THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2011-CP-10-2444
Appellate Case No. 2017-001221

Stow Away Storage, LLC and
MSC MTP, LLC,

Appellants,

v.

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

Respondents.

APPELLANTS' PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

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and

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MISCELLANEOUS

Appellants Stow Away Storage, LLC, and MSC MTP, LLC, hereby petition for rehearing as to this Court's Unpublished Opinion No. 2019-UP-401, filed December 18, 2019 (the "Opinion"). As set forth below, Appellants respectfully submit that the Opinion misapprehends material principles of law and overlooks matters in the Record.[1]

Because the Opinion's determination on the issue of equitable indemnity is based on authority that is not binding precedent, and which conflicts with prior rulings by this Court and the Supreme Court, Appellants respectfully suggest that rehearing *en banc* may be necessary to maintain uniformity of this Court's decisions.

I. The Court misapprehends the law of equitable indemnity.

The trial court erred, as a matter of law, in failing to award attorney's fees to the Appellant Stow Away under the principle of equitable indemnification, as against Defendant Sisson (and his related entities). This Court wrongly affirmed the trial court, citing in its Opinion as grounds that "[Attorney fees] are awarded to a party seeking indemnity when the expenses were incurred in the successful **defense** of a claim . . . ." Op. at p. 2, ¶ 1, *citing* 13 S.C. Jur. *Implied Contracts* § 10 (1992) (emphasis added). The Court also lists the elements of equitable indemnity, but it overlooks that the Appellant Stow Away meets every one of them.

The Court of Appeals' memorandum opinion does not provide an articulation of reasoning from which Appellants can discern its rationale. However, based on the

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[1] Appellants incorporate herein their Statement of the Case and Statement of the Facts from *Appellants' Final Brief*, filed with this Court on February 28, 2018.

section it quotes from South Carolina Jurisprudence,[2] Appellants perceive that the Court's analysis is erroneously based on a mistaken belief that equitable indemnity *only* allows for attorney's fees where a party *defends* against a claim, and not where a party *brings* a claim. **That is not the law**, and this Court should withdraw its Opinion and rehear this appeal.

Under the doctrine of equitable indemnification, attorney's fees are properly recovered as damages where a *plaintiff* becomes involved in a legal dispute with a third party because of a breach of contract by the defendant. This easement dispute concerns three actors: (1) Appellant Stow Away Storage, which owned the servient estate, over which ran an appurtenant easement belonging to (2) the Respondent Sisson, who accessed his property (the dominant estate) by means of the easement, and who—in breach of his easement agreement with Stow Away—granted a license to (3) the Respondent Sweetgrass Hardware, Inc., which was located on a non-appurtenant parcel, and which sought to allow its 300 customers a day to cross Stow Away's property by virtue of its—unlawful—license agreement with Sisson. The facts of the case are undisputed, having been stipulated at trial and set forth in a previous order, which was appealed and then affirmed by this Court.[3] (R. pp. 4-5, 15-26).

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[2] South Carolina Jurisprudence is a secondary source, and it does not completely and accurately reflect the law.

[3] The standard of review in this appeal is *de novo*, and this Court is empowered to review the case anew, without deference to the trial court's determinations. *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d. 773 (1976) (standard of review in equity is *de novo*); *WDW Properties v. City of Sumter*, 342 S.C. 6, 10, 535 S.E.2d 631 (2000) ("When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts.").

In affirming the trial court's order, this Court misapprehends at least three important points: (1) that the common law of this state unequivocally recognizes the right to attorney's fees, even when the party claiming them is the one that files the lawsuit; (2) that Appellant Stow Away successfully *defended* against counterclaims brought against it by Sweetgrass Hardware; and (3) that Appellant Stow Away meets all the elements of its equitable indemnity claim.

