked gate installed on the Access Easement because it encouraged motorists to incorrectly utilize the pre-existing easement from Mr. Sisson which was abandoned as part of the new Easement Agreement. (R. p. 745). By correspondence dated June 19, 2009, the SCDOT advised that access to the Easement must **not** be blocked and that "it is essential that access to this drive entrance remains unimpeded." (R. p. 746) (emphasis added).

> Judge Nicholson: There's a dedicated turnover going north to turn into the Plaintiff's property?
> Mr. Fletcher: Yes, sir, and an advanced light.
> Mr. O'Kelley: Yes, sir, there is, and an advanced light.
> ...
> Mr. O'Kelley: Mr. Fletcher, tell the Court about where the lane is.
> Mr. Fletcher: Coming north on Highway 17 at the Porcher's Bluff Intersection there is a protected left turn with a protected left turn arrow into the easement driveway.
> Mr. O'Kelley: And Mr. Fletcher, let me show you what I think we'll mark as 3 and 4. Mr. Fletcher, I've just marked some exhibits 3 and 4. The bottom one is 3 and the top one is 4. What does 3 show, sir?
> Mr. Fletcher: 3 is a photograph from the primary entrance going into Sisson Scale and Sweetgrass Hardware down south Highway 17 showing the right turn line [*sic*] going into the requested easement.
> Mr. O'Kelley: And there are two copies of that, correct, Mr. Fletcher, or three?
> Mr. Fletcher: Three copies.

> Mr. O'Kelley: Three copies of that. And then there's another set of photographs behind that Exhibit 4. What does that show?
> Mr. Fletcher: That is a photo on the back side of the Stow Away Storage property showing the termination of the proposed Porcher's Bluff extension that will connect to the intersection according to the published Town of Mount Pleasant highway plans.
> Mr. O'Kelley: And that's your understanding that the town is going to try and continue Porcher's Bluff Road across the highway, correct?
> Mr. Fletcher: Correct.
> ...
> Mr. O'Kelley: Mr. Fletcher, just so the Court understands, there are dedicated turn lanes in both directions, are there not?
> Mr. Fletcher: Correct. Northbound has a protected arrowed light.
> Mr. O'Kelley: It's an arrowed light that you can turn left into the easement, correct?
> Mr. Fletcher: Correct.
> Mr. O'Kelley: And that light was put by DOT to the best of your knowledge, correct?
> Mr. Fletcher: To my knowledge.

(R. pp. 840-843).

The changes to the subject intersection are the result of modifications to the highway by the SCDOT, not the Defendants, as indicated by Mr. Fletcher's testimony. The Plaintiff's employee, Allison Walshe, claims that increased traffic from customers traveling to Sweetgrass unduly burdens the Access Easement. (R. pp. 813-815). There is no indication that Ms. Walshe possesses the necessary expertise to comment on traffic patterns. (*Id*). Ms. Walshe also testified that there have been significant changes to Highway 17 and the intersection in front of Stow Away since she first started working there. (R. pp. 810-811). Ms. Walshe testified as follows:

> Ms. Walshe: When I first started at Stow Away, it was -- basically there was no traffic light there, and it was a dirt road and our driveway that came to a V to 17, and the DOT had not barricaded that dirt road off yet. There was no traffic light there that was continuing to be used, but there was a treeline going down the opposite side of the dirt road which is Mr. Sisson's easement...
> Mr. Sinkler: Tell us what the traffic was like that came along before the hardware store began.

Ms. Walshe: I would see Mr. Sisson's big trucks that have his logo on them pull in off of 17 and take the dirt road around to the back side to access his business, and I think the owners of the little landscaping business used it to park their cars in the back of the business they were running.
Mr. Sinkler: Was it a problem for your business?
Ms. Walsh: No sir.
Mr. Sinkler: When was your business created, and tell the Court what your business is.
Ms. Walshe: It's a self-storage facility. They opened in January of 2001, and I started there in January of 2004, so I wasn't there for the first three years.
Mr. Sinkler: All right. Now, when did you first begin having any trouble with the hardware store.
Ms. Walshe: When they opened, the first traffic started before they put their second access on Mr. Sisson's dirt road. Before they put that up it didn't take long for, I guess, the general public to realize that if they turned in the newly acquired traffic light where Stow Away's driveway meets the road, that if they went down the dirt road, the could have a traffic light to come through to go down that way around the back side of the hardware store to get to it...

