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. 2024-002150

Poly-Med, Inc., Technology Drive 51, LLC,
Technology Drive 52, LLC, and PMI Properties LLC . . . . . Respondents / Appellants,

v.

Research Park, LLC . . . . . Appellant / Respondent.

APPELLANT'S / RESPONDENT'S FINAL OPENING BRIEF

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X. Whether the trial court erred in failing to make an award of attorneys' fees to Appellant / Respondent, as required by the pertinent covenants, for the successful covenant-enforcement action that Appellant / Respondent brought against Respondents / Appellants.

STATEMENT OF THE CASE

These proceedings involve cross-appeals following a non-jury trial pertaining to the construction and enforcement of restrictive covenants that run with a commercial real estate development. Regrettably, the procedural circumstances of the case—specifically following trial—are complicated.

The action was commenced by Respondents / Appellants (who were the plaintiffs below) with the filing of the Complaint on July 14, 2021. (R. 73.) Following the disposition of a preliminary motion pursuant to Rule 12(b), Appellant / Respondent filed its Answer & Counterclaim on February 8, 2022. (R. 120.) Respondents / Appellants' Reply was filed March 8, 2022. (R. 139.)

Very little about the litigation was remarkable. Discovery was not complicated, and there were few disputes.

For the immediate purposes of these appellate proceedings, the first decision of note was delivered on July 18, 2023. Following a hearing on cross-motions for summary judgment, the trial court entered an order denying all parties' dispositive motions; the order also reflected that "all parties have agreed to have an accounting and to jointly pick a qualified accountant." And, importantly, the order held that Respondents / Appellants' request for "an award of attorney's fees is granted [but that] the amount shall be determined after trial." (R. 6.)

The matter proceeded to a nonjury trial held over two days—October 10 & 11, 2023. Upon the conclusion of trial, the disposition of the case was taken under advisement. A preliminary decision was issued roughly three weeks later.

By Form 4 dated November 6, 2023, the trial court held Appellant / Respondent in breach of the covenants at issue under a theory of a breach of the duty of good faith and fair dealing, as well as conversion. (R. 8.) Importantly, and as discussed at length below, Respondents / Appellants had never raised good faith and fair dealing as a theory of recovery; the first time good faith and fair dealing was raised in the case was by the trial court, sua sponte, in the November 6 decision. In any event, the trial court awarded damages to Respondents / Appellants in the amount of $65,724.23.

Importantly, however, in the same November 6 decision, the trial court found in favor of Appellant / Respondent on its counterclaim, against Respondents / Appellants for their own breach of the covenants at issue. Specifically, the trial court held that so-called temporary trailers that Respondents / Appellants had placed upon their property had, by virtue of how long those trailers had been on Respondents' / Appellants' premises, become noncompliant with, and violative of, the covenants. Accordingly, the trial court granted Appellant's / Respondent's request for an injunction and ordered that the trailers be removed.[1] The court also instructed counsel for Respondents / Appellants to prepare a more formal order for its signature. Counsel did so, and the more formal order was entered on February 29, 2024.[2]

There were certain questions that were left unanswered by the November 6 decision and the February 29 order. The court did not establish the time by which Respondents /

[1] The November 6 Order was presented as a Form 4. And, inadvertently or not, the trial court indicated through the Form 4 that the decision "ends" the case. Consequently, out of an extreme abundance of caution, Appellant / Respondent filed its first motion pursuant to Rules 52, 54 & 59, SCRCP, on November 16, 2023. (R. 1033.)

[2] The undersigned promptly filed a new motion pursuant to Rules 52, 54 & 59, SCRCP, at that time. (R. 1137.)

Appellants had to remove the noncompliant trailers, and invited further briefing on that issue. The court also invited further briefing on the issue of attorneys' fees. And, pursuant to the post-trial motions of Appellant / Respondent, the court reconsidered whether, as a matter of law, Respondents / Appellants were entitled to relief under their conversion theory.

A hearing on cross-motions arising from the disposition of trial was held on July 24, 2024. The court took the matters under advisement, but resolved many of the issues by Form 4 dated July 26, 2024.[3] (R. 40.) In that order, most of each party's post-trial motions was denied. However, the court directed counsel for Respondents / Appellants to revise and resubmit their requests for attorneys' fees. The matters remaining as to the injunction and the legal sufficiency of the conversion action remained under advisement, and the court again requested further briefing.

The conversion action was decided by Form 4 entered August 27, 2024. (R. 46.) The trial court granted Appellant's / Respondent's motion for reconsideration and vacated the portion of the November 6 / February 29 decisions finding in favor of Respondents / Appellants on conversion. Furthermore, the court declined to rescind its order of injunction against Respondents' / Appellants' continuing violation of the covenants, and held the issue of attorneys' fees under advisement. The court instructed counsel for

[3] The Form 4 issued July 26, 2024 also indicated that it "ended" the case. However, on July 29, 2024, the court issued a new Form 4 that was identical to the decision of July 26, except that it indicated that it did not end the case. (R. 43.) The July 29 decision did not expressly vacate the July 26 decision, though. Consequently, and again out of an extreme abundance of caution, the undersigned filed Appellant's / Respondent's first notice of appeal. (R. 1348.) That appeal was dismissed without prejudice by order of this Court dated October 14, 2024. (R. 56.)

Appellant / Respondent to prepare a more formal order, and that order was entered by the court on September 26, 2024, (R. 50).

Roughly two months later, on November 19, 2024, the trial court entered an order granting Respondents' / Appellants' request for attorneys' fees and instructed counsel to prepare a proposed order to that effect. (R. 58.) Counsel did so, and a more formal order on attorneys' fees was entered on December 9, 2024, (R. 61).

Meanwhile, however, Respondents / Appellants had filed a motion for reconsideration of the court's disposition of the injunction and conversion issues. (R. 1441.) But that motion was summarily denied by Form 4 dated December 17, 2024. (R. 68.)

The undersigned perceived that the court's decision of November 19 comprised a final judgment of all issues outstanding with respect to the appealable issues pertinent to Appellant / Respondent. Accordingly, on December 19, 2024, Appellant / Respondent filed a new notice of appeal—which is the notice giving rise to these proceedings. (R. 1453.) However, on December 20, 2024, the trial court entered a brief order that was a summary disposition of matters decided at trial and by the multitude of post-trial motions. (R. 71.) Accordingly, on December 23, 2024, Appellant / Respondent filed an amended notice of appeal, to include the summary disposition order of three days earlier. (R. 1506.) Respondents / Appellants filed their notice of appeal on December 27, 2024. (R. 1561.)

STATEMENT OF FACTS

During or about 1986, the South Carolina Research Authority ("**the Authority**") acquired more than two hundred acres of undeveloped land in Anderson County, near Clemson University, on which the Authority established a commercial real estate development known as the "Clemson Research Park." The development continues to exist today, though it is presently known as the "Clemson University Advanced Materials Center." For simplicity, this property will be referred to hereinafter as "**the Research Park**."

At the time of the Research Park's creation, the Authority recorded a set of Covenants, Conditions, and Restrictions, (referred to hereinafter as "**the Covenants**"), which were intended to govern the administration of the Research Park and the property that comprises the Park. (R. 157.) The Covenants also explain the Authority's vision for the Research Park: the purpose of the Authority's acquisition of the Park, and the ambition of the Covenants, is to "promote the development of high technology industries and research facilities." (R. 160.) The Covenants were duly recorded and have never been modified or amended. Accordingly, the version of the Covenants recorded in 1986 is the same version that present governs the Research Park to this day.

The Authority continued to own the Research Park until 2006, at which time the Authority conveyed all unsold property within the Park, as well as the totality of its developer rights, to Anderson County. (See R. 713 (explaining derivation).) Anderson County subsequently assigned the totality of all property rights and interests it received from the Authority with respect to the Research Park to a non-profit entity known as the

Anderson County Development Partnership. (Id.) In 2008, the Anderson County Development Partnership formally changed its name to Innovate Anderson. (Id.)

Ultimately, on October 10, 2018, Innovate Anderson conveyed all unsold property within the Park, as well as the totality of its developer rights, to Appellant / Respondent, Research Park, LLC ("**RPLLC**"). (Id.) RPLLC is a South Carolina limited liability company, and its sole member is an individual named Dan Wagner. (R. 290:13-24.) As of the date of trial (and presently), RPLLC is the record-title owner of all unsold property at the Research Park, and continues to hold developer rights in and to the Park. (R. 291:2-8.)

Each of the Respondents / Appellants is alleged to be either an owner and/or lessee of property located within the Research Park. (R. 79 at ¶ 28.) Technology Drive 51, LLC and Technology Drive 52, LLC are South Carolina limited liability companies and are under common control with Poly-Med, Inc. (R. 416:7-8.) Furthermore, Poly-Med, Inc. leases the premises owned by Technology Drive 51, LLC and Technology Drive 52, LLC, and conducts its principal business operations from those premises. (R. 75 at ¶ 1; R. 79 at ¶ 28.)