1. **Equitable indemnity applies to compel an award of attorney's fees, regardless of whether the claimant sues or is sued.**

This Court overlooks that our Supreme Court has recognized that attorney's fees are available to a plaintiff under a theory of equitable indemnity. The Opinion's restriction of the doctrine so as to apply only to defendants is incorrect, and it misconstrues and is in conflict with the plain language of the seminal cases on this matter in South Carolina jurisprudence: "If the attorneys' fees were incurred as a result of a breach of contract between **plaintiff** and defendant, the defendant will be deemed to have contemplated that his breach might cause **plaintiff** to seek legal services in his dispute with the third party." *Addy v. Bolton*, 257 S.C. 28, 33, 183 S.E.2d 708, 710 (1971), *quoting* 22 Am. Jur. 2d. Damages § 166 (emphasis added); *see also Town of Winnsboro v. Wiedmann-Singleton, Inc.* 307 S.C. 128, 414 S.E.2d 118 (1992) ("Recovery is allowed when as a result of the defendant's breach of contract or tortious activity the **plaintiff** is required to either defend itself or bring an action against a third party.") (emphasis added).

Further, this Court disregards that the Supreme Court based its holding in *Addy* on the proposition that:

> It is generally held that where the wrongful act of the defendant **has involved the plaintiff in litigation with others** or placed him in such relation with others as makes it necessary to incur expense to protect his interest, such costs and expenses, including attorneys' fees, should be treated as the legal consequences of the original wrongful act and may be recovered as damages.

Id., quoting 22 Am. Jur. 2d *Damages*, § 166, pp. 235-236 (emphasis added); *Town of Winnsboro*, 307 S.C. at 131, 414 S.E. 2d at 121; *see also Rhett v. Gray*, 401 S.C. 478, 736 S.E.2d. 873 (Ct. App. 2013) (summarizing South Carolina law on equitable indemnity). The undisputed facts show that is precisely what happened in this case. Following word-for-word the above quoted passage from the Supreme Court's opinions in *Addy* and *Town of Winnsboro*: the wrongful act of the defendant (Sisson) has involved the plaintiff (Stow Away) in litigation with others (Sweetgrass Hardware) or placed him (Stow Away) in such relation with others (Sweetgrass) as makes it necessary to incur expense to protect his interest. Accordingly, "such costs and expenses, including attorneys' fees, should be treated as the legal consequence of the original wrongful act [by Sisson] and may be recovered as damages." *Id.*

This Court's Opinion, finding that attorney's fees are not available to a plaintiff under a theory of equitable indemnity, improperly contradicts binding precedent. Our Supreme Court expressly set forth that: "Recovery is allowed when as a result of defendant's breach of contract or tortious activity the plaintiff is required **to either defend itself or bring an action against a third party**." *Winnsboro* 307 S.C. at 132, 414 S.E.2d 121 (emphasis added).

This makes sense. The purpose of equitable indemnity is to redress the damaged party for the wrongdoer's actions. Often, as here, the party seeking indemnification may

have been required by the wrongdoer's acts to protect its property by pursuing its rights. Whether that party is labeled the "plaintiff" or the "defendant" in the caption is not dispositive of whether or not equitable indemnity applies.

South Carolina's equitable indemnity rule allowing attorney's fees to a plaintiff—not just to defendants—is common in other jurisdictions as well, although it is often called by different names. *See, e.g., Seabright Ins. Co. v. Matson Terminals, Inc.*, 828 F. Supp. 2d 1177, 1184–85 (D. Haw. 2011) ("The 'wrongful act' exception arises in cases where the acts of the defendant cause the plaintiff to litigate with a third party."); *Blueberry Place Homeowners Ass'n v. Northward Homes, Inc.*, 110 P.3d 1145, 1149–50 (Wash. App. Div. 1 2005) ("One of the recognized equitable grounds under which fees may be awarded is the theory of equitable indemnity, or the 'ABC rule'. Under this theory, 'where the acts or omissions of a party to an agreement or event have exposed one to litigation by persons—that is, to suit by persons not connected with the initial transaction or event—the allowance of attorney's fees may be a proper element of consequential damages.'") (internal citations and quotations omitted); *Lee v. Aiu*, 936 P.2d 655, 669 (Haw. 1997) ("Thus, where the wrongful act of a defendant causes a plaintiff to engage in litigation with a third party in order to protect his or her rights or interests, attorney's fees incurred in litigating with that third party may be chargeable against the wrongdoer as an element of the plaintiff's damages."); *cf.* 22 Am. Jur. 2d Damages § 450 ("A plaintiff has the right to recover attorney's fees incurred in other litigation with a third person if the plaintiff was involved in that litigation as a result of a breach of contract or tortious act by the present defendant."); 22 Am. Jur. 2d Damages § 453 ("Application of the 'wrong of

