THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Anderson County
Court of Common Pleas
R. Lawton McIntosh, Circuit Court Judge

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

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

Respondents/Appellants,

v.

Research Park, LLC,

Appellant/Respondent.

RESPONDENTS/APPELLANTS' RETURN TO APPELLANT/RESPONDENT'S MOTION TO DISMISS A PORTION OF THE CROSS-APPEAL AS MOOT

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Plaintiffs[1] submit this return in opposition to Defendant's[2] motion to dismiss a portion of their appeal as moot (the "Subject Motion").

INTRODUCTION

The Subject Motion seeks dismissal of the portion of Plaintiffs' appeal challenging the circuit court's ruling on what Plaintiffs refer to in their principal brief (and is likewise defined below) as "Defendant's Trailer Removal Claim" based on mootness. Hereinafter, this portion of Plaintiffs' appeal is referred to as the "Trailer Removal Issue."

While Plaintiffs admit that the "Trailers" at issue (also defined below) were removed during the pendency of this appeal, as explained below, they deny that the Trailer Removal Issue has been mooted because of its relationship to the award of attorneys' fees and costs to the prevailing party.

BACKGROUND[3]

A. Factual Background

1. Plaintiffs, the Park, and Plaintiffs' Parcels

Plaintiffs are four entities related through common ownership and control[4] that own (or, in the case of PMI Properties, used to own) and/or lease certain lots of land ("Parcels," as defined in the Declaration of Covenants, Conditions and Restrictions of Clemson Research Park (the

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[1] "Plaintiffs" refers to Respondents/Appellants, Poly-Med, Inc. ("Poly-Med"), Technology Drive 51, LLC ("TD51"), Technology Drive 52, LLC ("TD52"), and PMI Properties, LLC ("PMI Properties"), collectively.

[2] "Defendant" refers to Appellant/Respondent, Research Park, LLC.

[3] With apologies for the length of this section, Plaintiffs believe that explaining the Trailer Removal Issue and its context in this appeal requires presenting almost all of the Statement of the Case in their principal brief.

[4] (R. pp. 414:5–417:24.)

"Covenants")) in what is now known as the Clemson University Advanced Materials Center (the "Park").[5] [6]

As further explained below, among Plaintiffs, Poly-Med is the entity that actually paid the maintenance fees at issue in this matter. (R. pp. 335:25–337:21, p. 417:17–24, pp. 787–796.) Poly-Med is a biomedical technology company.[7] Its corporate headquarters are in the Park on Technology Drive, where it employs about 185 people. (R. p. 415:9–19.)

At all relevant times, Poly-Med has leased Parcels at 51 and 52 Technology Drive from TD51 and TD52, respectively. (R. pp. 415:20–416:2, p. 417:14–16.) In October of 2019, Poly-Med's wholly owned subsidiary PMI Properties purchased another nearby Parcel, which it leased to Poly-Med until it transferred ownership of the Parcel to Poly-Med in March of 2021. (R. pp. 416:3–417:13, pp. 782–786, pp. 827–828.) Hereinafter, the term "Plaintiffs' Parcels" refers, collectively, to all Parcels owned by TD51, TD52, PMI Properties, or Poly-Med.

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[5] The Covenants define "'Parcel' [to] mean and refer to any lot(s) or parcel(s) of land, or subdivisions thereof, in the Park, . . . together with any improvements thereon, which are designated and intended by the [Park] Authority to be sold to Owners or leased to tenants; provided, however, that a Parcel [does] not include any Common Area, or any roads, rights-of-way or other area(s) dedicated to the public use." (R. p. 730.) This definition includes the following terms that are themselves specifically defined in the Covenants: "'Park,'" "'Owner,'" "'[Park] Authority,'" and "'Common Area.'" (R. pp. 729–730.) "'Park,'" as well as the synonymous term "'Property,'" means and refers to the whole of the Park, i.e., the entirety of the real property and improvements thereon subject to the Covenants. (R. p. 730.) "'Owner'" means and refers to any person or entity, including the "'[Park] Authority,'" who owns fee simple title to a Parcel. (R. p. 730.) The terms "'[Park] Authority'" and "'Common Area'" are explained below.

[6] As reflected by the title of the Covenants, the Park was formerly known as Clemson Research Park. (R. pp. 713–714.)

[7] For example, among other things, Poly-Med designs and develops bioabsorbable polymers for use in medical implants. (R. p. 415:9–13.)

2. The Park's Creation and Purpose

The South Carolina General Assembly created the South Carolina Research Authority (the "SCRA") in 1983[8] "to," among other things, "enhance the research capabilities of the state's public and private universities"[9] and "promote the development of high technology industries and research facilities in South Carolina." *Id.*

The SCRA created the Park in 1986 when, pursuant to the Covenants,[10] it subjected certain real property it owned in Anderson County, South Carolina, to "a master development plan in order to develop [the Park] and to allow the [Park] Authority," i.e., the SCRA itself and its successors and assigns[11] (collectively, the "Park Authority"), "to offer parcels [in the Park] . . . for sale to purchasers or for lease to tenants or for other development within the purview of the Act [establishing the SCRA] . . . [to] bring about economic growth in the State of South Carolina through science and engineering." (R. p. 728.) Accordingly, the Covenants mandate that "[t]he [Park] Authority shall develop the [Park] as a high technology research and development park . . . ." (R. p. 731.)

3. The Covenants

"[R]un[ning] with the land" and "inur[ing] to the benefit of, and . . . binding upon, each and every person or entity, their heirs, successors, and assigns who . . . acquire any interest in [the Park] or any part or portion thereof,"[12] the Covenants include, among others cited elsewhere herein, the following pertinent provisions to which Plaintiffs would now draw the Court's attention.

