THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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S.C. SUPREME COURT

Court of Appeals Case No. 2017-001221
Unpublished Opinion No. 2019-UP-401

Stow Away Storage, LLC and MSC MTP, LLC,

Petitioners,

v.

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

Respondents.

PETITION FOR A WRIT OF CERTIORARI

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II. Alternatively, do the facts present an important, novel question for this Court as to whether South Carolina's law of equitable indemnity allows recovery when—as a direct result of one defendant's breach of contract—the *plaintiff* is required to bring an action against a third person not party to the contract, and to defend itself against counterclaims by that third person?

III. Did the Court of Appeals improperly disregard the law of the case and the undisputed facts evidencing intentional conduct by Sweetgrass Hardware and warranting consideration of punitive damages?

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CERTIFICATE OF COUNSEL

Counsel for Petitioners certify that Petitioners filed a Petition for Rehearing to the Court of Appeals, and that petition was finally ruled upon on March 9, 2020.

QUESTIONS PRESENTED

I. Did the Court of Appeals wrongly interpret this Court's established precedent when it found that the Petitioner Stow Away is not entitled—as a matter of law—to equitable indemnification by Respondent Sisson, when Sisson's breach of contract directly caused litigation between Stow Away and Sweetgrass Hardware?

II. Alternatively, do the facts present an important, novel question for this Court as to whether South Carolina's law of equitable indemnity allows recovery when—as a direct result of one defendant's breach of contract—the *plaintiff* is required to bring an action against a third person not party to the contract, and to defend itself against counterclaims by that third person?

III. Did the Court of Appeals improperly disregard the law of the case and the undisputed facts evidencing intentional conduct by Sweetgrass Hardware and warranting consideration of punitive damages?

IV. Did the Court of Appeals misapprehend this Court's measure of damages for temporary injury to real property?

STATEMENT OF THE CASE

Petitioners Stow Away Storage, LLC and MSC MTP, LLC ("Petitioners" or "Stow Away") ask that this Court issue a writ of certiorari to review the Court of Appeals' final decision in this case, because that opinion and the circuit court's order[1] are in conflict with this Court's precedent, and because this case may present a novel question as to the application of the law of equitable indemnification.

A. Background Facts

This case concerns an express appurtenant access easement granted by Stow Away to Respondent Sisson, on October 17, 2000, involving property on Highway 17 in Mount Pleasant, South Carolina. Importantly, in exchange for the access easement across Stow Away's parcel, Sisson specifically agreed to "abandon and terminate any rights [Sisson] may have to access U.S. Highway 17 by any means other than the Access Easement."[2] (R. pp. 131-132, Access Easement Agreement). Under the terms of the easement agreement, Sisson terminated any other access to his property from Highway 17. (R. pp. 19-20, 131-133).

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1 *Order on Damages*, Record on Appeal, pp. 38-112. (In light of the Supreme Court's Order Regarding Operation of the Appellate Courts During the Coronavirus Emergency, dated March 20, 2020, all citations herein are to the Record on Appeal, which was filed with the Court of Appeals on February 28, 2018).

2 When it granted an encroachment permit by Stow Away for access to Highway 17, the South Carolina Department of Transportation ("SCDOT") required that Sisson abandon the approach previously used by him to access Highway 17. (R. p. 19, ¶10).

For illustrative purposes, this is a visualization of the properties at issue:

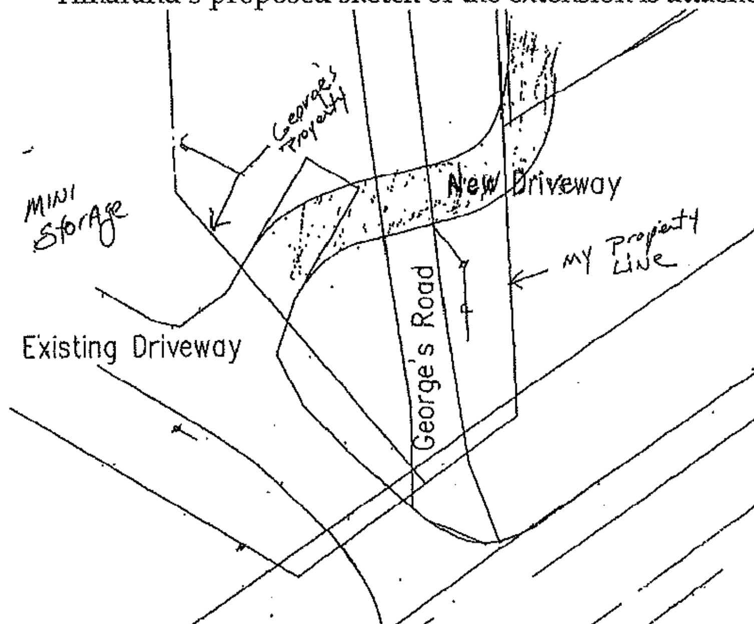
Charleston County SC

Seven years after Stow Away granted the access easement to Sisson (and Sisson abandoned his previous access), the Respondent Sweetgrass Hardware entered into a 20-year lease for a parcel that was adjacent to Sisson's property (but which was neither appurtenant to nor contiguous to Stow Away's property); the leased parcel was owned by Respondent Timarand. Timarand approached Stow Away, requesting an extension of Sisson's easement over Stow Away's land for access to the parcel that was ultimately

leased by Sweetgrass Hardware. (R. pp. 6, 121).[3] Stow Away did not ever agree to extend the easement to the parcel leased by Sweetgrass Hardware. (*Id.*).

Sweetgrass Hardware renovated and enlarged a commercial building on its leased parcel and opened it for business as a hardware store. (R. p. 21). With permission from Sisson and actual knowledge of the terms of the easement agreement between Sisson and Stow Away, Sweetgrass Hardware allowed and encouraged[4] its customers to use Sisson's prior, abandoned access ("George's Road") to Highway 17 for ingress to and egress from the store, such that its customers entered onto, and came across, Sisson's property (with

[3] Timarand's proposed sketch of the extension is attached to the Complaint as Exhibit 3:



(R. p. 140) ("George's Road" is the access to Highway 17 that Sisson had agreed to abandon per his easement agreement with Stow Away. "Existing Driveway" is Stow Away's driveway onto its own property, in which Sisson had the easement).

[4] As part of its construction of the hardware store, Sweetgrass built an entry arch for its customers' use, which entry arch contemplated access over Sisson's property via the access that Sisson had agreed with Stow Away to abandon. (Order of Judge Nicholson, November 25, 2013, R. p. 21).

Sisson's permission); this was in blatant disregard of Sisson's agreement with Stow Away to abandon that access, which abandonment was required by the SCDOT. (R. p. 19, ¶ 10; p. 21; p. 154). The SCDOT eventually shut off Sisson's previously abandoned access, whereupon the customers of Sweetgrass Hardware began using the easement granted by Stow Away to Sisson (the "Existing Driveway" in footnote 4). (R. pp. 21-22). This meant that hundreds of Sweetgrass Hardware Store customers crossed over Stow Away's property every day. (R. p. 1021:19-p. 1024:5).

After objections by Stow Away to the use of Sisson's easement by Sweetgrass Hardware customers, Sisson gave a License Agreement to Sweetgrass Hardware, in which Sisson purported to grant Sweetgrass Hardware and its customers the right to use the easement across Stow Away's property, despite language in both the Access Easement Agreement and the License Agreement prohibiting such an extension. (R. pp. 22-23; pp. 155-171). When its many protests to Sisson and Sweetgrass Hardware went unheeded, Stow Away had no other recourse but to file suit to halt the unauthorized use, which it did on April 4, 2011.

B. Procedural History

Given that hundreds of unauthorized persons were crossing its property each day, on April 4, 2011, Stow Away filed its Complaint seeking declaratory judgment, injunction, and actual and punitive damages, and alleging causes of action for tortious interference with contract against Respondent Sweetgrass Hardware, Inc. ("Sweetgrass Hardware" and "Sweetgrass"), and for breach of contract and equitable indemnity against Respondents Sisson, 4.0 LLC, and Sisson Foundation ("Sisson"). (R. pp. 117-175).

Sisson and Sweetgrass Hardware filed their Answer on April 29, 2011; they each alleged counterclaims against Stow Away for breach of contract[5] and tortious interference with contract. (R. pp. 176-187).[6] Stow Away necessarily defended against Sweetgrass Hardware's counterclaims for tort and breach of contract.