The record is somewhat less clear with respect to PMI Properties, LLC. The testimony at trial was that PMI Properties, LLC is a wholly owned subsidiary of Poly-Med, Inc., (R. 433:3-10), and that it purchased a certain amount of acreage in the Park from RPLLC in 2019, (R. 782). According to Respondents' / Appellants' trial testimony, this property was never transferred away from PMI's ownership. (R. 416:14-17.) This would suggest that PMI Properties, LLC is a property-owner within the Research Park. And this is what Respondents / Appellants alleged in the Complaint. (R. 79 at ¶ 28.)

However, at trial, Respondents / Appellants presented an unrecorded deed bearing an execution date of March 18, 2021, by which PMI Properties appeared to have conveyed the same property to Poly-Med, Inc. (R. 827.) Furthermore, Respondents' / Appellants' testimony at trial was that, through the 2021 conveyance, PMI Properties, LLC had transferred all of its property ownership in the Research Park to Poly-Med, Inc. (R. 434:19-435:22.) Therefore, the record is not immediately clear whether, as of the time of trial, PMI Properties, LLC was a property owner within the Research Park, or whether Poly-Med, Inc. was a property owner.

In July 2021, Respondents / Appellants commenced this civil action against RPLLC for the following: (a) breach of restrictive covenants; (b) conversion; (c) unjust enrichment; (d) an accounting; and (e) for a permanent injunction. (R. 73.) In general, Respondents' / Appellants' claim can be reduced to three different allegations: (i) that RPLLC had failed to designate common-area property within the Research Park, had failed to create a property-owners' association, and had failed to transfer common-area property to the property-owners' association, all in derogation of obligations established by the Covenants; (ii) that RPLLC intended to sell property within the Research Park to types of buyers who, under the Covenants, were not qualified to be property owners; and (iii) that RPLLC had collected annual maintenance fees from property owners, and had expended a portion of those fees, in ways that violated the Covenants. It is appropriate at this juncture to briefly address each of these assertions.

It was Respondents' / Appellants' position that the Covenants expressly imposed a present obligation on RPLLC, (as successor to the Authority), to designate certain property within the Research Park as a common area, to create a property-owners' association, and

to convey the common areas to the property-owners' association. These assertions are belied by the plain language of the Covenants. The Covenants explain that the Authority (or its successor) need not establish a property-owners' association "until such time as the Authority is ready to convey Common Areas to it." (R. 739-40 at § 1.) This may not happen until the "earlier [of] five (5) years after the date of recordation of [the Covenants] and after that date, not 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. (R. 733.) However, "[t]he Authority [is required to] convey all Common Areas to the Association no later than ninety (90) days after the date of closing the sale of the last Parcel in the Park." (R. 732.) It is undisputed that RPLLC (as the Authority's successor) continues to own property in the Research Park.

It was also Respondents' / Appellants' position that the Covenants expressly prohibited RPLLC from selling any Park property to any person unless that "person or entity . . . at all times maintain[ed] in its employment a minimum of 15% of its employees as scientists or engineers." (R. 735-36 at § 2.) This assertion is not exactly what the pertinent provision of the Covenants require. But it is also irrelevant; RPLLC denied the allegation, and there was no evidence at trial that RPLLC was in breach—or in imminent breach—of this provision.

Finally, and of critical importance to these appellate proceedings, it was Respondents' / Appellants' position that RPLLC (as successor to the Authority) could only collect an amount of annual maintenance fee as contemplated by the Covenants in an amount that was necessary to pay for "maintenance and upkeep." Following is the relevant portion of the Covenants pertaining to maintenance fees:

> Section 1. Maintenance Fee to the Authority. Prior to the conveyance of any portion of the Property to the Association as Common Area, each Owner shall pay the Authority a maintenance fee for the maintenance and upkeep of the Park. The fee shall be computed on the basis of $300.00 per acre per annum and it shall be payable in advance in equal monthly installments. The per acre fee of $300.00 shall be for the calendar year 1986. It shall increase by 10% compounded annually each year until the Authority conveys any portion of the Property to the Association as Common Area, after which conveyance this maintenance fee shall terminate and the Owner's sole liability and responsibility shall be to pay whatever Assessments are due the Association. In any year, the Authority may reduce this fee in its sole discretion.

(R. 743 at § 1.) Furthermore:

> The maintenance, repair, upkeep and operation of the Common Areas shall be the responsibility of the Association after the conveyance of any Common Areas to the Association by the Authority and shall be paid for by the Association as a common expense. Until the conveyance of any Common Area to the Association, the sole responsibility for maintaining the Park, except for Parcels sold to Owners, shall be that of the Authority and the sole obligation of any Owner, other than the Authority, shall be to pay the maintenance fee to the Authority as provided herein.

(R. 751-52.)

Under these provisions, and to put a finer point on the position taken by Respondents / Appellants: (i) regardless of the $300.00 per acre per annum calculation, the Covenants prohibit the Authority (or its successor) from imposing any amount of annual maintenance fee greater or different than the expense actually incurred for "maintenance and upkeep;" (ii) the phrase "maintenance and upkeep" is narrowly confined to preservation of existing physical assets; and (iii) neither the Authority nor its successor may spend any amount of maintenance fees collected from Park property owners for any purpose other than preservation of existing physical assets. RPLLC disagreed (and continues to disagree) with each of these assertions.

Prior to trial, and by Form 4 dated July 18, 2023, the court entered an order reflecting that "all parties have agreed to have an accounting and to jointly pick a qualified accountant." (R. 6.) Accordingly, at the outset of trial, the remaining causes of action which Respondents / Appellants were continuing to pursue were: (a) breach of restrictive covenants; (b) conversion; (c) unjust enrichment; and (d) for a permanent injunction. Then, at trial (which was held without a jury over October 10 & 11, 2023), counsel for Respondents / Appellants made an oral motion, which was granted, to formally amend their pleadings to supplement their action for breach of restrictive covenants with the allegation that the Covenants require RPLLC to designate property within the Research Park as "Common Areas," and to convey such "Common Areas" to a property owners' association within a reasonable period of time. (R. 578:18-25.)

After the close of Respondents' / Appellants' case-in-chief, RPLLC made a motion for involuntary nonsuit under Rule 41(b), SCRCP, which was granted as to the action for unjust enrichment only. (R. 535:1-539:21.) This was necessary because any equitable relief that could have been available to Respondents / Appellants on the claim presented would have been precluded by the availability of legal remedies.

RPLLC had also brought counterclaims against Respondents / Appellants, alleging that each was in breach of the restrictive covenants: (a) with respect to the unauthorized placement of temporary office trailers upon their property; and (b) for failure to make payment of annual maintenance fees. (R. 134-137 at ¶¶ 102-19.) However, during trial, RPLLC voluntarily withdrew the portion of its counterclaim regarding the non-payment of annual maintenance fees. (R. 626:17-627:10.)

Accordingly, at the conclusion of trial, the matters that were submitted to the trial court for adjudication were: (a) Respondents' / Appellants' action for breach of restrictive covenants; (b) Respondents' / Appellants' action for conversion; (c) Respondents' / Appellants' action for a permanent injunction; and (d) RPLLC's counterclaim for breach of restrictive covenants.

As indicated by the Statement of the Case, above, following trial, the procedural history of this case became exceedingly complicated. The undersigned will endeavor to distill the tortured post-trial history of this case down to its most critical components, focusing instead on what was ultimately decided (and therefore, what is ultimately before this Court):

1. With respect to the action for conversion, the trial court initially found in favor of Respondents / Appellants, that RPLLC was liable for conversion. However, during the course of post-trial litigation, the trial court reconsidered its decision, reversed itself, and held that RPLLC could not be liable for conversion on the claim presented as a matter of law, (R. 71);
2. With respect to Respondents' / Appellants' request for injunctive relief, this was denied, (id.);
3. With respect to RPLLC's counterclaim for breach of the restrictive covenants, the trial court found in favor of RPLLC and all Respondents / Appellants were ordered to remove certain temporary trailers that had become noncompliant according to a timeline that remains under judicial supervision, (id.); and,
4. With respect to Respondents' / Appellants' action against RPLLC for breach of the Covenants:

a. The court held that RPLLC had an "unambiguous right" established by the Covenants to charge and collect an amount of annual maintenance fee to the extent the fee was calculated in a manner not inconsistent with the calculation method established by the Covenants. That is, as long as the annual maintenance fee imposed by the Authority (or its successor) is $300.00 per acre per annum (compounded by 10% annually since 1986) or less, the imposition of the fee is proper, (R. 8 & R. 37);

b. The court further held that the Covenants prohibit the Authority (or its successor) from using any amounts collected from property owners for annual maintenance fees for any purpose other than "maintenance and upkeep" of existing physical assets, and expressly limited the types of permissible expenses to landscaping, power, and water, (R. 8 & R. 36);

c. The trial court rested its construction of "maintenance and upkeep" on the implied covenant of good faith and fair dealing, despite the fact that Respondents / Appellants had not raised this theory at any point in the litigation, including trial, (R. 8 & R. 37);

d. The court awarded damages in favor of Respondents / Appellants in the amount of $74,001.41, (R. 39); and,

e. The court imposed attorneys' fees against RPLLC in the amount of $163,644.25, (R. 71).

These appellate proceedings followed.