another' or 'collateral litigation' doctrine requires, as a predicate, one lawsuit against a third party and one lawsuit against the defendant. To recover attorney's fees under the doctrine, a plaintiff must show: (1) involvement in a legal dispute either because of a breach of contract by the defendant or because of the defendant's tortious conduct; (2) that the dispute was with a third party rather than with the defendant; (3) that the plaintiff incurred attorney's fees connected with that dispute; (4) that the expenditure of attorney's fees was a foreseeable or necessary result of the breach or wrong; and (5) that the fees claimed are reasonable." (footnotes omitted)); 22 Am. Jur. 2d Damages § 454 ("The test of recoverability of counsel fees is not whether they were generated in another case but rather whether they were incurred in bringing or defending an action against a third person.").

This Court should reconsider its Opinion and substitute it with a decision that adheres to South Carolina law and correctly allows for an award of attorney's fees to a plaintiff (Stow Away) who has been forced by a defendant's (Sisson's) breach of contract to file suit against a third party (Sweetgrass) in order to protect its interests.

2. Sweetgrass Hardware filed counterclaims against Appellant Stow Away, entitling it to attorney's fees against Sisson for the successful defense of those counterclaims.

For the sake of argument, even if the Court takes the language that it quotes in its Opinion at strict face value,[4] construing the law on equitable indemnity to apply only where "the expenses were incurred in the successful **defense** of a claim," the trial court's

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[4] Which it should not do, because the quoted passage is taken from a secondary source publication on South Carolina law, and it is not binding precedent nor an accurate representation of the law.

order is still wrong to deny Appellant Stow Away an award of the attorney's fees incurred in its successful **defense** against Sweetgrass Hardware's counterclaims.

In affirming the trial court's Order, this Court overlooks material pleadings in the Record, including Sweetgrass Hardware's *Answer and Counterclaims*. (R. pp. 181-186). Defendant Sweetgrass brought three causes of action against Plaintiff Stow Away, seeking damages and costs for breach of contract, declaratory judgment, and tortious interference with contract. Stow Away, which was found to be without fault in this lawsuit, necessarily incurred the costs (including attorney's fees) of defending against those counterclaims. Therefore, even under the narrowest reading of the language that this Court quotes in its Opinion, the Court misapprehends the law and overlooks the material fact that Sweetgrass Hardware brought counterclaims against Appellant Stow Away.

3. Appellant met all of the elements of its claim for equitable indemnity.

This Court properly quotes the elements of an equitable indemnity claim, but it overlooks that Appellant Stow Away established each of those elements, without question.[5] The Supreme Court in *Addy* outlined three elements that must be met in order to recover attorney's fees: "(1) that the plaintiff had become involved in a legal dispute either because of a breach of contract by the defendant or because of defendant's tortious conduct; (2) that the dispute was with a third party—not with the defendant; and (3) that

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[5] The facts of this case are undisputed, having been found in a previous order, which was appealed by Sisson and Sweetgrass, and which was affirmed by this Court. (R. pp. 4-5, 15-22). That Sisson breached his contract with Stow Away was also decided within the same order, and affirmed by this Court. (R. p. 25: " . . . in violation of the Easement Agreement between Plaintiff and Defendant Sisson . . . .").

the plaintiff incurred attorneys' fees connected with that dispute. If the attorneys' fees were incurred as a result of a breach of contract between plaintiff and defendant, the defendant will be deemed to have contemplated that his breach might cause plaintiff to seek legal services in his dispute with the third party." *Addy*, 183 S.E.2d at 709; *quoted by Rhett v. Gray*, 401 S.C. 478, 736 S.E.2d 873 (Ct. App. 2013).

In the case at hand, Appellant Stow Away had a contract (an easement agreement) with Respondent Sisson. In breach of that contract, Sisson first wrongfully granted to Respondent Sweetgrass Hardware the right to use an access route that Sisson had contractually agreed with Stow Away to abandon, and he subsequently granted Sweetgrass the right to use Sisson's easement across Stow Away's property; in doing so, Sisson **breached the contract** (twice over) and the law of easements in South Carolina, which prohibits the extension of an appurtenant easement to a non-appurtenant parcel.

