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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. 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.

INITIAL REPLY BRIEF OF RESPONDENTS/APPELLANTS

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Believing most respectfully that their other briefs filed in this cross-appeal already ably support their position, Plaintiffs would make the following points in reply to Defendant's respondent's brief.[1]

ARGUMENT IN REPLY

1. Regarding Plaintiffs' Argument I: The circuit court erred in finding that "Defendant had the unambiguous right to charge the prescribed amounts in the Covenants, which was $300 per acre compounded 10% annually [since 1986], for maintenance and upkeep."[2]

As explained in Plaintiffs' principal appellants' brief, "'[r]estrictive covenants are contractual in nature,' so that the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document,"[3] with "[c]ommon sense and good faith [being] the leading touchstones of the inquiry." *Farr v. Duke Power Co.*, 265 S.C. 356, 362, 218 S.E.2d 431, 434 (1975); *see also id.* ("Where a construction of a contract makes it unusual or extraordinary and another construction, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction must prevail."); *Koon v. Fares*, 379 S.C. 150, 155, 666 S.E.2d 230, 233 (2008) ("An interpretation which establishes the more reasonable and probable agreement of the parties should be adopted while an interpretation leading to an absurd result should be avoided."). Defendant's supposedly plain-

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[1] In this cross-appeal, Plaintiffs have already filed a principal appellants' brief and a respondents' brief. Shorthand references already defined in those briefs are continued herein (e.g., "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; "Defendant" refers to Appellant/Respondent, Research Park, LLC; the "Covenants" refers to the Declaration of Covenants, Conditions and Restrictions of Clemson Research Park; the "Park" refers to what is now known as the Clemson University Advanced Materials Center and was formerly known as Clemson Research Park; etc.).

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

[3] *Palmetto Dunes Resort v. Brown*, 287 S.C. 1, 6, 336 S.E.2d 15, 18 (Ct. App. 1985) (quoting *Hoffman v. Cohen*, 262 S.C. 71, 75, 202 S.E.2d 363, 365 (1974)).

language reading of the Covenants ignores not only these principles but, in fact, the Covenants' plain language.

Defendants' assertion that the Covenants contain no text limiting maintenance fees to actual expenditures for maintenance and upkeep ignores the plain language of the Covenants that such fees are "for the maintenance and upkeep of the Park." (Pls.' Ex. 5 [Covenants] p. 17.) This language, which is part and parcel of the very language authorizing the maintenance fee, is self-limiting and plainly ties the fee to that which is needed "for maintenance and upkeep of the Park," as indeed the circuit court itself correctly recognized when it ruled in Plaintiffs' favor on Plaintiffs' Maintenance Fee Breach Claim. (Order filed 2/29/24 p. 8 ("To the extent the Covenants do not *expressly* provide that maintenance fees collected by the [Park] Authority (now Defendant) may only be used, and may only be collected to the extent necessary, for the maintenance and upkeep of the Park, given the language used in the Covenants, the intent of them and of the original Authority (SCRA) and the covenant of good faith and fair dealing, such a limitation may be certainly implied.") (emphasis in original); *id.* at p. 10 ("The Covenants provide that the [Park] Authority may collect 'a maintenance fee for maintenance and upkeep of the Park.' Had the [Park] Authority intended to authorize expenditure of fees for anything other than the physical upkeep of the Park's common areas, it could have easily so stated in the Covenants, would not have used the language it did ('*for* maintenance and upkeep') and would not have called the fee a 'maintenance' fee.") (emphasis in original).

According to Defendant, "[t]he only workable reading of the Covenants"[4] is the one that allows it the unfettered discretion[5] to collect from Parcel owners and keep for itself, under the

[4] (Def.'s Respondent's Br. p. 10.)

guise of an annual "maintenance fee," "in excess of $12,000 per acre owned"[6] (and increasing exponentially every year going forward[7]) without regard to what is actually needed "for maintenance and upkeep of the Park." By this logic, with respect to the 12.685-acre Parcel that PMI Properties purchased from Defendant in 2019 for $224,360, Defendant could charge an annual "maintenance fee" of more than $152,220 (an amount equal to 67.8% percent of the purchase price) for this year alone.