ARGUMENT

This appeal presents several critical errors in the trial court's interpretation and application of the Covenants governing the Research Park, each of which independently warrants reversal or remand. First, the trial court erroneously narrowed the permissible uses of "maintenance fees" by creating a restriction—ordinary physical asset preservation—that appears nowhere in the Covenants. It then found in favor of Respondents / Appellants on a legal theory that was neither pleaded nor pursued at trial, resulting in a damages award that Respondents / Appellants were not legally competent to receive. Second, the court compounded these errors by adopting an internally inconsistent position: recognizing RPLLC's unambiguous contractual right to charge the maintenance fee, while simultaneously ordering a refund of collections not used in accordance with its judicially imposed limitation. Third, the court awarded attorneys' fees to Poly-Med, Inc., a party that—based on judicial admissions in the pleadings—was not an "Owner" and lacked standing to enforce the Covenants or recover fees under their terms. Fourth, even assuming Poly-Med was properly before the court, the fee award remains without legal basis under the Covenants, as Respondents / Appellants prevailed only on an equitable accounting—agreed to by RPLLC—and on a sua sponte claim for breach of the implied covenant of good faith and fair dealing, which was never pleaded or litigated. Fifth, the attorneys' fee award is unreasonable and disproportionate, given the limited success achieved and the court's failure to allocate fees between successful and unsuccessful claims. Finally, the trial court erred in failing to award attorneys' fees to RPLLC as the prevailing party on its counterclaim to enforce the Covenants—an omission that should be corrected on remand if RPLLC prevails in this appeal.

I. THE TRIAL COURT ERRED IN CONCLUDING THAT RPLLC BREACHED A DUTY OF GOOD FAITH AND FAIR DEALING IN ITS ADMINISTRATION OF THE COVENANTS.

The Covenants expressly provide for the collection of maintenance fees by the Authority (now RPLLC) for the "maintenance and upkeep of the Park" and contain no language limiting the permissible expenditures to physical repairs or common areas. The trial court's narrowing construction is inconsistent with the Covenants' text, structure, and purpose, and violates settled principles of contract interpretation, the business judgment rule, and the limitations on the implied duty of good faith and fair dealing as articulated by the South Carolina Supreme Court. Accordingly, the judgment below must be reversed.

A. The Relevant Portion of the Orders from which Appeal Is Taken

Section II.A of the trial court's decision of February 29, 2024 addresses "Maintenance Fees" under the Covenants. (R. 33-37.) The decision begins with an observation that the Covenants do not expressly define the purposes for which "maintenance fees" may be used, but that "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" imply the purposes that are permissible uses of "maintenance fees" collected. The trial court proceeded to hold that "maintenance fees" under the Covenants may be used only for "ordinary physical repairs to keep the common areas in good condition." (R. 36.) Ultimately, the trial court concluded that RPLLC's use of "maintenance fees" collected through the Covenants for anything other than "ordinary physical repairs" to the Research Park's "common areas" constitutes a breach of the implied covenant of good faith and fair dealing, and "possibly" a breach of fiduciary duty. (R. 37.)

B. Standard of Review

With respect to the trial court's determination that RPLLC is liable under a theory of a breach of the implied duty of good faith and fair dealing, the relief sought by Respondents / Appellants—and the remedy provided by the court—was monetary damages. Accordingly, even though the underlying action is one involving restrictive covenants on real estate, which may implicate an equitable standard of review, the fact that the relief sought and awarded is damages would suggest that the issues involved in this portion of the appeal are ones that arise at law. See, e.g., O'Shea v. Lesser, 308 S.C. 10, 14, 416 S.E.2d 629, 631 (1992).

"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. The trial judge's findings of fact will not be disturbed on appeal unless found to be without evidence which reasonably supports the judge's findings." J&W Corp. v. Broad Creek Marina of Hilton Head, LLC, 441 S.C. 642, 664, 896 S.E.2d 328, 340 (Ct. App. 2023) (citation omitted). However, with respect to questions of law, the proper standard of review is effectively de novo. See, e.g., Hunt v. South Carolina Forestry Comm'n, 358 S.C. 564, 569, 595 S.E.2d 846, 848-49 (Ct. App. 2004) (citations omitted).

C. The Contents of the Covenants

In relevant part, the Covenants provide as follows:

> Section 1. Maintenance Fee to the Authority. Prior to the conveyance of any portion of the Property to the Association as Common Area, each Owner shall pay the Authority a maintenance fee for the maintenance and upkeep of the Park. The fee shall be computed on the basis of $300.00 per acre per annum and it shall be payable in advance in equal monthly installments. The per acre fee of $300.00 shall be for the calendar year 1986. It shall increase by 10% compounded annually each year until the Authority conveys any portion of the Property to the Association as

> Common Area, after which conveyance this maintenance fee shall terminate and the Owner's sole liability and responsibility shall be to pay whatever Assessments are due the Association. In any year, the Authority may reduce this fee in its sole discretion.

(R. 743.)

This provision contains several defined terms. The term "'Authority' shall mean and refer to South Carolina Research Authority, its successors and assigns." (R. 729.) The term "'Owner' shall mean and refer to a person or entity which owns fee simple title to any Parcel, which shall include the Authority." (R. 730.)

The terms "'Property' and 'Park' shall mean and refer to that certain real property described on Exhibit A attached hereto, together with any improvements thereon, together with such Additional Property and any improvements thereon, which the Authority may, in its sole discretion, elect to subject to the terms and conditions of this Declaration." (Id.) In short, "Property" and "Park" refer to the entirety of the Clemson Research Park development.

The term "'Parcel' shall mean and refer to any lot(s) or parcel(s) of land, or subdivisions thereof, in the Park, as shown on plats recorded by the Authority together with any improvements thereon, which are designated and intended by the Authority to be sold to Owners or leased to tenants; provided, however, that a Parcel shall not include any Common Area, or any roads, rights-of-way or other area(s) dedicated to the public use." (Id.)

The term "'Association' shall mean and refer to Clemson Research Park Owner's Association, Inc., a South Carolina not-for-profit corporation." (R. 729.) And the term "'Common Area' shall mean and refer to all portions of the Property, if any, (1) which may have recreational facilities constructed thereon; (2) which may be designated by the

Authority for the common use and enjoyment of the Owners; (3) which is separately platted; and (4) which is conveyed to the Association." (Id.)

The Covenants also establish when the Authority may, and must, turn "Common Area" property over the Association. "The Authority shall convey all Common Areas to the Association no later than ninety (90) days after the date of closing the sale of the last Parcel in the Park." (R. 732.) Furthermore, "[t]he Authority may convey Common Areas to the Association at any time and from time to time without notice or approval by the Association . . . ." (R. 731.) However, "[n]o part of the Property shall be conveyed to the Association as Common Area earlier than five (5) years after the date of recordation of this Declaration and after that date, not 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." (R. 733.)

"The Association shall be fully and solely responsible and liable for the operation, maintenance and repair of all Common Areas immediately upon the recordation of the deed conveying them to the Association." (R. 732.) However, "[u]ntil the conveyance of any Common Area to the Association, the sole responsibility for maintaining the Park, except for Parcels sold to Owners, shall be that of the Authority and the sole obligation of any Owner, other than the Authority, shall be to pay the maintenance fee to the Authority as provided herein." (R. 751-52.)

The maintenance fee regime established by the Covenants is, therefore, quite simple:

(1) Once any Common Area is conveyed to the Association, the Association becomes responsible for the "maintenance, repair, upkeep and operation of

the Common Areas," which shall be "paid for by the Association as a common expense" through the mechanism of "Assessments," (R. 744-45, 751), and the Owners' obligation to pay "maintenance fees" to the Authority ceases, (R. 74; R. 751-52);

(2) Until that time, however, each Owner is responsible for paying the "maintenance fees" imposed by the Covenants to the Authority, (R. 743).

There is no dispute that RPLLC is successor to the Authority; nor is there any dispute that any conveyance of property has been made to the Association—no such conveyance has happened. Accordingly, the Park remains under the regime by which Owners are responsible for paying the annual maintenance fee established by the Covenants, and that fee is payable to RPLLC.

Which leads to the question that is central to this appeal: *What restrictions, if any, are imposed on the Authority (or its successor) with respect to the permissible uses of funds collected from Owners as "maintenance fees"?*

D. The Trial Court's Definition of "Maintenance Fee"

The term "maintenance fee" is not expressly defined anywhere in the Covenants. Accordingly, to adjudicate the claims and defenses raised in proceedings below, the trial court perceived it was necessary to construe the term "maintenance fee."

Restrictive covenants are contractual in nature. See, e.g., Penny Creek Assocs., LLC v. Fenwick Tarragon Apartments, LLC, 375 S.C. 267, 271, 651 S.E.2d 617, 620 (Ct. App. 2007). Accordingly, restrictive covenants are subject to the same rules of construction that are applied to contracts generally. See, e.g., Houck v. Rivers, 316 S.C. 414, 416, 450 S.E.2d 106, 108 (Ct. App. 1994). "[T]he paramount rule of construction is

to ascertain and give effect to the intent of the parties as determined from the whole document." Taylor v. Lindsey, 332 S.C. 1, 4, 498 S.E.2d 862, 863-64 (1998). "Words of a restrictive covenant will be given the common, ordinary meaning attributed to them at the time of their execution." Id., 332 S.C. at 4, 498 S.E.2d at 863.