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

[9] S.C. Code Ann. § 13-17-20.

[10] (R. pp. 727–759.)

[11] (R. p. 729 (defining the "'[Park] Authority' [to] mean and refer to [the SCRA], its successors and assigns").)

[12] (R. p. 728.)

(a) The 15% Requirement

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

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

(R. pp. 735–736.)

(b) Conveyance of Common Areas to the Association

Although said "not [to] be established until such time as the [Park] Authority is ready to convey Common Areas to it,"[13] the Covenants provide for the establishment of an Owners association, namely, "Clemson Research Park Owner's Association, Inc., a South Carolina not-for-profit corporation"[14] (the "Association"), of which every Owner of a Parcel is to be a member, with every member other than the Park Authority entitled to one vote for each full acre of the Parcel to which the member is attributable and the Park Authority entitled to one vote for each full of acre that it owns in the Park except for portions subject to roadway rights of way. (R. pp. 739–740.)

"'Commons Area' . . . mean[s] and refer[s] to all portions of the [Park], if any, (1) which may have recreational facilities constructed thereon; (2) which may be designated by the [Park] Authority for the common use and enjoyment of Owners; (3) which is separately platted; and (4)

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[13] (R. pp. 739–740.)

[14] (R. p. 3 (defining "'Association'").)

which is conveyed to the Association." (R. p. 729.) The Covenants require that the Park Authority designate portions of the Park as Common Areas and convey them to the Association. (R. pp. 730–731 ("The [Park] Authority shall develop the [Park] by . . . designating portions of the [Park], and all improvements constructed thereon, if any, as Common Areas, and conveying them to the Association.").)

Subject to certain conditions irrelevant here, "[t]he [Park] Authority may convey Common Areas to the Association at any time and from time to time without notice to or approval by the Association . . . ;"[15] however, "[n]o part of the [Park] [can] be conveyed to the Association as Common Area . . . until such conveyance will result in the [Park] Authority owning less than one-half of the [Park] so that the [Park] Authority will be entitled to less than one-half the votes in the Association." (R. p. 733.) The Park Authority must "convey all Common Areas to the Association no later than ninety (90) days after the date of closing of the sale of the last Parcel in the Park." (R. p. 732.)

(c) Maintenance Fees

The Covenants provide that, "[p]rior to the conveyance of any portion of the [Park] to the Association as Common Areas, each Owner shall pay the [Park] Authority a maintenance fee for maintenance and upkeep of the Park." (R. p. 743.) With the caveat that, "[i]n any year, the [Park] Authority may reduce th[e] [maintenance] fee in its sole discretion," the Covenants state that the maintenance fee is initially, i.e., for the calendar year 1986, to be "computed on the basis of $300 per acre per annum" and thereafter to "increase by 10% compounded annually each year until the [Park] Authority convey[ed] any portion of the [Park] to the Association as Common Area . . . ."

[15] (R. p. 731.)

(R. p. 743.) At all relevant times, however, the maintenance fee has been computed on the basis of $600 per acre per year. (R. pp. 375:1–376:2, p. 382:17–21, p. 453:20–23, p. 532:14–23, p. 762.)

"Until the conveyance of any Common Area to the Association, the sole responsibility for maintaining the Park, except for Parcels sold to Owners, [is that of] the [Park] Authority and the sole obligation of any Owner, other than the [Park] Authority, [is] to pay the maintenance fee to the [Park] Authority as provided [in the Covenants]." (R. pp. 751–752.) Upon the conveyance of any Common Area to the Association, "th[e] maintenance fee . . . terminate[s] and the Owner's sole liability and responsibility [is] to pay whatever Assessments are due the Association." (R. p. 743.)

Once established, the Association is to prepare a budget and determine the amount of Assessments to be assessed against the Parcels. (R. pp. 744–745.) Unlike the maintenance fee, which the Covenant's only authorize the Park Authority to collect "for maintenance and upkeep of the Park,"[16] the Covenants authorize the Association to use Assessments to pay "Common Expenses," a broad and open-ended term that expressly includes, without limitation, "all . . . expenses arising out of or connected with maintenance and operation of the Commons Areas" and "any other expenses and liabilities which may be incurred by the Association for the benefit of all the Owners under or by reason of [the Covenants]." (R. p. 744.)[17]

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16 (R. p. 743.)

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

> The Assessments [assessed against all Parcels by the Association] shall be based upon annual estimates of the Association's cash requirements to provide for payment of all estimated expenses arising out of or connected with maintenance and operation of the Commons Areas. Such estimated expenses may include, among other things, the following: expenses of management; taxes and special assessments; premiums for all insurance that the Association is required or permitted to maintain [under the Covenants]; repairs and maintenance; wages for Association employees, including for a Manager (if any); utility

(d) Approval of Improvements

The Covenants provide that "[n]o building, landscaping or other improvements shall be altered, placed or erected on any Parcel without approval from the [Park] Authority or its agent." (R. p. 752.)

(e) The Fees/Costs Provision

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

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

(R. p. 748.)

4. Defendant a/k/a the Park Authority

Defendant is a for-profit, single-member limited liability company owned by Dan Wagner ("Wagner"). (R. pp. 290:21–291:5, pp. 300:18–301:1.) In October of 2018, Defendant bought the Park (comprising approximately 150 acres of real property, including all unsold Parcels) for $700,000 and took assignment of the rights, title, and interest as declarant under the Covenants.

