

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

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May 08 2025

SC Court of Appeals

Appeal from Anderson County
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2021-CP-04-01349
Appellate Case No. 2024-002150

Poly-Med, Inc., Technology Drive 51, LLC,
Technology Drive 52, LLC, PMI Properties, LLC,

Respondents/Appellants,

v.

Research Park, LLC,

Appellant/Respondent.

**AGREEMENT TO RESOLVE
APPELLANT/RESPONDENT'S MOTION
TO STRIKE CERTAIN MATTER DESIGNATED BY RESPONDENTS/APPELLANTS
TO BE INCLUDED IN THE RECORD ON APPEAL**

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NOW COME Respondents/Appellants, Poly-Med, Inc., Technology Drive 51, LLC, Technology Drive 52, LLC, PMI Properties, LLC (collectively, “Plaintiffs”), by and through their undersigned counsel, joined by and with the consent of Appellant/Respondent, Research Park, LLC (“Defendant”), by and through its undersigned counsel, and, pursuant to Rule 261(a), SCACR,¹ present this agreement to the Court for its consideration in resolution of Plaintiff’s pending motion, filed April 28, 2025, to strike certain matter designated by Plaintiffs to be included in the record on appeal (the “Subject Motion”).²

The Subject Motion asks the Court for an order striking Items 83–87 and 89 from Plaintiffs’ designation of matter and requiring references to these Items to be removed from Plaintiffs’ initial brief.

After consultation, Plaintiffs and Defendant have reached an agreement to resolve the Subject Motion, which they ask that the Court approve via an order that provides as follows:

- (1) Plaintiffs will, and are granted leave to, serve/file an amended designation of matter that omits Items **83–86** in their current designation;
- (2) Items **87** and **89** in Plaintiffs’ current designation will remain in Plaintiffs’ amended designation (although they will be renumbered as Items 83 and 85, respectively);³ and

¹ In pertinent part, Rule 261(a) provides, “Any agreement submitted to the appellate court for its consideration shall be in writing and signed by the parties or their attorneys.”

² Pursuant to Rule 240(e), SCACR, Plaintiffs’ return to the Subject Motion is due today, May 8, 2025. The instant agreement is, of course, intended to resolve the Subject Motion, thus mooting the need for Plaintiffs to submit a return. Out of an abundance of caution, however, to the extent that a return from Plaintiffs is nonetheless required, this agreement is intended to serve as Plaintiffs’ return.

³ The changes to be made via Plaintiffs’ amended designation are shown on the attached **Exhibit 1**.

- (3) Rather than serving/filing an amended initial brief, when the Final Appellants' Brief of Respondents/Appellants is served/filed, Plaintiffs will, and are granted leave to, omit reference to Items **83–86** in their current designation therein.⁴

WHEREFORE, Plaintiffs, joined by and with the consent of Defendant, ask the Court to enter an order resolving the Subject Motion and approving the parties' above-stated agreement.

<SIGNED ON THE FOLLOWING PAGES>

⁴ The references to these Items that will be omitted in Plaintiffs' final brief is shown on the attached **Exhibit 2**.

Respectfully submitted,

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May 8, 2025

**THE STATE OF SOUTH CAROLINA
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SC Court of Appeals

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Poly-Med, Inc., Technology Drive 51, LLC,
Technology Drive 52, LLC, PMI Properties, LLC,

Respondents/Appellants,

v.

Research Park, LLC,

AMENDED Appellant/Respondent.

**RESPONDENTS/APPELLANTS' DESIGNATION OF
MATTER TO BE INCLUDED IN THE RECORD ON APPEAL**

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EXHIBIT

1

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PMI Properties, LLC*

Respondents/Appellants, Poly-Med, Inc., Technology Drive 51, LLC, Technology Drive 52, LLC, and PMI Properties, LLC, propose the following to be included in the Record on Appeal, with any duplicative matter therein to appear in the record but once (i.e., avoiding any unnecessary redundancy):

Orders, Judgments, Decrees, or Decisions

1. Order filed 1/24/22;
2. Order filed 3/28/23;
3. Order filed 7/18/23;
4. Order filed 11/6/23;
5. Memorandum and Order for Judgment filed 2/29/24;
6. Form 4 Judgment filed 2/29/24;
7. Order filed 7/26/24;
8. Order filed 7/29/24;
9. Order filed 8/27/24;
10. Order filed 9/26/24;
11. Order filed 11/19/24;
12. Order filed 12/9/24;
13. Order filed 12/17/24;
14. Final Judgment filed 12/20/24;

Pleadings

15. Summons and Complaint, filed July 14, 2021, with Exhibit;
16. Answer & Counterclaim filed February 8, 2022;
17. Plaintiffs' Reply to Defendant's Counterclaim, filed March 8, 2022;

18. Amended Complaint, filed October 13, 2023, with Exhibit;
19. Defendant's Answer to Amended Complaint & Counterclaim, filed October 27, 2023;
20. Plaintiffs' Reply to Defendant's Amended Counterclaim, filed October 31, 2023;

Transcripts

21. Transcript of Hearing on 6/15/23;
22. Trial Transcript, 10/10/23 – 10/11/23;
23. Transcript of Hearing on 7/24/24;

Other Material

Motions, Memoranda, and Other Filed Documents

24. Defendant's Motion to Dismiss filed September 3, 2021;
25. Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss, filed October 19, 2021;
26. Motion for Summary Judgment on behalf of Plaintiffs, filed March 6, 2023;
27. Memorandum in Support of Motion for Summary Judgment on behalf of Plaintiffs, filed March 6, 2023, with Exhibits;
28. Defendant's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment, as well as Defendant's Cross-Motion for Partial Summary Judgment, filed May 12, 2023, with Exhibits;
29. Plaintiffs' Motion for Summary Judgment on Defendant's Counterclaims, filed May 3, 2023, with Exhibits;
30. Plaintiffs' Memorandum in Opposition to Defendant's Cross-Motion for Partial Summary Judgment, filed June 2, 2023;
31. Defendant's Consolidated Motion pursuant to Rules 52, 54, & 59, SCRCF;
32. Defendant's Supplemental Brief regarding Removal of Plaintiffs' Trailers, filed November 16, 2023;
33. Plaintiffs' Motion to Alter and Amend Order and Issue Formal Order, Filed November 16, 2023, with Exhibit;

34. Plaintiffs' Brief regarding Removal of Trailers and Motion for Reconsideration, filed November 22, 2023, with Exhibit;
35. Defendant's Memorandum in Response to Plaintiffs' Brief regarding a "Reasonable Amount of Time" to Remove their Non-Compliant Trailers, filed November 27, 2023;
36. Plaintiffs' Memorandum in Opposition to Defendant's Motion to Strike Affidavit of David Shalaby and Reply in Support of Brief regarding Removal of Trailers, filed November 30, 2023, with Exhibit;
37. Plaintiffs' Motion for Attorney's Fees and Expenses, filed March 8, 2024, with Exhibits;
38. Defendant's Second Motion Pursuant to Rules 52 & 59, SCRPC, filed March 8, 2024;
39. Defendant's Memorandum in Opposition to Plaintiffs' Request for an Award of Attorneys' Fees, filed April 15, 2024;
40. Plaintiffs' Memorandum in Opposition to Defendant's Consolidated Motion Pursuant to Rules 52, 54 & 59, SCRPC & Defendant's Second Motion Pursuant to Rules 52 & 59, filed April 15, 2024;
41. Plaintiffs' Supplemental Memorandum regarding Requests for Attorneys' Fees, filed August 7, 2024, with Exhibits;
42. Plaintiffs' Memorandum Regarding Removal of Office Trailers, Filed August 7, 2024;
43. Plaintiffs' Supplemental Memorandum on their Conversion Claim, filed August 8, 2024;
44. Defendant's Memorandum regarding Conversion, filed August 26, 2024;
45. Defendant's Memorandum regarding Attorneys' Fees, filed August 26, 2024;
46. Defendant's Memorandum regarding the Removal of Plaintiffs' Trailers, filed August 26, 2024;
47. Defendant's Supplemental Memorandum regarding Attorneys' Fees, filed September 9, 2024;
48. Plaintiffs' Reply Brief in support of Plaintiffs' Motion for Attorney's Fees and Expenses, filed September 12, 2024;

49. Plaintiffs' Motion for Reconsideration of Order on Outstanding Motions regarding Conversion & Injunctive Relief, filed October 7, 2024;
50. Defendant's Notice of Appeal, omitting orders, with proof of service, filed December 19, 2024;
51. Defendant's Amended Notice of appeal, omitting orders, with proof of service, filed December 23, 2024;
52. Plaintiffs' Notice of Cross Appeal, omitting orders, with proof of service, filed December 27, 2024;

Trial Exhibits

53. Plaintiffs' Trial Ex. 1 [Deed from Innovate to Def.];
54. Plaintiffs' Trial Ex. 2 [Quit Claim Deed from SCRA to Defendant];
55. Plaintiffs' Trial Ex. 3 [Lot 1A Plan];
56. Plaintiffs' Trial Ex. 4 [Defendant's Mortgage];
57. Plaintiffs' Trial Ex. 5 [Covenants];
58. Plaintiffs' Trial Ex. 6 [Borrower's Statement];
59. Plaintiffs' Trial Ex. 7 [Innovate Income and Expense Proration Estimates for Settlement];
60. Plaintiffs' Trial Ex. 8 [Bank Statement of 11/30/18];
61. Plaintiffs' Trial Ex. 9 [Bank Statement of 5/29/20];
62. Plaintiffs' Trial Ex. 10 [Bank Statement of 5/31/22];
63. Plaintiffs' Trial Ex. 11 [Southern First Bank Statements];
64. Plaintiffs' Trial Ex. 12 [Deed from Defendant to PMI Properties];
65. Plaintiffs' Trial Ex. 13 [Defendants' Invoices to Poly-Med];
66. Plaintiffs' Trial Ex. 14 [Poly-Med Payments];
67. Plaintiffs' Trial Ex. 15 [Affidavit of Tamara S. Hannon, CPA];
68. Plaintiffs' Trial Ex. 16 [Deed from PMI Properties to Poly-Med];

69. Plaintiffs' Trial Ex. 17 [PMI Settlement Statement];
70. Plaintiffs' Trial Ex. 18 [Shalaby email to Wagner of 4/30/20];
71. Plaintiffs' Trial Ex. 19 [Nicolai letter to Wagner of 5/26/20];
72. Plaintiffs' Trial Ex. 20 [Patterson letter to Nicolai of 8/7/20];
73. Plaintiffs' Trial Ex. 21 [Nicolai letter to Patterson of 8/28/20];
74. Plaintiffs' Trial Ex. 22 [1/14/21 letter from Patterson];
75. Plaintiffs' Trial Ex. 23 [Entities RP Marketed To];
76. Plaintiffs' Trial Ex. 24 [Ellis's Email dated 6/14/17 to Nelson];
77. Plaintiffs' 20240167 Trial Ex. 25 [Email Chain Between Ellis and Nelson dated 6/14/17];
78. Plaintiffs' Trial Ex. 26 [Email Chain Between Shalaby and Nelson dated 6/27/17];
79. Plaintiffs' Trial Ex. 27 [10/25/17 Email from Ellis];
80. Plaintiffs' Trial Ex. 28 [Secretary of State Record];
81. Plaintiffs' Trial Ex. 29 [Research Park Mortgage]; and
82. Plaintiffs' Trial Ex. 30 [Damages Calculation];

Other Documents

- ~~83. Email dated 9/3/24 from Defendant's Counsel to Plaintiffs' Counsel with Defendant's Proposed Formal Order;~~
- ~~84. Reply Email dated 9/5/24 at 9:58 AM from Plaintiffs' Counsel to Defendant's Counsel;~~
- ~~85. Reply Email dated 9/5/24 at 9:59 AM from Defendant's Counsel to Plaintiffs' Counsel;~~
- ~~86. Reply Email dated 9/10/24 from Plaintiffs' Counsel to Defendant's Counsel with Plaintiffs' Proposed Formal Order;~~
- 83 87. Email dated 9/12/24 at 2:12 PM from Defendant's Counsel to Law Clerk with Defendant's Proposed Formal Order & Plaintiffs' Proposed Formal Order;

- 84 ~~88~~. Defendant's Proposed Formal Order submitted 9/12/24; and
- 85 ~~89~~. Reply Email dated 9/12/24 at 3:26 PM from Plaintiffs' Counsel to Law Clerk Objecting to Defendant's Proposed Formal Order.

I certify that this Designation of Matters contains no matter which is irrelevant to this appeal.