"If [a contract's] language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect." Bluffton Towne Ctr., LLC v. Gilleland-Prince, 412 S.C. 554, 570, 772 S.E.2d 882, 891 (Ct. App. 2015) (internal citation omitted). "[A] court has no authority to rewrite a contract and impose unwanted obligations and terms under the guise of specific performance or judicial construction." Lowcountry Open Land Trust v. Charleston S. Univ., 376 S.C. 399, 411, 656 S.E.2d 775, 781 (Ct. App. 2008). Importantly:

> It is not the province of the court to alter a contract by construction or to make a new contract for the parties; its duty is confined to the interpretation of the one which they have made for themselves, and, in the absence of any ground for denying enforcement, to enforcing or giving effect to the contract as made, that is, to enforce or give effect to the contract as made without regard to its wisdom or folly, to the apparent unreasonableness of the terms, or to the fact that the rights of the parties are not carefully guarded, as the court cannot supply material stipulations or read into the contract words which it does not contain so as to change the meaning of words contained in the contract.

McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 33 S.E.2d 501, 510 (1945) (quoting 17 C.J.S., Contracts, § 296).

In short, South Carolina courts are obliged to enforce restrictive covenants just as they are written, unless they are indefinite or contravene public policy. See, e.g., Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 270, 363 S.E.2d 891, 894 (1987).

With respect to the instant proceedings, the trial court did not find any aspect of the Covenants to be ambiguous. Instead, the court's analysis focused solely on the following phrase found in Article VI, § 1, of the Covenants: "[E]ach Owner shall pay the Authority a maintenance fee for the maintenance and upkeep of the Park." (R. 34.) Neither "maintenance" nor "upkeep" are defined in the Covenants. This led the court to consider dictionary definitions of the terms "maintenance" and "upkeep," in order to conclude that "'maintenance and upkeep' is limited to ordinary physical repairs to keep the common areas in good condition." (R. 36.) The court then, in reliance on this definition, held that no part of the "maintenance fee" may be used for any purpose other than physical maintenance and upkeep of the Park.

E. The Error of the Trial Court's Definition of "Maintenance Fee"

In its interpretation of the terms "maintenance" and "upkeep," the trial court did three of the very things that courts are cautioned to refrain from doing: (1) the court injected a new material term into the contract—that is, the prohibition against "maintenance fees" being used for anything other than "physical repairs to keep the common areas in good condition;" (2) the court failed to appreciate the "maintenance fee" in light of the totality of provisions in the Covenants; and (3) the court rendered a definition of "maintenance fees" that is unreasonable in light of the purposes for which the Covenants were imposed, to the point of frustrating the clear intention of the Covenants.

To begin with, the limitation of "maintenance fees" to "physical repairs to keep the common areas in good condition" is inconsistent with the architecture of the Covenants. As discussed above, "common areas" is a defined term; such areas are not implicated by the Covenants unless and until the Authority designates Park property as "common area,"

creates an Association, and conveys such "common areas" to the Association, at which point the Association—not the Authority—is responsible for their preservation. Instead, and contrary to the court's decision, for as long as the Authority is empowered to collect the annual maintenance fee, the fee is "for the maintenance and upkeep of the Park" as a whole—not necessarily common areas only.

Second, the trial court's definition of "maintenance fees" is irreconcilable with the intention of the Covenants. The Covenants explain that the motivation for the restrictions is to "promote the development of high technology industries and research facilities" at the Park. (R. 730.) Until such time as Common Areas are conveyed to the Association, the responsibility for "maintenance, repair, upkeep and operation" of the Park is that of the Authority exclusively. (R. 751-52.) Certainly, preservation of physical assets is critical to the proper development of the Park. But proper development involves more than physical asset preservation. For example:

(1) The Covenants contemplate enforcement action to secure a party's compliance with the Covenants. (R. 757 at § 2.) If an Owner fails to pay its annual maintenance fee and the Authority is required to bring collection action, is it not appropriate for the Authority to use funds received through payment of maintenance fees to sustain the action?

(2) The Covenants require all plans and specifications for proposed development within the Park to be submitted to the Authority for prior written approval. (R. 752 at § 1.) In the event that the Authority must engage legal or design professionals to evaluate development plans, is it not appropriate for such expenses to be paid from maintenance fees collected?

(3) Under the Covenants, Owners are "solely responsible for maintaining [their] Parcel[s] and all improvements thereon." (R. 749-50.) But, if they fail to do so, the Authority is empowered to enter upon their premises "to repair, maintain and restore the Parcel and the buildings and improvements thereon." Until the costs of such work can be recovered from the non-compliant Owner, shouldn't such expenses be paid out of the annual maintenance fees?

There is no prohibition in the Covenants—anywhere—for the use of annual maintenance fees for these purposes. Yet they are ostensibly prohibited under the trial court's interpretation.

It is particularly interesting to consider this point in light of the responsibilities vested in the Authority and the Association. Both are tasked with the "maintenance, repair, upkeep and operation" of the Park. (R. 751-52.) The Authority has those responsibilities while the Park is under development; the Association acquires those responsibilities only once the Park has achieved a critical mass of property Owners sufficient to self-sustain its operations. (Id.) In any event, the trial court was apparently convinced that the Authority—through the Covenants—had reserved less governance and financial opportunity for itself than would ultimately be granted to the Association. For example:

(1) Article VI, § 2 of the Covenants sets out a long, yet non-exhaustive, list of expenditures that the Association may pay for through Assessments levied against Owners. These enumerated categories of expense are:

a. Expenses of management;
b. Taxes and special assessments;
c. Premiums for all insurance that the Association is required or permitted to maintain;
d. Repairs and maintenance;

e. Wages for Association employees, including fees for a Manager (if any);
f. Utility charges;
g. Legal and accounting fees;
h. Any deficit remaining from a previous period; and,
i. Creation of a reasonable contingency reserve, surplus, and/or sinking fund.

(2) Article V, § 8 of the Covenants allows the Association to hire a professional manager or management company;

(3) Article V, § 9 requires the Association to procure liability insurance, which shall also ensure the Authority; and,

(4) Article Article VI, § 4, authorizes the Association to establish a reserve fund.

Nowhere do the Covenants prohibit the Authority from engaging in such activities, or from using maintenance fees collected under the Covenants for the costs of their expense. Yet they are prohibited under the trial court's interpretation.

As discussed above, once Common Areas are conveyed to the Association, the Authority's power to collect annual maintenance fees ceases, and is replaced by the Association's power to impose Assessments. If there is a principled distinction between the uses that the Authority can make of maintenance fees collected for the development of the Park and the uses that the Association can make of Assessments once the Park is developed, that distinction is not only elusive, it is nowhere to be found in the Covenants.

Nor is there support anywhere in the Covenants for the proposition that maintenance fees can be used only for ordinary physical asset preservation. To put a finer point on the limitations imposed, the trial court limited RPLLC's ability to use maintenance fees to landscaping, power, and water. In order to reach this decision, the trial court relied

upon the definition of "maintenance" supplied by Merriam Webster. However, according to Black's Law Dictionary, among the acceptable definitions for "maintenance" is "[t]he care and work put into property to keep it operating and productive." Black's Law Dictionary, 7th ed.; see also McDonald v. City of Portland, 239 A.3d 662, 670 (Me. 2020); Canal Barge Co. v. Commonwealth Edison Co., 2002 WL 1264002, at *4-6 (N.D. Ill. June 3, 2002) (unpublished decision) (giving extensive discussion to the commonly understood meaning of "maintenance"). Accordingly, it is RPLLC's understanding that its authority to engage in "maintenance" and "upkeep" of the Park empowers it to do anything that is necessary, proper, or appropriate, in its sound discretion, to put care and work into the property so as to continue its operations and productivity in a good condition.[4]

Without a doubt, both parties can—and did—find credible sources of authority to support their individual perspectives on the opportunities and limitations on the uses of maintenance fees collected under the Covenants. But those interpretations are useful only to the extent that they fit within the context, meaning, and purposes of the Covenants as a whole. The trial court's limitations on the use of maintenance fees collected, arrived at through its interpretation of "maintenance and upkeep," is not in harmony with the Covenants, and constitutes error.[5]

[4] This implicates the business judgment rule, which generally holds that a discretionary business decision should not be set aside by the court unless the decision made is outside of the decision-maker's authority and was a product of the decision-maker's corrupt motives. See, e.g., Fisher v. Shipyard Vill. Council of Co-Owners, Inc., 415 S.C. 256, 270-71, 781 S.E.2d 903, 910-11 (2016) (citations omitted). (See also discussion, below, in § I.F.)

[5] It is also inconsistent with the business judgment rule.

F. The Application of the Duty of Good Faith and Fair Dealing

Respondents / Appellants advanced a number of theories which, they asserted, amounted to a breach of RPLLC's duties under the Covenants. Those allegations were:

(1) That RPLLC has marketed, offered, and attempted to sell Park Property "to persons that do not and would not qualify as Owners under the Covenants." (R. 81 at ¶¶ 44-47.)

(2) That RPLLC has failed to create an Association, as required by the Covenants. (R. 551:25-555:18.)