> charges; legal and accounting fees; and deficit remaining from a previous period; creation of a reasonable contingency reserve, surplus, and/or sinking fund; and any other expenses and liabilities which may be incurred by the Association for the benefit of all of the Owners under or by reason of [the Covenants]. Such expenses shall constitute the Common Expenses.

(R. p. 744.)

(R. p. 291:6–24, pp. 296:25–297:8, p. 371:16–19, pp. 708–718, pp. 720–726.)[18] Since then, Defendant has been the Park Authority.

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

Unlike Defendant, its predecessors as Park Authority were all nonprofit entities. (R. p. 291:6–13, p. 292:20–24.) Indeed, two of its three predecessors are "arms of the state." *See Georgetown County v. Davis & Floyd, Inc.*, 426 S.C. 52, 59, 824 S.E.2d 471, 475 (Ct. App. 2019) ("As a state-created agency, SCDOT is an arm of the state. Like SCDOT, [Georgetown] County is a creature of the state.") (internal citation omitted).

The original Park Authority was, of course, the SCRA,[19] a state agency. *Nichols v. S.C. Research Auth.*, 290 S.C. 415, 418, 351 S.E.2d 155, 157 (1986) (holding the SCRA "to be an agency of the State"). In 2006, the SCRA conveyed the Park, including all unsold Parcels and its developer rights, to Anderson County, a political subdivision of the state,[20] who assigned it to nonprofit entity Anderson County Development Partnership ("ACDP"). (R. p. 713–718.) In 2008, ACDP changed its name to Innovate Anderson, a South Carolina non-profit ("Innovate"). (R. p. 713.)

It was Innovate from whom Defendant acquired the Park in October of 2018. (R. p. 291:6–24, pp. 708–718.) Wagner knew a couple of Innovate board members, including his "good friend" Mike Wooles ("Wooles"), when he got the opportunity to acquire the Park from Innovate—though Wagner says he does not specifically remember how he learned about the Park being for sale. (R.

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[18] Defendant financed the bulk of the purchase via a mortgage loan. (R. pp. 295:25–296:24, pp. 720–726.)

[19] (R. p. 729.)

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

pp. 297:9–298:11). Wooles was also Wagner's banker at County Bank, which gave Defendant the mortgage loan that allowed it to buy the Park. (R. p. 297:19–21, p. 300:5–10.)

6. Innovate's Collection of Maintenance Fees

When Innovate was the Park Authority, it periodically collected maintenance fees from Owners in the Park, including Poly-Med. (R. pp. 375:20–376:5.) Before conveying the Park to Defendant, Innovate gave Defendant a document entitled "Innovate Income and Expense Proration Estimates for Settlement." (R. p. 762.) This document showed that, at the rate of $600 per acre, annual maintenance fees collected from Owners totaled $69,645.36 while "Monthly Expenses," including monthly water, power, and landscaping expenses, were only $2,333.33 per month (or, in other words, only $27,999.96 per year). (R. pp. 315:9–316:22, p. 762.) When Innovate sold the Park, it transferred $50,182.82 in collected but unused maintenance fees to Defendant. (R. pp. 313:24–314:19, p. 761.)

7. Innovate's Approval of the Trailers

Until they were recently (i.e., during the pendency of this appeal) removed, Poly-Med had three modular office buildings on one of Plaintiffs' Parcels (the "Trailers"). (R. p. 502:8–13.) Prior to installing them, on or about June 14, 2017, which was, of course, before Defendant acquired the Park in October of 2018, Jeffrey Ellis ("Ellis"), then a Senior Project Manager in Poly-Med's IT Department (now Poly-Med's Manager of Facility and IT), emailed Burriss Nelson ("Nelson"), registered agent of, and Poly-Med's exclusive contact at, Innovate requesting approval to install the Trailers to serve as "temporary" offices. (R. p. 499:4–20, p. 502:21–25, p. 505:1–16, pp. 841–856.) In using the word "temporary," Ellis's email did not specify any duration but rather related the Trailers' use to Poly-Med's plan to renovate its current office space into new laboratories, an inherently long-term project as to which Ellis offered no particular date of completion—and

there is no evidence that such a date was material to Innovate. (R. p. 841.) Ellis's email to Nelson included drawings, specifications, a rendering showing how the Trailers "would match the current building as much as possible using hardi-board siding," and a copy of the lease agreement that would be entered into for the Trailers providing a "Minimum Lease Term" of 36 months. (R. p. 841.) Thereafter, Ellis spoke with Nelson via telephone, and in that conversation, Nelson approved the Trailers. (R. pp. 502:8–505:16, pp. 857–858.)

8. Defendant's Collection of Maintenance Fees

In 2019, Defendant began billing Owners annual maintenance fees at the rate of $600 per acre. At that time, Plaintiffs' Parcels comprised 19.25 acres, so Poly-Med was charged $11,550 in maintenance fees for the year. (R. p. 335:4–15, p. 791.) With the addition of the Parcel that PMI Properties purchased in October of 2019, the size of Plaintiffs' Parcels increased by 12.685 acres,[21] prompting Poly-Med's annual maintenance fee bill to increase to $19,161 beginning in 2020. (R. pp. 335:25–336:20, pp. 792–796.)

On April 30, 2020, after receiving Defendant's maintenance fee invoice dated April 24, 2020,[22] Poly-Med's president, David Shalaby ("Shalaby"), sent Wagner a message complaining that very little maintenance was actually being performed in the Park and asking for information about how the maintenance fees Defendant collected were being spent. (R. pp. 832–833.) No response having been received, Poly-Med's counsel emailed Wagner on May 26, 2020, requesting an accounting of the maintenance fees. (R. p. 834.) In response, Defendant took the position that

[21] PMI Properties paid Defendant $224,360 for the Parcel. (R. pp. 335:25–336:4, pp. 782–786.) According to Wagner, Defendant sold the 12.685-acre Parcel to PMI Properties "at a below-market rate" (R. p. 396:22–25), but this is hard to square with the fact that, only a year earlier, Defendant had purchased the whole roughly 150-acre Park for $700,000. (R. pp. 708–712.) Included in the $224,360 that PMI Properties paid was $5,385.93 for maintenance fees for the period October 16, 2019, to July 1, 2020. (R. p. 829).