The case came to trial on August 14, 2013 before the Honorable J.C. Nicholson, Jr. Judge Nicholson bifurcated the trial, deciding the legal issues but reserving the issue of damages for a later hearing. (R. p. 16). Importantly for this analysis, at the outset of the trial, counsel for the Defendants stipulated that the allegations of paragraphs 1-29 of Stow Away's Complaint were admitted and constitute the facts on which the case should be considered. (R. p. 16).

In an Order dated November 22, 2013, the trial court found in favor of Stow Away. (R. pp. 15-26). The trial court concluded that the greatly increased volume of vehicular traffic[7] "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 of South Carolina." (R. p. 25).

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[5] Note that the contract that Stow Away allegedly breached was the access easement agreement, despite the fact that Sweetgrass Hardware was not a party to that agreement.

[6] Respondent Timarand was adjudged to be in default on August 16, 2011 by Order of the Chief Administrative Judge for the Ninth Judicial Circuit. (R. pp. 7-8).

[7] At trial, the general manager of Stow Away Storage testified that hundreds of cars per day crossed Stow Away's property, bound for Sweetgrass Hardware, and that the addition by Sweetgrass of a satellite branch of the U.S. Post Office inside the hardware store increased traffic "exponentially." (R. p. 1021:19-p. 1024:5); *see also* R. p. 1020:3-9) ("[m]y concern was that one of our customers . . .were going to be in a car wreck because of the traffic increase coming out of the hardware store, crossing through the driveway and blocking the driveway. You know, I was concerned for the safety of our customers, of the general public, of myself and my employee, and [the traffic]'s just been increasing ever since").

Sisson and Sweetgrass Hardware filed a Notice of Appeal on January 14, 2014. (R. p. 419). On December 23, 2014, Stow Away's property was sold to MSC MTP LLC, and the Court of Appeals issued an order adding that entity as a party Appellant. (R. p. 3). The Court of Appeals affirmed the trial court's Order, declaring: "If an easement is appurtenant to a particular parcel of land, any extension thereof to other parcels is a misuse of the easement." (Unpublished Opinion No. 2016-UP-014, filed January 13, 2016) (R. pp. 4-5). The Court of Appeals then remanded the case to the circuit court for further proceedings. (R. p. 6).

This case again came before the trial court for a hearing on damages on November 6, 2016. On April 14, 2017, the court filed an Order on Damages, granting damages to Stow Away for the amount it had expended in its unsuccessful attempt to halt the crossing of the easement, but denying Stow Away's claim for actual damages in the amount of $13,124.00, denying Stow Away's claim for attorneys' fees in the amount of $97,692.30, and denying Stow Away's claim for punitive damages. (R. pp. 38-44).

Stow Away filed a Motion pursuant to Rule 59, SCRCP, on April 21, 2017; the trial court denied that Motion in an Order on Damages filed on May 5, 2017. (R. pp. 494-500; 113).

Stow Away served and filed its Notice of Appeal on May 19, 2017. (R. p. 508). On December 18, 2019, the Court of Appeals filed its Unpublished Opinion No. 2019-UP-401, in which it wrongly affirmed the trial court's Order on Damages. Stow Away filed a petition for rehearing, which was denied on March 9, 2020.

ARGUMENT

Petitioners Stow Away Storage, LLC, and MSC MTP, LLC, hereby petition for certiorari as to the Court of Appeals' Unpublished Opinion No. 2019-UP-401, filed December 18, 2019 (the "Opinion"). This Court has considerable discretion in determining whether to issue a writ of certiorari to review a final decision of the Court of Appeals. The significant legal errors here call for the exercise of that discretion in favor of certiorari review. As set forth below, the Court of Appeals' Opinion and the circuit court's Order on Damages are in clear conflict with this Court's binding precedent. Further, this case potentially presents a novel question for clarification by this Court as to the application of the law of equitable indemnity.

I. The trial court and the Court of Appeals disregarded this Court's decisions on equitable indemnity when they found that attorney's fees may not be awarded in this case, where Stow Away incurred those fees in a dispute with a third party as a direct consequence of Respondent Sisson's breach of contract.