Defendant calls this construction of the Covenants "workable" while at the same time dismissing "the construction [Plaintiffs] have proposed" as "simply unworkable," given that, "[a]ccording to the Covenants, the maintenance fee at issue is payable in advance"[8]—as if the maintenance fee could not be based on a reasonable forecast of estimated maintenance and upkeep needs. To accept Defendant's position is to endorse the absurd view that the SCRA[9]—which is not a private, for-profit real estate developer, but rather an agency of the state, that, pursuant to its statutory mandate, created the Park and subjected it to the Covenants, not for the purpose of lining its own pockets, but for the purpose of promoting "economic growth in the State of South Carolina through science and engineering"[10]—intended "maintenance fee" charges to be divorced from actual expenses "for maintenance and upkeep of the Park," such that

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[5] (Def.'s Respondent's Br. p. 7 (contending "each owner must pay the per-acre fee as calculated according to the Covenants, subject only to the [Park] Authority's discretion to reduce it").)

[6] (Def.'s Respondent's Br. p. 10.)

[7] Under this reading of the Covenants, the fee would grow to roughly $22,000 in five years and $35,000 five years after that.

[8] (Def.'s Respondent's Br. p. 7.)

[9] *See Hanold v. Watson's Orchard Prop. Owners Ass'n, Inc.*, 412 S.C. 387, 396, 772 S.E.2d 528, 533 (Ct. App. 2015) ("The language of a restrictive covenant is to be construed according to the plain and ordinary meaning attributed to it *at the time of execution*.") (emphasis added), *aff'd* 419 S.C. 162, 797 S.E.2d 47 (2017) (quoting *Hardy v. Aiken*, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006)) (emphasis added).

[10] (Pls.' Trial Ex. 5 [Covenants] p. 2.)

it was free to grossly overcharge for them and profit off the difference, or at least free to grossly overcharge for them and let the overage it needlessly collected sit unused.[11]

At the same time as Defendant champions the Covenants' supposed unambiguousness as to its right to charge maintenance fees without regard to actual maintenance and upkeep expenditures, Defendant ignores the fact that the circuit court itself recognized the existence of a textual basis to the contrary when it looked to, among other things, "the language used in the Covenants" to find that "maintenance fees . . . may only be used, and may only be collected to the extent necessary, for the maintenance and upkeep of the Park." (Order filed 2/29/24 p. 8.) And it is this ruling by the circuit court, on Plaintiffs' Maintenance Fee Breach Claim, that properly applies the rules of construction to the Covenants to reach a conclusion that honors their language and underlying intent and the touchstones of common sense and good faith—rightly declining Defendant's invitation to adopt the absurd construction it urges, under which the annual "maintenance fee" that the Park Authority is authorized to collect "for the maintenance and upkeep of the Park"[12] is not in fact a "maintenance fee for the maintenance and upkeep of the Park" at all, but rather a revenue stream that the Park Authority may tap for any reason, or simply pocket as

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[11] Regarding Defendant's reference to Plaintiffs as sophisticated commercial actors who accepted the terms of the Covenants when they bought into the Park in 2011 and reaffirmed the same via the 2019 purchase, Plaintiffs certainly did not accept Defendant's unilateral construction of the Covenants. Indeed, Plaintiffs had no reason to know what that construction was, or that Defendant was not acting in good faith. It was not until after the 2019 purchase, and the subsequent receipt of a new, higher bill for maintenance fees, that Poly-Med inquired as to what maintenance fees were used for. (Pls.' Trial Exs. 18, 19, & 21.) Defendant flatly refused to say. (Pls.' Trial Exs. 20 & 22; *see also* Trial Tr. pp. 140:13–141:11.) At the time, Plaintiffs had no reason to believe, and could not have known, that Defendant was paying its mortgage, attorney's fees, accounting fees, and other operating expenses—or that Defendant was profiting—from the maintenance fees it was collecting. Given the language of the Covenants, regardless of how "big" or "sophisticated" Plaintiffs are, they had every reason to believe the fees "for maintenance and upkeep of the Park" would only be collected and used for maintenance and upkeep of the Park.

[12] (Pls.' Trial Ex. 5 [Covenants] p. 17.)

profit. This reading of the Covenants—that the maintenance fee may only be charged and collected for maintenance and upkeep of the Park—the only reasonable reading—is the only one that can be deemed unambiguous. *See Farr*, 265 S.C. at 362, 218 S.E.2d at 433 ("A contract is ambiguous only when it may *fairly and reasonably* be understood in more ways than one.") (emphasis added); *S.C. Dep't of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 624, 550 S.E.2d 299, 303 (2001) ("A contract is ambiguous when the terms of the contract are *reasonably susceptible* of more than one interpretation.") (emphasis added).