[22] (R. p. 787.)

Plaintiffs were not entitled to an accounting of the maintenance fees and refused to provide one. (R. pp. 408:18–409:11, p. 838; *see also* R. pp. 835–837.)

Through this lawsuit, Plaintiffs learned that Defendant was using maintenance fees collected from Owners, including Plaintiffs, to pay its monthly mortgage payments and for expenses like accounting fees, insurance, marketing expenses, and legal fees, including legal fees incurred in this action. (R. pp. 323:21–324:21, p. 325:21–22, p. 332:6–10, pp. 333:14–335:24, pp. 352:20–353:8, p. 354:17–25, pp. 356:25–90:3, p. 358:19–25, pp. 763–781.) At trial, Wagner testified that he considered any maintenance fees collected in excess of expenses for maintenance and upkeep to be profits with which he could do as he pleased. (R. p. 319:10–15, p. 330:15–16.) When Defendant first opened a bank account after its acquisition of the Park in 2018, it deposited only $25,000.00 of the $50,182.82 in collected but unused maintenance fees it had received from Innovate. (R. pp. 314:16–319:9, pp. 763–764.) At various times, Wagner has withdrawn funds from Defendant's maintenance fee accounts for his personal use. (R. pp. 333:14–335:24, pp. 766–781.)

B. Procedural History

1. Plaintiffs' Claims

Plaintiffs filed this lawsuit on July 14, 2021, in the Anderson County Court of Common Pleas. (R. pp. 73–119.) Seeking money damages, injunctive relief, and an award of attorneys' fees and costs, Plaintiffs' original complaint asserts five causes of action against Defendant: (1) breach of the Covenants by charging maintenance fees in excess of actual maintenance and upkeep costs ("Plaintiffs' Maintenance Fee Breach Claim"), (2) conversion of maintenance fees ("Plaintiffs' Maintenance Fee Conversion Claim"), (3) unjust enrichment with respect to the maintenance fees ("Plaintiffs' Maintenance Fee Unjust Enrichment Claim"), (4) an accounting of the Maintenance Fees collected and spent ("Plaintiffs' Maintenance Fee Accounting Claim"), and

(5) an injunction to prevent Defendant from selling Parcels in violation of the 15% Requirement ("Plaintiffs' 15% Requirement Claim"). (R. pp. 75–85.)

At trial, Plaintiffs also argued that the Covenants required Defendant to designate Common Areas and convey them to the Association, contending that, given the absence in the Covenants of a specific time for this to occur, the Court should apply a reasonable time and that, after the passage of nearly four decades without it occurring, such time had come. (R. pp. 552:15–561:21, pp. 565:19–577:11.) Plaintiffs were permitted to amend their Complaint to conform to the evidence in this regard. (R. pp. 578:6–579:10.) Accordingly, Plaintiffs' amended complaint adds a claim seeking an order requiring Defendant to designate, as Common Areas, at least ten (10) acres of Defendant's property in the Park, or such lesser amount of acreage as will result in Defendant owning less than one-half of the Park, so that Defendant will be entitled to less than one-half the votes in the Association, and then convey the Common Areas to the Association pursuant to the Covenants ("Plaintiffs' Common Area Conveyance Claim"). (R. pp. 145–190.)[23]

2. Defendant's Counterclaims

Following an unsuccessful motion to dismiss,[24] Defendant answered Plaintiffs' complaint on February 9, 2022, denying its alleged liability, and raising various affirmative defenses. (R. pp. 120–138.) Seeking money damages, injunctive relief, and an award of attorneys' fees and costs, Defendant also asserted two counterclaims against Plaintiffs: one for Plaintiffs' alleged "historical[] fail[ure] to make timely payment" of maintenance fees ("Defendant's Maintenance

[23] Defendant currently owns somewhere between 118.81 acres (47.94% of the acres) and 136.40 acres (51.44% of the acres) in the Park while the other Owners, i.e., Plaintiffs and the other Owners besides Defendant, currently own somewhere between 129.04 acres (52.07% of the acres) and 128.76 acres (48.56 % of the acres) in the Park. (R. pp. 874–877.)

[24] (R. pp. 1–3; *see also* R. pp. 942–961.)

Fee Payment Claim") and another alleging that the Trailers constituted unauthorized improvements ("Defendant's Trailer Removal Claim"). (R. pp. 120–138.)[25]

3. Pre-Trial Proceedings

On March 6, 2023, Plaintiffs moved for summary judgment on their claims against Defendant. (R. pp. 962–963; *see also* R. pp. 964–976.) On May 12, 2023, Defendant cross-moved for summary judgment on Plaintiffs' claims. (R. pp. 990–1025; *see also* R. pp. 1026–1032.) On May 31, 2023, Plaintiffs also moved for summary judgment on Defendant's counterclaims. (R. pp. 977–989.) The circuit court heard these motions on June 15, 2023, the Honorable R. Lawton McIntosh presiding. (R. pp. 215–268.)