(3) That RPLLC has failed to designate any Park Property as "Common Area," as required by the Covenants. (Id.)

(4) That RPLLC has failed to convey any "Common Area" Park Property to the Association. (Id.)

(5) That RPLLC's imposition and collection of annual Maintenance Fees was improper under the Covenants. (R. 80 at ¶ 43.)

(6) That RPLLC's expenditures of annual Maintenance Fees was improper under the Covenants. (Id.)

Respondents / Appellants did not prevail under any of these expressly asserted theories of breach. Instead, and as explained by the Orders from which appeal is taken, the sole narrow ground on which Respondents / Appellants prevailed was under the implied duty of good faith and fair dealing, and only as to RPLLC's expenditures of Maintenance Fees.

At the outset, it must be noted that the first time the implied duty of good faith and fair dealing was raised in the litigation was in the trial court's initial decision of November 6, 2023. Good faith and fair dealing was not alleged anywhere in the Complaint; it was

not raised at any time at trial; and at trial, Respondents / Appellants did not seek to amend their pleadings to include such a theory. Good faith and fair dealing was raised for the first time by the court, sua sponte, weeks after the conclusion of trial.

The undersigned is mindful of the law in South Carolina regarding good faith and fair dealing, that it is not a cause of action that is independent from an action for breach of contract. See, e.g., RoTec Servs., Inc. v. Encompass Servs., Inc., 359 S.C. 467, 471-73, 597 S.E.2d 881, 883-84 (Ct. App. 2004). But the undersigned is not aware of any authority to suggest that a party may prevail in an action for breach of contract with respect to the implied covenant of good faith and fair dealing without ever raising it.

Perhaps the closest case on this point in South Carolina is found in the unpublished decision of Baril v. Aiken Regional Medical Centers. 2005 WL 7083683 (S.C. Ct. App. Apr. 19, 2005). Baril was an action involving an alleged breach of an employment contract. The opinion indicates that, in the context of the primary breach of contract action, the jury was also charged on the implied covenant of good faith and fair dealing. Following an award in plaintiff's favor, defendant appealed, contending that the jury should never have been charged on the implied covenant because it was not pleaded as a separate cause of action. This argument was rejected by the Court of Appeals, which held that the decision in RoTec Services—that it is improper to plead separate causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing—was dispositive; that is, there is no independent cause of action for breach of the implied covenant of good faith and fair dealing that must be pleaded separately. The RoTec opinion seems to leave an open question, though: *Even if there is no independent cause of action for breach of contract for breach of the implied covenant of good faith and fair dealing*

that may be separately pleaded, can a party prevail on such a claim even if it is not raised anywhere in the complaint, including the allegations in support of the breach of contract action? Or, is it the case that a party can merely plead a breach of contract, make no mention of a breach of the implied covenant of good faith and fair dealing, and nonetheless prevail on that theory? Both fairness and Rule 8, SCRCP, would seem to require that the allegation of a breach of the implied covenant of good faith and fair dealing be raised at some point in the litigation, prior to the close of evidence, in order for a party to prevail on that theory.

Perhaps that's only an academic question. After all, even if Respondents / Appellants had asserted a legally cognizable claim for relief under a theory of breach of the implied duty of good faith and fair dealing, they would still not be entitled to relief as a matter of law. It is axiomatic that a party cannot proceed on a claim of breach of the implied duty of good faith and fair dealing, let alone prevail, if that party is itself in breach of the very contract sued upon. See, e.g., Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 487, 514 S.E.2d 126, 135 (1999) (citing Parks v. Lyons, 219 S.C. 40, 48, 64 S.E.2d 123, 126 (1951)); see also John Deere Constr. & Forestry Co. v. N. Edisto Logging, Inc., 443 S.C. 424, 446, 904 S.E.2d 889, 900-01 (Ct. App. 2024). In this case, the trial court expressly found that Respondents / Appellants were, themselves, in breach of the Covenants. (R. 38 at § II.C.) That fact alone is preclusive of Respondents' / Appellants' ability to prevail on a theory of breach of the implied duty of good faith and fair dealing under the Covenants.

Additionally, an action for breach of duty of good faith and fair dealing is not an appropriate vehicle to challenge a party for doing what the provisions of a contract give

him the right to do. See, e.g., Adams v. G.J. Creel & Sons, Inc., 320 S.C. 274, 465 S.E.2d 84 (1995). In the instant case, the trial court interpreted the Covenants to mean that RPLLC could only spend maintenance fees for "ordinary physical repairs to keep the common areas in good condition." (R. 36 at § II.A.) The court went on to hold that any of RPLLC's uses of maintenance fees for any purpose other than landscaping, power, and water was prohibited. There are no such restrictions in the Covenants. In fact, nowhere do the Covenants impose any restrictions, limitations, or qualifications on the use of maintenance fees whatsoever.

At trial, during a phase in which motions were being argued, the following exchange occurred between the court and counsel:

THE COURT:	So my understanding is you argument [sic] is that the payment of these monies is required. But once we get them, I can go out and buy a new car. I can do anything I want to with them because the covenants don't say anything about it. Is that your argument?
MR. BUCKINGHAM:	On the claims that have been presented, yes, Your Honor, that is my argument.

(R. 542:21-543:3.)

The undersigned appreciates that his response may have been unsatisfying to the trial court. But it is the answer that the law compels. As discussed above, by the time of trial, no one—not Respondents / Appellants, and not the court—had raised the implied covenant of good faith and fair dealing as an issue in the litigation; it was Respondents' / Appellants' contention that the express language of the Covenants precludes RPLLC from using maintenance fees for anything other than ordinary physical asset maintenance. And the Covenants simply don't say that. Regardless, after trial, the court proceeded to invoke

the doctrine of the implied duty of good faith and fair dealing in order to establish a limitation on maintenance fee expenditures where none existed, precipitating these appellate proceedings.

In a relatively recent decision, our Supreme Court has clarified the law regarding the application of good faith and fair dealing to supply unexpressed terms of a contract. Road, LLC v. Beaufort County, 443 S.C. 11, 24, 902 S.E.2d 366, 372-73 (2024). Following is an extended excerpt from that decision:

> The implied covenant of good faith and fair dealing cannot create new contractual duties not already expressed or implied in the contract. See 17A Am. Jur. 2d, Contracts § 362 (2016) ("A duty of good faith must relate to performance of an express term of the contract and is not an abstract and independent term of a contract . . . ."). Rather, the implied covenant serves only to govern the manner in which parties to a contract enforce their existing contractual rights and carry out their existing contractual duties—express or implied. . . . The covenant may not be relied on to create new contractual duties not expressly stated or fairly implied in the contract itself.

Road, LLC, 443 S.C. at 24, 902 S.E.2d at 372-73 (internal citations omitted).

The Covenants do not place any limitations on RPLLC's ability to pay for expenditures out of the maintenance fees. Yet, though the implied duty of good faith and fair dealing, the trial court created new contractual requirements, proscribing the use of maintenance fees to only and exclusively ordinary physical asset preservation, which the court later defined as only and exclusively landscaping, power, and water. None of this can be squared with the Supreme Court's decision in Road, LLC.

Perhaps Respondents / Appellants will suggest that the limitation on expenditures may be "fairly implied" by the Covenants. If that were the case, it would be appropriate to question where in the Covenants it may be "fairly implied" that RPLLC's use of

maintenance fees is limited to ordinary physical asset preservation, or only to payment for landscaping, power, and water. The answer is simple: nowhere.

The error of the trial court's construction is further undermined by the business judgment rule. RPLLC, by virtue of its status as successor to the Authority, is vested by the Covenants with a great deal of discretion with respect to Park operations and development, including the matters of whether to develop the Park, how, and what expenses to incur. And, during the tenure of its administration, RPLLC has exercised its discretion to pay a number of Park expenses that are not within the tight ambit of ordinary physical asset preservation established by the trial court. That discretion should not be set aside by judicial action, unless it is shown that RPLLC acted outside of its authority and in furtherance of corrupt motives. See, e.g., Fisher v. Shipyard Vill. Council of Co-Owners, Inc., 415 S.C. 256, 270-71, 781 S.E.2d 903, 910-11 (2016) (citations omitted). No evidence of either was elicited at trial.

G. The reference to a breach of fiduciary duty is dicta.

In concluding that RPLLC was liable for a breach of the implied duty of good faith and fair dealing under the Covenants, the trial court casually observed that RPLLC could "possibly" have been liable for breach of fiduciary duty. (R. 738 at § II.A.) It is not clear why the court included this observation in its decision. Respondents / Appellants did not allege any such theory in their complaint. At trial, Respondents / Appellants sought and were granted leave to amend their complaint under Rule 15(b), SCRCP, to conform to the evidence; but that motion—according to Respondents' / Appellants' counsel—was limited to the assertion of a cause of action for breach of the Covenants "for the failure to designate [Park Property as Common Areas] and to transfer [that Property] to the [A]ssociation." (R.