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**INITIAL APPELLANTS' BRIEF
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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

PROLOGUE 1

STATEMENT OF ISSUES ON APPEAL 2

STATEMENT OF THE CASE..... 3

 A. Factual Background 3

 1. Plaintiffs, the Park, and Plaintiffs’ Parcels 3

 2. The Park’s Creation and Purpose..... 4

 3. The Covenants 5

 (a) The 15% Requirement 5

 (b) Conveyance of Common Areas to the Association 5

 (c) Maintenance Fees..... 7

 (d) Approval of Improvements 8

 (e) The Fees/Costs Provision..... 9

 4. Defendant a/k/a the Park Authority 9

 5. Defendant’s Predecessors as Park Authority and
 Defendant’s Acquisition of the Park..... 9

 6. Innovate’s Collection of Maintenance Fees..... 10

 7. Innovate’s Approval of the Trailers 11

 8. Defendant’s Collection of Maintenance Fees 12

 B. Procedural History 13

 1. Plaintiffs’ Claims 13

 2. Defendant’s Counterclaims..... 15

 3. Pre-Trial Proceedings..... 15

| | |
|--|----|
| 4. Trial and Post-Trial Proceedings | 16 |
| STANDARD OF REVIEW | 23 |
| ARGUMENT..... | 24 |
| I. The circuit court erred in finding that “Defendant had the unambiguous right to charge the prescribed amounts in the Covenants, which was \$300 per acre compounded 10% annually [since 1986], for maintenance and upkeep.”..... | 24 |
| II. The circuit court erred in ruling against Plaintiffs on Plaintiffs’ Maintenance Fee Conversion Claim..... | 27 |
| III. The circuit court erred in ruling against Plaintiffs on Plaintiffs’ Common Area Conveyance Claim. | 32 |
| IV. The circuit court erred in ruling against Plaintiffs on Defendant’s Trailer Removal Claim. | 34 |
| V. If this Court reverses the circuit court as to its ruling against Plaintiffs on Defendant’s Trailer Removal Claim, and/or any other claim, Plaintiffs should be awarded (either by this Court directly or by the circuit court on remand with instructions from this Court, whichever is procedurally proper) 100% (or at least a higher percentage) of their attorneys’ fees and costs. | 38 |
| VI. If this Court rules in favor of Plaintiffs in this appeal, and/or with respect to Defendant’s appeal, Plaintiffs should be awarded (either by this Court directly or by the circuit court on remand, whichever is procedurally proper) their attorneys’ fees and costs for this appeal. | 38 |
| CONCLUSION..... | 39 |

TABLE OF AUTHORITIES

Cases

Buffington v. T.O.E. Enters.,
383 S.C. 388, 680 S.E.2d 289 (2009)35

Castell v. Stephenson Fin. Co.,
244 S.C. 45, 135 S.E.2d 311 (1964)32

Cedar Cove Homeowners Ass’n, Inc. v. DiPietro,
368 S.C. 254, 628 S.E.2d 284 (2006)24

Com. Credit Corp. v. Nelson Motors, Inc.,
247 S.C. 360, 147 S.E.2d 481 (1966)33

County of Lexington, S.C. v. City of Columbia,
303 S.C. 300, 400 S.E.2d 146 (1991)10

Davis v. Cordell,
237 S.C. 88, 115 S.E.2d 649 (1960)33

Electro-Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter,
357 S.C. 363, 593 S.E.2d 170 (Ct. App. 2004).....24

Farr v. Duke Power Co.,
265 S.C. 356, 218 S.E.2d 431 (1975)25

Forest Land Co. v. Black,
216 S.C. 255, 57 S.E.2d 420 (1950)35

Georgetown County v. Davis & Floyd, Inc.,
426 S.C. 52, 824 S.E.2d 471 (Ct. App. 2019).....9

Hanold v. Watson’s Orchard Prop. Owners Ass’n, Inc.,
412 S.C. 387, 772 S.E.2d 528 (Ct. App. 2015).....25

Hanold v. Watson’s Orchard Prop. Owners Ass’n, Inc.,
419 S.C. 162, 797 S.E.2d 47 (2017)25

Hardy v. Aiken,
369 S.C. 160, 631 S.E.2d 539 (2006)25

Hawkins v. City of Greenville,
358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004).....32

| | |
|---|--------|
| <i>Heins v. Heins</i> , 344 S.C. 146, 543 S.E.2d 224 (Ct. App. 2001) | 31 |
| <i>Hoffman v. Cohen</i> , 262 S.C. 71, 202 S.E.2d 363 (1974) | 25 |
| <i>Hunnicutt v. Rickenbacker</i> , 268 S.C. 511, 234 S.E.2d 887 (1977) | 35, 38 |
| <i>Kneale v. Bonds</i> , 317 S.C. 262, 452 S.E.2d 840 (Ct. App. 1994)..... | 23 |
| <i>Koon v. Fares</i> , 379 S.C. 150, 666 S.E.2d 230 (2008) | 26 |
| <i>LeFurgy v. Long Cove Club Owners' Ass'n, Inc.</i> , 313 S.C. 555, 443 S.E.2d 577 (Ct. App. 1994)..... | 36 |
| <i>Litchfield Co. of S. C., Inc. v. Kiriakides</i> , 290 S.C. 220, 349 S.E.2d 344 (Ct. App. 1986)..... | 25 |
| <i>McPherson v. Neuffer & Hendrix</i> , 45 S.C.L. 267 (S.C. App. L. 1858) | 32 |
| <i>Ness v. Eckerd Corp.</i> , 350 S.C. 399, 566 S.E.2d 193 (Ct. App. 2002) | 31 |
| <i>Nichols v. S.C. Research Auth.</i> , 290 S.C. 415, 351 S.E.2d 155 (1986) | 10, 26 |
| <i>O'Shea v. Lesser</i> , 308 S.C. 10, 416 S.E.2d 629 (1992) | 23 |
| <i>Palmetto Dunes Resort v. Brown</i> , 287 S.C. 1, 336 S.E.2d 15 (Ct. App. 1985)..... | 25 |
| <i>Rhodes v. Palmetto Pathway Homes, Inc.</i> , 303 S.C. 308, 400 S.E.2d 484 (1991) | 35 |
| <i>S.C. Dep't of Natural Res. v. Town of McClellanville</i> , 345 S.C. 617, 550 S.E.2d 299 (2001) | 23 |
| <i>Sea Pines Plantation Co. v. Wells</i> , 294 S.C. 266, 363 S.E.2d 891 (1987) | 35 |

SSI Med. Servs., Inc. v. Cox,
301 S.C. 493, 392 S.E.2d 789 (1990)32

Tirado v. Tirado,
339 S.C. 649, 530 S.E.2d 128 (Ct. App. 2000).....2

Young v. Corbitt Motor Truck Co.,
148 S.C. 511, 146 S.E. 534 (1929)32

Statutes

S.C. Code Ann. § 13-17-10.....4
S.C. Code Ann. § 13-17-20.....4
S.C. Code Ann. § 13-17-70.....26
S.C. Code Ann. § 15-78-30.....10

Other Authorities

20 Am. Jur. 2d. Covenants, etc. § 32836
27 S.C. Jur. Injunctions § 3.....35

Rules

Rule 207, SCACR.....2
Rule 59, SCRPC31

PROLOGUE

Q. You said you don't like to get involved in lawsuits and you'd like to try to communicate to resolve things. Was that -- wasn't that your testimony?

A. That is correct.

Q. Before Poly-Med or before the plaintiffs brought this action, they just wanted to know from you what you were spending maintenance fees on, right? And you wouldn't tell them?

A. That's correct.

Q. Is that communicating and trying to resolve differences?

A. I'm a single member LLC and I'm a private business. It's not -- it's not their right and it's not been pointed out in the covenants what are their rights to those.

Q. It's fees they're paying for you to maintain the park. They don't have a right to know where that money is going?

A. That's exactly right. It's been that way for 30 years.

Q. Because if it's going in your pocket, that's your business, right?

A. Correct.

–Trial Testimony of Dan Wagner, Owner of Research Park, LLC¹

¹ (Trial Tr. pp. 140:13–141:11.)

STATEMENT OF ISSUES ON APPEAL²

- I. Did the circuit court err in finding that “Defendant^{3]} had the unambiguous right to charge the prescribed amounts in the Covenants^{4]}, which was \$300 per acre compounded 10% annually [since 1986], for maintenance and upkeep”⁵?
- II. Did the circuit court err in ruling against Plaintiffs⁶ on Plaintiffs’ Maintenance Fee Conversion Claim⁷?
- III. Did the circuit court err in ruling against Plaintiffs on Plaintiffs’ Common Area Conveyance Claim⁸?
- IV. Did the circuit court err in ruling against Plaintiffs on Defendant’s Trailer Removal Claim⁹?
- V. If this Court reverses the circuit court as to its ruling against Plaintiffs on Defendant’s Trailer Removal Claim, and/or any other claim, should Plaintiffs be awarded (either by this Court directly or by the circuit court on remand with instructions from this Court, whichever is procedurally proper) 100% (or at least a higher percentage) of their attorneys’ fees and costs?
- VI. If this Court rules in favor of Plaintiffs in this appeal, and/or with respect to Defendant’s appeal, should Plaintiffs be awarded (either by this Court directly or by the circuit court on remand, whichever is procedurally proper) their appellate attorneys’ fees and costs?¹⁰

² As explained below, the errors raised in this appeal appear in and/or implicate a number of circuit court orders. To be clear, this issue statement, and the corresponding arguments below, challenges all such errors in all such orders.

³ “Defendant” refers to Appellant/Respondent, Research Park, LLC.

⁴ The “Covenants” are defined below.

⁵ (Order filed 2/29/24 p. 12; *see also* Order filed 11/6/23; Order filed 9/26/24 p. 2.)

⁶ “Plaintiffs” refers to Respondents/Appellants, Poly-Med, Inc. (“Poly-Med”), Technology Drive 51, LLC (“TD51”), Technology Drive 52, LLC (“TD52”), and PMI Properties, LLC (“PMI Properties”), collectively.

⁷ “Plaintiffs’ Maintenance Fee Conversion Claim” is defined below.

⁸ “Plaintiffs’ Common Area Conveyance Claim” is defined below.

⁹ “Defendant’s Trailer Removal Claim” is defined below.

¹⁰ Plaintiffs expressly include this issue, and the corresponding argument below, out of an abundance of caution, in light of *Tirado v. Tirado*, 339 S.C. 649, 655, 530 S.E.2d 128, 131 (Ct. App. 2000) (finding request for attorneys’ fees and costs unpreserved for review because, among other reasons, “[o]rdinarily, no point will be considered which is not set forth in the statement of issues on appeal”) (citing Rule 207(b)(1)(B), SCACR).

STATEMENT OF THE CASE

A. Factual Background

1. Plaintiffs, the Park, and Plaintiffs' Parcels

Plaintiffs are four entities related through common ownership and control¹¹ that own (or, in the case of PMI Properties, used to own) and/or lease certain lots of land (“Parcels,” as defined in the Declaration of Covenants, Conditions and Restrictions of Clemson Research Park (the “Covenants”)) in what is now known as the Clemson University Advanced Materials Center (the “Park”).^{12 13}

As further explained below, among Plaintiffs, Poly-Med is the entity that actually paid the maintenance fees at issue in this matter. (Trial Tr. pp. 67:25–69:21, p. 149:17–24; Pls.’ Trial Ex. 13 [Def.’s Invoices to Poly-Med]; Pls.’ Trial Ex. 14 [Poly-Med Payments].) Poly-Med is a biomedical technology company.¹⁴ Its corporate headquarters are in the Park on Technology Drive, where it employs about 185 people. (Trial Tr. p. 147:9–19.)

¹¹ (Trial Tr. pp. 146:5–149:24.)

¹² The Covenants define “Parcel’ [to] mean and refer to any lot(s) or parcel(s) of land, or subdivisions thereof, in the Park, . . . together with any improvements thereon, which are designated and intended by the [Park] Authority to be sold to Owners or leased to tenants; provided, however, that a Parcel [does] not include any Common Area, or any roads, rights-of-way or other area(s) dedicated to the public use.” (Pls. Trial Ex. 5 [Covenants] p. 4 at Article I § 1.7.) This definition includes the following terms that are themselves specifically defined in the Covenants: “Park,” “Owner,” “[Park] Authority,” and “Common Area.” (Pls. Trial Ex. 5 [Covenants] pp. 3–4 at Article I.) “Park,” as well as the synonymous term “Property,” means and refers to the whole of the Park, i.e., the entirety of the real property and improvements thereon subject to the Covenants. (Pls. Trial Ex. 5 [Covenants] p. 4 at Article I § 1.8.) “Owner” means and refers to any person or entity, including the “[Park] Authority,” who owns fee simple title to a Parcel. (Pls.’ Trial Ex. 5 [Covenants] p. 4 at Article I § 1.6.) The terms “[Park] Authority” and “Common Area” are explained below.

¹³ As reflected by the title of the Covenants, the Park was formerly known as Clemson Research Park. (Pls.’ Trial Ex. 2 [SCRA Deed to Def.] pp. 1–2.)