(R. pp. 810-812).

The dispute centers on the contention of the Plaintiff that traffic from patrons of Sweetgrass on the Access Easement affects Stow Away's customers by creating a safety issue and the increased traffic materially burdens the servient estate changing the scope of the Easement. (R. pp. 813-814). Ms. Walshe conducted a traffic count on the vehicle access over the Easement on "two random days, Wednesday, April 20th, and Saturday, July 13th in 2013. (R. p. 816).

Mr. Sinkler: Did you ever do a traffic count on the vehicle access for the Stow Away's property?
Ms. Walshe: Yes.
Mr. Sinkler: How did you do that? What sort of equipment did you have?
Ms. Walshe: We used our surveillance cameras and video. It's standard equipment for every storage facility. They all have them. And we have a camera dedicated to the entrance at Highway 17, and I took video footage off of that and burned it to a disc and used the necessary software to view it and went through each day and counted cars...

Mr. Sinkler: ...And what did you conclude?
Ms. Walshe: On Wednesday, April 20th, I counted 732 cars turning into the hardware store and on Saturday, July 13th, I counted 676 cars turning in and out of the hardware store. Let me correct the first one too, it's turning in and out.
Mr. Sinkler: What do you call that document you're reading from?
Ms. Walshe: A traffic study...
Judge Nicholson: Any objection?
Mr. O'Kelley: Yes, Your Honor, I do object. Ms. Walshe -- there's no foundation for this. She's not a traffic engineer. She hasn't said where the cars are going to or from.

(R. pp. 815-818).

Ms. Walshe nor her employer provided any additional documentation of issues with traffic. Yet, Ms. Walshe continued to close the gate installed on the Easement against the instruction of the SCDOT. (R. pp. 104-94).

At this time R/D (responding deputy) met with Subject #1, Judith Sterrett, who stated that she was involved in the incident. Sterrett stated that she had made a left hand turn at the traffic light at Porchers Bluff Road and Highway 17 North in an attempt to get to work (Ace Hardware). When she made her way to the access road, she observed that the gate was closed. According to Sterrett, she was met by an unknown frantic woman in the roadway who was yelling at her, instructing her that she could not use the road. Sterrett stated while attempting to turn her vehicle around, for an unknown reason, **the woman intentionally bumped into her car** and started stating "hit and run, hit and run, I'm going to call the police." Sterrett stated at this time an unknown male came over to the unknown woman and pulled her aside, stating, "Cmon Allison, just let it go." At this time R/D cleared the call due to the Complainant not being on scene and Charleston County Communications not being able to make contact with her. R/D cleared the call however stayed on the scene for several minutes in case the Complainant arrived on scene or contacted Charleston County Communications. The Complainant did not arrive on scene, nor contact Charleston County Communications until approximately two to three hours later when another Deputy responded to the incident location. It was at this time the Complainant was identified as Allison Walsh[e], the manager of Stow Away Storage. Complainant Walsh[e] stated she observed both deputies on scene at Ace Hardware, however did not flag them down. To follow-up on the incident R/D made contact with subject Sterrett at her residence on 03/28/10 to get a more in-depth account of the incident due to Complainant Walsh[e] requesting a further investigation into the incident...R/D asked Sterrett if she was aware of the ongoing civil

> dispute over the access road between the Stow Away Storage and her employer Ace Hardware. She stated she was not. Sterrett stated that "there was no hit and run." Sterrett stated that several hours later she went back to Stow Away Storage in an attempt to have the gate opened due to the influx of customers at Ace Hardware. She was met by the unknown male who Sterrett stated was very cordial. The unknown male stated he could not open the gate, only the owner could approve that. Sterrett asked if the Complainant Walsh[e] was the owner and the unknown male stated no, she is the business manager. Sterrett did state however later that day at approximately 1500 hours, the gate was observed open, opened by an unknown source, possibly Complainant Walsh[e]. **R/D did observe paperwork on the date of the original incident from SCDOT indicating that the gate in question was to remain open for use.** R/D could not locate any damage to Sterrett's vehicle that would indicate she was involved in a collision.

