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SC Court of Appeals

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

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

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

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

Respondents/Appellants,

v.

Research Park, LLC,

Appellant/Respondent.

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# FINAL APPELLANTS' BRIEF OF RESPONDENTS/APPELLANTS

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Stephen L. Brown (SC Bar No. 66468)
Russell G. Hines (SC Bar No. 72100)
CLEMENT RIVERS, LLP
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

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

**Additional counsel identified on next page*

Willam A. Coates (SC Bar No. 1289)
Ross B. Plyler (SC Bar No. 71688)
CASSIDY COATES PRICE, P.A.
1052 North Church Street
Greenville, South Carolina 29601
P.O. Box. 10529 (29603)
(864) 349-2600

*-and-*

Marwan S. Zubi (admitted pro hac vice)
NICOLAI LAW GROUP, P.C.
198 Charlton Road, Suite 8
Sturbridge, Massachusetts 01566
P.O. Box 2840
Worcester, Massachusetts 01613
(413) 272-2000

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

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## PROLOGUE

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

A. That is correct.

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

A. That's correct.

Q. Is that communicating and trying to resolve differences?

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

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

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

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

A. Correct.

–Trial Testimony of Dan Wagner, Owner of Research Park, LLC[1]

[1] (R. pp. 408:13–409:11.)

## STATEMENT OF ISSUES ON APPEAL[2]

**I. Did the circuit court err in finding that "Defendant[3] had the unambiguous right to charge the prescribed amounts in the Covenants[4], which was $300 per acre compounded 10% annually [since 1986], for maintenance and upkeep"?**[5]

**II. Did the circuit court err in ruling against Plaintiffs**[6] **on Plaintiffs' Maintenance Fee Conversion Claim**[7]**?**

**III. Did the circuit court err in ruling against Plaintiffs on Plaintiffs' Common Area Conveyance Claim**[8]**?**

**IV. Did the circuit court err in ruling against Plaintiffs on Defendant's Trailer Removal Claim**[9]**?**

**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 attorney 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 attorney fees and costs?**[10]

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

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

[4] The "Covenants" are defined below.

[5] (R. p. 37; *see also* R. pp. 8, 51.)

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

[7] "Plaintiffs' Maintenance Fee Conversion Claim" is defined below.

[8] "Plaintiffs' Common Area Conveyance Claim" is defined below.

[9] "Defendant's Trailer Removal Claim" is defined below.

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

## STATEMENT OF THE CASE

### A. Factual Background

#### 1. Plaintiffs, the Park, and Plaintiffs' Parcels

Plaintiffs are four entities related through common ownership and control[11] that own (or, in the case of PMI Properties, used to own) and/or lease certain lots of land ("Parcels," as defined in the Declaration of Covenants, Conditions and Restrictions of Clemson Research Park (the "Covenants")) in what is now known as the Clemson University Advanced Materials Center (the "Park").[12] [13]

As further explained below, among Plaintiffs, Poly-Med is the entity that actually paid the maintenance fees at issue in this matter. (R. pp. 335:25–337:21, 417:17–24, 787–796.) Poly-Med is a biomedical technology company.[14] 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, 417:14–16.) In October of 2019, Poly-

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[11] (R. pp. 414:5–417:24.)

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

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

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

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, 782–786, 827–828.) Hereinafter, the term "Plaintiffs' Parcels" refers, collectively, to all Parcels owned by TD51, TD52, PMI Properties, or Poly-Med.

**2. The Park's Creation and Purpose**

The South Carolina General Assembly created the South Carolina Research Authority (the "SCRA") in 1983[15] "to," among other things, "enhance the research capabilities of the state's public and private universities"[16] and "promote the development of high technology industries and research facilities in South Carolina." *Id.*

The SCRA created the Park in 1986 when, pursuant to the Covenants,[17] it subjected certain real property it owned in Anderson County, South Carolina, to "a master development plan in order to develop [the Park] and to allow the [Park] Authority," i.e., the SCRA itself and its successors and assigns[18] (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.)

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

16 S.C. Code Ann. § 13-17-20.

17 (R. pp. 727–759.)

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

### 3. The Covenants

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

#### (a) The 15% Requirement

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

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

(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,"[20] 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"[21] (the "Association"), of which every Owner of a Parcel is to be a member, with every member other than the Park Authority entitled to one vote for each full acre of the Parcel to which the member is attributable and the Park Authority entitled to one vote for

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19 (R. p. 728.)
20 (R. p. 739–740.)
21 (R. p. 729 (defining "'Association'").)

each full of acre that it owns in the Park except for portions subject to roadway rights of way. (R. pp. 739–740.)

"'Common Area' . . . mean[s] and refer[s] to all portions of the [Park], if any, (1) which may have recreational facilities constructed thereon; (2) which may be designated by the [Park] Authority for the common use and enjoyment of Owners; (3) which is separately platted; and (4) which is conveyed to the Association." (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. 730–740 ("The [Park] Authority shall develop the [Park] by . . . designating portions of the [Park], and all improvements constructed thereon, if any, as Common Areas, and conveying them to the Association.").)