¹⁴ For example, among other things, Poly-Med designs and develops bioabsorbable polymers for use in medical implants. (Trial Tr. p. 147:9–13.)

At all relevant times, Poly-Med has leased Parcels at 51 and 52 Technology Drive from TD51 and TD52, respectively. (Trial Tr. pp. 147:20–148:2, p. 149:14–16.) In October of 2019, Poly-Med’s wholly owned subsidiary PMI Properties purchased another nearby Parcel, which it leased to Poly-Med until it transferred ownership of the Parcel to Poly-Med in March of 2021. (Trial Tr. pp. 148:3–149:13; Pls.’ Trial Ex. 12 [Deed from Def. to PMI Properties]; Pls.’ Trial Ex. 16 [Deed from PMI Properties to Poly-Med].) Hereinafter, the term “Plaintiffs’ Parcels” refers, collectively, to all Parcels owned by TD51, TD52, PMI Properties, or Poly-Med.

2. The Park’s Creation and Purpose

The South Carolina General Assembly created the South Carolina Research Authority (the “SCRA”) in 1983¹⁵ “to,” among other things, “enhance the research capabilities of the state’s public and private universities”¹⁶ and “promote the development of high technology industries and research facilities in South Carolina.” *Id.*

The SCRA created the Park in 1986 when, pursuant to the Covenants,¹⁷ it subjected certain real property it owned in Anderson County, South Carolina, to “a master development plan in order to develop [the Park] and to allow the [Park] Authority,” i.e., the SCRA itself and its successors and assigns¹⁸ (collectively, the “Park Authority”), “to offer parcels [in the Park] . . . for sale to purchasers or for lease to tenants or for other development within the purview of the Act [establishing the SCRA] . . . [to] bring about economic growth in the State of South Carolina through science and engineering.” (Pls.’ Trial Ex. 5 [Covenants] p. 2.) Accordingly, the

¹⁵ S.C. Code Ann. § 13-17-10 (“There is created a body corporate and politic to be known as the South Carolina Research Authority or as the SCRA.”).

¹⁶ S.C. Code Ann. § 13-17-20.

¹⁷ (Pls.’ Trial Ex. 5 [Covenants].)

¹⁸ (Pls.’ Trial Ex. 5 [Covenants] p. 3 at Article I § 1.3 (defining the “[Park] Authority’ [to] mean and refer to [the SCRA], its successors and assigns”).)

Covenants mandate that “[t]he [Park] Authority shall develop the [Park] as a high technology research and development park” (Pls.’ Trial Ex. 5 [Covenants] p. 5 at Article II.)

3. The Covenants

“[R]un[ning] with the land” and “inur[ing] to the benefit of, and . . . binding upon, each and every person or entity, their heirs, successors, and assigns who . . . acquire any interest in [the Park] or any part or portion thereof,”¹⁹ the Covenants include, among others cited elsewhere herein, the following pertinent provisions to which Plaintiffs would now draw the Court’s attention.

(a) The 15% Requirement

In keeping with the legislative intent behind the SCRA’s creation and the purpose for which the SCRA created the Park, the Covenants limit ownership, tenancy, and/or occupancy of Parcels as follows (the “15% Requirement”):

No person or entity shall be an Owner or a tenant or occupant of any Parcel or subdivision thereof unless such person or entity shall at all times maintain in its employment a minimum of 15% of its employees as scientists or engineers upon the Parcel or Parcels owned or occupied by such person or entity. The term “scientists or engineers” shall be deemed to include all employees of occupants of Parcels whose function is to render services to their employers of a scientific or engineering nature.

(Pls.’ Trial Ex. 5 [Covenants] pp. 9–10 at Article IV § 2.)

(b) Conveyance of Common Areas to the Association

Although said “not [to] be established until such time as the [Park] Authority is ready to convey Common Areas to it,”²⁰ the Covenants provide for the establishment of an Owners association, namely, “Clemson Research Park Owner’s Association, Inc., a South Carolina not-

¹⁹ (Pls.’ Trial Ex. 5 [Covenants] p. 2.)

²⁰ (Pls.’ Trial Ex. 5 [Covenants] pp. 13–14 at Article V § 1.)

for-profit corporation”²¹ (the “Association”), of which every Owner of a Parcel is to be a member, with every member other than the Park Authority entitled to one vote for each full acre of the Parcel to which the member is attributable and the Park Authority entitled to one vote for each full of acre that it owns in the Park except for portions subject to roadway rights of way. (Pls.’ Trial Ex. 5 [Covenants] pp. 13–14 at Article V §§ 1–2.)

“‘Commons Area’ . . . mean[s] and refer[s] to all portions of the [Park], if any, (1) which may have recreational facilities constructed thereon; (2) which may be designated by the [Park] Authority for the common use and enjoyment of Owners; (3) which is separately platted; and (4) which is conveyed to the Association.” (Pls. Trial Ex. 5 [Covenants] p. 3 at Article I § 1.5.) The Covenants require that the Park Authority designate portions of the Park as Common Areas and convey them to the Association. (Pls.’ Trial Ex. 5 [Covenants] pp. 4–5 (“The [Park] Authority shall develop the [Park] by . . . designating portions of the [Park], and all improvements constructed thereon, if any, as Common Areas, and conveying them to the Association.”).)

Subject to certain conditions irrelevant here, “[t]he [Park] Authority may convey Common Areas to the Association at any time and from time to time without notice to or approval by the Association . . . ;”²² however, “[n]o part of the [Park] [can] be conveyed to the Association as Common Area . . . until such conveyance will result in the [Park] Authority owning less than one-half of the [Park] so that the [Park] Authority will be entitled to less than one-half the votes in the Association.” (Pls.’ Trial Ex. 5 [Covenants] p. 7.) The Park Authority must “convey all Common Areas to the Association no later than ninety (90) days after the date of closing of the sale of the last Parcel in the Park.” (Pls.’ Trial Ex. 5 [Covenants] p. 6.)

²¹ (Pls.’ Trial Ex. 5 [Covenants] p. 3 at Article I § 1.2 (defining “‘Association’”).)

²² (Pls.’ Trial Ex. 5 [Covenants] p. 5.)

(c) Maintenance Fees

The Covenants provide that, “[p]rior to the conveyance of any portion of the [Park] to the Association as Common Areas, each Owner shall pay the [Park] Authority a maintenance fee for maintenance and upkeep of the Park.” (Pls.’ Trial Ex. 5 [Covenants] p. 17 at Article VI § 1.) With the caveat that, “[i]n any year, the [Park] Authority may reduce th[e] [maintenance] fee in its sole discretion,” the Covenants state that the maintenance fee is initially, i.e., for the calendar year 1986, to be “computed on the basis of \$300 per acre per annum” and thereafter to “increase by 10% compounded annually each year until the [Park] Authority convey[ed] any portion of the [Park] to the Association as Common Area” (*Id.*) At all relevant times, however, the maintenance fee has been computed on the basis of \$600 per acre per year. (Trial Tr. pp. 107:1–108:2, p. 114:17–21, p. 185:20–23, p. 264:14–23; Pls. Trial Ex. 7 [Innovate Income and Expense Proration Estimates for Settlement].)

“Until the conveyance of any Common Area to the Association, the sole responsibility for maintaining the Park, except for Parcels sold to Owners, [is that of] the [Park] Authority and the sole obligation of any Owner, other than the [Park] Authority, [is] to pay the maintenance fee to the [Park] Authority as provided [in the Covenants].” (Pls.’ Trial Ex. 5 [Covenants] pp. 25–26 at Article IX.) Upon the conveyance of any Common Area to the Association, “th[e] maintenance fee . . . terminate[s] and the Owner’s sole liability and responsibility [is] to pay whatever Assessments are due the Association.” (Pls.’ Trial Ex. 5 [Covenants] p. 17 at Article VI § 1.)

Once established, the Association is to prepare a budget and determine the amount of Assessments to be assessed against the Parcels. (Pls.’ Trial Ex. 5 [Covenants] pp. 18–19 at Article VI § 2.) Unlike the maintenance fee, which the Covenant’s only authorize the Park

Authority to collect “for maintenance and upkeep of the Park,”²³ the Covenants authorize the Association to use Assessments to pay “Common Expenses,” a broad and open-ended term that expressly includes, without limitation, “all . . . expenses arising out of or connected with maintenance and operation of the Commons Areas” and “any other expenses and liabilities which may be incurred by the Association for the benefit of all the Owners under or by reason of [the Covenants].” (Pls.’ Trial Ex. 5 [Covenants] p. 18 at Article VI § 2(a).)²⁴

(d) Approval of Improvements

The Covenants provide that “[n]o building, landscaping or other improvements shall be altered, placed or erected on any Parcel without approval from the [Park] Authority or its agent.” (Pls.’ Trial Ex. 5 [Covenants] p. 26 at Article IX § 1.)

²³ (Pls.’ Trial Ex. 5 [Covenants] p. 17 at Article VI § 1.)

²⁴ In full, the Covenants define Common Expenses as follows:

The Assessments [assessed against all Parcels by the Association] shall be based upon annual estimates of the Association’s cash requirements to provide for payment of all estimated expenses arising out of or connected with maintenance and operation of the Commons Areas. Such estimated expenses may include, among other things, the following: expenses of management; taxes and special assessments; premiums for all insurance that the Association is required or permitted to maintain [under the Covenants]; repairs and maintenance; wages for Association employees, including for a Manager (if any); utility charges; legal and accounting fees; and deficit remaining from a previous period; creation of a reasonable contingency reserve, surplus, and/or sinking fund; and any other expenses and liabilities which may be incurred by the Association for the benefit of all of the Owners under or by reason of [the Covenants]. Such expenses shall constitute the Common Expenses.

(Pls.’ Trial Ex. 5 [Covenants] p. 18 at Article VI § 2(a).)

(e) The Fees/Costs Provision

The Covenants provide for the “prevailing party” to recover attorneys’ fees and costs in enforcement actions (the “Fees/Costs Provision”):

In any suit or action brought by the Authority, an Owner, the Association or a first lienholder or their heirs, successors or assigns to enforce any of the terms, provision or restrictive covenants of [the Covenants], the prevailing party shall be entitled to his costs and disbursements and reasonable attorneys’ fees in such suit or action and any appeal thereof.

(Pls.’ Trial Ex. 5 [Covenants] p. 22 at Article VI § 5.)

4. Defendant a/k/a the Park Authority

Defendant is a for-profit, single-member limited liability company owned by Dan Wagner (“Wagner”). (Trial Tr. pp. 22:21–23:5, pp. 32:18–33:1.) In October of 2018, Defendant bought the Park (comprising approximately 150 acres of real property, including all unsold Parcels) for \$700,000 and took assignment of the rights, title, and interest as declarant under the Covenants. (Trial Tr. p. 23:6–24, pp. 28:25–29:8, p. 103:16–19; Pls.’ Trial Ex. 1 [Deed from Innovate to Def.]; Pls.’ Trial Ex. 2 [Quit Claim Deed from SCRA to Def.]; Pls.’ Trial Ex. 4 [Def.’s Mortgage].)²⁵ Since then, Defendant has been the Park Authority.

5. Defendant’s Predecessors as Park Authority and Defendant’s Acquisition of the Park

Unlike Defendant, its predecessors as Park Authority were all nonprofit entities. (Trial Tr. p. 23:6–13, p. 24:20–24.) Indeed, two of its three predecessors are “arms of the state.” *See Georgetown County v. Davis & Floyd, Inc.*, 426 S.C. 52, 59, 824 S.E.2d 471, 475 (Ct. App. 2019) (“As a state-created agency, SCDOT is an arm of the state. Like SCDOT, [Georgetown] County is a creature of the state.”) (internal citation omitted).

²⁵ Defendant financed the bulk of the purchase via a mortgage loan. (Trial Tr. pp. 27:25–28:24; Pls.’ Trial Ex. 4 [Def.’s Mortgage].)

The original Park Authority was, of course, the SCRA,²⁶ a state agency. *Nichols v. S.C. Research Auth.*, 290 S.C. 415, 418, 351 S.E.2d 155, 157 (1986) (holding the SCRA “to be an agency of the State”). In 2006, the SCRA conveyed the Park, including all unsold Parcels and its developer rights, to Anderson County, a political subdivision of the state,²⁷ who assigned it to nonprofit entity Anderson County Development Partnership (“ACDP”). (Pls.’ Trial Ex. 2 [Quit Claim Deed from SCRA to Defendant].) In 2008, ACDP changed its name to Innovate Anderson, a South Carolina non-profit (“Innovate”). (*Id.*)

It was Innovate from whom Defendant acquired the Park in October of 2018. (Trial Tr. p. 23:6–24; Pls.’ Trial Ex. 1 [Deed from Innovate to Def.]; Pls.’ Trial Ex. 2 [Quit Claim Deed from SCRA to Def.].) Wagner knew a couple of Innovate board members, including his “good friend” Mike Wooles (“Wooles”), when he got the opportunity to acquire the Park from Innovate—though Wagner says he does not specifically remember how he learned about the Park being for sale. (Trial Tr. pp. 29:9–30:11). Wooles was also Wagner’s banker at County Bank, which gave Defendant the mortgage loan that allowed it to buy the Park. (Trial Tr. p. 29:19–21, p. 32:5–10.)