(R. pp. 330-331).

The SCDOT created a dedicated turn lane going north on Highway 17 into the Plaintiff's property at the location of the Easement to control traffic. (R. pp. 840-841). The Plaintiff continued to reject instruction from the SCDOT, as well as local law enforcement, to keep the gate unlocked and open. (R. pp. 83-94). The Plaintiff does not possess any traffic studies or records relating to traffic outside of what Ms. Walshe provided at trial. (R. p. 822).

> Mr. O'Kelley: You've actively tried to shut down this easement yourself, haven't you, Ms. Walshe?
> Ms. Walshe: I've not tried to shut down the easement. I've tried to stop the traffic chaos to the hardware store and out.
> Mr. O'Kelley: Do you have any traffic counts that were done prior to Sweetgrass opening up?
> Ms. Walshe: I do not.
> Mr. O'Kelley: Why not?
> Ms. Walshe: I couldn't have foreseen this coming.
> Mr. O'Kelley: How can you say that the traffic has increased exponentially if you don't have a baseline?
> Ms. Walshe: I may not have done a traffic count, but I am a firsthand witness, and I am testifying that it was a handful of vehicles a day.
> Mr. O'Kelley: Do you remember testifying a few minutes ago the traffic has increased exponentially?
> Ms. Walshe: Mm-hmm.

Mr. O'Kelley: Is that a yes?
Ms. Walshe: Yes...
Mr. O'Kelley: But yet you have no baseline and you have four or five days of traffic counts; is that correct?
Ms. Walshe: I have two days.
Mr. O'Kelley: Two days. I'm sorry....
Mr. O'Kelley: You've got two days, and you've got various times, correct?
Ms. Walshe: It's by hour because that's the way our video records.
Mr. O'Kelley: When you've closed the gates, have you seen people trying to back out into Highway 17?
Ms. Walshe: Have I seen people back out into Highway 17?
Mr. O'Kelley: I'll ask it another way. When the gate's been closed, has that created problems with people trying to get back onto Highway 17?
Mr. Walshe: Not to my knowledge....
Mr. O'Kelley: But you're testifying as to the traffic counts, that they've increased exponentially.
Ms. Walshe: Yes.
Mr. O'Kelley: That it's created a problem for you all and your business; is that correct?
Ms. Walshe: It has created a traffic problem for Stow Away Storage.
Mr. O'Kelley: Has anyone said to you, ma'am, we can't get to our storage unit because of this easement.
Ms. Walshe: I have had customers tell me that they can't get in the driveway because of the blocked up traffic coming from the hardware store, yes.
Mr. O'Kelley: So people have said, I can't get to my unit because of this easement?
Ms. Walshe: I can't get to Stow Away Storage because of the traffic.
Mr. O'Kelley: And how many customers has that been ma'am?
Ms. Walshe: I haven't done that study.

(*Id*).

The Easement Agreement speaks for itself as follows:

> Grantor does hereby grant and convey unto the Grantee, his successors and assigns, forever, **a non-exclusive and perpetual easement** over, on, and through that certain portion of Grantor's property designated and delineated as "Access Easement for Sissons [*sic*] Property"...**for purposes of access, ingress, and egress by any** and all pedestrian and passenger and delivery vehicular means between Grantee's property and U.S. Highway 17.
>
> ...The Access Easement and all rights granted in favor of Grantee herein are limited in nature and scope; such that the use of the Access

Easement by Grantee shall not materially adversely affect the use, enjoyment, and operation of the Grantor or its property…

…**Grantee does hereby agree to abandon and terminate any rights Grantee may have to access U.S. Highway 17 by any means other than the Access Easement**. It is specifically understood and agreed by Grantee that the grant of the Access Easement shall terminate any rights Grantee may have to access Grantee's property from U.S. Highway 17 by any means other than the Access Easement.