2. Regarding Plaintiffs' Argument II: The circuit court erred in ruling against Plaintiffs on Plaintiffs' Maintenance Fee Conversion Claim.

The circuit court's decision on Plaintiffs' Maintenance Fee Conversion Claim suggests that Defendant, as Park Authority, can grossly overcharge for maintenance fees (again, at this point, in excess of $12,000 per acre and increasing exponentially each year going forward) so long as it does not do anything with the amount collected in excess of what is needed for physical maintenance and upkeep, i.e., so long as the overage simply lies fallow in some account, of no use to anyone. For the reasons set forth above and in Plaintiffs' principal appellants' brief, this is nonsensical and relies on the erroneous construction of the Covenants as granting Defendant "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." (Order filed 2/29/24 p. 12; *see also* Order filed 11/6/23; Order filed 9/26/24 p. 2.)

Indeed, it should be noted, the facts of Defendant's purchase of the Park from Innovate belie this construction of the Covenants. When Innovate sold the Park to Defendant, it transferred $50,182.82 in collected but unused maintenance fees to Defendant. (Trial Tr. pp. 45:24–46:19; Pls. Trial Ex. 6.) If, in fact, maintenance fees belong to the Park Authority as soon as they are collected from Parcel owners, there would have been no need for Innovate to transfer

the unused maintenance fees to Defendant, as those funds would have belonged to Innovate. But the funds did not belong to Innovate and were therefore transferred to Defendant upon the sale of the Park, whereupon Defendant converted more than $25,000.00 of the $50,182.82 it received from Innovate for its own use. (Trial Tr. pp. 49:12–51:15; Pls.' Trial Ex. 8.) So, not only did Defendant wrongly obtain Plaintiffs' funds by collecting "maintenance fees" from them that Defendant knew would go to pay its mortgage and into its own pocket, it misappropriated maintenance fees previously collected by Innovate.

3. Regarding Plaintiffs' Argument III: The circuit court erred in ruling against Plaintiffs on Plaintiffs' Common Area Conveyance Claim.

Defendant is incorrect in asserting that Plaintiffs' Common Area Conveyance Claim relies on implied terms. On the contrary, Plaintiffs rely on, and Defendant ignores, the express language of the Covenants providing that the "[Park] Authority *shall* develop the Property . . . by designating portions of the Property, and all improvements constructed thereon, if any, as Common Areas, *and conveying them to the Association*." (Pls.' Ex. 5 [Covenants] pp. 4–5 (emphasis added).) The Covenants set out the rights and responsibilities of the Association in detail. The Association, and in turn the Plan of Development contemplated by the Covenants, is rendered pointless if the Park Authority never (or after 40 years fails to) conveys Common Areas to it.

4. Regarding Plaintiffs' Argument IV: The circuit court erred in ruling against Plaintiffs on Defendant's Trailer Removal Claim.

Defendant wrongly asserts that the finding that the Trailers breached the Covenants is unchallenged and, therefore, the law of the case. As set forth in Plaintiffs' principal appellants' brief, the provision of the Covenants implicated by Defendant's Trailer Removal Claim provides 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,"[13] and Plaintiffs presented evidence that Poly-Med duly obtained approval to install the Trailers. (Pls.' Appellants' Br. pp. 11–12, 36; *see also* Trial Tr. pp. 160:10–163:20, p. 172:3–10, pp. 187:23–190:4, pp. 234:8–237:21, p. 242:5–22.) Based on this evidence, Poly-Med duly argued at trial that the Trailers were not in breach of the Covenants. (Trial Tr. pp. 359:12–363:24.) Thereafter, the circuit court ruled against Plaintiffs on the Defendants' Trailer Removal Claim. (Order filed 11/6/23; Order filed 2/29/24 p. 13.) Nothing more is required of Plaintiffs to preserve for appellate review the threshold question of whether the Trailers were in breach of the Covenants,[14] which Plaintiffs duly argued to the circuit court below and to this Court in their principal appellants' brief, along with, of course, the secondary issue of whether, assuming, *arguendo*, the Trailers were in breach, the circuit court's remedy (removal) was proper. (Pls.' Appellants' Br. pp. 34–38.)[15]

Defendant wrongly claims that Plaintiffs cannot know what the circuit court considered in terms of the equities supporting requiring removal of the Trailers. On the contrary, it is

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[13] (Pls.' Appellants' Br p. 8 (quoting Pls.' Trial Ex. 5 [Covenants] p. 26.)