6. Innovate’s Collection of Maintenance Fees

When Innovate was the Park Authority, it periodically collected maintenance fees from Owners in the Park, including Poly-Med. (Trial Tr. pp. 107:20–108:5.) Before conveying the Park to Defendant, Innovate gave Defendant a document entitled “Innovate Income and Expense Proration Estimates for Settlement.” (Pls.’ Trial Ex. 7 [Innovate Income and Expense Proration Estimates for Settlement].) This document showed that, at the rate of \$600 per acre, annual

²⁶ (Pls.’ Trial Ex. 5 [Covenants] p. 3 at Article I § 1.3.)

²⁷ *County of Lexington, S.C. v. City of Columbia*, 303 S.C. 300, 301, 400 S.E.2d 146, 147 (1991) (identifying Lexington County as “a political subdivision of the State”); *see also* S.C. Code Ann. § 15-78-30(h) (defining “political subdivision” to include “counties”).

maintenance fees collected from Owners totaled \$69,645.36 while “Monthly Expenses,” including monthly water, power, and landscaping expenses, were only \$2,333.33 per month (or, in other words, only \$27,999.96 per year). (Trial Tr. pp. 47:9–48:22; Pls.’ Trial Ex. 7 [Innovate Income and Expense Proration Estimates for Settlement].) When Innovate sold the Park, it transferred \$50,182.82 in collected but unused maintenance fees to Defendant. (Trial Tr. pp. 45:24–46:19; Pls.’ Trial Ex. 6 [Borrower’s Statement].)

7. Innovate’s Approval of the Trailers

Poly-Med has three modular office buildings on one of Plaintiffs’ Parcels (the “Trailers”). (Trial Tr. p. 234:8–13.) Prior to installing them, on or about June 14, 2017, which was, of course, before Defendant acquired the Park in October of 2018, Jeffrey Ellis (“Ellis”), then a Senior Project Manager in Poly-Med’s IT Department (now Poly-Med’s Manager of Facility and IT), emailed Burriss Nelson (“Nelson”), registered agent of, and Poly-Med’s exclusive contact at, Innovate requesting approval to install the Trailers to serve as “temporary” offices. (Trial Tr. p. 231:4–20, p. 234:21–25, p. 237:1–16; Pls.’ Trial Ex. 24 [Ellis’s Email dated 6/14/17 to Nelson]; Pls.’ Trial Ex. 28 [Secretary of State Record].) In using the word “temporary,” Ellis’s email did not specify any duration but rather related the Trailers’ use to Poly-Med’s plan to renovate its current office space into new laboratories, an inherently long-term project as to which Ellis offered no particular date of completion—and there is no evidence that such a date was material to Innovate. (Pls.’ Trial Ex. 24 [Ellis’s Email dated 6/14/17 to Nelson].) Ellis’s email to Nelson included drawings, specifications, a rendering showing how the Trailers “would match the current building as much as possible using hardi-board siding,” and a copy of the lease agreement that would be entered into for the Trailers providing a “Minimum Lease Term” of 36 months. (Pls.’ Trial Ex. 24 [Ellis’s Email dated 6/14/17 to Nelson].) Thereafter, Ellis

spoke with Nelson via telephone, and in that conversation, Nelson approved the Trailers. (Trial Tr. pp. 234:8–237:16; Pls.’ Trial Ex. 25 [Email Chain Between Ellis and Nelson dated 6/14/17]; Pls.’ Trial Ex. 26 [Email Chain Between Shalaby and Nelson dated 6/27/17].)

8. Defendant’s Collection of Maintenance Fees

In 2019, Defendant began billing Owners annual maintenance fees at the rate of \$600 per acre. At that time, Plaintiffs’ Parcels comprised 19.25 acres, so Poly-Med was charged \$11,550 in maintenance fees for the year. (Trial Tr. p. 69:4–15; Pls.’ Trial Ex. 14 [Poly-Med Payments] p. 1.) With the addition of the Parcel that PMI Properties purchased in October of 2019, the size of Plaintiffs’ Parcels increased by 12.685 acres,²⁸ prompting Poly-Med’s annual maintenance fee bill to increase to \$19,161 beginning in 2020. (Trial Tr. pp. 67:25–68:20; Pls.’ Trial Ex. 13 [Def.’s Invoices to Poly-Med]; Pls.’ Trial Ex. 14 [Poly-Med Payments] pp. 2–6.)

On April 30, 2020, after receiving Defendant’s maintenance fee invoice dated April 24, 2020,²⁹ Poly-Med’s president, David Shalaby (“Shalaby”), sent Wagner a message complaining that very little maintenance was actually being performed in the Park and asking for information about how the maintenance fees Defendant collected were being spent. (Pls.’ Trial Ex. 18 [Shalaby email to Wagner of 4/30/20].) No response having been received, Poly-Med’s counsel emailed Wagner on May 26, 2020, requesting an accounting of the maintenance fees. (Pls.’ Trial Ex. 19 [Nicolai letter to Wagner of 5/26/20].) In response, Defendant took the position that Plaintiffs were not entitled to an accounting of the maintenance fees and refused to provide one.

²⁸ PMI Properties paid Defendant \$224,360 for the Parcel. (Trial Tr. pp. 67:25–68:4; Pls.’ Trial Ex. 12 [Deed from Defendant to PMI Properties].) According to Wagner, Defendant sold the 12.685-acre Parcel to PMI Properties “at a below-market rate” (Trial Tr. p. 128:22–25), but this is hard to square with the fact that, only a year earlier, Defendant had purchased the whole roughly 150-acre Park for \$700,000. (Pls.’ Trial Ex. 1 [Deed from Innovate to Def.].) Included in the \$224,360 that PMI Properties paid was \$5,385.93 for maintenance fees for the period October 16, 2019, to July 1, 2020. (Pls.’ Trial Ex. 17 [Settlement Statement]).

²⁹ (Pls.’ Trial Ex. 13 [Def.’s Invoices to Poly-Med] p. 1)

(Trial Tr. pp. 140:18–141:11; Pls.’ Trial Ex. 21 [Patterson letter to Nicolai of 1/14/21]; *see also* Pls.’ Trial Ex. 20 [Patterson letter to Nicolai of 8/7/20]; Pls.’ Trial Ex. 21 [Nicolai letter to Patterson of 8/28/20].)

Through this lawsuit, Plaintiffs learned that Defendant was using maintenance fees collected from Owners, including Plaintiffs, to pay its monthly mortgage payments and for expenses like accounting fees, insurance, marketing expenses, and legal fees, including legal fees incurred in this action. (Trial Tr. pp. 55:21–56:21, p. 57:21–22, p. 64:6–10, pp. 65:14–67:24, pp. 84:20–85:8, p. 86:17–25, pp. 88:25–90:3, p. 90:19–25; Pls.’ Trial Ex. 8 [Bank Statement of 11/30/18]; Pls. Trial Ex. 9 [Bank Statement of 5/29/20]; Pls.’ Trial Ex. 11 [Southern First Bank Statements].) At trial, Wagner testified that he considered any maintenance fees collected in excess of expenses for maintenance and upkeep to be profits with which he could do as he pleased. (Trial Tr. p. 51:10–15, p. 62:15–16.) When Defendant first opened a bank account after its acquisition of the Park in 2018, it deposited only \$25,000.00 of the \$50,182.82 in collected but unused maintenance fees it had received from Innovate. (Trial Tr. pp. 46:16–51:9; Pls.’ Trial Ex. 8 [Bank Statement of 11/30/18].) At various times, Wagner has withdrawn funds from Defendant’s maintenance fee accounts for his personal use. (Trial Tr. pp. 65:14–67:24; Pls.’ Trial Ex. 10 [Bank Statement of 5/31/22]; Pls.’ Trial Ex. 11 [Southern First Bank Statements].)

B. Procedural History

1. Plaintiffs’ Claims

Plaintiffs filed this lawsuit on July 14, 2021, in the Anderson County Court of Common Pleas. (Summons; Compl.) Seeking money damages, injunctive relief, and an award of attorneys’ fees and costs, Plaintiffs’ original complaint asserts five causes of action against Defendant: (1) breach of the Covenants by charging maintenance fees in excess of actual

maintenance and upkeep costs (“Plaintiffs’ Maintenance Fee Breach Claim”), (2) conversion of maintenance fees (“Plaintiffs’ Maintenance Fee Conversion Claim”), (3) unjust enrichment with respect to the maintenance fees (“Plaintiffs’ Maintenance Fee Unjust Enrichment Claim”), (4) an accounting of the Maintenance Fees collected and spent (“Plaintiffs’ Maintenance Fee Accounting Claim”), and (5) an injunction to prevent Defendant from selling Parcels in violation of the 15% Requirement (“Plaintiffs’ 15% Requirement Claim”). (Compl.)

At trial, Plaintiffs also argued that the Covenants required Defendant to designate Common Areas and convey them to the Association, contending that, given the absence in the Covenants of a specific time for this to occur, the Court should apply a reasonable time and that, after the passage of nearly four decades without it occurring, such time had come. (Trial Tr. pp. 284:15–293:21, pp. 297:19–309:11) Plaintiffs were permitted to amend their Complaint to conform to the evidence in this regard. (Trial Tr. pp. 310:6–311:10.) Accordingly, Plaintiffs’ amended complaint adds a claim seeking an order requiring Defendant to designate, as Common Areas, at least ten (10) acres of Defendant’s property in the Park, or such lesser amount of acreage as will result in Defendant owning less than one-half of the Park, so that Defendant will be entitled to less than one-half the votes in the Association, and then convey the Common Areas to the Association pursuant to the Covenants (“Plaintiffs’ Common Area Conveyance Claim”). (Am. Compl.)³⁰

³⁰ Defendant currently owns somewhere between 118.81 acres (47.94% of the acres) and 136.40 acres (51.44% of the acres) in the Park while the other Owners, i.e., Plaintiffs and the other Owners besides Defendant, currently own somewhere between 129.04 acres (52.07% of the acres) and 128.76 acres (48.56 % of the acres) in the Park. (Pls.’ Trial Ex. 30 [Damages Calculation].)

2. Defendant's Counterclaims

Following an unsuccessful motion to dismiss,³¹ Defendant answered Plaintiffs' complaint on February 9, 2022, denying its alleged liability, and raising various affirmative defenses. (Answer & Counterclaim.) Seeking money damages, injunctive relief, and an award of attorneys' fees and costs, Defendant also asserted two counterclaims against Plaintiffs: one for Plaintiffs' alleged "historical[] fail[ure] to make timely payment" of maintenance fees ("Defendant's Maintenance Fee Payment Claim") and another alleging that the Trailers constituted unauthorized improvements ("Defendant's Trailer Removal Claim"). (Answer & Counterclaim.)³²

3. Pre-Trial Proceedings

On March 6, 2023, Plaintiffs moved for summary judgment on their claims against Defendant. (Pls.' Mot. for Summary J.; *see also* Pls.' Mem. in Support of Mot. for Summary J.) On May 12, 2023, Defendant cross-moved for summary judgment on Plaintiffs' claims. (Def.'s Mem. in Opp'n to Pls.' Mot. for Summary J. & Cross-Mot. for Partial Summary J.; *see also* Pls.' Mem. in Opp'n to Def.'s Cross-Mot. for Partial Summary J.) On May 31, 2023, Plaintiffs also moved for summary judgment on Defendant's counterclaims. (Pls.' Mot. for Summary J. on Def.'s Counterclaims.) The circuit court heard these motions on June 15, 2023, the Honorable R. Lawton McIntosh presiding. (Tr. of Hr'g on 6/15/23.)

³¹ (Order filed 1/24/22; *see also* Def.'s Mot. to Dismiss; Pls.' Mem. in Opp'n to Def.'s Mot. to Dismiss.)

³² Plaintiffs timely replied to Defendant's counterclaims, denying their alleged liability and raising various affirmative defenses. (Pls.' Reply to Def.'s Counterclaim.) When Plaintiffs later amended their complaint to conform to the evidence at trial, Defendant again answered by denying its alleged liability, raising various affirmative defenses, and counterclaiming as before (Answer to Am. Compl. & Counterclaim), and Plaintiffs timely replied, again denying their alleged liability and raising various affirmative defenses. (Pls.' Reply to Def.'s Am. Counterclaim.)