Under the doctrine of equitable indemnity, or implied contract for indemnity, 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. *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."). This easement dispute concerns three actors: (1) Petitioner Stow Away Storage, which owned the servient estate, over which ran an appurtenant easement belonging to (2) Respondent Sisson, who—in breach of his easement agreement with Stow Away—granted a license to (3) the Respondent Sweetgrass Hardware, 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 Respondents appealed and which was affirmed by the Court of Appeals in 2016.[8] (R. pp. 4-5, 15-26).

The trial court erred, as a matter of law, in failing to award attorney's fees to Stow Away under the principle of equitable indemnity, as against Sisson. The trial court's Order on Damages incorrectly states that "[t]here is no right to attorneys' fees in a case interpreting an easement." (R. p. 43, *erroneously citing Rhett v. Gray*, 401 S.C. 478, 736 S.E.2d 873 (Ct. App. 2013) (in which the Court of Appeals made no such holding)). The court went on to base its Order on an error of law: the incorrect conclusion that this Court's watershed decisions on the law of equitable indemnity hold that an obligation for equitable indemnity cannot arise out of an easement contract, but only in the context of negligence. (R. p. 43, *erroneously citing Addy v. Bolton*, 257 S.C. 28, 183 S.E.2d 708 (1971) and *Town of Winnsboro*, 307 S.C. 128, 414 S.E.2d 118 (1992)). To the contrary, this Court's decisions are clear that the obligation of equitable indemnity may arise in either the context of tort **or in contract**, regardless of whether the contract is one for an easement.

The Court of Appeals wrongly affirmed the trial court's patently erroneous order, without setting forth any analysis or rationale in its memorandum opinion. Instead, the

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8 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.").

Opinion cites broad swathes of law from this Court, all of which compels the opposite ruling. Those cases and a correct reading of the law should have required reversal of the trial court's decision, rather than affirmance.

a. Stow Away met all of this Court's established elements for its claim for equitable indemnity.

The seminal case on equitable indemnity in South Carolina is *Addy v. Bolton,* 257 S.C. 28, 183 S.E.2d 708 (1971). In that case, this Court sought to determine "whether the appellants, in the absence of an express contract of indemnity, are entitled to recover their costs and attorneys' fees incurred in the successful defense of this action under an implied contract, or because they were put to the necessity of defending themselves against the lessees' claim by the tortious conduct of the contractor, or by his breach of contract." *Id.* at 709.

This Court, in *Addy*, outlined its test, with three elements that must be met in order to recover attorney's fees under a claim for equitable indemnity:

> (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 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 (emphasis added). Stow Away established each of those elements, without question.[9]

[9] That Sisson breached his contract with Stow Away was decided in the trial court's 2013 Order and affirmed by the Court of Appeals in 2016. (R. p. 25: " . . . in violation of the Easement Agreement between Plaintiff and Defendant Sisson . . .").

In the case at hand, 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 Sisson subsequently purported to grant to Sweetgrass a license 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 his contract with Stow Away 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; pp. 154-175). 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 remedy except to bring a lawsuit against Sweetgrass Hardware to protect its interest.[10]

Sweetgrass Hardware (the third party in the elements set forth above) brought counterclaims against Stow Away, including for breach of the easement agreement and

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10 The public policy of this state encourages litigation and the peaceful resolution of disputes over the alternative of property owners taking matters into their own hands. *See, e.g. Pittman v. Lowther*, 363 S.C. 47, 52, 610 S.E.2d 479 (2005) (declining to require drastic action to interrupt easement use, which "would encourage wrongful or potentially violent behavior that is contrary to sound public policy considerations and the peaceful resolution of disputes.") (in this instance, Stow Away could not lawfully place a barrier across the easement, because of its easement agreement with Sisson).

tortious interference with contractual relations, 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) *aff'd, Stow Away Storage, LLC, et al. v. Sisson, et al.*, Unpublished Op. No. 2016-UP-014 (R. pp. 4-5). Stow Away successfully defended against the counterclaims and was found to be without fault in the dispute.

Stow Away's claim for equitable indemnity against Sisson meets each of the elements required by this Court in *Addy*. Attorney's fees are proper damages in this case because: (1) Stow Away became involved in litigation because of Sisson's breaches of contract in reviving his abandoned access and 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, as well as against counterclaims brought against it by Sweetgrass Hardware.

b. Stow Away's special relationship with Sisson compels indemnification.

Again, this 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). This 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).

