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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.

APPELLANT'S / RESPONDENT'S FINAL REPLY BRIEF

Steven Edward Buckingham (S.C. Bar No. 0075089)
The Law Office of Steven Edward Buckingham
114 Poinsett Highway / Suite D
Greenville, South Carolina 29609
(o) 864.735.0832
(e) seb@buckingham.legal

Attorney for Appellant / Respondent Research Park, LLC

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ARGUMENT IN REPLY

Respondents / Appellants seek to preserve a judgment based on a legal theory they never pleaded, a misreading of the controlling Covenants, and a damages award to which they are not legally entitled. Each of these errors warrants correction.

A. The Covenants establish a formula for calculating annual maintenance fees, and that calculation is not limited by "maintenance and upkeep."

Respondents / Appellants contend the trial court "correctly found that [RPLLC] breached the Covenants by charging maintenance fees in excess of actual maintenance and upkeep costs." (Respondents' / Appellants' Resp. Br. at 2.) But that is not what the trial court held.

The court expressly found that RPLLC, as successor to the Authority, had the "unambiguous right" to charge and collect maintenance fees in accordance with the method established by the Covenants. (R. 8 & 26.) The governing provision is clear:

> The fee shall be computed on the basis of $300.00 per acre per annum . . . [and] shall increase by 10% compounded annually each year until the Authority conveys any portion of the Property to the Association as Common Area . . . .

(R. 735 at § 1.)

Throughout the proceedings below, and now on appeal, Respondents / Appellants have misread the Covenants. They argue that, regardless of what the plain language of the Covenants says, what it <u>really means</u> is that RPLLC may collect maintenance fees in an amount no greater than necessary to pay for "maintenance and upkeep," and in no event shall the amount exceed $300.00 per acre per annum, as may be increased by 10% compounded annually.

There is simply no credible basis for this argument. No such limitations are found in the text of the Covenants. No such limitations may be fairly implied from the text of the Covenants. And, in fact, the plain text of the Covenants expressly rejects Respondents' / Appellants' construction. The Covenants state that, "[i]n any year, the Authority may reduce th[e] [amount of the maintenance fee] in its sole discretion." (R. 743.) If Respondents' / Appellants' construction were correct, there would be little sense for the Covenants to include a provision vesting the Authority (or its successor) with discretion to reduce the amount of the fee payable.

Instead, Respondents / Appellants are continuing to confuse two issues. The first issue is the amount of the maintenance fee that RPLLC may charge, and that issue is decided wholly by referring to the calculation method quoted above. The second issue relates to the types of expenditures of maintenance fees that are permissible, or impermissible, under the Covenants. In other words, while the meaning of "maintenance and upkeep" may affect the propriety of expenditures of maintenance fees collected, it has no effect on the amount of maintenance fees charged (and for which property owners are responsible for paying in full).

RPLLC respectfully urges this Court to follow the decision of the court below and hold, consistent with the plain language of the Covenants, that RPLLC has the unambiguous right to charge and collect a maintenance fee of $300.00 per acre per annum, compounded 10% annually since 1986, except as such amount may be reduced in RPLLC's sole discretion.

B. The trial court's construction of "maintenance and upkeep" is improper.

Respondents / Appellants assert that RPLLC has mischaracterized the trial court's order establishing a definition for "maintenance and upkeep" by claiming that the order "expressly limit[s] the types of permissible expenses [to be paid out of maintenance fee funds] to landscaping, power, and water." (Respondents' / Appellants' Resp. Br. at 5.) They are mistaken.

The trial court expressly found that the term "maintenance and upkeep," as used in § VI.1 of the Covenants, was undefined. The court then immediately turned to dictionary-definitions of "maintenance and upkeep" to conclude that the phrase means "a state of physical repair, upkeep, and preservation, and does not include administrative expenditures." (R. 34.) The limiting term—"physical"—controlled the court's reasoning. Applying that definition, the trial court concluded that the only expenditures qualifying as "maintenance and upkeep" were those used for preservation of physical assets or improvements; nothing else. This holding directly led to the trial court's ultimate conclusion, that the only expenditures for physical maintenance and upkeep of Park property were for "water, power, and landscaping." (R. 36.)