Sisson's breach of contract resulted in hundreds of additional vehicles crossing Stow Away's land every day, on their way to Sweetgrass Hardware's store. Stow Away objected to the use of the abandoned access and the easement by Sweetgrass Hardware customers, including in letters and phone calls to both Sisson and Sweetgrass. (R. p. 22; pp. 123-124; p. 155). When both parties ignored Stow Away's objections and persisted in encouraging Sweetgrass Hardware customers to cross Stow Away's property, Stow Away had no choice to bring a lawsuit against Sweetgrass Hardware, among others, to protect its interest.

Sweetgrass Hardware (the third party in the elements set forth above) brought counterclaims against Stow Away, which Stow Away was obligated to defend against.

(R. pp. 181-185). The trial court ultimately held that Sisson's action of granting the use of the easement to Sweetgrass Hardware and its customers "materially increased the scope of the easement and the burden on the servient estate, thus, expanding the dominant estate **in violation of the Easement Agreement** between Plaintiff and Defendant Sisson and the law in South Carolina." (R. p. 25) (emphasis added). Stow Away was without fault in the dispute. This Court affirmed that holding. *Stow Away Storage, LLC, et al. v. Sisson, et al.*, Unpublished Op. No. 2016-UP-014 (R. pp. 4-5).

Stow Away's claim for equitable indemnity against Sisson meets each of the elements required by the Supreme Court in *Addy*. Attorney's fees are proper damages in this case because: (1) Stow Away became involved in a litigation because of Sisson's breach of contract in seeking to extend the easement to a non-appurtenant parcel and unrelated party; (2) that dispute was with a third party, Sweetgrass Hardware and its customers; and (3) Stow Away necessarily incurred attorney's fees in order to defend its property against the unwarranted, daily entry of hundreds of cars bound for Sweetgrass Hardware's store.

Again, the Supreme Court considered equitable indemnification and affirmed the award of attorney's fees as proper damages in *Town of Winnsboro v. Wiedmann-Singleton, Inc.* 307 S.C. 128, 414 S.E.2d 118 (1992). The Court summarized South Carolina law: "The damages which can be claimed under equitable indemnity may include . . . attorney fees and cost which proximately result from the at-fault party's breach of contract." *Id.*, 307 S.C. at 130, 414 S.E.2d at 120. As a matter of equity, the expenses that a party incurs in litigation with others because of the wrongful acts of the defendant "should be treated as

the legal consequences of the original act." *Id.*, 307 S.C. at 131, 414 S.E.2d at 120, *quoting McGaw v. Acker, Merrall & Condit Co.*, 111 Md. 153, 73 A. 731 (Md. 1909).[6]

A contract for indemnification should have been equitably implied under the facts of this case, allowing Appellant Stow Away to recover from Respondent Sisson for the costs and fees it incurred when Sisson's actions left it with no choice but to bring a lawsuit to protect its interests against Sweetgrass Hardware, as well as for the cost incurred in defending itself against Sweetgrass Hardware's counterclaims. "The very nature of equitable indemnification is that a contract for indemnity is unnecessary. **Recovery is allowed when as a result of defendant's breach of contract or tortious activity the plaintiff is required to either defend itself or bring an action against a third party.**" *Winnsboro*, 307 S.C. at 132, 414 S.E.2d at 121 (emphasis added).

Because it overlooks that the facts of this case (which are not at issue) meet each and every one of the elements required by the South Carolina Supreme Court for the award of attorneys' fees and costs under the doctrine of equitable indemnity, this Court should withdraw its Opinion and substitute it with a decision that finds that the trial court erred in denying those damages.

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[6] The Opinion does not appear to base its decision on the question of whether a special relationship exists between the parties, and nor did Respondents argue this issue in their brief. However, for the purpose of preserving this issue, Appellants incorporate herein their argument on the matter as contained within their *Final Brief* and *Final Reply Brief* to this Court.

II. The Court overlooked undisputed facts in the Record evidencing intentional conduct by Sweetgrass Hardware and warranting consideration of punitive damages.