It is intended that the terms, conditions, easements and rights granted and agreed to herein shall be perpetual and shall run with title to the Grantor's Property and the Grantee, respectively. **It is further intended that the easements and rights herein granted and agreed to herein are, whether determined to be appurtenant or in gross, perpetual, assignable, and divisible and that the division of the Grantor's Property by ownership or lease or the assignment of Grantee's rights under this Agreement, shall entitle all parties to enjoy the benefits hereby granted and shall not be deemed to be an unlawful increase or burden upon the Grantor's property or Grantee,** as applicable….

(R. pp. 46-54) (emphasis added).

## STANDARD OF REVIEW

This is an action in equity, and appellate courts will review factual findings and legal conclusions in an equitable action *de novo*. *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). "De novo review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court's findings." *Id.* 392 S.C. at 390, 709 S.E.2d at 654. However, under this broad standard of review, the appellate court is not required to disregard the factual findings of the trial court or ignore the fact that the trial court is in a better position to assess the credibility of the witnesses. *Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001).

## ARGUMENT

### I. THE TRIAL COURT IMPROPERLY GRANTED THE PLAINTIFF THE RIGHT TO SHUT OFF TRAFFIC ENTERING AND/OR CROSSING THE EASEMENT FOR THE PURPOSE OF ENTERING SWEETGRASS' PROPERTY WHERE THE INTENT OF THE GRANTOR OF THE EASEMENT AT ISSUE IN THIS CASE STATES THAT ANY ASSIGNMENT OF THE EASEMENT SHALL NOT BE DEEMED AN UNLAWFUL INCREASE OR BURDEN UPON THE GRANTOR'S PROPERTY

The Trial Court improperly concluded that the issuance of a License Agreement between 4.0, LLC and Sweetgrass Hardware, Inc. materially increased the burden on the dominant estate, thereby changing the character of the Easement Agreement between Mr. Sisson and Stow Away. The Trial Court relied on testimony from a lay witness, Allison Walshe, an employee of the Plaintiff, to establish the change in character of the express easement. (R. pp. 9-20). The Easement Agreement contemplates an assignment of the Grantee's rights in the Agreement stating that "...the **assignment** of Grantee's rights under this Agreement, shall entitle **all parties** to enjoy the benefits hereby granted and **shall not be deemed to be an unlawful increase or burden upon the Grantor's property or Grantee**, as applicable." (R. pp. 46-54)(emphasis added). There are no restrictions on assigning the Easement. There is no restriction on assignability.

The intent of the grantor is thwarted by the Court's Order. "The intention of the grantor must be found within the four corners of the deed." *Rhett v. Gray*, 401 S.C. 478, 491, 736 S.E.2d 873, 880 (Ct. App. 2013) citing *Windham v. Riddle*, 381 S.C. 192, 201, 672 S.E.2d 578, 582-83 (2009), *See Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 143 S.E.2d 803 (1965). In the present case, the intent of the Grantor, Stow Away, is clear. The Easement is "...for purposes of access, ingress, and egress by any and all pedestrian and passenger and delivery vehicular means between Grantee's property and U.S.

Highway 17." (R. pp. 46-54). It is clearly and unquestionably assignable. The Court agreed. (R. pp. 9-20). Stow Away did not attempt to limit Mr. Sisson's use of the Easement because it understood that in addition to Sisson employees, customers and vendors would also need to access Mr. Sisson's property via the Easement. "Whether a grant in a written instrument creates an easement and the type of easement created are to be determined by ascertaining the intention of the parties as gathered from the language of the instrument; the grant should be construed so to carry out that intention." *Smith v. Comm'rs of Pub. Works of City of Charleston*, 312 S.C. 460, 466, 441 S.E.2d 331, 335 (Ct. App. 1994) citing *Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 143 S.E.2d 803 (1965). The property in question is commercial in nature and a reasonable person would expect that individuals other than the employees or owners of a business on the property would need access to it. *See Hilton Head Air Svc. Inc. v. Beaufort Cnty.*, 308 S.C. 450, 418 S.E.2d 849 (Ct. App. 1992) (where rental car company was provided counter space for customers in terminal and parking spaces for vehicles from airport company by assignment). Just as employees and customers of Sisson utilize the Easement for access, by the License Agreement, employees and customers of Sweetgrass may utilize the Easement, too.