Regardless, it is not entirely clear why the trial court declined to construe "maintenance and upkeep" in light of the contents of the totality of the Covenants. Certainly, when a contract is ambiguous, the court may resort to extrinsic resources—such as a dictionary, see, e.g., Heilker v. Zoning Bd. of Appeals, 346 S.C. 401, 552 S.E.2d 42 (Ct. App. 2001)—to construe the ambiguous terms. See, e.g., Portrait Homes-S.C., LLC v. Penn. Nat'l Mut. Cas. Ins. Co., 442 S.C. 515, 577-81, 900 S.E.2d 245, 279-80 (Ct. App. 2023) (numerous quotations and citations omitted). But recourse to extrinsic resources is

permissible only after the court has considered the totality of the instrument—the 4 corners of the contract—to find that the instrument requires further construction. Id., 442 S.C. at 578, 900 S.E.2d at 279.

In proceedings below, the trial court was explicitly invited to consider "maintenance and upkeep" in light of the totality of the Covenants. The invitation was declined. And this constitutes reversible error because consideration of the Covenants as a whole illustrates that—according to the Covenants' declarant—"maintenance and upkeep" involves much more than preservation of physical assets.

The Covenants explain that "[t]he 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;" but until then, "the sole responsibility for maintaining the Park . . . shall be that of the Authority . . . ." (R. 751-52.) In that connection, the Authority is expressly empowered to bring actions to enforce the Covenants, (R. 757 at § 2), and to review, approve, or object to proposed developments within the Park, (R. 756 at § 1). The Authority also has the power—but not the obligation—to construct or demolish improvements. (R. 730-32.) *Who does Poly-Med think should have to pay for all these efforts?* Apparently, consistent with Respondents' / Appellants' argument, it's RPLLC, and property owners have little obligation to pay for anything other than power, water, and landscaping. Yet there is no support in the text of the Covenants for any of that proposition.

This is reinforced by reference to the powers vested in the Association, whenever it may be formed. As explained in RPLLC's opening brief, the Association is authorized, "among other things," to hire a manager, procure and maintain insurance, pay for legal and

accounting fees, and establish capital reserve funds. (See, e.g., R. 739-49.) And on this point, Respondents / Appellants have made a curious argument. It now seems to be their contention that RPLLC can do these same things, too; after all, "neither the Covenants nor the court's order prohibits [RPLLC] from doing so." (Respondents' / Appellants' Br. Resp. at 9.) The difference, according to Poly-Med, is that RPLLC can't make property owners pay for those expenses.

But that's not the difference. The difference (at least in financial affairs) between the Authority and the Association is that the Association, once established, will consist of a board of directors, which—as a corporate body—is given plenary authority to decide what expenditures will be incurred on behalf of property owners. In that connection, the Association's board of directors will prepare an annual budget, and assessments to property owners will be based on that budget. (R. 744-45.) Until then, the property owners' financial obligations to the Park are calculated solely by the $300 per acre per annum method, and it is the Authority (or its successor) who gets to decide how that money should be spent.

This leads to two important points. First, Respondents / Appellants seem to have finally conceded that RPLLC is empowered by the Covenants to not only do that which it is expressly authorized to do, but also that which it is not expressly prohibited from doing. And nowhere do the Covenants restrict the expenditures that RPLLC may undertake with respect to the Park. RPLLC may decide what products or services to procure for the benefit of the Park, at what amounts of expenditure, and to pay for those expenses out of the fees collected from property owners. And that is perfectly consistent with the Covenants. "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.)