578:18-25.) In short, neither the existence of a fiduciary duty owed by RPLLC by virtue of the Covenants, nor a breach of that duty, was ever at issue in the litigation. (R. 541:17-542:20.) Accordingly, the reference to a "possible" breach of fiduciary duty was improper, is dicta, and ought not be given any weight. See, e.g., Crocker v. Crocker, 281 S.C. 154, 157-58, 314 S.E.2d 343, 346 (Ct. App. 1984) ("A judgment or decree, whether in law or equity, must accord with and be warranted by the pleadings of the party in whose favor it was rendered.").

H. Section Concluding Statement

Consistent with the foregoing discussion, the trial court's conclusions regarding the permissible use of maintenance fees under the Covenants—and its resulting imposition of liability against RPLLC for breach of the implied covenant of good faith and fair dealing—cannot stand. The Covenants, by their plain terms, impose no restrictions on the use of maintenance fees beyond their general purpose for the "maintenance and upkeep of the Park," and certainly do not limit their application to physical repairs or common areas. The trial court's attempt to rewrite the Covenants under the guise of judicial interpretation exceeds the bounds of settled South Carolina contract law and undermines the Covenants' clear intent. Moreover, the invocation of an unpleaded theory of breach—raised sua sponte and post-trial—deprived RPLLC of the notice and opportunity to be heard that due process requires. Accordingly, this Court should reverse the trial court's judgment and enter judgment in favor of RPLLC.

II. THE TRIAL COURT ERRED IN HOLDING THAT RPLLC WAS OBLIGATED TO REIMBURSE ANY AMOUNT OF MAINTENANCE FEES PAID BY RESPONDENTS / APPELLANTS.

The Orders from which this appeal is taken are internally inconsistent. On the one hand, the trial judge found that RPLLC had the "unambiguous right," established by the Covenants, to charge and collect from Owners the annual maintenance fee established by the Covenants. But, on the other hand, the court proceeded to find that RPLLC had used maintenance fees collected for purposes other than ordinary physical asset preservation, and directed that RPLLC return all funds to Respondents / Appellants they had paid as maintenance fees that had not been used for ordinary physical asset preservation. It is therefore implicit in the trial court's decision that RPLLC did not have the "unambiguous right" to charge and collect the maintenance fee as established by the Covenants, but could only charge and collect a maintenance fee that was commensurate with the expenses for ordinary physical asset preservation. Which is problematic.

First of all, the Covenants expressly state the manner by which the Authority shall calculate the annual amount of the Maintenance Fee; it is a straightforward mathematical equation: (1) the fee is $300.00 per acre per year starting with the year 1986; and (2) the fee escalates by ten percent (10%) each year thereafter, compounded annually. So, for calendar year 2025, and as expressly contemplated by the Covenants, RPLLC could require Park Owners to pay $12,343.00 per acre owned per year; for calendar year 2026, that amount would increase to $13,578.00. RPLLC doesn't impose such exorbitant fees—not even close. (R. 375:1-376:2.) The Covenants give RPLLC the discretion to reduce the amount of the maintenance fee in any given year. And, consistent with that authority, RPLLC charges Park Owners $600.00 per acre owned, and has done so for the entirety of

its administration, which is the same amount that Park Owners have been charged for more than a decade. In any event, with respect to the payment of the annual maintenance fee, the Covenants are exceedingly clear: until such time as the Park is turned over to the Association, "the sole obligation of any Owner, other than the Authority, shall be to pay the maintenance fee to the Authority." (R. 751-52.)

Second, nowhere do the Covenants modify the calculation method of the maintenance fee. Nowhere do they suggest that the amount of the maintenance fee charged and collected from Park Owners is limited to RPLLC's actual or anticipated maintenance expenditures. The Covenants are simple: whatever the amount of the fee is, as long as it is no greater than $300.00 per acre per year compounded annually since 1986, that is the payment obligation of each Owner. Period.

This leads to the first problem with the Orders from which this appeal is taken. The trial court held that RPLLC has the "unambiguous right" to charge and collect the annual maintenance fee within the parameters of the Covenants, but then immediately contradicts itself to say that RPLLC must return all maintenance fees paid by Respondents / Appellants that were not used for ordinary physical asset preservation. In short, RPLLC does not have the "unambiguous right" to charge and collect the fee as provided by the Covenants. RPLLC's rights are limited by actual or expected costs of ordinary physical asset maintenance, and, to the extent maintenance fees collected are not used for such purposes, apparently they must be returned to the payee Owner.

Nowhere do the Covenants contemplate any of this. If it is, in fact, the policy of the judiciary to refrain from rewriting contracts for litigants, then this portion of the trial court's decision must be reversed.

Relatedly, there is no obligation in the Covenants for RPLLC to return any amounts of maintenance fees paid to Owners. The Covenants require Owners to pay maintenance fees to RPLLC. Assuming for the sake of argument that Owners are competent to challenge expenditures of maintenance fees incurred by RPLLC, and that a successful challenge to the use of funds were made, the recourse would be for RPLLC to reimburse the maintenance fee fund—not return funds to individual Owners.

III. THE TRIAL COURT ERRED IN CALCULATING HOW MUCH RESPONDENTS / APPELLANTS ARE ENTITLED TO WITH RESPECT TO A REFUND OF MAINTENANCE FEES PAID.

The trial court's award of $74,001.41 in damages to Respondents / Appellants is unsupported by the evidence and reflects serious methodological flaws. Most notably, the court based its calculation on unverified ownership percentages asserted by Respondents / Appellants, rather than relying on the uncontested findings of the jointly retained accounting expert, whose analysis was introduced into evidence without challenge. The court also adopted financial figures that diverge from those presented by the expert, without explanation, and excluded several categories of reasonable and historically accepted expenditures—such as management fees and administrative costs—that fall squarely within the operational scope of the Park. As a result, the damages award not only deviates from the factual record, but also rests on an erroneous interpretation of the Covenants and must be vacated.

A. The Relevant Portion of the Orders from which Appeal Is Taken

The trial court's initial decision of November 6, 2023 held that Respondents / Appellants were entitled to damages in the amount of $65,724.23. (R. 8.) The court did not explain how it arrived at this particular amount. However, in the more formal order of

February 29, 2024, the court held that Respondents / Appellants were entitled to damages of $74,001.41, calculated as follows:

Total Amount Paid by Respondents / Appellants as Maintenance Fee:	$101,902.25
Percentage of Property Owned by Respondents / Appellants:	
i. According to Respondents / Appellants' Assertions	
ii. Not Based on Actual Property Records	
iii. Excluding Property Owned by RPLLC	
iv. Accounting for Property Acquired on Oct. 15, 2019	
Prior to October 15, 2019:	16.58%
After October 15, 2019:	24.81%
Share of Landscaping & Utility Expenses Based on Property Ownership	
Prior to October 15, 2019	$3745.64
After October 15, 2019	$24,669.18
Landscape & Utility Subtotal	$27,900.84
Subtraction of Landscape & Utility Share from Total Amount Paid	$74,001.41

(R. 36-37.)

B. Standard of Review

The standard of review with respect to an award of damages arising from a trial conducted without a jury is limited to the correction of errors of law. See, e.g., Austin v. Specialty Transp. Servs., Inc., 358 S.C. 298, 310-11, 594 S.E.2d 867, 873-74 (Ct. App. 2004) (citations omitted). Under this standard, it is appropriate for the appellate courts to inquire into whether the types of damages awarded were legally capable of being awarded, whether there is evidence to support the award, and whether there was error in the computation of damages. See, e.g., McCall v. IKON, 380 S.C. 649, 659, 670 S.E.2d 695, 700-01 (Ct. App. 2008).

C. The error of the trial court's methods of calculation.

There are two fundamental problems with the method used by the trial court to calculate the damages award entered in favor of Respondents / Appellants: first, it is not

clear—at all—why the court would have relied on the mere assertions of Respondents / Appellants as to their ownership percentage of Property within the Park; and second, the amounts relied upon by the court were not consistent with the testimony and report of an accounting expert jointly retained by the parties. Each of these will be addressed, beginning with the expert's testimony.

On July 18, 2023, the trial court entered an order reflecting that the "parties have agreed to have an accounting and to jointly pick a qualified accountant." (R. 6.) The parties thereafter jointly engaged Tamara S. Hannon, who is a CPA licensed by the State of South Carolina. (R. 797.) Ms. Hannon testified at trial, and her report was entered into evidence. Ms. Hannon's report explains that she was engaged to "provide a classification of deposits and disbursements of the maintenance account(s) of Research Park, LLC for the period of October 2018 through July 2023." (Id.) Following is a summary of her material conclusions:

Total Amount of Maintenance Fees Collected by RPLLC from All Owners	$340,289.82
Total Amount of Expenditures of Maintenance Fee Funds	$176,688.00
Difference between the Two	$163,601.82

(Id.; R. 465:10-470:11.)

Furthermore, Ms. Hannon found that, for the time-period at issue, Respondents / Appellants had paid a total of $96,516.32 in Maintenance Fees to RPLLC. Expressed as a percentage, Respondents / Appellants had paid 28.36% of all Maintenance Fees collected by RPLLC. Which leads to an important point: land doesn't pay any maintenance fees. The amount of Park Property owned will dictate how much of a maintenance fee obligation an Owner has. But, as the judges of this Court may fondly remember from their time in private practice, there is a dramatic difference between sending an invoice and getting paid.