In the case at hand, the Court looked to the character of the Easement to determine if the burden of the servient estate materially increased. (R. pp. 9-20). In South Carolina, "the general rule is that the character of an express easement is determined by the nature of the right and the intention of the parties creating it." *Plott v. Justin Enterprises*, 374 S.C. 504, 514, 649 S.E.2d 92, 96 (Ct. App. 2008) citing *Smith v. Comm'rs of Pub. Works of City of Charleston*, 312 S.C. 460, 467, 441 S.E.2d 331, 336

(Ct. App. 1994), *See also Lighthouse Tennis Club Village Horizontal Prop. Regime LXVI v. So. Island Public Svc. Dist.*, 355 S.C. 529, 586 S.E.2d 146 (Ct. App. 2003). *Plott* is distinguished from the present case because the language in the *Plott* easement limited its scope to "...the commercial and economic benefit of [Tract 1B]..." *Plott*, 374 S.C. at 508-509, 649 S.E.2d at 94. The language of the Easement Agreement between Stow Away and Mr. Sisson broadly includes "...any and all pedestrian and passenger and delivery vehicular means..." (R. pp. 46-54). "It is further intended that the **easements and rights herein granted and agreed to herein are**, whether determined to be appurtenant or in gross, perpetual, **assignable** and divisible and that the division of the Grantor's property by ownership or lease **or the assignment of Grantee's rights under this Agreement, shall entitle all parties to enjoy the benefits hereby granted and shall not be deemed to be an unlawful increase or burden upon the Grantor's property or Grantee**, as applicable." (*Id.*) (emphasis added).

In addition to being commercial in nature, the property is located immediately adjacent to a major intersection in a rapidly growing area of Mt. Pleasant. (R. pp. 833-834). As a result of the continuing development up and down Highway 17, the overall volume of traffic increased significantly since Mr. Sisson's original ownership of this land. (*Id.*) The SCDOT added a dedicated turn lane. (*Id.*) Mr. Sisson testified that traffic all over Mt. Pleasant exploded exponentially in the last few years. (*Id.*) Mr. Sisson further testified that traffic at the subject intersection increased but the increase is not a result of anything he did nor has it been a problem for him. (R. pp. 834-835). The only evidence presented at trial relating to an increased volume of vehicular traffic on the Easement came from the manager of the Stow Away facility, Allison Walshe. (R. pp.

810-829) Ms. Walshe testified about the traffic entering the Easement on two random days in 2013 but provided no baseline report for comparison nor provided any substantive information as to the destination of each vehicle entering the Easement. (R. p. 823). The Trial Court's reliance on an incomplete traffic study of the subject intersection is improper because it ignored the lack of a baseline for comparison. Development and traffic continue to increase on Highway 17 as indicated by testimony of witnesses from the Plaintiff and Defendants. A reasonable person would conclude that more vehicles access the Easement as a result of these changes. The overall increase in vehicular traffic as a result of more development does not automatically change the character of the easement. The Plaintiff must show a material increase in the scope of the Easement that materially burdens the servient estate. *See Plott*, 374 S.C. 504, 649 S.E.2d 92 (Ct. App. 2008). A change in ownership, lease or the assignment of the Grantee's rights under the Easement "...shall not be deemed to be an unlawful increase or burden upon the Grantor's property or Grantee, as applicable." (R. pp. 46-54).

The Trial Court focused on the alleged limitations of the License Agreement granted to Sweetgrass by 4.0, LLC, propounding that because the "...license is personal to Licensee [Sweetgrass] and may not be sold, transferred, assigned or given to any third party," then the License Agreement does not extend to the customers and vendors of the hardware store. (R. p. 741; R. pp. 9-20). The personal aspect of the License Agreement goes to the use and not the specific parties allowed to use it, unless noted otherwise. *See Hilton Head Air Service, Inc. v. Beaufort Cnty.*, 308 S.C. 450, 418 S.E.2d 849 (Ct. App. 1992). Mr. Sisson has the ability to assign or license his rights in the Easement Agreement based on the language of the document itself. (R. pp. 46-54). As the sole

member of 4.0, LLC, Mr. Sisson rightfully assigned his interest in the Easement to Sweetgrass with no limitation.