Which leads to the second important point. Under the trial court's order, as well as Respondents' / Appellants' construction of the Covenants, any time RPLLC may wish to pay an expenditure out of maintenance fees collected for something other than power, water, or landscaping—anything other than ordinary physical asset preservation, it may be necessary for RPLLC to first get approval from the court. This is not a proper function of the courts. See, e.g., Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 538 S.E.2d 15 (Ct. App. 2000); Fisher v. Shipyard Vill. Counsel of Co-Owners, Inc., 415 S.C. 256, 781 S.E.2d 903 (2016).

In summary, and consistent with Respondents' / Appellants' concession, RPLLC (as successor to the Authority) is empowered under the Covenants to do anything not prohibited by the Covenants. In furtherance of that authority, RPLLC charged Respondents / Appellants an amount that was expressly contemplated by the Covenants, which they were obligated to pay. The Covenants further empower RPLLC to use annual maintenance fees collected for "maintenance and upkeep" of the Park, and does not define what those terms mean. In reliance on the plain language of the Covenants, RPLLC understood the scope of expenditures made permissible under the Covenants to include things other than physical asset preservation. Yet, by looking beyond the 4 corners of the Covenants—which was neither necessary nor proper, the trial court has dramatically curtailed RPLLC's governance authority and the power to determine how the Park may be developed.

Respondents / Appellants have cautioned the Court to refrain from endorsing an "absurd construction" of the Covenants. (Respondents' / Appellants' Resp. Br. at 3.) RPLLC agrees, and would invite the Court to consider the construction that Respondents / Appellants are advocating:

(1) With regard to charging annual maintenance fees, prohibiting RPLLC from charging a fee in excess of the amount needed to pay for physical asset preservation, despite the Covenants having expressly established a clear calculation method that does not contain any such limitation; and,

(2) With regard to spending funds from annual fees collected, prohibiting RPLLC from making any such expenditure other than for physical asset preservation, despite the 4 corners of the Covenants expressly contemplating RPLLC's authority to undertake broader responsibilities.

It is hard to conceive of a more absurd result in the context of contract construction than for a court to strip a party of the very authority affirmatively conferred by the contract.

Finally, Respondents / Appellants continue to assert that RPLLC used maintenance fees for non-maintenance purposes, such as paying a mortgage. This issue was addressed at trial. RPLLC earned a management fee and, as a single-purpose LLC, directly applied those earnings toward its mortgage obligations. (See R. 328:13-21, 332:15-22, 357:19-358:25, 392:17-393:21 & 468:19-469:8.) The undersigned appreciates the strategic reason why Respondents / Appellants keep raising this issue to the attention of various courts. But the fact of the matter is that all issues regarding accounting for funds paid and received by RPLLC were resolved in the third-party accounting prepared for purposes of trial. (See R. 797.)

In sum, the trial court erred by construing "maintenance and upkeep" in isolation, without regard to the broader structure and purpose of the Covenants. When read as a whole, the Covenants empower RPLLC, as successor to the Authority, to exercise broad

discretion in fulfilling its obligations and applying collected fees toward that end. The court's narrow definition not only contradicts the contractual text, it invites judicial intrusion into matters that are expressly committed to RPLLC's governance. This Court should reject that construction and reaffirm the full scope of authority granted by the Covenants.

C. Good faith and fair dealing was neither pleaded nor pursued at trial.

Respondents / Appellants characterize RPLLC's challenge to the trial court's reliance on good faith and fair dealing as "misguided." (Respondents' / Appellants' Resp. Br. at 9.) But their response fails to address—let alone refute—the central procedural defect RPLLC identified in its opening brief:

> 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.

(RPLLC Op. Br. at 27.)

Respondents / Appellants did not contest any of these assertions. Nor could they. The following are indisputable facts: (1) circumstances to implicate good faith and fair dealing were not alleged anywhere in the Complaint; (2) good faith and fair dealing was not raised at any time during trial; (3) Respondents / Appellants never sought to amend their Complaint to contemplate a breach of contract on a theory of good faith and fair dealing; and (4) the first time that good faith and fair dealing was raised as a theory of recovery was by the trial court, in its initial decision of November 6, 2023, weeks after the

conclusion of trial, and without any prior notice that this theory was under consideration—much less that it would become the basis of a decision in Respondents' / Appellants' favor.