Subject to certain conditions irrelevant here, "[t]he [Park] Authority may convey Common Areas to the Association at any time and from time to time without notice to or approval by the Association . . . ;"[22] however, "[n]o part of the [Park] [can] be conveyed to the Association as Common Area . . . until such conveyance will result in the [Park] Authority owning less than one-half of the [Park] so that the [Park] Authority will be entitled to less than one-half the votes in the Association." (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

[22] (R. p. 731.)

[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 conveys any portion of the [Park] to the Association as Common Area . . . ." (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, 382:17–21, 453:20–23, 532:14–23, 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,"[23] the Covenants authorize the Association to use Assessments to pay "Common Expenses," a broad and open-ended term that expressly includes, without limitation, "all . . . expenses arising out of or connected with maintenance and operation of the Common 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.)[24]

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[23] (R. p. 743.)

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

> The Assessments [assessed against all Parcels by the Association] shall be based upon annual estimates of the Association's cash

**(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 attorney fees and costs in enforcement actions (the "Fees/Costs Provision"):

> In any suit or action brought by the [Park] 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.)

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

(R. p. 744.)

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

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

Unlike Defendant, its predecessors as Park Authority were all nonprofit entities. (R. pp. 291:6–13, 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,[26] a state agency. *Nichols v. S.C. Research Auth.*, 290 S.C. 415, 418, 351 S.E.2d 155, 157 (1986) (holding the SCRA "to be an agency of the State"). In 2006, the SCRA conveyed the Park, including all unsold Parcels and its developer rights, to Anderson County, a political subdivision of the state,[27] who assigned it to nonprofit entity Anderson County Development Partnership ("ACDP"). (R. pp. 713–718.) In

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

[26] (R. p. 729.)

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

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. pp. 291:6–24, 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. 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. pp. 29:19–21, 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 shows 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, 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, 761.)

**7. Innovate's Approval of the Trailers**

Poly-Med has 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. pp. 499:4–20, 502:21–25, 505:1–16, 841–856; Supp. R. pp. 18–19.) 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. pp. 841–856.) Thereafter, Ellis spoke with Nelson via telephone, and in that conversation, Nelson approved the Trailers. (R. pp. 502:8–505:16, 857–858, 863.)

**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. pp. 337:4–15, 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,[28] prompting Poly-Med's annual maintenance fee bill to increase to $19,161 beginning in 2020. (R. pp. 335:25–336:20, 787–790, 792–797.)

[28] PMI Properties paid Defendant $224,360 for the Parcel. (R. pp. 335:25–336:4, 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–

On April 30, 2020, after receiving Defendant's maintenance fee invoice dated April 24, 2020,[29] Poly-Med's president, David Shalaby ("Shalaby"), sent Wagner a message complaining that very little maintenance was actually being performed in the Park and asking for information about how the maintenance fees Defendant collected were being spent. (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 Plaintiffs were not entitled to an accounting of the maintenance fees and refused to provide one. (R. pp. 408:18–409:11, 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, 325:21–22, 332:6–10, 333:14–335:24, 352:20–353:8, 354:17–25, 356:25–358:3, 358:19–25, 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. pp. 319:10–15, 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, 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, 766–781.)

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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. pp. 829–831).

[29] (R. p. 787.)

## 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 attorney 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. 552:15–5621:21, 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.)[30]

### 2. Defendant's Counterclaims

Following an unsuccessful motion to dismiss,[31] Defendant answered Plaintiffs' complaint on February 8, 2022, denying its alleged liability, and raising various affirmative defenses. (R. pp. 120–138.) Seeking money damages, injunctive relief, and an award of attorney fees and costs, Defendant also asserted two counterclaims against Plaintiffs: one for Plaintiffs' alleged "historical[] fail[ure] to make timely payment" of maintenance fees ("Defendant's Maintenance Fee Payment Claim") and another alleging that the Trailers constituted unauthorized improvements ("Defendant's Trailer Removal Claim"). (R. pp. 120–138.)[32]

### 3. Pre-Trial Proceedings

On March 6, 2023, Plaintiffs moved for summary judgment on their claims against Defendant. (R. pp. 962–976.) 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.)

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

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

[32] Plaintiffs timely replied to Defendant's counterclaims, denying their alleged liability and raising various affirmative defenses. (R. pp. 139–142.) 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.)

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. p. 6.) 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[33]) to jointly select a qualified accountant to do an accounting of the maintenance fees;[34] and granted Plaintiffs an award of attorney fees in an amount to be determined after trial. (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,[35] 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

[33] (R. pp. 237:17–241:24, 261:25–262:24.)

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

[35] (R. pp. 4–5.)