A. THE EASEMENT AGREEMENT BETWEEN STOW AWAY STORAGE AND GEORGE W. SISSON CONTEMPLATED THE MATERIAL INCREASE IN SCOPE OF THE EASEMENT AND SPECIFICALLY STATES THAT THERE WILL BE NO UNDUE BURDEN CREATED IF THE EASEMENT IS ASSIGNED

On its face, the Easement Agreement between Stow Away and Mr. Sisson contemplates the rights of both Grantor and Grantee and entitles "...all parties to enjoy the benefits hereby granted and shall not be deemed to be an unlawful increase or burden upon the Grantor's property or Grantee, as applicable." (R. pp. 46-54). The Trial Court found that this language relates to the assignment of rights under the Easement Agreement. (R. pp. 9-20). We disagree with the Trial Court's interpretation. The Trial Court plucked this language out of context, ignoring the intent of the Grantor and Grantee. "To determine the purpose of the easement, we must evaluate the intention of the parties when the easement was granted." *Lighthouse Tennis Club Village Horizontal Prop. Regime LXVI v. So. Island Pub. Svc. Dist.*, 355 S.C. 529, 534, 586 S.E.2d 146, 148 (Ct. App. 2003). In exchange for agreeing to this Easement Agreement, Mr. Sisson gave up an existing encroachment permit. (R. pp. 46-54). The Easement Agreement is very specific as to the relinquishment of Mr. Sisson's existing access and in the same accord, it states that the sale or lease of the Grantor's property or the assignment of the Grantee's rights "...shall not be deemed to be an unlawful increase or burden..." (*Id.*). The intent of the parties is clear: **an assignment of Mr. Sisson's rights is not an unlawful increase or burden of the Easement**. There is no ambiguity, no other way to interpret that

statement. *See Smith v. Comm'rs of Public Works of City of Charleston*, 312 S.C. 460, 465, 441 S.E.2d 331, 335 (Ct. App. 1994).

"The language of an easement determines its extent. Thus, this court **must construe** unambiguous language in the grant of an easement according to the terms the parties have used." *Plott*, 374 S.C. at 513-14, 649 S.E.2d at 96 (emphasis added). In the present case, the Trial Court found that the language of the Easement Agreement was not specific enough to contemplate the material increase in the scope of the Easement and the burden on the servient estate by the dominant estate holder. (R. pp. 9-20). The Easement Agreement specifically states that an assignment of the Grantee's rights is not an unlawful increase or burden. (R. pp. 46-54). The Trial Court treats this portion of the Easement Agreement as though it is ambiguous in contravention to the intent of the document.

In *Plott*, the issue addressing the character of the easement related to the placement of fence and shrubbery along the boundary of the subject easement. *Plott*, 374 S.C. at 513, 649 S.E.2d at 96. The Court in *Plott* found that the Respondents had a right of ingress and egress "upon, over and across" the subject easement. 374 S.C. at 514, 649 S.E.2d at 97. The placement of the fence and shrubbery prevented the Respondents from traveling across Encampment Plantation Drive. *Id.*

In the present case, the only testimony provided to the Trial Court as to the impact on the Plaintiff's use and enjoyment of its property came from a lay witness who is the employee of the Plaintiff. (R. pp. 815-822). In *Plott*, there is a finite issue dealing with the installation of a fence and shrubbery. In the case at hand, there are multiple outside factors affecting the vehicular traffic accessing the Easement Agreement including the

significant development and increase in overall traffic volume along Highway 17. Sweetgrass, 4.0, LLC and Mr. Sisson have no control over these outside factors, nor do they change the scope of the easement by default.

B. THE LICENSE AGREEMENT BETWEEN 4.0, LLC AND SWEETGRASS IMPLICITLY INCLUDES THE CUSTOMERS OF SWEETGRASS AS LICENSEES AND COMPLIES WITH THE EASEMENT AS THE EASEMENT WAS REQUIRED BY THE SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

In analyzing the scope of the License Agreement, the Trial Court looked to *Hilton Head Air Service, Inc. v. Beaufort County*. 308 S.C. 450, 418 S.E.2d 849 (Ct. App. 1992). In *Hilton Head Air*, one of the issues relates to a license given to rental car companies by Air Service, a company operating an aviation business on premises leased to it by Beaufort County. 308 S.C. at 452, 418 S.E.2d at 850. During the time Air Service operated its business, it allowed rental car companies to operate on the premises. *Id.*