The Court observed in *Winnsboro* that a special relationship must exist between the parties in order to sustain a claim for equitable indemnity. "[A] sufficient relationship exists [for indemnification] when the at-fault party's negligence or breach of contract is directed at the non-faulting party and the non-faulting party incurs attorney fees and costs in defending itself against the other's conduct." 307 S.C. at 132, 414 S.E.2d at 121. Here, a sufficient special relationship exists for indemnification because there was a contract between Sisson and Stow Away, in which Sisson abandoned his previous access to Highway 17 in exchange for the right to an easement across Stow Away's property. Sisson breached that contract, first when he attempted to permit Sweetgrass Hardware to use his abandoned access, and again when he purported to grant a license to use the easement to Sweetgrass. This breach of contract by Sisson ultimately resulted in Stow Away having to incur expenses, including but not limited to legal expenses, to defend its property against Sweetgrass Hardware's use. "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*, 183 S.E.2d at 710, *quoting* 22 Am.Jur. (2d) *Damages* § 166 (emphasis added).

Under this Court's binding precedent, a contract for indemnification should have been equitably implied under the facts of this case, allowing Stow Away to recover from Sisson for (a) 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 (b) the cost incurred in defending itself against Sweetgrass Hardware's counterclaims. Those costs were the direct result of Sisson's breach of contract. "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 the facts of this case (which are not disputed) satisfy this Court's test for the award of attorneys' fees and costs under the doctrine of equitable indemnity, the trial court erred in denying those damages to Stow Away, and the Court of Appeals erred in affirming that error. Petitioner respectfully requests that this Court would issue a writ of certiorari in order to correct the lower courts' unjust decisions, which are in conflict with precedent.

II. Alternatively, this Court should grant certiorari to clarify that the law of this State allows a *plaintiff* to recover attorney's fees under a theory of equitable indemnity.

The Court of Appeals wrongly affirmed the trial court, quoting 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 of Appeals' memorandum opinion does not provide an articulation of reasoning from which Stow Away can discern its rationale. However, based on the section it quotes from South Carolina Jurisprudence,[11] it seems 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 grant certiorari to clarify the application of the doctrine of equitable indemnity for the Court of Appeals and other courts throughout South Carolina.

This Court has recognized that attorney's fees are available to a plaintiff under a theory of equitable indemnity, particularly where those fees were necessitated as a result of a breach of contract between plaintiff and defendant that causes plaintiff to become involved in litigation with a third party. *Addy*, 257 S.C. at 33, 183 S.E.2d at 710 ("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.") (emphasis added); *see also Town of Winnsboro*, 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).

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

This makes sense. Equitable indemnity, at its essence, is a judicially implied contract for indemnification. Whether the party seeking such relief is labeled the "plaintiff" or the "defendant" in the case caption should not be dispositive of whether or not equitable indemnity applies. As a practical matter, if Sweetgrass Hardware had sued Stow Away first, Stow Away could unquestionably have brought a cause of action against Sisson for indemnification. If the Court of Appeals' Opinion stands, therefore, South Carolinians will be perversely encouraged to take actions to *provoke* a lawsuit (so they can be a "defendant" and avail themselves of equitable indemnity), rather than seeking to resolve disputes by filing in the courts (as the "plaintiff," without benefit of equitable indemnity).

Nonetheless, despite the unmistakable language that its opinions contain, this Court's decisions on equitable indemnity have not yet involved a fact pattern similar to the one at issue here, where a *plaintiff* (Stow Away) was placed in such a relationship with others (Sweetgrass Hardware), because of the wrongful acts of defendant (Sisson), as made it necessary to bring suit to protect its interest. The Court therefore should accept this case in order to provide direction to courts in South Carolina on this important issue.

Other states recognize this right of equitable indemnification, 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 § 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.").

Petitioners respectfully request that this Court would grant a writ of certiorari in order to clarify South Carolina law in this area.

III. The findings of fact in the trial court's order evidence intentional conduct by Sweetgrass Hardware and warrant at least the consideration of punitive damages.