By order filed July 18, 2023, the circuit court denied Defendant's motion for summary judgment on Plaintiffs' claims, denied Plaintiffs' motion for summary judgment on Defendant's counterclaims, and denied Plaintiffs' motion for summary judgment on their own claims as to Plaintiffs' Maintenance Fee Breach Claim, Plaintiffs' Maintenance Fee Conversion Claim, and Plaintiffs' Maintenance Fee Unjust Enrichment Claim. (Order filed 7/18/23.) The court also granted Plaintiffs' oral motion for an injunction prohibiting Defendant from selling Parcels in violation of the 15% Requirement; confirmed the parties' agreement (stated on the record during the hearing on June 15, 2023³³) to jointly select a qualified accountant to do an accounting of the maintenance fees;³⁴ and granted Plaintiffs an award of attorney fees in an amount to be determined after trial. (*Id.*)

4. Trial and Post-Trial Proceedings

Having been transferred to the non-jury trial roster by consent order filed March 23, 2023,³⁵ the circuit court conducted a two-day bench trial beginning October 10, 2023, the Honorable R. Lawton McIntosh presiding. (Trial Tr.)

Plaintiffs' Maintenance Fee Unjust Enrichment Claim and Plaintiffs' 15% Requirement Claim were dismissed at trial, and Defendant having already acceded to Plaintiffs' Maintenance Fee Accounting Claim, the only claims of Plaintiffs' left to be determined by the circuit court were Plaintiffs' Maintenance Fee Breach Claim, Plaintiffs' Maintenance Fee Conversion Claim, and Plaintiffs' Common Area Conveyance Claim. Defendant's Maintenance Fee Payment Claim

³³ (Tr. of Hr'g on 6/15/23 pp. 23:17–27:24, pp. 47:25–48:24.)

³⁴ Thereafter, the parties agreed upon accountant Tamara S. Hannon who conducted an accounting of the maintenance fees. (Pls.' Trial Ex. 15 [Aff. of Tamara S. Hannon, CPA].)

³⁵ (Order filed March 28, 2023.)

was abandoned at trial after the court agreed there was no evidence to support it,³⁶ leaving only Defendant's Trailer Removal Claim as the only counterclaim to be determined.

By form order filed November 6, 2023, requesting a proposed formal order from Plaintiffs' counsel, the circuit court ruled in Plaintiffs' favor on (at least) Plaintiffs' Maintenance Fee Breach Claim (if not Plaintiffs' Maintenance Fee Conversion Claim), finding that "the fees charged for maintenance and upkeep were not intended to be a profit-making mechanism,"³⁷ that "Defendant was required by the implied covenant of good faith and fair dealing, and possibly had a fiduciary duty[,] to use the monies charged for the purpose of maintenance and upkeep,"³⁸ and that Plaintiffs were entitled to damages from Defendant in an amount equal to the difference between the amount that Defendant charged Plaintiffs for maintenance and upkeep and that which Defendant actually spent on maintenance and upkeep. (*Id.*)³⁹ The circuit court decided in Defendant's favor, however, on Plaintiffs' Common Area Conveyance Claim, finding that Defendant's conveyance of Common Areas to the Association was not required by the Covenants, but rather discretionary. (*Id.*) The court also ruled in Defendant's favor on Defendant's Trailer Removal Claim, reasoning, while the Trailers "were once considered temporary structures in accordance with the Covenants, . . . the time period in which they can reasonably be considered temporary" had passed. (*Id.* (original bold print and capitalization omitted.)) Accordingly, the court found that the Trailers were in violation of the Covenants and

³⁶ (Trial Tr. pp. 358:12–359:10.) Plaintiffs' Rule 41(b), SCRCPP, motion with respect to this claim was "granted." (Trial Tr. pp. 358:17–359:10.)

³⁷ (Order filed 11/6/23 (original bold print and capitalization omitted).)

³⁸ (*Id.* (original bold print and capitalization omitted).)

³⁹ While Plaintiffs' Maintenance Fee Breach Claim is certainly a basis for the circuit court's finding of Defendants' liability in this regard, its form order of November 6, 2023, does not specifically mention Plaintiffs' Maintenance Fee Conversion Claim as a basis for such liability. (*Id.*)

should be removed within “a reasonable time period” and requested further briefing from the parties as to what that was. (*Id.* (original bold print and capitalization omitted).)

The circuit court’s formal order corresponding to its form order of November 6, 2023, was filed on February 29, 2024. (Order filed 2/29/24.) Consistent with the earlier form order, the formal order provided that Poly-Med was entitled to damages in the amount of \$74,001.41, which amount equaled the difference between what Defendant had charged Plaintiffs for maintenance and upkeep and what Defendant had actually spent on maintenance and upkeep from 2018 to 2023;⁴⁰ ⁴¹ ⁴² that Defendant prevailed on Plaintiffs’ Common Area Conveyance Claim and on Defendant’s Trailer Removal Claim; and that “[t]he parties [were to first] attempt to agree upon what constitutes a reasonable time” for removal of the Trailers and, failing that, to move the court to determine the issue. (*Id.* at p. 14.)⁴³ Consistent with its ruling that Defendant was liable for

⁴⁰ (*Id.* at p. 12.) The form order states the amount of damages as \$65,724.23. (Order filed 11/6/23.) The formal order correctly states a higher amount (\$74,001.41) because the form order had only included overcharges from 2019 to 2023, omitting overcharges from 2018. (Order filed 2/29/24.)

⁴¹ The same day, February 29, 2024, judgment was entered in favor Poly-Med against Defendant in the principal amount of \$74,001.41. (Form 4 Judgment filed 2/29/24.)

⁴² Like the form order, the formal order is, however, unclear as to whether Plaintiffs’ Maintenance Fee Conversion Claim is included as a basis for Defendant’s liability in this regard. (*Compare* Order filed 2/29/24 p. 14 (“Judgment shall enter *in favor of Poly-Med* and against Defendant on Plaintiffs[’] claim for breach of the Covenants in Count I, and for *conversion in Count II*, of Plaintiffs’ Amended Complaint, in the amount of \$74,001.41”) *with id.* (“Judgment shall enter *in favor of Defendant* on Plaintiffs’ claim for breach of the covenants in Count[] I (to the extent that [cause of] action is based on a violation of [the 15% Requirement])[,] *Conversion in Count II* and for an injunction in Count V of the Amended Complaint.”) (emphasis added).)

⁴³ As referenced above, the court’s form order of November 6, 2023, had directed “the parties to brief [it] on what should be considered a reasonable time period to have the structures removed base[d] on the circumstances of this case.” (Order filed 11/6/23 (original bold print and capitalization omitted).) And shortly thereafter, prior to the filing of the formal order, the parties had submitted briefs on this issue as directed. (Def.’s Supplemental Br. Regarding Removal of Pls.’ Trailers; Pls.’ Br. Regarding Removal of Trailers & Mot. for Reconsideration (with attached Aff. of David Shalaby dated 11/21/23); Def.’s Mem. in Response to Pls.’ Br. Regarding a “Reasonable Amount of Time” to Remove their Non-Compliant

\$74,001.41 in maintenance fee overcharges, as well as its July 18, 2023, order granting Plaintiffs an award of attorney fees in an amount to be determined after trial, in its formal order, the court also ruled that the maintenance fee-related claims constituted the main issue in the case and, having prevailed thereon, Plaintiffs were the “prevailing party” under the Fees/Costs Provision. (*Id.* at p. 13.) Accordingly, the court found Plaintiffs entitled to an award of attorneys’ fees and costs and directed them to submit proof of the same within fourteen days. (*Id.* at 14.)

After the filing of the circuit court’s form order on November 6, 2023, but before the filing of its corresponding formal order on February 29, 2024, Plaintiffs and Defendant had both filed motions to reconsider on November 16, 2023. (Def.’s Consolidated Mot. Pursuant to Rules 52, 54 & 59, SCRCPC; Pls.’ Mot. to Alter & Amend Order & Issue Formal Order (with Ex. A [Pls.’ Proposed Formal Order].) After the filing of the formal order on February 29, 2024, on March 8, 2024, Defendant filed another motion to reconsider⁴⁴ and, in accordance with the circuit court’s directive that they submit proof of their attorneys’ fees and costs within fourteen days, Plaintiffs filed a motion for attorneys’ fees and costs with supporting affidavits. (Pls.’ Mot. for Attorneys’ Fees & Expenses (with Affs. of Coates & Zubi); *see also* Def.’s Mem. in Opp’n to Pls.’ Request for an Award of Attorneys’ Fees.)

The circuit court heard the outstanding motions on July 24, 2024,⁴⁵ and by form order filed July 29, 2024,⁴⁶ denied Defendant’s motion to reconsider as to Plaintiffs’ Maintenance Fee Breach

Trailers; Pls.’ Mem. in Opp’n to Def.’s Mot. to Strike Aff. of David Shalaby & Reply in Support of Br. Regarding Removal of Trailers.) Nonetheless, the formal order still did not decide the issue of when the Trailers had to be removed, but rather, as stated above, directed the parties to first try to resolve the matter among themselves. (Order filed 2/29/24 p. 14.)

⁴⁴ (Def.’s 2d Mot. Pursuant to Rules 52 & 59, SCRCPC; *see also* Pls.’ Mem. in Opp’n to Def.’s Consolidated Mot. Pursuant to Rules 52, 54 & 59, SCRCPC & Def.’s 2d Mot. Pursuant to Rules 52 & 59.)

⁴⁵ (Tr. of Hr’g on 7/24/24.)

Claim and affirmed the award of damages thereon but took the issue of Plaintiffs' Maintenance Fee Conversion Claim under advisement. (Order filed 7/29/24.) The court adhered to its ruling that Plaintiffs were the prevailing party but also took the issue of the amount of attorneys' fees and costs to be awarded under advisement pending Plaintiffs' counsel's submission of revised fee/cost affidavits that addressed the required elements for an award of attorneys' fees. (*Id.*) The court took the issue of the removal of the Trailers under advisement, too. (*Id.*)⁴⁷

Plaintiffs' counsel submitted revised fee/cost affidavits on August 7, 2024. (Pls.' Supplemental Mem. Regarding Requests for Attorneys' Fees; Revised Aff. of Marwan S. Zubi; Supplemental Aff. of William A. Coates.) Also on August 7, 2024, Plaintiffs submitted a proposed plan of action for the removal of the Trailers,⁴⁸ the circuit court having directed them to do so during the hearing on July 24, 2024. (Tr. of Hr'g on 7/24/24 pp. 57:10–58:21.) The next day, August 8, 2024, Plaintiffs submitted a supplemental memo in support of Plaintiffs' Maintenance Fee Conversion Claim. (Pls.' Supplemental Mem. on their Conversion Claim.)⁴⁹ And on August 26, 2024, Defendant filed memos regarding Plaintiffs' Maintenance Fee Conversion Claim,⁵⁰ Plaintiffs' request for attorneys' fees and costs,⁵¹ and the issue of the removal of the Trailers. (Def.'s Mem. Regarding the Removal of the Trailers.)

By form order filed August 27, 2024, the circuit court ruled against Plaintiffs on Plaintiffs' Maintenance Fee Conversion Claim; allowed Defendant fifteen days to seek to cross-

⁴⁶ Technically, this order is an amended order, because it amends an earlier order, filed July 26, 2024, to correct a scrivener's error. (Order filed July 26, 2024.)

⁴⁷ The circuit court's order of July 29, 2024, did not request any party to submit a proposed formal order. (*Id.*)

⁴⁸ (Pls.' Mem. Regarding Removal of Office Trailers filed 8/7/24.)

⁴⁹ On August 25, 2024, Defendant noticed an appeal, prompting Plaintiffs to notice a cross-appeal on August 29, 2024. The appeals were consolidated and thereafter dismissed without prejudice by order of this Court filed October 14, 2024.

⁵⁰ (Def.'s Mem. Regarding Conversion.)

⁵¹ (Def.'s Mem. Regarding Attorneys' Fees.)

examine Plaintiffs' counsel as to Plaintiffs' requested attorneys' fees and costs and/or file additional briefing thereon;⁵² and, while reserving the right to do so in the future should it deem Plaintiffs' progress toward removal of the Trailers to be inadequate, declined to set a certain timeframe for removal of the Trailers and instead ruled that, at Defendant's request, it would review Plaintiffs' progress in removing the Trailers from time to time going forward. (Order filed 8/27/24.) The circuit court filed a formal order as to its rulings on Plaintiffs' Maintenance Fee Conversion Claim and the Trailer-removal issue on September 26, 2024,⁵³ and thereafter denied Plaintiffs' timely motion for reconsideration of the same⁵⁴ by order filed December 17, 2024. (Order filed 12/17/24.)

⁵² Defendant declined the circuit court's invitation to cross-examine Plaintiffs' counsel, but, on September 9, 2024, submitted a supplemental memo in opposition to Plaintiffs' request for attorneys' fees and costs (Def.'s Supplemental Mem. Regarding Attorneys' Fees), to which Plaintiffs replied on September 12, 2024. (Reply Br. in Support of Pls.' Mot. for Attorney's Fees & Expenses.)