By order filed July 18, 2023, the circuit court denied Defendant's motion for summary judgment on Plaintiffs' claims, denied Plaintiffs' motion for summary judgment on Defendant's counterclaims, and denied Plaintiffs' motion for summary judgment on their own claims as to Plaintiffs' Maintenance Fee Breach Claim, Plaintiffs' Maintenance Fee Conversion Claim, and Plaintiffs' Maintenance Fee Unjust Enrichment Claim. (R. pp. 6–7.) The court also granted Plaintiffs' oral motion for an injunction prohibiting Defendant from selling Parcels in violation of the 15% Requirement; confirmed the parties' agreement (stated on the record during the hearing on June 15, 2023[26]) to jointly select a qualified accountant to do an accounting of the maintenance

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[25] Plaintiffs timely replied to Defendant's counterclaims, denying their alleged liability and raising various affirmative defenses. (R. pp. 139–144.) When Plaintiffs later amended their complaint to conform to the evidence at trial, Defendant again answered by denying its alleged liability, raising various affirmative defenses, and counterclaiming as before (R. pp. 191–210), and Plaintiffs timely replied, again denying their alleged liability and raising various affirmative defenses. (R. pp. 211–214.)

[26] (R. pp. 237:17–238:24, pp. 261:25–262:24.)

fees;[27] and granted Plaintiffs an award of attorney fees in an amount to be determined after trial. (R. p. 6.)

4. Trial and Post-Trial Proceedings

Having been transferred to the non-jury trial roster by consent order filed March 23, 2023,[28] the circuit court conducted a two-day bench trial beginning October 10, 2023, the Honorable R. Lawton McIntosh presiding. (R. pp. 269–638.)

Plaintiffs' Maintenance Fee Unjust Enrichment Claim and Plaintiffs' 15% Requirement Claim were dismissed at trial, and Defendant having already acceded to Plaintiffs' Maintenance Fee Accounting Claim, the only claims of Plaintiffs' left to be determined by the circuit court were Plaintiffs' Maintenance Fee Breach Claim, Plaintiffs' Maintenance Fee Conversion Claim, and Plaintiffs' Common Area Conveyance Claim. Defendant's Maintenance Fee Payment Claim was abandoned at trial after the court agreed there was no evidence to support it,[29] leaving only Defendant's Trailer Removal Claim as the only counterclaim to be determined.

By form order filed November 6, 2023, requesting a proposed formal order from Plaintiffs' counsel, the circuit court ruled in Plaintiffs' favor on (at least) Plaintiffs' Maintenance Fee Breach Claim (if not Plaintiffs' Maintenance Fee Conversion Claim), finding that "the fees charged for maintenance and upkeep were not intended to be a profit-making mechanism,"[30] that "Defendant was required by the implied covenant of good faith and fair dealing, and possibly had a fiduciary duty[,] to use the monies charged for the purpose of maintenance and upkeep,"[31] and that Plaintiffs

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[27] Thereafter, the parties agreed upon accountant Tamara S. Hannon who conducted an accounting of the maintenance fees. (R. pp. 797–816.)

[28] (R. pp. 4–5.)

[29] (R. pp. 626:12–627:10.) Plaintiffs' Rule 41(b), SCRCP, motion with respect to this claim was "granted." (R. pp. 626:17–627:10.)

[30] (R. p. 8 (original bold print and capitalization omitted).)

[31] (R. p. 8 (original bold print and capitalization omitted).)

were entitled to damages from Defendant in an amount equal to the difference between the amount that Defendant charged Plaintiffs for maintenance and upkeep and that which Defendant actually spent on maintenance and upkeep. (R. p. 8.)[32] The circuit court decided in Defendant's favor, however, on Plaintiffs' Common Area Conveyance Claim, finding that Defendant's conveyance of Common Areas to the Association was not required by the Covenants, but rather discretionary. (R. p. 8.) The court also ruled in Defendant's favor on Defendant's Trailer Removal Claim, reasoning, while the Trailers "were once considered temporary structures in accordance with the Covenants, . . . the time period in which they can reasonably be considered temporary" had passed. (R. p. 8 (original bold print and capitalization omitted.) Accordingly, the court found that the Trailers were in violation of the Covenants and should be removed within "a reasonable time period" and requested further briefing from the parties as to what that was. (R. p. 8 (original bold print and capitalization omitted).)

The circuit court's formal order corresponding to its form order of November 6, 2023, was filed on February 29, 2024. (R. pp. 26–39.) Consistent with the earlier form order, the formal order provided that Poly-Med was entitled to damages in the amount of $74,001.41, which amount equaled the difference between what Defendant had charged Plaintiffs for maintenance and upkeep and what

[32] While Plaintiffs' Maintenance Fee Breach Claim is certainly a basis for the circuit court's finding of Defendants' liability in this regard, its form order of November 6, 2023, does not specifically mention Plaintiffs' Maintenance Fee Conversion Claim as a basis for such liability. (R. p. 8.)

Defendant had actually spent on maintenance and upkeep from 2018 to 2023;[33] [34] [35] that Defendant prevailed on Plaintiffs' Common Area Conveyance Claim and on Defendant's Trailer Removal Claim; and that "[t]he parties [were to first] attempt to agree upon what constitutes a reasonable time" for removal of the Trailers and, failing that, to move the court to determine the issue. (R. p. 25.)[36] Consistent with its ruling that Defendant was liable for $74,001.41 in maintenance fee overcharges, as well as its July 18, 2023, order granting Plaintiffs an award of attorney fees in an amount to be determined after trial, in its formal order, the court also ruled that the maintenance fee-related claims constituted the main issue in the case and, having prevailed thereon, Plaintiffs were the "prevailing party" under the Fees/Costs Provision. (R. p. 24.) Accordingly, the court found Plaintiffs entitled to an award of attorneys' fees and costs and directed them to submit proof of the same within fourteen days. (R. p. 25.)