Respondents / Appellants now seem to take the position that, because every contract includes an implied duty of good faith and fair dealing, it was unnecessary to expressly plead or litigate the issue. Respondents / Appellants have cited no authority for such a proposition, which itself would seem to defy the simple pleading standards required by Rule 8, SCRCP. Even if the duty of good faith and fair dealing is implied in law, it is not automatically placed at issue in a case unless a party actually pleads a breach of it.

In a puzzling shift, Respondents / Appellants seem to be distancing themselves from the trial court's ruling, stating: "Context makes clear that the circuit court's consideration of good faith and fair dealing was as interpretative tools and not as creating new contractual terms not already expressly stated or fairly implied in the Covenants." (Respondents' / Appellants' Resp. Br. at 10 n.20.) But that characterization cannot be reconciled with the trial court's express findings. To the contrary, the trial court's various dispositive decisions make exceedingly clear that good faith and fair dealing was more than just a mere tool in facilitating the Covenants' construction; it was the sole, material theory upon which the trial court's decision rested.

Respondents / Appellants go further in their efforts to diminish the trial court's invocation of good faith and fair dealing, arguing that the court's analysis was little more than a way to articulate the "language and underlying intent" of the Covenants. (Respondents' / Appellants' Resp. Br. at 10.) With sincere respect to my opponents, they must be reading from a different record. The trial court's decisions of November 6, 2023 and February 29, 2024 make it very clear that, in substantial part, the court relied on its

assessment of what the declarant's intentions for the Covenants must have been when the Covenants were established in 1986. Such information is not competent evidence for influencing the construction of a contract, and particularly in the context of actions for good faith and fair dealing. See, e.g., Road, LLC v. Beaufort County, 443 S.C. 11, 25-26, 902 S.E.2d 366, 373 (2024).

Ultimately, "[a] judgment or decree, whether in law or equity, must conform to both the pleadings and the proofs, and be in accordance with the theory of the action upon which the pleadings are framed and the case was tried. In case the plaintiff proceeds on a definite, clear and certain theory, it will not support or permit of another theory because it contains isolated or subsidiary statements consistent therewith." Parker Peanut Co. v. Felder, 207 S.C. 63, 69, 34 S.E.2d 488, 490 (1945) (citation omitted).

Respondents / Appellants never pleaded, pursued, or tried a theory of breach based on the implied duty of good faith and fair dealing. That theory was raised sua sponte by the trial court and formed the basis of its ruling—despite the absence of any claim or proof. While Respondents / Appellants now attempt to recast the court's analysis as merely interpretive, the record tells a different story. The judgment below cannot stand. A litigant cannot prevail on a theory never pleaded or proven, and a trial court cannot sua sponte construct a claim the parties themselves never asserted.

D. Respondents' / Appellants' own breach precludes recovery under good faith and fair dealing.

In its opening brief, RPLLC explained that Respondents / Appellants could not prevail on a claim for breach of the duty of good faith and fair dealing because they were themselves found to be in breach of the Covenants. (RPLLC Op. Br. at 29.) The responsive brief of Respondents / Appellants does not address—much less oppose—this argument.

Nor could it. The law is clear and consistent that "one who seeks to recover damages for breach of a contract, to which he was a party, must show that the contract has been performed on his part, or at least that he was, at the appropriate time, able, ready, and willing to perform it." Parks v. Lyons, 219 S.C. 40, 48, 64 S.E.2d 123, 126 (1951). The condition of a party being in breach of a contract precludes that party from prevailing in its own action for breach of the implied covenant of good faith and fair dealing. See, e.g., Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 487, 514 S.E.2d 126, 135 (1999); 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).

Because Respondents were in breach of the Covenants, they were legally barred from recovering under a theory of good faith and fair dealing. The trial court's contrary conclusion is reversible error.