Consequently, when it comes to maintenance fee collections, the amount of Property owned by any specific Owner matters far less than the amount the Owner has paid relative to all other Owners, particularly if other Owners are delinquent in payment. It is therefore confusing why the trial court would have rested any aspect of its damages calculation on the percentage of Property that Respondents / Appellants claim to own; the more reasonable and practical metric—by far—is the percentage of maintenance fee contributions attributable to Respondents / Appellants.

Furthermore, the specific dollar amounts relied upon by the trial court to calculate damages—which were supplied exclusively by Respondents / Appellants—are not quite the same as what Ms. Hannon found. For example, in reliance on the assertions of Respondents / Appellants, the trial court found that Respondents / Appellants had paid RPLLC a total of $101,902.25, (Respondents' / Appellants' Damages Calculation); Ms. Hannon found that it was only $96,516.32, (R. 465:24-466:6). There are other, slighter discrepancies in the amounts found by the trial court versus the amounts found by Ms. Hannon with respect to landscaping and utility payments.

In any event, Ms. Hannon found that, during the tenure of its administration of the Park, RPLLC had spent $120,222.90 on landscaping and utilities. Subtracting this amount from the total amount of maintenance fees collected from all Owners—$340,289.82—yields the sum of $220,066.92. And, when this amount is multiplied by the actual share of maintenance fees attributable to Respondents / Appellants—which is 28.36%—the amount of collected maintenance fees which had not been used for "maintenance and upkeep," as defined by the trial court, is $62,410.98. This is the amount of damages that the court

should have found, were it to have applied its definition of "maintenance and upkeep" in light of the actual expenditures found by Ms. Hannon.

But even this analysis is somewhat incomplete. The total amount of maintenance fee expenditures reflected in Ms. Hannon's report is actually $176,688.00. The discrepancy between this amount and the amount quoted above ($120,222.90) arises from the fact that RPLLC incurred additional expenses on behalf of Park administration which—by virtue of the trial court's construction of the phrase "maintenance and upkeep"—were not considered. Those expenses include items for insurance, taxes, advertising, bank service fees, merchant fees, and professional fees. Consistent with the trial court's ruling that maintenance fees could only be used for ordinary physical asset preservation, none of the other types of administrative fees could be considered. But that error has been discussed at length above.

For the immediate purposes of this discussion, it is important to consider how inclusion of additional types of expenditures—which ought to be considered as proper expenditures—would further affect the calculation of damages. As referenced above, the total amount of maintenance fee expenditures found by Ms. Hannon was $176,688.00. Subtracting that amount from total maintenance fees collected yields the sum of $163,601.82. Then, multiplying that amount by the percentage of contribution attributable to Respondents / Appellants results in a total of $46,397.48.

Even this doesn't tell the full story, though. None of the foregoing expenditures identified by Ms. Hannon includes amounts payable to RPLLC for management of the Park. It was Respondents' / Appellants' position at trial that RPLLC was not authorized by the Covenants to earn a management fee out of the maintenance fees collected.

Ultimately, the trial court adopted this position, despite the fact that nowhere do the Covenants prohibit the Authority from collecting a management fee, despite the fact that other, informative sections of the Covenants do contemplate the engagement of a manager—even a third-party manager, and despite the fact that the testimony at trial was that RPLLC's predecessor had charged and collected a management fee for its efforts to administer the Park, (R. 559:24-601:20).

In any event, RPLLC's representative testified at trial that RPLLC had budgeted a management fee of $1500.00 per month—$18,000.00 per year—for management services at the Park. (R. 387:15-388:11.) He further testified that, if RPLLC were to engage a third-party manager for the Park, he would expect the cost of that to be $2500.00 per month, or $30,000.00 per year. (Id.)

It is interesting to consider how the inclusion of these expenses would further modify the court's damages award. The period of Ms. Hannon's analysis was October 2018 through July 2023—fifty-seven months. Had RPLLC not been excluded from earning a management fee by the trial court's construction of "maintenance and upkeep," at $1500.00 per month, RPLLC would have earned $85,500.00; at $2500.00 per month, the amount would have been $142,500.00. Consequently, deducting these additional expenses from the total amount of maintenance fees collected would put the amount in controversy in this dispute to somewhere between $5000.00 and $25,000.00.

As a final observation, it is worth pointing out that none of the foregoing discussions of expenditures include any other types of ordinary, reasonable, and permissible uses of maintenance fees that were nonetheless excluded by the trial court's construction of "maintenance and upkeep," such as the creation of a capital reserve.

D. Section Concluding Statement

The trial court's determination that Respondents / Appellants are entitled to an award of $74,001.41 is simply unsupported by the evidence and is contrary to the undisputed testimony of the only accounting professional to provide an opinion in this case. Consequently, the trial court's award of damages must be vacated.

IV. THE TRIAL COURT ERRED IN ITS AWARD OF ATTORNEYS' FEES TO RESPONDENTS / APPELLANTS, AND IN FAILING TO AWARD RPLLC ITS ATTORNEYS' FEES.

The trial court's order of December 9, 2024 disposed of the pending motions for attorneys' fees. In relevant part, the order awarded $163,644.25 in attorneys' fees in favor of Respondent / Appellant Poly-Med, Inc. only, which was seventy-five percent (75%) of the total amount requested. (R. 66.)

A. Attorneys' Fees Awarded to Respondents / Appellants

As an initial matter, it was error for the trial court to make an award of attorneys' fees in favor of Poly-Med, Inc. In relevant part, the Covenants provide as follows:

> 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, provisions, or restrictive covenants of this Declaration, the prevailing party shall be entitled to his costs and disbursements and reasonable attorneys' fees in such suit or action and any appeal thereof.

(R. 748 at § 5.)

The complaint alleges that Poly-Med, Inc. leases its premises from co-parties Technology Drive 51, LLC, Technology Drive 52, LLC, and PMI Properties, LLC. (R. 79 at ¶ 28.) RPLLC admitted these allegations of the complaint. (R. 125 at ¶ 29.) However, at trial, Respondents' / Appellants' party representative testified that Poly-Med, Inc. is actually the owner of the property acquired by PMI Properties, LLC, but this is reflected only in an unrecorded deed. (R. 416:14-417:13.) Strangely, the unrecorded deed bears an

execution date of March 18, 2021, which is four months before the complaint was filed. It is mystifying that Respondents / Appellants would fail to accurately allege the ownership of their own properties, since that forms the basis for the assertion of the contractual rights they sued upon.

But that may be of little moment. "It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise. . . . Any allegations, statements, or admissions contained in a pleading are conclusive against the pleader, and a party cannot subsequently take a contrary or inconsistent position." Dawkins v. Sell, 434 S.C. 572, 582, 865 S.E.2d 1, 6 (Ct. App. 2021).

Respondents / Appellants pleaded that Poly-Med, Inc. was merely a lessee of the properties in suit; RPLLC admitted that allegation. Under the Covenants, only "[t]he Authority, the Association or any Owner shall have the right to enforce, by any proceeding at law or in equity, all restrictions, conditions, covenants, reservations, liens and charges now or hereafter imposed by the provisions of this Declaration." (R. 757 at § 2.) An "Owner" is "a person or entity which owns fee simple title to any Parcel." (R. 730 at § 1.6.) Respondents / Appellants never amended their pleadings to assert that Poly-Med, Inc. was an "Owner" for purposes of enforcing the Covenants, and are therefore bound by the judicial admission that Poly-Med, Inc. was not competent to bring suit under the Covenants. See, e.g., S. Cotton Oil Co. v. Bryant, 136 S.C. 453, 134 S.E. 508, 510 (1926). And, if Poly-Med, Inc. was not properly before the court as an Owner, then it should not have been entitled to any award of attorneys' fees. Indeed, as a matter of law, without standing to sue under the Covenants, Poly-Med, Inc. could not have been a prevailing party.

Assuming for the sake of argument only that Poly-Med, Inc. was properly before the court, it was still not entitled to an award of attorneys' fees. Attorneys' fees were available only by virtue of the Covenants, which provide that attorneys' fees shall be awarded to the party who prevails in an action "to enforce any of the terms, provisions, or restrictive covenants of this Declaration." (R. 748 at § 5.) Out of the five causes of action brought against RPLLC, Respondents / Appellants prevailed on only two: (1) the action for an accounting; and (2) the action for breach of the Covenants based on the duty of good faith and fair dealing.

With respect to the accounting cause of action, it is important to note that the Covenants do not expressly establish any right for a party who claims to be an Owner to demand an accounting from the Authority. In other words, there is no contractual basis for Respondents / Appellants to have sought or obtained an accounting from RPLLC. Accordingly, the trial court's authority to an award an accounting in favor of Respondents / Appellants must necessarily have been based on some other precept. And that basis is equity. See, e.g., Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 427, 673 S.E.2d 448, 453 (2009) ("An action for an accounting sounds in equity.").

This is exceedingly problematic for Respondents / Appellants. The undersigned has not been able to locate any pertinent authority to suggest that a party may be awarded contractual attorneys' fees for prevailing on a cause of action that is not established by the contract sued upon. In the instant case, and as noted above, the Covenants do not create a right to an accounting in favor of any Owner, and instead, make attorneys' fees available only with respect to actions "to enforce any of the terms, provisions, or restrictive

covenants of this Declaration." An accounting does not fall into any of those categories of enforcement.