This Court's memorandum opinion does not contain reasoning from which Appellants can surmise with certainty its rationale for affirming the trial court's denial of punitive damages. However, from the Opinion's itemization of the elements of a cause of action for tortious interference with contract, along with its quotation to the effect that, in order to support an award of punitive damages, the interfering party must "intend to interfere with . . . an existing contract . . . ," Appellants extrapolate that this Court mistakenly concludes Sweetgrass Hardware did not ***intend*** to interfere with the easement agreement between Stow Away and Sisson.[7] This conclusion is erroneous, because it overlooks stipulated facts to the contrary, as well as findings of fact in the trial court's prior order—which this Court affirmed. (R. pp. 4-5, 15-26).

The undisputed facts are clear: Sweetgrass Hardware acted intentionally, and with conscious disregard for the rights of Stow Away, when it encouraged hundreds of its customers every day (for a period of six years) to cross Stow Away's property, in violation of a contract between Sisson and Stow Away, of which it had knowledge. The following stipulated and found facts, which are not in question, demonstrate that Sweetgrass Hardware was aware of and ***intended to*** interfere with the existing Easement Agreement between Appellant Stow Away and Sisson:

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[7] In the event that Appellants have mis-identified the basis for this Court's memorandum Opinion, they incorporate herein by reference *Appellants' Final Brief* and *Appellants' Reply Brief* for the purpose of preserving their arguments on this issue.

15. Following several telephone conversations with Stow Away's member, Bert Pooser, on September 27, 2006, Tim Askins, the sole shareholder of Timarand, had his wife fax a sketch to Pooser, depicting a proposed extension of the Access Easement previously provided to Sisson which would have allowed access over Stow Away's Access Easement to Timarand's property, which he subsequently leased to Sweetgrass. (See Exhibit 3) Pooser never agreed to the proposed extension.

16. On January 3, 2007, the Defendant Timarand and the Defendant Sweetgrass entered into a lease of the property described below, pursuant to the provisions of which Timarand leased the property to Sweetgrass for a term of ten (10) years with an option to extend the term for two additional five (5) year periods. The property is described as follows:

[property description omitted]

17. The deed and plat by which Timarand acquired the property leased to Sweetgrass provided access to Hwy. 17 North only to the east of Sisson's property as shown on plat recorded in the RMC Office for Charleston County in Plat Book CD at page 139 and plat recorded in the RMC Office for Charleston County in Plat Book EA at page 742. (Exhibits 5 and 6)

18. Shortly after Sweetgrass leased the property from Timarand, it renovated and enlarged a commercial building on the property for use as a retail hardware store.

19. In the course of preparing its leased property for use as a hardware store, large trees and shrubbery blocking access to Sisson's property were removed and Sweetgrass constructed a gate on its west property line, thereby providing access to its property from the access to Hwy. 17 that Sisson had agreed with Stow Away to abandon.

20. Upon completion of renovations and opening of the store, customers of Sweetgrass, with the permission of Sisson, began using the old easement to Sisson's property which he had agreed to abandon under the terms of the Access Easement and Abandonment of Encroachment Permit dated October 17, 2000. Indeed, Sisson and/or Sweetgrass paved the old easement on April 19, 2009, to facilitate its use, notwithstanding Sisson's contractual agreement to abandon it.

21. Despite the SCDOT's objection, Sweetgrass and its customers continued to use the access Sisson had agreed to abandon to reach the hardware store. (See Letter from Richard L. Turner, P.E., Resident Maintenance Engineer dated July 21, 2008 attached as Exhibit 7)

22. Shortly thereafter, the SCDOT erected barriers to prohibit further use of the access Sisson had agreed to abandon, thereby limiting access to both Stow Away's property and Sisson's property and extinguishing the access of the customers of Sweetgrass.

23. Thereupon, Sweetgrass and its customers began using the access constructed by Stow Away on its property to access Sweetgrass' hardware store.