E. Reimbursement contradicts the Covenants and the trial court's own findings.

In its opening brief, RPLLC identified a seeming contradiction in the trial court's orders regarding maintenance fees. On the one hand, the trial court held that RPLLC has the "unambiguous right" to charge and collect a maintenance fee in an amount that is not greater than the calculation method established by the Covenants; yet, on the other hand, the court held that RPLLC owed Respondents / Appellants reimbursement of all amounts paid during the period of RPLLC's ownership for anything other than power, water, and landscaping. Both cannot be true. If RPLLC had the unambiguous right to charge Respondents / Appellants an amount that is permissible under the calculation method established by the Covenants, then it would not be proper for Respondents / Appellants to receive any reimbursement as damages—the money at issue would have been properly

collected under the Covenants, and Respondents / Appellants would not be owed any refund. If, alternatively, Respondents / Appellants were owed a refund as damages—despite the fact that the amounts charged were permissible under the Covenants' calculation method—then it cannot be the case that RPLLC had the "unambiguous right" to charge an amount authorized by the Covenants (despite the plain language of the Covenants).

Respondents / Appellants do not confront this contradiction in their brief. Instead, they resort to hyperbole, claiming that if this Court were to enforce the Covenants as written, a horrible result would follow by which RPLLC would charge the maximum amount authorized under the Covenants per acre per year, just to hold the funds in perpetuity where they would "be left forever to rot." (Respondents' / Appellants' Resp. Br. at 15.)

First of all, under the Covenants, which Respondents / Appellants freely and voluntarily entered into (including the acquisition of additional Park Property in 2019), there can be no question that RPLLC (as successor to the Authority) is expressly authorized to charge Park Property owners $300 per acre owned per year as the annual maintenance fee, and that this amount authorized has escalated by 10% compounded annually from 1986. For 2025, that amount would exceed $12,000 per acre owned per year.

Second, it is undisputed that RPLLC has never increased the annual maintenance fee assessed against Park Property owners. At all times since the outset of its administration, RPLLC has continued the practice of its predecessor, and the annual fee charged has been $600 per acre owned per year. Regardless, under the Covenants, *could RPLLC charge Park Property owners $12,000 per acre owned per year?* Absolutely.

As a practical matter, though—and based on nothing more than basic market economics, RPLLC has very strong financial incentives to refrain from maxing-out the annual maintenance fee charged to Park Property owners. It is not unreasonable to perceive that the interests of prospective land purchasers—upon discovering such substantial maintenance fees—would be chilled. Accordingly, if RPLLC wishes to sell land to parties who would become subject to the Covenants, RPLLC must be mindful of the barriers to their willingness to purchase.

For some reason, Respondents / Appellants don't want to trust the market. They would rather the Courts of this State fashion them a solution, in derogation of the Covenants, to make sure that they pay as little as possible. Consequently, they have invited the Courts to establish control rights for Park Property owners where none exists; they want RPLLC to appear before the trial court every time that RPLLC wishes to use annual maintenance fees to pay for something other than power, water, and landscaping; they want to install the trial judge as the administrator of all governance rights and obligations in the Park; and, along the way, they don't want to pay for anything other than power, water, and landscaping.

They want the control rights that RPLLC has and to which they are not entitled. If it is the case that Respondents / Appellants want RPLLC's control rights, let them buy those rights. But it is not right or proper for the Courts of this State to be drawn in as the proxy for the control that Respondents / Appellants want but aren't willing to earn.

F. The damages calculation applied lacks evidentiary support.

Respondents / Appellants have criticized RPLLC's damages-calculation methodology as "unsound because, unlike [their] formula, it does not account for the

change in [Respondents' / Appellants'] ownership percentage before and after October of 2019." (Respondents' / Appellants' Resp. Br. at 15.) They have also encouraged the Court to deem this issue abandoned because "the only treatment [given by RPLLC] in its brief is so scant and conclusory." (Respondents' / Appellants' Resp. Br. at 14.) The undersigned is not aware of any case where the Court has declined to entertain an argument as "abandoned" where 6 full pages of the underlying brief were dedicated to the issue and supported by multiple citations to the trial transcript and documents of record. Accordingly, the undersigned will focus this discussion on the only substantive matter in dispute, which is the calculation method.