⁵³ (Order filed 9/26/24.) Although the circuit court's form order of August 27, 2024, includes the language "Defendant's counsel to prepare a formal order" (Order filed 8/27/24 (original bold print and capitalization omitted)), given the placement of this language in the context of the circuit court's ruling on the Trailer-removal issue, it was Plaintiffs' understanding that Defendant was to submit a proposed formal order as to the Trailer-removal issue only, not as to Plaintiffs' Maintenance Fee Conversion Claim. Indeed, as evidenced by the fact that its proposed formal order did not address the attorneys' fee/cost issue (Def.'s Proposed Formal Order submitted 9/12/24), even Defendant recognized that the form order did not request a proposed formal order as to all the issues addressed therein. Yet, Defendant maintained that the form order requested a proposed formal order as to both the Trailer-removal issue and Plaintiffs' Maintenance Fee Conversion Claim and submitted such an order to the circuit court over Plaintiffs' objection. (~~Email dated 9/3/24 from Def.'s Counsel to Pls.' Counsel with Def.'s Proposed Formal Order; Reply Email dated 9/5/24 at 9:58 AM from Pls.' Counsel to Def.'s Counsel; Reply Email dated 9/5/24 at 9:59 AM from Def.'s Counsel to Pls.' Counsel; Reply Email dated 9/10/24 from Pls.' Counsel to Def.'s Counsel with Pls.' Proposed Formal Order; Email dated 9/12/24 at 2:12 PM from Def.'s Counsel to Law Clerk with Def.'s Proposed Formal Order & Pls.' Proposed Formal Order; Reply Email dated 9/12/24 at 3:26 PM from Pls.' Counsel to Law Clerk Objecting to Def.'s Proposed Formal Order.~~)

⁵⁴ (Pls.' Mot. for Reconsideration of Order on Outstanding Motions Regarding Conversion & Injunctive Relief.)

By form order filed November 19, 2024,⁵⁵ and formal order filed December 9, 2024, the circuit court reiterated its ruling that Plaintiffs were the prevailing party under the Fees/Costs Provision and ordered that \$163,644.25 in attorneys' fees and costs be added to the judgment in favor of Poly-Med against Defendant. (Order filed 12/9/24.) This award was based on the court's finding that "the vast majority of this case and time at trial was devoted to Plaintiffs' claims that Defendant breached the Covenants by collecting maintenance fees well in excess of the annual cost of maintenance and upkeep of the Park" and that "Plaintiffs clearly prevailed on the main issue and are, therefore, 'the prevailing party.'" (Order filed 12/9/24 pp. 3–4.) But because "Plaintiffs did not prevail on all of their claims, as the case also involved Defendant's counterclaim for an order requiring removal of the Plaintiffs' office trailers," Plaintiffs were only entitled to recover 75% of the attorneys' fees and costs they incurred, which, given Plaintiffs' had incurred a total of \$218,192.33 in attorneys' fees and costs as of August 7, 2024, worked out to \$163,644.25. (Order filed 12/9/24 p. 4.)⁵⁶ "At Plaintiffs' request, in the interest of simplicity, and so th[e] Court d[id] not have to apportion the fees and costs among Plaintiffs, the award of fees and expenses is in favor of Plaintiff, Poly-Med, Inc., only." (Order filed 12/9/24 p. 4.)

The circuit court then issued a final judgment, filed December 20, 2024, confirming its rulings in favor of Plaintiffs on Plaintiffs' Maintenance Fee Breach Claim, Plaintiffs' Maintenance Fee Accounting Claim, and Defendant's Maintenance Fee Payment Claim and the entry of judgment in favor of Poly-Med against Defendant in the total principal amount of \$237,645.66

⁵⁵ (Order filed 11/19/24.)

⁵⁶ Recognizing that the Fees/Costs Provision allows the prevailing party to recover attorneys' fees and costs incurred "in any appeal," the court's order expressly allowed that, after the conclusion of all appeals in this matter, provided Plaintiffs remain entitled to recover attorneys' fees and costs, they may move the court for an additional award for any attorneys' fees and costs incurred in this matter, including any appellate attorneys' fees and costs, to account for any not already covered by the order. (Order filed 12/9/24 pp. 1–2 n.1; *id.* at p. 4 n.3.)

(comprising damages in the amount of \$74,001.41 and attorneys' fees and costs in the amount of \$163,644.25) and its rulings in favor of Defendant on Plaintiffs' Maintenance Fee Conversion Claim, Plaintiffs' Maintenance Fee Unjust Enrichment Claim, Plaintiffs' 15% Requirement Claim, and Defendants' Trailer Removal Claim (albeit without the imposition of a date certain by which removal of the Trailers must be accomplished). (Final Judgment filed 12/20/24.)⁵⁷

This consolidated appeal follows. (Pls.' Notice of Cross-Appeal & Proof of Service; *see also* Def.'s Notice of Appeal & Proof of Service; Def.'s Am. Notice of Appeal & Proof of Service.)

STANDARD OF REVIEW

The character of an action as legal or equitable depends on the relief sought. *Compare O'Shea v. Lesser*, 308 S.C. 10, 14, 416 S.E.2d 629, 631 (1992) (holding an action for breach of restrictive covenants was at law, because relief sought was general damages for loss of view and invasion of privacy) *with Kneale v. Bonds*, 317 S.C. 262, 265, 452 S.E.2d 840, 841 (Ct. App. 1994) ("An action to enforce restrictive covenants by injunction is in equity."); *see also* S.C. *Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001) (holding an action to enforce restrictive covenants by injunction is an equitable action). Accordingly, with respect to the issues in this appeal regarding claims for equitable relief (Plaintiffs' Common Area Conveyance Claim and Defendant's Trailer Removal Claim), the equitable standard of review applies, under which this Court may find facts in accordance with its own view of the evidence. *See Cedar Cove Homeowners Ass'n, Inc. v. DiPietro*, 368 S.C. 254, 258, 628 S.E.2d 284, 286 (2006) ("Because the Association's action is one to enforce

⁵⁷ Although the circuit court's final judgment does not mention Plaintiffs' Common Area Conveyance Claim, it does state "[i]f, and to the extent, there were other claims or counterclaims of the parties in this action, they were disposed of by prior Orders of the Court" (Final Judgment filed 12/20/24), and the circuit court disposed of Plaintiffs' Common Area Conveyance Claim via form order filed November 6, 2023 (Order filed 11/6/23), and formal order filed February 29, 2024. (Order filed 2/29/24.)

restrictive covenants by injunction, it is in equity, and we may find facts in accordance with our own view of the evidence.”). Otherwise, the legal standard of review applies, under which the circuit court may be reversed only for errors of law or factual findings without reasonable evidentiary support. *See Electro-Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter*, 357 S.C. 363, 367, 593 S.E.2d 170, 172 (Ct. App. 2004) (“An action for breach of contract is an action at law.”); *id.* (“In an action at law, on appeal of a case tried without a jury, the appellate court’s standard of review extends only to the correction of errors of law.”); *id.* (“The trial [court’s] findings of fact will not be disturbed upon appeal unless found to be without evidence which reasonably supports the [court’s] findings.”).

ARGUMENT

I. The circuit court erred in finding that “Defendant had the unambiguous right to charge the prescribed amounts in the Covenants, which was \$300 per acre compounded 10% annually [since 1986], for maintenance and upkeep.”⁵⁸

Albeit in the process of ruling in Plaintiffs’ favor on Plaintiffs’ Maintenance Fee Breach Claim, the circuit court erroneously found that “Defendant had the unambiguous right to charge the prescribed amounts in the Covenants, which was \$300 per acre compounded 10% annually [since 1986], for maintenance and upkeep”⁵⁹ and thereafter erroneously reiterated and relied on this finding in ruling against Plaintiffs on Plaintiffs’ Maintenance Fee Conversion Claim. (Order filed 9/26/24 p. 2 (“In the initial written decision regarding this dispute, this Court held that, under the pertinent covenants, ‘Defendant had the unambiguous right to charge the prescribed amounts in the covenants, which was \$300 per acre compounded 10% annually’ going back to 1986.”).)

⁵⁸ (Order filed 2/29/24 p. 12; *see also* Order filed 11/6/23; Order filed 9/26/24 p. 2.)

⁵⁹ (Order filed 2/29/24 p. 12; *see also* Order filed 11/6/23.) To be clear, however, Plaintiffs do not challenge the conclusion the circuit court reached in Plaintiffs’ favor on Plaintiffs’ Maintenance Fee Breach Claim, only the quoted proposition about Defendant’s supposed “unambiguous right.” And to be further clear, Plaintiffs challenge this proposition as erroneous in every order of the circuit court in which it is included.

“Restrictive covenants are contractual in nature,’ so that the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document.” *Palmetto Dunes Resort v. Brown*, 287 S.C. 1, 6, 336 S.E.2d 15, 18 (Ct. App. 1985) (quoting *Hoffman v. Cohen*, 262 S.C. 71, 75, 202 S.E.2d 363, 365 (1974)); *see also Litchfield Co. of S. C., Inc. v. Kiriakides*, 290 S.C. 220, 223, 349 S.E.2d 344, 346 (Ct. App. 1986) (the purpose of the rules of contract construction is to ascertain the intention of the parties as gathered from the contents of the entire document and not from any particular provision within the contract). “The language of a restrictive covenant is to be construed according to the plain and ordinary meaning attributed to it *at the time of execution.*” *Hanold v. Watson’s Orchard Prop. Owners Ass’n, Inc.*, 412 S.C. 387, 396, 772 S.E.2d 528, 533 (Ct. App. 2015), *aff’d* 419 S.C. 162, 797 S.E.2d 47 (2017) (quoting *Hardy v. Aiken*, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006)) (emphasis added). “Common sense and good faith are the leading touchstones of the inquiry.” *Farr v. Duke Power Co.*, 265 S.C. 356, 362, 218 S.E.2d 431, 434 (1975). “Where a construction of a contract makes it unusual or extraordinary and another construction, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction must prevail.” *Farr v. Duke Power Co.*, 265 S.C. 356, 362, 218 S.E.2d 431, 434 (1975). Likewise, “[a]n interpretation which establishes the more reasonable and probable agreement of the parties should be adopted while an interpretation leading to an absurd result should be avoided.” *Koon v. Fares*, 379 S.C. 150, 155, 666 S.E.2d 230, 233 (2008).⁶⁰

To say that “Defendant had the unambiguous right to charge the prescribed amounts in the Covenants, which was \$300 per acre compounded 10% annually [since 1986], for

⁶⁰ These principles are hereby incorporated into Plaintiffs’ other arguments that implicate contract construction.

maintenance and upkeep . . . ,” is to say that Defendant has the right to charge Owners more than \$10,000 (and counting) per acre per year for maintenance and upkeep without regard to what is actually spent on maintenance and upkeep—which is patently absurd. Indeed, even Wagner himself admitted that this “would be a little egregious.” (Trial Tr. pp. 54:3–55:3.)

While the Covenants do state that “the [maintenance] fee shall be computed on the basis of \$300.00 per acre per annum . . . increase[ing] by 10% compounded annually,” they also state that the fee so computed is “for maintenance and upkeep of the Park.” Read in context and in keeping with the rules of contract construction, the reasonable need “for maintenance and upkeep” necessarily limits what the Park Authority may charge.

Moreover, Defendant’s predecessor the SCRA, the original Park Authority, is a public “corporation owned completely by the people of the state” created by statute “in order ‘to promote the development of high technology industries and research facilities in South Carolina’ and ‘to enhance the research capabilities of [South Carolina’s] public and private universities.’” *Nichols*, 290 S.C. at 417, 351 S.E.2d at 156 (quoting § 13-17-70(8)). The SCRA is “empowered to issue revenue bonds.” *Id.* at 418, 351 S.E.2d at 418. Accordingly, the Park Authority contemplated by the Covenants was one that had the means to pay expenses beyond maintenance and upkeep from sources other than maintenance fees collected from Owners.

The Association, on the other hand, will have no source of funding other than Assessments, which is why it makes perfect sense that the Covenants would expressly provide for the Association’s collection of Assessments to fund a wide array of Common Expenses while making no such allowance for the Park Authority, who is allowed only to collect a “maintenance fee” solely “for maintenance and upkeep of the Park.”

The finding that “Defendant had the unambiguous right to charge the prescribed amounts in the Covenants, which was \$300 per acre compounded 10% annually [since 1986], for maintenance and upkeep” is beset by a failure to read the Covenants wholistically and a departure from the touchstones of common sense and good faith, resulting in an extraordinary and unreasonable construction that frustrates their purpose and could not have been intended at the time of their execution.

II. The circuit court erred in ruling against Plaintiffs on Plaintiffs’ Maintenance Fee Conversion Claim.

As explained above, the circuit court’s ruling against Plaintiffs on Plaintiffs’ Maintenance Fee Conversion Claim is erroneous due to the court’s mistaken reliance on the proposition that “‘Defendant had the unambiguous right to charge the prescribed amounts in the covenants, which was \$300 per acre compounded 10% annually’ going back to 1986.’” (Order filed 9/26/24 p. 2.) While this alone is sufficient to warrant reversal, Plaintiffs would make clear that, after getting off on the wrong track by relying on this erroneous proposition, the circuit court continued further in the wrong direction.