24. By letter dated August 20, 2008, counsel for Stow Away wrote Sweetgrass' President demanding that he notify his customers to cease using Stow Away's access to reach Sweetgrass' store. (See letter attached as Exhibit 8)

25. This demand was met by a written response from Sweetgrass' attorney, dated November 10, 2008, advising that: "Sweetgrass Hardware, Inc. is a lawful assignee of Mr. Sissons [sic], and therefore entitled to the full benefit of the Easement." (See letter attached as Exhibit 9)

26. Counsel for Stow Away then sent an email to Sweetgrass' attorney asking him to email him a copy of the document by which Sweetgrass Hardware, Inc. had become "a lawful assignee of Mr. Sissons [sic], and therefore entitled to the full benefit of the Easement." (Exhibit 10)

27. It developed that, in point of fact, Sweetgrass did not hold any written lawful assignment, but counsel for Sweetgrass then proceeded to obtain a License Agreement from 4.0 LLC to Sweetgrass dated November 13, 2008 (three days after counsel had advised that Sweetgrass was already a "lawful assignee of Mr. Sissons [sic]."). (See License Agreement attached as Exhibit 11)

28. The License Agreement, by its terms and according to law, was and is personal to Sweetgrass and "may not be sold, transferred, assigned or given to any third party." (License Agreement ¶ 10)

29. Nonetheless, both Sisson, individually and as sole member of 4.0 LLC, and Sweetgrass have persisted in asserting that the License Agreement allows Sweetgrass to assign to its customers the use of Stow Away's Easement and have refused to relent in their insistence that Sweetgrass' customers have the right to use Stow Away's Easement and have threatened that "any further attempt by Stow Away Storage, LLC to interfere with this right will result in action for injunctive relief, and damages for any lost business." (See letter from Sweetgrass' counsel, Exhibit 12, and letter from George Sisson, Exhibit 13)

R. pp. 22-23, *Order*, filed November 25, 2013 (*aff'd*).[8]

Further, this Court overlooks that the License Agreement between Sisson and Sweetgrass Hardware specifically references the Easement Agreement between Sisson and Appellant Stow Away. R. pp. 169-171. There is no question that Sweetgrass

[8] The exhibits referenced in the above findings may be found on R. pp. 155-175.

Hardware procured and entered into the License Agreement, the very purpose of which was to attempt to circumvent Stow Away's existing contract with Sisson. That existing contract was designed to limit use of the easement to Sisson's appurtenant parcel—not to allow hundreds of cars, daily, bound for an unrelated and non-appurtenant parcel owned by a separate entity. Since the License Agreement on its face refers to the Easement Agreement, it is clear that Sweetgrass knew about and intended to interfere with that Easement Agreement.

The Opinion misapprehends that the facts are not in dispute, and it overlooks that those undisputed facts clearly demonstrate that Sweetgrass Hardware entered into a contract with knowledge that that contract violated and interfered with another. For that reason, and for those set forth in Appellants' previous briefs, this Court should reconsider its Opinion, reverse the trial court, and remand for the circuit court's consideration of punitive damages.

III. The depreciation in rental value of the property is the proper measure of damages for temporary injury to real property.

This Court misapprehends South Carolina law on the method of measuring injury to real property, as applied to the facts of this case. The direct result of Sisson's breach of contract and Sweetgrass Hardware's tortious interference with contract was that **hundreds of cars *per day*—for a period of six years—crossed Appellant Stow Away's property**, bound for Sweetgrass Hardware's store. That daily, voluminous traffic,

crushing gravel, running over shrubbery, and wearing down pavement, constituted a physical injury to real property.[9]

This Court overlooks that temporary physical injury to real property can be measured, and it misapprehends the trial court's error in failing to allow recovery for that measured amount. Our Supreme Court holds that, where there is "temporary or nonpermanent injury to real property, the injured landowner can recover the depreciation in the rental or usable value of the property . . . ." *Gray v. Southern Facilities, Inc.*, 256 S.C. 558, 183 S.E.2d 438 (1971) (measuring damages for temporary pollution); *see also Yadkin Brick Co., Inc. v. Materials Recovery Co.*, 339 S.C. 640, 529 S.E.2d 764 (Ct. App. 2000) (measuring damages for temporary physical injury to property in terms of lost rent).