The crux of this particular dispute is simple: *should the damages calculation be based on land ownership percentages (and somewhat divorced from actual economic realities), or should the damages calculation be based on the testimony and report of the parties' jointly retained expert who specifically identified the total amount of revenue RPLLC realized from annual maintenance fees collected, and how much of that revenue came from Respondents / Appellants?* The answer would seem apparent.

Respondents / Appellants complain that the calculation method advocated for by RPLLC fails to account for an additional property acquisition in 2019. Which is not true. By focusing on the actual contribution amount of Respondents / Appellants to annual maintenance fees during the period of RPLLC's ownership, and comparing that against the total amount of annual maintenance fees realized over the same period, an accurate statement of Respondents' / Appellants' financial contribution (and the percentage thereof) is provided. It necessarily accounts for any change in ownership percentages that Respondents / Appellants may have experienced (or any other Park Property owner, for

that matter) because of its effects on both the numerator and the denominator; that is, Respondents' / Appellants' actual financial contribution versus all maintenance fee revenue realized, respectively. In other words, if Respondents / Appellants bought more property in the Park in 2019, the impact on maintenance fees should be reflected in the amount of fees paid by Respondents / Appellants (which should have increased) and the amount of fee-revenue realized by RPLLC (which should also have increased).

The calculation method preferred by Respondents / Appellants (and adopted by the trial court) has 2 fundamental problems. First, it assumes that all Park Property owners paid their annual maintenance fee obligations, and that none were delinquent. Which leads to the second problem: there is no evidence that this assumption was accurate. Consequently, a damages calculation based on relative property ownership is of exceedingly limited utility, and particularly when compared with a calculation method that is based on actual revenue analyses conducted by a mutually agreed upon third party whose report and testimony were received without objection. (See R. 797.)

To be clear, even if Respondents / Appellants were entitled to relief—which RPLLC disputes—any damages awarded must be based on actual, substantiated financial impact. A model built on unsupported assumptions cannot sustain a damages award under South Carolina law.

CONCLUDING STATEMENT

Respondents / Appellants ask this Court to uphold a judgment based on a theory they never pleaded, tried, or proved, on a cause of action they were legally prohibited from pursuing, under a construction of the Covenants that ignores their plain text, disregards long-settled interpretive rules, and imposes obligations on RPLLC that find no support in

law or fact. The trial court's rulings—particularly its sua sponte invocation of good faith and fair dealing, its restrictive reading of "maintenance and upkeep," and its internally inconsistent reimbursement award—depart from South Carolina precedent and from the terms of the Covenants. Because the judgment rests on legal error, procedural irregularity, and a misapplication of governing authority, it must be reversed.

Respectfully,

s/ Steven Edward Buckingham

Steven Edward Buckingham (S.C. Bar No. 0075089)
The Law Office of Steven Edward Buckingham
114 Poinsett Highway / Suite D
Greenville, South Carolina 29609
(o) 864.735.0832
(e) seb@buckingham.legal

Attorney for Appellant / Respondent Research Park, LLC

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CERTIFICATION OF CONFORMITY

Steven Edward Buckingham (S.C. Bar No. 0075089)
The Law Office of Steven Edward Buckingham
114 Poinsett Highway / Suite D
Greenville, South Carolina 29609
(o) 864.735.0832
(e) seb@buckingham.legal

Attorney for Appellant / Respondent
Research Park, LLC

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,

Steven Edward Buckingham (S.C. Bar No. 0075089)
The Law Office of Steven Edward Buckingham
16 Wellington Avenue
Greenville, South Carolina 29609
(o) 864.735.0832
(e) seb@buckingham.legal

Attorney for Appellant / Respondent
Research Park, LLC

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