In pertinent part, the circuit court’s order of September 26, 2024, reads as follows:

In the initial written decision regarding this dispute, this Court held that, under the pertinent covenants, “Defendant had the unambiguous right to charge the prescribed amounts in the covenants, which was \$300 per acre compounded 10% annually” going back to 1986. The undisputed evidence at trial was that, for the duration of Defendant’s ownership of the Clemson Research Park, Defendant had charged property owners \$600 per year per acre owned, and that this was substantially less than the amount authorized by the covenants, which is a mathematical fact. Accordingly, the Court held that the amount Defendant had charged property owners under the covenants was consistent with the covenants, while also holding that Defendant’s use of funds collected from property owners for anything other than “maintenance and upkeep,” as that term is defined in this Court’s prior decision, was inconsistent with the covenants.

Plaintiffs’ interpretation of the covenants appears to conflate two issues: collection of maintenance fees and their expenditure. It appears to be Plaintiffs’ contention that, under the covenants, Defendant may only collect maintenance fees from property owners necessary to cover “maintenance and upkeep;” that the collection of any amount of maintenance fee in excess of what is necessary for “maintenance and upkeep” constitutes conversion.

To reach this construction, however, the Court would have to disregard the plain language of the covenants, which establish the method by which annual maintenance fees are calculated, and which further establish that each property owner’s obligation is to pay the maintenance fees as calculated. And, while the covenants do give Defendant the authority to reduce the amount of the maintenance fee in any given year according to its discretion, the covenants do not establish an obligation to do so. Therefore, if the Court were to adopt Plaintiffs’ construction of the covenants, the Court would also be required to create a new term in the covenants—one providing an alternative method of calculating the maintenance fee—even though the covenants already establish the method by which the fee is calculated. Consistent with well-established precedent, the Court declines the invitation to create a new contractual obligation.

The question of whether Defendant’s collection of maintenance fees remains distinct from the question of how the maintenance fees are spent.

(Order filed 9/26/24 pp. 2–3.)

This analysis is inconsistent with the circuit court’s February 29, 2024, order, which, in granting Plaintiffs judgment in an “amount represent[ing] the difference *in what Defendant charged Plaintiff[s] for maintenance and upkeep* and the amount defendant actually spent on maintenance and upkeep . . . ,”⁶¹ had already correctly recognized that “[t]he Covenants provide that the Authority may collect ‘a maintenance fee for maintenance and upkeep of the Park,’”⁶²

⁶¹ (Order filed 2/29/24 p. 10 (emphasis added); *see also id.* at p. 14.)

⁶² (Order filed 2/29/24 p. 10.)

and ruled that, under the terms of the Covenants, the Park “authority is limited to charging parcel owners for ‘maintenance and upkeep,’”⁶³ and that:

To the extent the Covenants do not *expressly* provide that maintenance fees collected by the Authority (now Defendant) may only be used, and **may only be collected to the extent necessary, for the maintenance and upkeep of the Park**, given the language used in the Covenants, the intent of them and of the original Authority (SCRA) and the covenant of good faith and fair dealing, such a limitation may be certainly implied.

(*Id.* at pp. 8–9 (bold print added for emphasis) (italics in original).)

As explained above, by the time of the inconsistent September 26, 2024, order, the circuit court had already denied Defendant’s motion for reconsideration of the February 29, 2024, order via its July 29, 2024, order, which ruled, “Defendant[’s] motion to reconsider is denied as to the Court’s ruling on maintenance and upkeep and related fees. Plaintiffs[’] award of damages is affirmed. The Court finds that Plaintiff is the prevailing party in the case.” (Order filed 7/29/24.)⁶⁴ Therefore, at that time, Plaintiffs’ Maintenance Fee Conversion Claim, the amount of attorneys’ fees and costs to be awarded Plaintiffs, and the removal of the Trailers were the only matters still under advisement. (*Id.*)

Then, after Plaintiffs submitted proof of their attorneys’ fees, by order filed August 27, 2024, the circuit court gave Defendant an opportunity to challenge the amount of attorneys’ fees sought, denied Plaintiffs’ Maintenance Fee Conversion Claim, and announced its ruling on the Trailer-removal issue, which was that it would not set a certain timeframe for their removal but would instead monitor Plaintiffs’ progress at Defendant’s request. (Order filed 8/27/24.) At the

⁶³ (*Id.* at p. 3.)

⁶⁴ Likewise, at the July 24, 2024, hearing on Defendant’s motion for reconsideration, with respect to the maintenance fee issue, the Court stated, “the way I saw it worded was the way I ruled,” “I’m not going to change my mind,” and “I’m not changing my ruling on that.” (Tr. of Hr’g on 7/24/24 pp. 52:12–53:1.)

end of paragraph of the order concerning the Trailers, the Court instructed Defendant's counsel to prepare a formal order. (*Id.*)

As noted above, Defendant disagreed with Plaintiffs' position that circuit court had only requested a proposed formal order from Defendant addressing the Trailer-removal issue. (~~Email dated 9/3/24 from Def.'s Counsel to Pls.' Counsel with Def.'s Proposed Formal Order; Reply Email dated 9/5/24 at 9:58 AM from Pls.' Counsel to Def.'s Counsel; Reply Email dated 9/5/24 at 9:59 AM from Def.'s Counsel to Pls.' Counsel; Reply Email dated 9/10/24 from Pls.' Counsel to Def.'s Counsel with Pls.' Proposed Formal Order.~~) After Defendant's counsel submitted a proposed order addressing both the Trailer-removal issue and Plaintiffs' Maintenance Fee Conversion Claim,⁶⁵ Plaintiffs advised the circuit court that Defendant's proposed order appeared to be:

an attempt to try to get the court to find facts favorable to the defendant's unsuccessful defense of the Plaintiff's breach of covenants claim, so that the Defendant can point to the findings on appeal. The proposed order is yet another (probably the fifth or sixth) bite at this apple. The court has made it perfectly clear, in its July 29, 2024 order, that: "Defendant motion to reconsider is denied as to the court's ruling on maintenance and upkeep and related fees."

(Reply Email dated 9/12/24 at 3:26 PM from Pls.' Counsel to Law Clerk Objecting to Def.'s Proposed Formal Order (emphasis in original).) Plaintiffs also advised the court that "many of the purported factual findings in Defendant's proposed order on conversion have little to do with the conversion claim and much to do with the breach of covenants claim that Defendant [o]st" (*Id.*)

While the circuit court adopted Defendant's proposed order, in its entirety, in the form of its order filed September 26, 2024, as explained above, that order is inconsistent with the court's

⁶⁵ (Email dated 9/12/24 at 2:12 PM from Def.'s Counsel to Law Clerk with Def.'s Proposed Formal Order & Pls.' Proposed Formal Order.)

earlier February 29, 2024, ruling in Plaintiffs’ favor on Plaintiffs’ Maintenance Fee Breach Claim, which ruling the had already been finalized via the court’s the denial of Defendant’s motion for reconsideration thereof by order filed July 29, 2024. Thus, to the that extent the court’s September 26, 2024, order is inconsistent with the court’s ruling in Plaintiffs’ favor on Plaintiffs’ Maintenance Fee Breach Claim, the court’s September 26, 2024, order is an improper alteration of the court’s ruling in Plaintiffs’ favor on Plaintiffs’ Maintenance Fee Breach Claim without jurisdiction. *See Ness v. Eckerd Corp.*, 350 S.C. 399, 402–03, 566 S.E.2d 193, 195 (Ct. App. 2002) (“In *Heins v. Heins*, 344 S.C. 146, 543 S.E.2d 224 (Ct. App. 2001), this court held that a family court judge lacked jurisdiction to *sua sponte* alter a judgment more than ten days after it was issued. Although trial judges retain jurisdiction to alter judgments on their own initiative for ten days if a Rule 59(e), SCRPC, motion is filed, after ten days that jurisdiction is lost. *Id.* at 157, 543 S.E.2d at 229–30. In this case, as in *Heins*, the trial judge modified an order not as requested in a Rule 59(e) motion, but rather on his own initiative and after more than ten days had passed. He therefore lacked jurisdiction to vacate the original order.”) (internal footnote omitted).

Moreover, the circuit court’s conversion analysis is erroneous. “Conversion is the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of the condition or the exclusion of the owner’s rights. Conversion may arise by some illegal use or misuse, or by illegal detention of another’s personal property. Conversion is a wrongful act which emanates by either a wrongful taking or wrongful detention.” *Hawkins v. City of Greenville*, 358 S.C. 280, 297, 594 S.E.2d 557, 566 (Ct. App. 2004) (internal quotations and citations omitted). “Conversion is a tortious act and ‘may arise either by a wrongful taking of the chattel or by some other illegal assumption of ownership, by illegally using or misusing it, or by wrongful detention.’” *Castell v. Stephenson Fin. Co.*, 244

S.C. 45, 50–51, 135 S.E.2d 311, 313 (1964) (quoting *Young v. Corbitt Motor Truck Co.*, 148 S.C. 511, 146 S.E. 534, 542 (1929)). Conversion may result by securing money, “illegally, tortiously, by fraud, or other wrongful conduct.” *SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 499, 392 S.E.2d 789, 793 (1990). “If a party wrongfully assume[s] property in goods belonging to another, or wrongfully use[s] them, it amounts to a direct conversion . . .” *McPherson v. Neuffer & Hendrix*, 45 S.C.L. 267, 281 (S.C. App. L. 1858).

Here, Defendant secured Plaintiffs’ money “tortiously by fraud, or other wrongful conduct” *and* misused it. Defendant invoiced Plaintiffs, and other Parcel Owners in the Park, for “Common Area Maintenance”⁶⁶ knowing the funds would, for the most part, be used to pay Defendant’s mortgage or go into the pocket of its sole manager/member, Wagner. When Plaintiffs inquired as to what the funds were used for, Defendant refused to say, and, of course, it did so because it knew the funds were not being used for maintenance or upkeep, i.e., they were being misappropriated. The circuit court erred in ruling that Defendant’s improper charging of maintenance fees and misappropriation of the funds collected did not amount to conversion.

III. The circuit court erred in ruling against Plaintiffs on Plaintiffs’ Common Area Conveyance Claim.

In ruling against Plaintiffs on Plaintiffs’ Common Area Conveyance Claim, the circuit court erroneously found that, “when taking the Covenants into consideration as a whole, Defendant is under no obligation or requirement to convey Common Areas over to the Association. Based on the Covenants, the conveyance of Common Areas to the Association is discretionary.” (Order filed 2/29/24 p. 12; *see also* Order filed 11/6/23.)

The Covenants provide that the “[Park] Authority **shall** develop the Property . . . by designating portions of the Property, and all improvements constructed thereon, if any, as Common

⁶⁶ (Pls.’ Trial Ex. 13 [Maintenance Fee Invoices].)

Areas, and conveying them to the Association.” (Pls.’ Trial Ex. 5 [Covenants] pp. 4–5 (emphasis added).) The Covenants also provide that “[n]o part of the Property shall be conveyed to the Association as Common Area . . . until such conveyance will result in the Authority owning less than one-half of the Property so that the Authority will be entitled to less than one-half the votes in the Association.” (*Id.* at p. 7.) Because the Covenants do not include a period of time by which the Authority must designate Common Areas and convey them to the Association, the Court must imply a reasonable period of time. *Cf. Davis v. Cordell*, 237 S.C. 88, 99–100, 115 S.E.2d 649, 654 (1960) (“Here the contract specified no precise date upon which appellant was required to pay the balance of the purchase price; by presumption of law, he was required to do so within a reasonable time.”); *Com. Credit Corp. v. Nelson Motors, Inc.*, 247 S.C. 360, 366–67, 147 S.E.2d 481, 484 (1966) (“[N]oncontradictory terms may be implied in a contract in order to effectuate the manifest intention of the parties when the circumstances warrant it, and . . . there exists in every contract an implied covenant of good faith and fair dealing.”).

While the Covenants provide that the “Park shall consist of whatever mix of Parcels and Common Areas as the Authority may designate and/or construct, in its sole discretion,”⁶⁷ that does not relieve the Authority of its obligation to designate portions of the Property as Common Areas and convey them to the Association within a reasonable period of time. Though it had been (at the time of trial) approximately 37 years since the Covenants became effective, no Park Authority has designated any Common Areas or conveyed any Common Areas to the Association. It is clear, from the provisions of the Covenants, that the SCRA did not intend for it, or its predecessor, to control the Park, and its Common Areas, forever. Given the clear intent of the Covenants that an Association of Owners would assume control of the Park, nearly four

⁶⁷ (Pls.’ Trial Ex. 5 [Covenants] pp. 4–5.)

decades is beyond any reasonable period of time for such designation and conveyance, as the circuit court should have found.