Stow Away sought punitive damages under its cause of action against Sweetgrass Hardware for its tortious interference with the easement agreement between Stow Away and Sisson. (R. pp. 126-127). The Court of Appeals wrongly affirmed the trial court's

denial of punitive damages, finding that in order to support an award of punitive damages, the interfering party must intend to interfere with an existing contract and that Sweetgrass Hardware did not ***intend*** to interfere with the easement agreement between Stow Away and Sisson. This conclusion is erroneous, because it overlooks specific findings of fact in the trial court's prior order—which the Court of Appeals affirmed, and which is the law of the case. (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 actual knowledge. The following findings of fact by the trial court leave no question that Sweetgrass Hardware was aware of and ***intended to*** interfere with the existing Easement Agreement between Appellant Stow Away and Sisson:

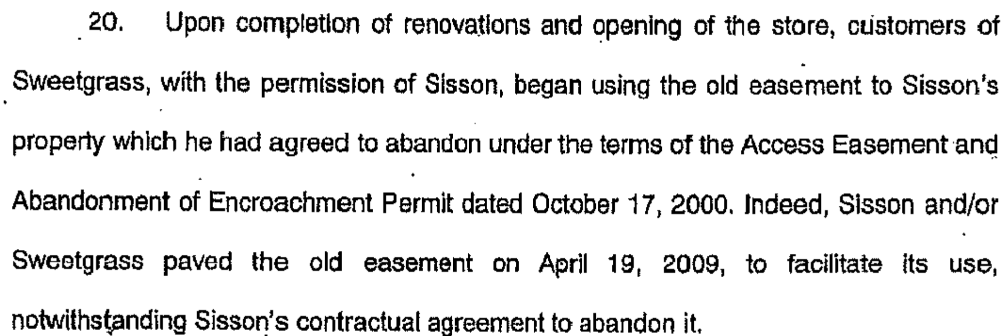
> 15. Following several telephone conversations with Stow Away's member, Bert Pooser, on September 27, 2006, Tim Askins, the sole shareholder of Timarand, had his wife fax a sketch to Pooser, depicting a proposed extension of the Access Easement previously provided to Sisson which would have allowed 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 it's 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*).[12]

Further, the Court of Appeals and the trial court misconstrued 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 dispute that Sweetgrass 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—and 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 trial court and the Court of Appeals erred because the undisputed facts clearly demonstrate that Sweetgrass Hardware entered into a contract with knowledge that that contract violated and interfered with another. For that reason this Court should issue a writ of certiorari in order to review the Court of Appeals' decision, which failed to reverse and remand to the trial court for the consideration of punitive damages.

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

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

The Court of Appeals misapprehended 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 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.[13]

The Court of Appeals erred when it misunderstood that temporary physical injury to real property can be measured, and in failing to reverse to allow recovery for that measured amount. This 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 an unauthorized and unwanted influx of hundreds of cars, every day, for six years, somehow does not constitute a **physical injury** to real property, this Court has found that **non-physical** damages may also be measured in terms of lost

13 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.

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.").

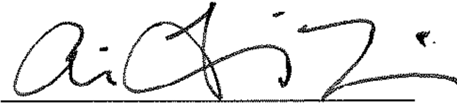
Stow Away put forth unrefuted evidence, in the form of a report prepared by an expert in the appraisal of commercial real estate in Mount Pleasant, South Carolina. (R. pp. 45-87). The expert concluded that the damage to the property could properly be calculated as the fair market value of the rent that could have been charged for the use of the easement, which amounted to $13,124.00. (R. p. 81).

Because the Court of Appeals misconstrues this Court's decisions on the appropriate measure of damages to real property, this Court should issue a writ of certiorari to review its error and reverse the trial court's order denying Stow Away the lost rental value of the easement.

CONCLUSION

For the foregoing reasons, Petitioners Stow Away Storage, LLC and MSC MTP, LLC respectfully request that this Honorable Court grant their Petition for a Writ of Certiorari and, upon review of this case, reverse the Court of Appeals and the trial court's erroneous Order on Damages.

Respectfully submitted,



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April 6th, 2020

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

RECEIVED
Apr 07 2020
S.C. SUPREME COURT

Circuit Court Case No. 2011-CP-10-2444
Appellate Case No. 2017-001221
Unpublished Opinion No. 2019-UP-401

Stow Away Storage, LLC and
MSC MTP, LLC,

Petitioner,

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 6th day of April, 2020, I served the *Petition for Certiorari* on the Respondents herein by sending it to their attorney of record, G. Hamlin O'Kelley, III, Esquire at his AIS email address, as well as by U.S. mail.

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