[14] *See State v. Oxner*, 391 S.C. 132, 134, 705 S .E.2d 51, 52 (2011) ("[A]ll this Court has ever required is that the questions presented for its decision must first have been fairly and properly raised to the lower court and passed upon by that court.") (citation and quotation marks omitted); *State v. Brannon*, 388 S.C. 498, 502, 697 S.E.2d 593, 595–96 (2010) ("Error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review. Instead, a litigant is only required to fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue." (citations omitted)); *see also* Rule 52(b), SCRCP ("When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment.").

[15] Defendant also suggests that Plaintiffs did not seek reconsideration of the determination that the Trailers were in breach of the Covenants. This is not true. (Pls.' Br. Regarding Removal of Trailers & Motion for Reconsideration, filed November 22, 2023 (raising both the threshold and secondary issues).) But even if it were true, a motion to reconsider was not necessary to preserve the matter for appellate review. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (a motion to reconsider is not necessary to preserve an issue or argument for appellate review where it has been raised to and ruled on by the court below); *see also* Footnote 14, *supra*.

certain that the circuit court never considered any harm to Defendant because there was absolutely no evidence of any harm to Defendant, or anyone else besides Poly-Med.

Defendant makes the specious argument that Plaintiffs cannot complain about the circuit court's decision on Trailers because they drafted the formal order wherein it was set forth. Consistent with the circuit court's correct determination that Plaintiffs were the Prevailing Party, Plaintiffs were directed by the court to prepare a formal order adopting rulings stated in the court's Form 4 order, which included the court's ruling on the Trailers. (Order filed 11/6/23.) In the order it drafted, Plaintiffs simply reproduced, nearly verbatim, the portion of the Form 4 order regarding the Trailers. (R. 24.) Plaintiffs were in no position to prepare a formal order that contradicted the circuit court's instruction; however, as explained, they did at all times argue that the decision was wrong and sought reconsideration thereof.

And despite Defendant's claim to the contrary, giving Poly-Med more time to remove the Trailers is not "balancing the equities." Poly-Med still suffered the harm of having to displace its employees and needed to get approval from Defendant for an expansion to keep the employees in the Park, near the production they needed to support and labs they needed to access. As predicted, in October of last year (2025), Defendant unreasonably refused to approve Poly-Med's plans for an expansion of its current facilities in the Park. The only reason given was Poly-Med's supposed failure to pay maintenance fees that the circuit court ruled are not owed.

5. Regarding awarding Plaintiffs attorney fees as the Prevailing Party

Plaintiffs were unquestionably the Prevailing Party on the "main issue," which is Defendant's breach of the Covenants by collecting maintenance fees well in excess of the annual cost of maintenance and upkeep of the Park. (R. 63.) As the circuit court correctly found, "the

vast majority of this case and time at trial was devoted to" the claim. (*Id.*) Yet even though this claim resulted in a $237,645.66 judgment against it, Defendant would have this Court somehow believe it won.

According to Defendant, "[t]he only aspect of [Plaintiffs'] claim on which they could plausibly claim to have prevailed was on the action for an accounting. But even that is problematic. Respondents are not entitled to an accounting under the Covenants, and ultimately, an accounting was performed by virtue of an agreement between the parties." (Def.'s Respondent's Br. p. 46.) Plaintiffs would make clear that Defendant only "agreed" to an accounting well after suit was filed (after it had repeatedly flatly refused to provide any accounting of the maintenance fees) and only "agreed" when the circuit court made it clear, at the hearing on the parties' motions for summary judgment, that an accounting was being ordered. (6/15/23 Hr'g Tr. pp. 23:17–24:9 ([Court:] "Why don't you give him the accounting? . . . Well, you need to do it in writing so they can look at it and use it in this litigation.").)

Defendant fails to mention that it also brought a meritless counterclaim for breach of the Covenants for Plaintiffs' supposed failure to pay maintenance fees. The claim was disposed of at trial on Plaintiffs' Rule 41(b), SCRCP, motion, which the circuit court summarily granted. (Trial Tr. pp. 358:12–359:10.) The circuit court's decision with respect to the Trailers should be reversed such that Plaintiffs will be the prevailing party on that counterclaim as well. And while pointless as a practical matter, Defendant's argument that Poly-Med is not entitled to an award of attorney's fees, while other Plaintiffs may be, is amply refuted in Plaintiffs' respondent's brief. (*See* Pls.' Respondents' Br. pp. 19–21.)

CONCLUSION

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

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

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