In *Hilton Head Air*, the Court of Appeals assessed the difference between a sublease and a license agreement. *Id.*, 308 S.C. at 456, 418 S.E.2d at 853. "...A license to be on the premises for an agreed purpose is a contractual right personal to the licensee." *Id.* citing *Bunn v. Offutt*, 216 Va. 681, 222 S.E.2d 522 (1976). Air Service provided the rental car companies with a license to operate a counter space in the airport terminal along with reserved parking spaces in the parking lot. *Id.*, 308 S.C. at 457, 418 S.E.2d at 853. A reasonable person would assume that the use of the license granted to the rental car companies included its employees and customers because the rental car companies utilize the space afforded by Air Service to conduct business.

The purpose of having counter space for the rental car company in the terminal along with parking spaces for the rental cars is to allow customers of the rental car companies to also access those areas. The focus on the license as a "...contractual right **personal** to the licensee" does not equate to a limitation of the license for use only by the rental car companies. Personal simply means limited to the agreed upon business, which would be the rental of cars at the airport. *Hilton Head Air*, 308 S.C. at 456-457, 418 S.E.2d at 853. In the case at hand, the same understanding of personal use is true. The intent of the License Agreement granted by 4.0, LLC to Sweetgrass contemplated the use of the Easement by customers and vendors of Sweetgrass, not just the employees of Sweetgrass. The personal right afforded Sweetgrass goes to its specific business and all of the individuals who may come on the premises. The Trial Court insinuated that the use of the Easement by customers and vendors of Sweetgrass was an additional assignment of the License Agreement. (R. pp. 9-20). That is incorrect, as the original License Agreement between 4.0, LLC and Sweetgrass includes any customers or vendors of Sweetgrass.

As part of the application process to gain access to its new storage facility, Stow Away filed an encroachment permit with the SCDOT. (R. 377-384) In order to gain approval for its permit, Stow Away was required to obtain confirmation from Mr. Sisson for the same. (*Id.*) During the time Stow Away was building its storage facility, the SCDOT continued to make plans to restructure the intersection of Highway 17 and Porchers Bluff Road. The structure of the easement agreement between Stow Away and Mr. Sisson was approved by the SCDOT as of March 29, 2000. (R. pp. 363-366; R. pp. 715-717).

## CONCLUSION

The trial court improperly granted the Plaintiff the right to shut off traffic entering and/or crossing the easement for the purpose of entering the Defendant Sweetgrass' property because the intent of the Grantor and the Grantee of the Easement at issue allows for an assignment of said Easement. Further the Easement specifically contemplates the material increase in the scope of the easement, stating that there will be no undue burden created if the easement is assigned. The License Agreement between 4.0, LLC and Sweetgrass implicitly includes the customers and vendors of Sweetgrass as licensees and complies with the Easement, as the Easement was required by the South Carolina Department of Transportation.

Mt. Pleasant, South Carolina
September 8

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge



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Case No. 2011-CP-10-2444

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Stow Away Storage, LLC,.....Respondent,

v.

George W. Sisson, 4.0 LLC, The Sisson Foundation Limited Partnership, Sweetgrass Hardware, Inc. and Timarand, Inc., Defendants,

Of whom George W. Sisson, 4.0 LLC, The Sisson Foundation Limited Partnership, and Sweetgrass Hardware, Inc. are the.....Appellants.

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## CERTIFICATE OF COMPLIANCE

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The undersigned hereby certifies the Appellant's Final Brief complies with Rule 211(b) SCACR and with the South Carolina Supreme Court Order dated August 13, 2007, regarding personal data identifiers.

Sept. 9, 2014

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PROOF OF SERVICE

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The undersigned hereby certifies that a true copy of the Appellant's Final Brief and Certificate of Complainte were served upon G. Dana Sinkler, Esq., counsel for the Respondent at Gibbs & Holmes, PC, 171 Church Street, Suite 110, Charleston, South Carolina, 29402, by United States Mail, first class, postage prepaid on the 9 Day of September, 2014

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