With respect to the action for breach of the duty of good faith and fair dealing, this is also problematic for Respondents / Appellants. The Covenants say that attorneys' fees may be awarded to the prevailing party in an action "to enforce any of the terms, provisions, or restrictive covenants of this Declaration." As an initial observation, it is not immediately clear that this provision contemplates an award of attorneys' fees to a party that prevails on duties that are implied by the Covenants. See, e.g., Closson v. Bank of Am., N.A., C.A. No. 2:11-cv-275 (D. Nev. June 27, 2013) (unpublished decision) (citations omitted) (declining to award attorneys' fees to the prevailing party in an action for breach of the implied duty of good faith and fair dealing because "[t]he contract does not explicitly state that attorneys' fees may be recovered when defending an action brought under the same contract for breach of contract and breach of the implied covenant of good faith and fair dealing").

Perhaps more importantly, and as discussed above, none of the Respondents / Appellants were competent to proceed with, or prevail upon, an action for breach of the duty of good faith and fair dealing. That was the sole claim based on the Covenants on which Respondents / Appellants prevailed (even though it was never alleged or pursued by Respondents / Appellants). Regardless, since the trial court's disposition of the action for breach of the duty of good faith and fair dealing must be reversed as a matter of law, there would remain no valid legal basis on which to award any Respondent / Appellant contractual attorneys' fees, and the fee award must be vacated.

The final matter to address with respect to the award of attorneys' fees to Poly-Med, Inc. is the propriety of the amount. If a party becomes entitled to an award of attorneys' fees established by contract, the trial court is obligated to determine a "reasonable" amount to be awarded, which is a matter committed to the trial court's sound discretion. See, e.g., Brawley v. Richland County, 445 S.C. 80, 95, 911 S.E.2d 156, 164 (Ct. App. 2025). The reasonableness of an award is ordinarily guided with reference to six factors:

(1) The nature, extent, and difficulty of the case;

(2) The time necessarily devoted to the case;

(3) Professional standing of counsel;

(4) Contingency of compensation;

(5) Beneficial results obtained; and,

(6) Customary legal fees for similar services.

Burton v. York County Sheriff's Dep't, 358 S.C. 339, 358, 594 S.E.2d 888, 898 (Ct. App. 2004).

"The most critical factor is the degree of success obtained." Brawley, 445 S.C. at 164, 911 S.E.2d at 164 (citing Hensley v. Eckerhart, 461 U.S. 424 (1983)) (internal alteration omitted). This is a particularly important consideration, "especially where a plaintiff is deemed 'prevailing' even though he succeeded on only some of his claims for relief." Brawley, 445 S.C. at 96, 911 S.E.2d at 164 (citation omitted). As a first step, the court must determine whether the lawyer's time for which fees are sought were "reasonably expended" in the prosecution of the case, or whether the time reported is "excessive, redundant, or otherwise unnecessary." Id. Then, the court should consider whether the

moving party achieved a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award. Id.

In the instant case, the trial court did not engage in either of these analyses. The trial court's order of December 9, 2024 observes that counsel for Respondents / Appellants were seeking attorneys' fees for 619.6 hours, for a total of $218,192.33. (R. 65-66.) Although Respondents / Appellants had local counsel, most of the work was performed by their Massachusetts counsel. The case was not tried to a jury, and was concluded within a day-and-a-half of testimony. There were only six witnesses; thirty-eight documents were entered into evidence. Yet the totality of billing records submitted to the trial court for review consisted of more than seventy pages.

How?

To some extent, time and expense were incurred for Respondents' / Appellants' Massachusetts counsel to come to South Carolina. Certainly, hiring out-of-state counsel is Respondents' / Appellants' prerogative. But there is nothing so unique or extraordinary about this case that would have required the services of an attorney who possessed qualifications that could not be found among the members of the Bar of this State. Accordingly, it cannot be said that Respondents / Appellants "necessarily" incurred legal expense arising from the fact that its Massachusetts counsel had to travel to South Carolina, or from the fact that Respondents' / Appellants' Massachusetts counsel had to involve his South Carolina counsel in every material aspect of these proceedings, simply because that is what is required of counsel who appears pro hac vice. Respondents / Appellants made the decision to compound their legal expense by engaging counsel outside the State, and

the consequences of that decision are not a cost that in fairness ought to be borne by RPLLC.

But that only accounts for a portion of the legal expense for which an award was sought. There are still hundreds of hours that Respondents' / Appellants' counsel reported to the prosecution of this matter. And, assuming that every single moment of those remaining hours were "necessarily" incurred, it is appropriate to consider whether the results obtained justify the award of attorneys' fees rendered.

The trial court's December 9, 2024 order awarding attorneys' fees to Respondents / Appellants grants them seventy-five percent (75%) of the amount requested—$163,644.25. (R. 66.) Although the order is not entirely clear, it seems to be the court's reasoning that a twenty-five percent (25%) reduction of the amount sought was appropriate in light of the fact that Respondents / Appellants "did not prevail on all of their claims," and in light of the fact that RPLLC prevailed on its own action to enforce the Covenants. (Id.)

However, to say that Respondents / Appellants "did not prevail on all of their claims" is charitable. A more accurate statement would be that Respondents / Appellants did not prevail on any of their claims. In addition to the breach of contract action (which will be addressed in a moment), Respondents / Appellants brought suit against RPLLC for conversion, but did not prevail. They brought suit for unjust enrichment, and that was dismissed at trial. They brought suit for an accounting, but as reflected in the trial court's Form 4 of July 18, 2023, "all parties have agreed to have an accounting." (R. 6.) Respondents / Appellants brought a discrete cause of action for an injunction, and none was awarded (at least, not against RPLLC).

Which leads to the action for breach of the Covenants. It is not an exaggeration to say that Respondents / Appellants failed on each and every express basis on which their claim against RPLLC was predicated. Respondents / Appellants claimed:

(1) that RPLLC breached the Covenants by marketing, offering, and attempting to sell Park Property to persons that would not qualify as Owners under the Covenants, and did not prevail;

(2) that RPLLC failed to create an Association in derogation of their obligations under the Covenants, and did not prevail;

(3) that RPLLC failed to designate any Park Property as "Common Area" as required by the Covenants, and did not prevail;

(4) that RPLLC failed to convey "Common Area" property as required by the Covenants, and did not prevail;

(5) that RPLLC's imposition and collection of annual Maintenance Fees was improper under the Covenants, and did not prevail; and,

(6) that RPLLC's expenditures of Maintenance Fees collected was improper under the express terms of the Covenants, and did not prevail.

The only issue that Respondents / Appellants prevailed on was an issue they never raised: that RPLLC breached the implied duty of good faith and fair dealing by using maintenance fees for purposes other than paying for landscaping and utilities. Respondents / Appellants never pleaded that theory and never raised it at trial. The first time this theory was advanced was in the trial court's November 6, 2023 Form 4.

Accordingly, by the undersigned's count, on theories that were actually raised and litigated by Respondents / Appellants, they are 0-and-10. However, with the benefit of the

court raising breach of the implied duty of good faith and fair dealing after trial—and then ruling in favor of Respondents / Appellants on that issue, Respondents / Appellants are 1-and-10.

All of this leads to the specific issue immediately before this Court, whether the results obtained by Respondents' / Appellants' counsel—in obtaining a judgment for $74,001.41 on a theory of liability that was never asserted in a case that took less than two days to try—justifies an award of attorneys' fees of more than two-times actual damages.

B. It was an abuse of discretion to not award attorneys' fees to RPLLC.

As discussed in the preceding section, the Covenants require the trial court to make an award of attorneys' fees in favor of the Authority when the Authority is the prevailing party in an action brought to enforce the Covenants. (R. 748 at § 5.) In the instant action, RPLLC brought a counterclaim against Respondents / Appellants for their own violation of an express provision of the Covenants, and RPLLC prevailed. Therefore, according to the Covenants, the trial court should have made an award of attorneys' fees in RPLLC's favor. It did not. And that may be particularly problematic if the trial court's decisions in favor of Respondents / Appellants is reversed in these appellate proceedings, leaving RPLLC as the sole prevailing party, in which case a remand to the trial court to make findings of fact to support an award of attorneys' fees in RPLLC's favor would be necessary.

CONCLUDING STATEMENT

Appellant / Respondent respectfully requests a decision from the Court of Appeals which reverses and/or vacates the trial court's orders from which appeal is taken for any of the foregoing reasons or any basis that may appear from the record, remands the case for further proceedings consistent with such decision, and provides for such other and further relief as the Court deems just and proper.

Respectfully,

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September 3, 2025
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SC Court of Appeals

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. 2024-002150

Poly-Med, Inc., Technology Drive 51, LLC, Technology Drive 52, LLC, and PMI Properties LLC . . . . . Respondents / Appellants,

v.

Research Park, LLC . . . . . Appellant / Respondent.

CERTIFICATION OF CONFORMITY

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The undersigned counsel for Appellants hereby certifies that the Final Brief to which this Certification is attached complies with Rule 211(b), SCACR.

Respectfully submitted,

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