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[33] (R. pp. 22–23.) The form order states the amount of damages as $65,724.23. (R. p. 8.) The formal order correctly states a higher amount ($74,001.41) because the form order had only included overcharges from 2019 to 2023, omitting overcharges from 2018. (R. pp. 22–23, 25.)

[34] The same day, February 29, 2024, judgment was entered in favor Poly-Med against Defendant in the principal amount of $74,001.41.

[35] Like the form order, the formal order is, however, unclear as to whether Plaintiffs' Maintenance Fee Conversion Claim is included as a basis for Defendant's liability in this regard. (*Compare* R. p. 25 ("Judgment shall enter *in favor of Poly-Med* and against Defendant on Plaintiffs['] claim for breach of the Covenants in Count I, and f*or conversion in Count II*, of Plaintiffs' Amended Complaint, in the amount of $74,001.41 . . . .") *with id.* ("Judgment shall enter *in favor of Defendant on* Plaintiffs' claim for breach of the covenants in Count[] I (to the extent that [cause of] action is based on a violation of [the 15% Requirement])[,] *Conversion in Count II* and for an injunction in Count V of the Amended Complaint.") (emphasis added.).)

[36] As referenced above, the court's form order of November 6, 2023, had directed "the parties to brief [it] on what should be considered a reasonable time period to have the structures removed base[d] on the circumstances of this case." (R. p. 8 (original bold print and capitalization omitted).) And shortly thereafter, prior to the filing of the formal order, the parties had submitted briefs on this issue as directed. (R. pp. 1094–1095, pp. 1115–1136.) Nonetheless, the formal order still did not decide the issue of when the Trailers had to be removed, but rather, as stated above, directed the parties to first try to resolve the matter among themselves. (R. p. 25.)

After the filing of the circuit court's form order on November 6, 2023, but before the filing of its corresponding formal order on February 29, 2024, Plaintiffs and Defendant had both filed motions to reconsider on November 16, 2023. (R. pp. 1033–1093, pp. 1096–1114.) After the filing of the formal order on February 29, 2024, on March 8, 2024, Defendant filed another motion to reconsider[37] and, in accordance with the circuit court's directive that they submit proof of their attorneys' fees and costs within fourteen days, Plaintiffs filed a motion for attorneys' fees and costs with supporting affidavits. (R. pp. 1137–1238; *see also* R. pp. 1243–1245.)

The circuit court heard the outstanding motions on July 24, 2024,[38] and by form order filed July 29, 2024,[39] denied Defendant's motion to reconsider as to Plaintiffs' Maintenance Fee Breach Claim and affirmed the award of damages thereon but took the issue of Plaintiffs' Maintenance Fee Conversion Claim under advisement. (R. pp. 43–45.) The court adhered to its ruling that Plaintiffs were the prevailing party but also took the issue of the amount of attorneys' fees and costs to be awarded under advisement pending Plaintiffs' counsel's submission of revised fee/cost affidavits that addressed the required elements for an award of attorneys' fees. (R. p. 43.) The court took the issue of the removal of the Trailers under advisement, too. (R. p. 43.)[40]

Plaintiffs' counsel submitted revised fee/cost affidavits on August 7, 2024. (R. pp. 1256–1341.) Also on August 7, 2024, Plaintiffs submitted a proposed plan of action for the removal of the Trailers,[41] the circuit court having directed them to do so during the hearing on July 24, 2024. (R. pp. 695:10–696:21.) The next day, August 8, 2024, Plaintiffs submitted a supplemental memo

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[37] (R. pp. 1239–1242; *see also* R. pp. 1246–1255.)

[38] (R. pp. 639–706.)

[39] Technically, this order is an amended order, because it amends an earlier order, filed July 26, 2024, to correct a scrivener's error. (R. pp. 40–42.)

[40] The circuit court's order of July 29, 2024, did not request any party to submit a proposed formal order. (R. p. 43.)

[41] (R. pp. 1342–1344.)

in support of Plaintiffs' Maintenance Fee Conversion Claim. (R. pp. 1345–1347.)[42] And on August 26, 2024, Defendant filed memos regarding Plaintiffs' Maintenance Fee Conversion Claim,[43] Plaintiffs' request for attorneys' fees and costs,[44] and the issue of the removal of the Trailers. (R. pp. 1394–1395.)

By form order filed August 27, 2024, the circuit court ruled against Plaintiffs on Plaintiffs' Maintenance Fee Conversion Claim; allowed Defendant fifteen days to seek to cross-examine Plaintiffs' counsel as to Plaintiffs' requested attorneys' fees and costs and/or file additional briefing thereon;[45] and, while reserving the right to do so in the future should it deem Plaintiffs' progress toward removal of the Trailers to be inadequate, declined to set a certain timeframe for removal of the Trailers and instead ruled that, at Defendant's request, it would review Plaintiffs' progress in removing the Trailers from time to time going forward. (R. pp. 46–49.) The circuit court filed a formal order as to its rulings on Plaintiffs' Maintenance Fee Conversion Claim and the Trailer-removal issue on September 26, 2024, and thereafter denied Plaintiffs' timely motion for reconsideration of the same[46] by order filed December 17, 2024. (R. pp. 68–70.)

By form order filed November 19, 2024,[47] and formal order filed December 9, 2024, the circuit court reiterated its ruling that Plaintiffs were the prevailing party under the Fees/Costs Provision and ordered that $163,644.25 in attorneys' fees and costs be added to the judgment in

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

[43] (R. pp. 1390–1391.)

[44] (R. pp. 1392–1393.)