Furthermore, even if this Court does not believe that an unauthorized and unwanted influx of hundreds of cars, every day, for six years, constitutes a physical injury to real property, the Supreme Court has found that non-physical damages may also be measured in terms of lost rent. *Peoples Federal Savings and Loan Ass'n of South Carolina v. Resources Planning Corp.*, 358 S.C. 460, 596 S.E.2d 51 (2004) (upholding referee's award of damages that contemplated the temporary loss in value for a non-physical injury, and noting that the "appropriate measure of damages should be determined by the circumstances.").

Appellants put forth unrefuted evidence, in the form of a report prepared by an expert in the appraisal of commercial real estate in Mount Pleasant, South Carolina. (R.

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[9] From a practical and logical standpoint, the daily intrusion of cars was no different from water flowing onto property, or chemicals seeping into the soil.

pp. 45-87). The expert concluded that the damage to the property could properly be calculated as the fair market value of the rent that could have been charged for the use of the easement, which amounted to $13,124.00. (R. p. 81).

Because its Opinion misapprehends the appropriate measure of damages to real property, this Court should withdraw it and substitute it with a decision that reverses the trial court's error in denying Appellants the lost rental value of the easement.

CONCLUSION

Appellants respectfully request that this Court reconsider its Opinion, which overlooks errors of law by the trial court and misapprehends the application of the law to undisputed facts. The trial court's *Order on Damages* should be reversed so as to award the attorney's fees accumulated by Appellant Stow Away over the course of more than seven years of litigation, in defending its property and contract rights against access by a party outside the contemplation of the easement agreement entered into by Stow Away and Sisson. Furthermore, the matter should be remanded for consideration of punitive damages against Sweetgrass Hardware, which willfully, and in conscious disregard for Stow Away's contract and property rights, directed its 300 customers a day to come across Stow Away's property, over Stow Away's many objections. Finally, the trial court's order should be reversed to allow Stow Away to recover the fair market rental value of the easement over the course of the 68 months that the Respondents used Stow Away's property without recompense.

Respectfully submitted,

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Attorneys for Appellants

January 23rd, 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
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Case No. 2011-CP-10-2444
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v.

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

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of January, 2020, I served the *Appellants' Petition for Rehearing and Suggestion for Rehearing en Banc* on the Respondents by depositing a copy of the same in the United States Mail, postage prepaid, addressed to their attorney of record, G. Hamlin O'Kelley, III, Esquire, Buist, Byars, & Taylor, LLC, 652 Coleman Boulevard, Suite 200, Mt. Pleasant, SC 29464.

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FIRST CITIZENS BANK

3357

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57-664/539
227
CHECK AMOUNT

1/23/20

PAY TO THE ORDER OF S.C. Court of Appeals $ 50.00

Fifty and 00/100 DOLLARS

MEMO Petition for Rehearing
2017-001221

[redacted]

FORD WALLACE THOMSON LLC OPERATING ACCOUNT 3357

JAN 23 2020
SC Court of Appeals

FORD WALLACE THOMSON LLC OPERATING ACCOUNT 3357

FORD WALLACE THOMSON LLC

ATTORNEYS AT LAW

January 23, 2020

Via US Mail and Fax:
Ms. V. Claire Allen
Deputy Clerk
The South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Stow Away Storage, LLC, et al. v. George W. Sisson, et al. (2)
Appellate Case No. 2017-001221

Dear Ms. Allen,

Enclosed for filing, please find the original and six copies of *Appellants' Petition for Rehearing and Suggestion for Rehearing en Banc*, and a *Certificate of Service* in the above referenced matter. The filing fee is also enclosed.

By copy of this letter, I am serving all counsel of record with the same.

Please do not hesitate to contact me with any questions that you may have.

With kind regards, I am,

Very truly yours,

Ainsley Fisher Tillman

AFT/ja
Enc.- as stated
cc: G. Hamlin O'Kelley, III, Esq.
G. Dana Sinkler, Esq.

To: *18037341839@fax.bizvox.net*
From: *Johanna Arias <johanna.arias@fordwallace.com>*
Subject: *Stow Away Storage, LLC Case: 2011-CP-10-2444 Appellate Case: 2017-001221*
Date: *Thu, 23 Jan 2020 15:09:49 -0500*

Good afternoon Claire,
Attached please find a Petition for Rehearing and Suggestion for Rehearing in the above case. A hard copy is also being mailed to you.

Thank you,
Johanna Arias
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