Defendant currently owns somewhere between 118.81 acres (47.94% of the acres) and 136.40 acres (51.44% of the acres) in the Park, while the Owners other than Defendant currently own somewhere between 129.04 acres (52.07% of the acres) and 128.76 acres (48.56 % of the acres) in the Park. (Pls.’ Trial Ex. 30 [Damages Calculation] p. 1.) Defendant has breached the Covenants by failing to designate *any* Common Areas and convey them to the Association within a reasonable period of time. The circuit court should have issued an order directing Defendant to designate, as Common Areas, at least ten (10) acres of Defendant’s property in the Park, or such lesser amount of acres as will result in Defendant owning less than one-half of the Park Property so that Defendant will be entitled to less than one-half the votes in the Association, and then convey the Common Areas to an Association of Park Owners pursuant to the Covenants.

IV. The circuit court erred in ruling against Plaintiffs on Defendant’s Trailer Removal Claim.

In ruling against Plaintiffs on Defendant’s Trailer Removal Claim, the circuit court erroneously found “that the Poly-Med Trailers that were once considered temporary structures in accordance with the Covenants, have gone past the time period in which they can reasonabl[y] be considered temporary. As such, these trailers are in violation of the Covenants . . . [and] ordered to be removed within a reasonable time” (Order filed 2/29/24 p. 13; *see also* Order filed 11/6/23.)⁶⁸

Restrictions on the use of property are historically disfavored. *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 270, 363 S.E.2d 891, 893 (1987). “The historical disfavor of restrictive

⁶⁸ At least implicitly, the court erroneously adhered to this ruling in its orders filed August 27, 2024, September 26, 2024, November 19, 2024, and December 20, 2024. (Orders filed 8/27/24, 9/26/24, 11/19/24, and 12/20/24.)

covenants by the law emanates from the widely held view that society's best interests are advanced by encouraging the free and unrestricted use of land." *Rhodes v. Palmetto Pathway Homes, Inc.*, 303 S.C. 308, 311, 400 S.E.2d 484, 485 (1991). "[A]ll such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property." *Buffington v. T.O.E. Enters.*, 383 S.C. 388, 392, 680 S.E.2d 289, 291 (2009).

Moreover, the relief Defendant seeks with respect to the Defendant's Trailer Removal Claim, i.e., removal of the Trailers, is a mandatory injunction. 27 S.C. Jur. Injunctions § 3 ("A mandatory injunction is an extraordinary remedial process that commands the performance of some positive act."). And "[i]n cases where a mandatory injunction is sought, the general rule in this country is that the court will balance the benefit of an injunction to the plaintiff against the inconvenience and damage to the defendant, and grant an injunction or award damages as seem most consistent with justice and equity under the circumstances of the case." *Forest Land Co. v. Black*, 216 S.C. 255, 266–67, 57 S.E.2d 420, 426 (1950) (internal citation omitted); *see also Hunnicutt v. Rickenbacker*, 268 S.C. 511, 515–16, 234 S.E.2d 887, 889 (1977) ("[I]t is not every case of a structure erected in violation of a restriction which will call for [a mandatory injunction requiring removal of the structure]. The issuance of a mandatory injunction depends upon the equities between the parties, and it rests in the sound judicial discretion of the court whether such an injunction should be granted. *Where a great injury will be done to the defendant, with very little if any to the plaintiff, the courts will deny equitable relief.*") (quoting 20 Am. Jur. 2d. Covenants, etc. § 328) (emphasis added)); *LeFurgy v. Long Cove Club Owners' Ass'n, Inc.*, 313 S.C. 555, 558, 443 S.E.2d 577, 578 (Ct. App. 1994) ("The remedy of injunction is a drastic one and should be cautiously applied only when legal rights are unlawfully invaded or legal duties are willfully or wantonly neglected.").

As an initial matter, the circuit court committed reversible error here by requiring that the Trailers be removed without any balancing of the equities whatsoever. (Order filed 11/6/23; Order filed 2/29/24.) Moreover, and in any event, the balance of the equities weighs heavily against requiring Plaintiffs to remove the Trailers.

As explained above, before Defendant acquired the Park, Poly-Med (via Ellis) duly sought and obtained Innovate's approval (via Nelson) for the Trailers. Innovate never complained about the Trailers thereafter, and for that matter, neither did Defendant until the filing of its Answer and Counterclaim on February 8, 2022, which was Plaintiffs' first notice that Defendant had an issue with the Trailers. (Aff. of David Shalaby filed 11/22/23 ¶ 5.) Defendant identified no harm of any kind to itself or any other Parcel owner(s) as a result of the Trailers. Indeed, the Covenants do not prohibit trailers or temporary structures, they simply require improvements to be approved by the Park Authority or its agent (Pls.' Trial Ex. 5 [Covenants] p. 26 at Article IX § 1), which approval Poly-Med did in fact obtain. Likewise, Defendant presented no evidence that the Trailers violate any Park rule or regulation; nor did Defendant offer any evidence or testimony that it, or anyone else, was dissatisfied with "the quality of materials, harmony of external design and size, [or] location" of the Trailers or other matters to be considered by the Authority or Design Review Committee under the Covenants, including as to "the suitability" of the Trailers or materials of which they are built, "the appropriateness and harmony" of them in relation to improvements on contiguous or adjacent Parcels and "in relation to the general plan for the development of the Park," their "architectural merits," the effect of the Trailers "on the outlook from adjacent or neighboring Parcels" or any "other matters as may be deemed to be in the interest and benefit of the Owners of Parcels in the Park as a whole." (Pls.' Trial Ex. 5 [Covenants] pp. 26–27.) On the contrary, it is reasonable to infer that Defendant

brought Defendant's Trailer Removal Claim merely in retaliation for Plaintiffs bringing this action and/or out of spite.

Removing the Trailers, moving the affected employees and providing them with new offices will be a substantial burden and expense for Poly-Med. (Aff. of David Shalaby filed 11/22/23 ¶ 7.) There are currently 40 Poly-Med employees working in the Trailers. (*Id.* at ¶ 6.) Without the Trailers, Poly-Med does not have enough space for the employees in its current facilities in the Park. (*Id.* at ¶ 8.) While a small number of the forty (40) employees could potentially be relocated out of the Park, most of them support production in the building at 52 Technology Drive and/or need access to the laboratories at 51 Technology Drive. (*Id.* at ¶ 9.) When the Trailers are removed, Poly-Med's critical need would be to expand its current building at 52 Technology Drive and continue to employ the forty (40) employees in the Park. (*Id.* at ¶ 10.)

Further still, under the Covenants, Defendant would have to approve any such expansion. (Pls.' Trial Ex. 5 [Covenants] p. 26.) Given the animosity between Plaintiffs and Defendant, Plaintiffs are concerned that Defendant will unreasonably refuse to approve any expansion by Plaintiffs or call for plan revisions that make the expansion cost prohibitive. That would lead to a reduction in the number of Poly-Med employees in the Park—the exact opposite of the purpose and intent of the Covenants: “to promote the development of high technology industries and research facilities” and “bring about economic growth.” (*Id.* at pp. 1–2.) Because removal of the Trailers will cause great injury to Plaintiffs and allowing them to remain will cause no harm to Defendant (nor, for that matter, would their removal confer any benefit upon Defendant), this Court should reverse the circuit court's ruling against Plaintiffs on Defendant's Trailer Removal Claim and allow Plaintiffs to maintain the Trailers on their property. *See, e.g., Hunnicutt*, 268

S.C. at 517, 234 S.E.2d at 890 (reversing mandatory injunction for removal of structure based on balancing of the equities).

V. If this Court reverses the circuit court as to its ruling against Plaintiffs on Defendant’s Trailer Removal Claim, and/or any other claim, Plaintiffs should be awarded (either by this Court directly or by the circuit court on remand with instructions from this Court, whichever is procedurally proper) 100% (or at least a higher percentage) of their attorneys’ fees and costs.

As explained above, while the circuit court (correctly) found Plaintiffs to be the prevailing party under the Fees/Costs Provision, because they prevailed on the “main issue” to which “the vast majority of this case and time at trial was devoted[:] . . . Plaintiffs’ claims that Defendant breached the Covenants by collecting maintenance fees well excess of the annual cost of maintenance and upkeep of the Park.” (Order filed 12/9/24 pp. 3–4; *see also* Order filed 11/19/24.) But for the express reason that Plaintiffs did not prevail on Defendant’s Trailer Removal Claim, the court reduced the amount of attorneys’ fees and costs Plaintiffs could recover by 25%. (Order filed 12/9/24 p. 6 (“Plaintiffs did not prevail on all of their claims, *as the case also involved Defendant’s counterclaim for an order requiring removal of the Plaintiffs’ office trailers.*”) (emphasis added); *see also* Order filed 11/19/24 (granting Plaintiffs 75% of their total attorneys’ fees and costs); Order filed 12/20/24 (granting Plaintiffs’ judgment in an amount equal to 75% of their total attorneys’ fees and costs).) Consequently, if this Court reverses the circuit court as to its ruling against Plaintiffs on Defendant’s Trailer Removal Claim, and/or any other claim, Plaintiffs should be awarded (either by this Court directly or by the circuit court on remand with instructions from this Court, whichever is procedurally proper) 100% (or at least a higher percentage) of their attorney’s fees and costs.

VI. If this Court rules in favor of Plaintiffs in this appeal, and/or with respect to Defendant’s appeal, Plaintiffs should be awarded (either by this Court directly or by the circuit court on remand, whichever is procedurally proper) their attorneys’ fees and costs for this appeal.

The Fees/Costs Provision entitles “the prevailing party . . . to his costs and disbursements and reasonable attorneys’ fees in [any] suit or action [to enforce the Covenants] and *any appeal thereof*.” (Pls.’ Trial Ex. 5 [Covenants] p. 22 at Article VI § 5 (emphasis added).). If this Court rules in favor of Plaintiffs in this appeal, and/or with respect to Defendant’s appeal, they should be awarded their appellate attorneys’ fees and costs (either by this Court directly or by the circuit court on remand, whichever is procedurally proper) in an amount to be determined following submission of proof thereof.

CONCLUSION

For the foregoing reasons, the circuit court should be reversed as to its finding that “Defendant had the unambiguous right to charge the prescribed amounts in the Covenants, which was \$300 per acre compounded 10% annually [since 1986], for maintenance and upkeep;” its ruling against Plaintiffs on Plaintiffs’ Maintenance Fee Conversion Claim; its ruling against Plaintiffs on Plaintiffs’ Common Area Conveyance Claim; and its ruling against Plaintiffs on Defendant’s Trailer Removal Claim, and in consequence of the reversal of the circuit court’s ruling against Plaintiffs on Defendant’s Trailer Removal Claim, Plaintiffs should be awarded (either by this Court directly or by the circuit court on remand with instructions from this Court, whichever is procedurally proper) 100% (or at least a higher percentage) of their attorney’s fees and costs. If this Court rules in favor of Plaintiffs in this appeal, and/or with respect to Defendant’s appeal, they should be awarded their appellate attorneys’ fees and costs (either by this Court directly or by the circuit court on remand, whichever is procedurally proper) in an amount to be determined following submission of proof thereof.

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Charleston, South Carolina

April 25, 2025

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Anderson County
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2021-CP-04-01349
Appellate Case No. 2024-002150

Poly-Med, Inc., Technology Drive 51, LLC,
Technology Drive 52, LLC, PMI Properties, LLC,

Respondents/Appellants,

v.

Research Park, LLC,

Appellant/Respondent.

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I, Russell G. Hines, of Clement Rivers, LLP, attorneys for Respondents/Appellants, hereby certify that the **AGREEMENT TO RESOLVE APPELLANT/RESPONDENT'S MOTION TO STRIKE CERTAIN MATTER DESIGNATED BY RESPONDENTS/APPELLANTS TO BE INCLUDED IN THE RECORD ON APPEAL** was served on Appellant/Respondent on May 8, 2025, by emailing (see attached email) a copy of the same to Appellant/Respondent's counsel of record—and that it was likewise served on Respondents/Appellants' own additional counsel:

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May 8, 2025

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Subject: Poly-Med, Inc. v. Research Park, LLC ; Appellate Case No. 2024-002150 (CR 240167)
Attachments: Poly-Med v. Research Park (2024-002150) -- Agreement to Resolve Motion to Strike.pdf; Ex. 1 -- Respondents-Appellants' DOM -- Showing Proposed Amendment.pdf; Ex. 2 -- Initial Appellant's Brief of Respondents-Appellants -- Striking Out Items 83-86.pdf

Enclosed please an Agreement to Resolve Appellant/Respondent's Motion to Strike Certain Matter Designated by Respondents/Appellants to be Included in the Record on Appeal with Exhibits for service upon you in the above-referenced matter.

Thank you,

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