[45] Defendant declined the circuit court's invitation to cross-examine Plaintiffs' counsel, but, on September 9, 2024, submitted a supplemental memo in opposition to Plaintiffs' request for attorneys' fees and costs (R. p. 1432–1435), to which Plaintiffs replied on September 12, 2024. (R. pp. 1436–1440.)

[46] (R. pp. 1441–1452.)

[47] (R. pp. 58–60.)

favor of Poly-Med against Defendant. (R. pp. 61–67.) This award was based on the court's finding that "the vast majority of this case and time at trial was devoted to Plaintiffs' claims that Defendant breached the Covenants by collecting maintenance fees well in excess of the annual cost of maintenance and upkeep of the Park" and that "Plaintiffs clearly prevailed on the main issue and are, therefore, 'the prevailing party.'" (R. pp. 63–64.) But because "Plaintiffs did not prevail on all of their claims, as the case also involved Defendant's counterclaim for an order requiring removal of the Plaintiffs' office trailers," Plaintiffs were only entitled to recover 75% of the attorneys' fees and costs they incurred, which, given Plaintiffs' had incurred a total of $218,192.33 in attorneys' fees and costs as of August 7, 2024, worked out to $163,644.25. (R. p. 64.)[48] "At Plaintiffs' request, in the interest of simplicity, and so th[e] Court d[id] not have to apportion the fees and costs among Plaintiffs, the award of fees and expenses is in favor of Plaintiff, Poly-Med, Inc., only." (R. p. 64.)

The circuit court then issued a final judgment, filed December 20, 2024, confirming its rulings in favor of Plaintiffs on Plaintiffs' Maintenance Fee Breach Claim, Plaintiffs' Maintenance Fee Accounting Claim, and Defendant's Maintenance Fee Payment Claim and the entry of judgment in favor of Poly-Med against Defendant in the total principal amount of $237,645.66 (comprising damages in the amount of $74,001.41 and attorneys' fees and costs in the amount of $163,644.25) and its rulings in favor of Defendant on Plaintiffs' Maintenance Fee Conversion Claim, Plaintiffs' Maintenance Fee Unjust Enrichment Claim, Plaintiffs' 15% Requirement Claim, and Defendants'

[48] Recognizing that the Fees/Costs Provision allows the prevailing party to recover attorneys' fees and costs incurred "in any appeal," the court's order expressly allowed that, after the conclusion of all appeals in this matter, provided Plaintiffs remain entitled to recover attorneys' fees and costs, they may move the court for an additional award for any attorneys' fees and costs incurred in this matter, including any appellate attorneys' fees and costs, to account for any no already covered by the order. (R. pp. 61–62 n.1, p. 64 n.3.)

Trailer Removal Claim (albeit without the imposition of a date certain by which removal of the Trailers must be accomplished). (R. pp. 71–72.)[49]

This appeal follows. (R. pp. 1561–1616; *see also* R. pp. 1453–1560.)

Plaintiffs' principal brief states the following issues on appeal:

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

(Initial Appellants' Brief of Respondents/Appellants ("Plaintiffs' Principal Brief") p. 2 (footnotes and bold print omitted).)

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[49] Although the circuit court's final judgment does not mention Plaintiffs' Common Area Conveyance Claim, it does state "[i]f, and to the extent, there were other claims or counterclaims of the parties in this action, they were disposed of by prior Orders of the Court" (R. p. 72), and the circuit court disposed of Plaintiffs' Common Area Conveyance Claim via form order filed November 6, 2023 (R. p. 8), and formal order filed February 29, 2024. (R. p. 37.)

Upon learning that the Trailers had been removed, Defendant made the Subject Motion for dismissal of the Trailer Removal Issue from Plaintiffs' appeal.

This return follows.

ARGUMENT

I. Removal of the Trailers does not render the Trailer Removal Issue moot, because the question of whether the circuit court erred in its ruling on the Trailer Removal Issue impacts the issue of the attorneys' fees and costs to be awarded to the prevailing party.

As explained above, the circuit court ruled that Plaintiffs were the prevailing party under the Fees/Costs Provision and awarded Plaintiffs $163,644.25 in attorneys' fees and costs. (R. pp. 61–67.) The amount of this award was only 75% of the total attorneys' fees and costs Plaintiffs had incurred (as of August 7, 2024), and the circuit court expressly cited Plaintiffs' loss on the Trailer Removal Issue as a basis for the 25% reduction. (R. pp. 63–64.) As also explained above, the issues Plaintiffs' have raised on appeal include not only the question of whether the circuit court erred in its ruling on the Trailer Removal Issue[50] but also the question of whether Plaintiffs are entitled to recover a greater percentage of their attorneys' fees and costs. (Plaintiffs' Principal Brief p. 2 at Issue V; *see also id.* at Issue VI (regarding appellate attorneys' fees and costs).) Accordingly, to dismiss the Trailer Removal Issue from the appeal, and thereby deny Plaintiffs the opportunity to demonstrate the error in the circuit court's ruling on the issue, is to deny Plaintiffs the right to appeal the circuit court's decision to cap their recovery of attorneys' fees and costs at 75%.

Plaintiffs recognize this Court's decision in *J&W Corporation of Greenwood v. Broad Creek Marina of Hilton Head, LLC*, 441 S.C. 642, 666, 896 S.E.2d 328, 341 (Ct. App. 2023), wherein it rejected an argument that the Court should address an "issue to help the master determine which party

[50] (Plaintiffs' Principal Brief p. 2 at Issue IV.)

is the prevailing party for the purposes of an award of attorney's fees." While recognizing the existence of an exception to mootness "'if a decision by the trial court may affect future events, or have collateral consequences for the parties,'"[51] the *J&W* Court declined to apply it, explaining as follows:

> We see at least three reasons to decline this invitation. First, as our courts have noted, "[t]he utilization of an exception under the mootness doctrine is flexible and discretionary pursuant to South Carolina jurisprudence, not a mechanical rule that is automatically invoked." *Id.* at 535, 670 S.E.2d at 667. Second, a judgment on attorney's fees is not the kind of collateral consequence that the exception contemplates. *See* 5 Am. Jur. 2d *Appellate Review* § 561 (May 2023 update) (collecting cases). Finally, South Carolina law provides that the master can and should take into account the outcome of the office issue when determining which party is the prevailing party for the purposes of attorney's fees, regardless of how that outcome was achieved. *See Sloan v. Friends of Hunley, Inc. (Friends II)*, 393 S.C. 152, 155–59, 711 S.E.2d 895, 896–98 (2011) (holding non-profit subject to Freedom of Information Act could still be forced to pay attorney's fees when it provided requested information before the conclusion of litigation); *id.* at 157, 711 S.E.2d at 897 ("When a public body frustrates a citizen's FOIA request to the extent that the citizen must seek relief in the courts and incur litigation costs, the public body should not be able to preclude prevailing party status to the citizen by producing the documents after litigation is filed."). Therefore, it is unnecessary to address the issue's merits for the sole purpose of determining prevailing party status.

Id. at 666–67, 896 S.E.2d at 341–42 (footnote omitted). The *J&W* Court's reasoning does not apply here—or, if it does, most respectfully, it should be reconsidered.

As an initial matter, the relationship between the Trailer Removal Issue and the circuit court's award of attorneys' fees and costs to Plaintiffs is not a matter of "future events" or "collateral consequences," but rather a matter of past events (the amount of the award of attorneys' fees and costs to Plaintiffs) and direct consequences (whether the amount of the award of attorneys' fees and costs

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[51] *Id.* (quoting *Sloan v. Greenville County*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009) (quoting *Curtis v. State*, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001)).

to Plaintiffs should be increased), such that the Court can still directly give effective relief to Plaintiffs in the form of an increased recovery of attorneys' fees and costs.

Additionally, the *J&W* Court itself recognizes that the application of the exception is "flexible and discretionary," and this Court should exercise its discretion to apply it here. While the *J&W* Court found that "a judgment on attorney's fees is not the kind of collateral consequence that the exception contemplates,"[52] the authority it cites for this proposition, 5 Am. Jur. 2d *Appellate Review* § 561, addresses only criminal proceedings in the body of its text; the only civil case in its cumulative supplement of case law, *Cardiovascular Systems, Inc. v. Cardio Flow, Inc.*, 37 F.4th 1357 (8th Cir. 2022), finds against mootness; and indeed nowhere in the body of the text or the summaries of the cases cited in the cumulative supplement is any reference to the issue of attorneys' fees.

Moreover, *Sloan*, 393 S.C. 152, 711 S.E.2d 895, the authority the *J&W* Court cites for the proposition that "the master can and should take into account the outcome of the . . . issue when determining which party is the prevailing party for the purposes of attorney's fees, regardless of how that outcome was achieved,"[53] is a case about a public body's frustration of a citizen's request for records under the Freedom of Information Act ("FOIA"). While, of course, it makes sense that a public body that wrongfully forces a citizen to bring suit to vindicate FOIA rights should not be able to preclude prevailing party status to the citizen simply by producing the records after litigation is filed, the present situation is materially different.

This is not a contest between a citizen and a public body, but a contest between private interests. And unlike the public body before the *Sloan* Court, which, by at last providing the requested records necessarily acknowledged they should have been provided to begin with, the removal of the

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52 *Id.* at 666, 896 S.E.2d at 342.

53 *Id.* at 666, 896 S.E.2d at 342.

Trailers does not acknowledge that the Trial Court was correct to order them removed. As explained above, while Plaintiffs deny that the Trailers violated the Covenants, the Trailers were always intended to be "temporary" (though of indefinite duration) in the sense that Poly-Med's long-term plan was to replace them when it renovated its office space. The removal of the Trailers was not any sort of recognition that the circuit court was correct in ordering them to be removed, but rather an exercise of business judgment, despite the Plaintiffs' strong disagreement with the circuit court's ruling.

For a number of reasons, including the circuit court's failure to balance, or even consider the equities, Plaintiffs maintain that the circuit erred in ruling against them on the Trailer Removal Issue.[54] If the issue was properly decided, Plaintiffs almost certainly would have been awarded a greater percentage, if not 100% of, their attorneys' fees and costs. In these circumstances, Plaintiffs' appeal of the Trailer Removal Issue is effectively no different than, and will have the same practical effect as, any appeal of an attorneys' fee award. Again, these consequences are direct, but even if they are deemed "collateral," they are substantial, and this Court should consider the issue, conclude that it was wrongly decided, and award Plaintiffs 100%, or at least a greater percentage, of the fees and costs they incurred below and, upon a motion filed at conclusion of this appeal, those fees and costs incurred on appeal.[55]

Accordingly, the *J&W* Court's reasoning does not apply here—or, if it does, most respectfully, it should be reconsidered—and removal of the Trailers does not render the Trailer Removal Issue moot, because the question of whether the circuit court erred in its ruling on the Trailer Removal Issue impacts the issue of the attorneys' fees and costs to be awarded to the prevailing party.

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54 (Plaintiffs' Principal Brief pp. 34–38 at Issue IV.)

55 *See supra* n. 48.

CONCLUSION

For the foregoing reasons, the Subject Motion should be denied.

Respectfully submitted,

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