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

By form order filed November 6, 2023, requesting a proposed formal order from Plaintiffs' counsel, the circuit court ruled in Plaintiffs' favor on (at least) Plaintiffs' Maintenance Fee Breach Claim (if not Plaintiffs' Maintenance Fee Conversion Claim), finding that "the fees charged for maintenance and upkeep were not intended to be a profit-making mechanism,"[37] that "Defendant was required by the implied covenant of good faith and fair dealing, and possibly had a fiduciary duty[,] to use the monies charged for the purpose of maintenance and upkeep,"[38] and that Plaintiffs were entitled to damages from Defendant in an amount equal to the difference between the amount that Defendant charged Plaintiffs for maintenance and upkeep and that which Defendant actually spent on maintenance and upkeep. (Supp. R. p. 1.)[39] The circuit court decided in Defendant's favor, however, on Plaintiffs' Common Area Conveyance Claim, finding that Defendant's conveyance of Common Areas to the Association was not required by the Covenants, but rather discretionary. (Supp. R. p. 1.) 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. (Supp. R. p. 1 (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

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[36] (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.)

[37] (Supp. R. p. 1 (original bold print and capitalization omitted).)

[38] (Supp. R. p. 1 (original bold print and capitalization omitted).)

[39] While Plaintiffs' Maintenance Fee Breach Claim is certainly a basis for the circuit court's finding of Defendants' liability in this regard, its form order of November 6, 2023, does not specifically mention Plaintiffs' Maintenance Fee Conversion Claim as a basis for such liability. (Supp. R p. 1.)

briefing from the parties as to what that was. (Supp. R. p. 1 (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 Defendant had actually spent on maintenance and upkeep from 2018 to 2023;[40] [41] [42] that Defendant prevailed on Plaintiffs' Common Area Conveyance Claim and on Defendant's Trailer Removal Claim; and that "[t]he parties [were to first] attempt to agree upon what constitutes a reasonable time" for removal of the Trailers and, failing that, to move the court to determine the issue. (R. p. 39.)[43] 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

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[40] (R. p. 37.) The form order states the amount of damages as $65,724.23. (Supp. R. p. 1.) 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. p. 37.)

[41] The same day, February 29, 2024, judgment was entered in favor Poly-Med against Defendant in the principal amount of $74,001.41. (R. p. 1420.)

[42] Like the form order, the formal order is, however, unclear as to whether Plaintiffs' Maintenance Fee Conversion Claim is included as a basis for Defendant's liability in this regard. (*Compare* R. p. 39 ("Judgment shall enter *in favor of Poly-Med* and against Defendant on Plaintiffs['] claim for breach of the Covenants in Count I, and *for conversion in Count II*, of Plaintiffs' Amended Complaint, in the amount of $74,001.41 . . . .") *with* R. p. 39 ("Judgment shall enter *in favor of Defendant on* Plaintiffs' claim for breach of the covenants in Count[] I (to the extent that [cause of] action is based on a violation of [the 15% Requirement])[,] *Conversion in Count II* and for an injunction in Count V of the Amended Complaint.") (emphasis added).)

[43] As referenced above, the court's form order of November 6, 2023, had directed "the parties to brief [it] on what should be considered a reasonable time period to have the structures removed base[d] on the circumstances of this case." (Supp. R. p. 1 (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, 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. 39.)

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. 38.) Accordingly, the court found Plaintiffs entitled to an award of attorney fees and costs and directed them to submit proof of the same within fourteen days. (R. p. 39.)

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, 1096–1114.) After the filing of the formal order on February 29, 2024, on March 8, 2024, Defendant filed another motion to reconsider[44] and, in accordance with the circuit court's directive that they submit proof of their attorney fees and costs within fourteen days, Plaintiffs filed a motion for attorney 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,[45] and by form order filed July 29, 2024,[46] 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. (Supp. R. p. 5.) The court adhered to its ruling that Plaintiffs were the prevailing party but also took the issue of the amount of attorney fees and costs to be awarded under advisement pending Plaintiffs' counsel's submission of revised fee/cost affidavits

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

[45] (R. pp. 639–706.)

[46] 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.)

that addressed the required elements for an award of attorney fees. (Supp. R. p. 5.) The court took the issue of the removal of the Trailers under advisement, too. (Supp. R. p. 5.)[47]

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,[48] 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 in support of Plaintiffs' Maintenance Fee Conversion Claim. (R. pp. 1345–1347.)[49] And on August 26, 2024, Defendant filed memos regarding Plaintiffs' Maintenance Fee Conversion Claim,[50] Plaintiffs' request for attorney fees and costs,[51] 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 attorney fees and costs and/or file additional briefing thereon;[52] and, while reserving the right to do so in the future should it deem Plaintiffs' progress toward removal of the Trailers to be inadequate, declined to set a certain timeframe for removal of the Trailers and instead ruled that, at Defendant's request, it would review Plaintiffs' progress in removing the Trailers from time to time going forward. (Supp. R.

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[47] The circuit court's order of July 29, 2024, did not request any party to submit a proposed formal order. (Supp. R. p. 5.)

[48] (R. pp. 1342–1344.)

[49] On August 25, 2024, Defendant noticed an appeal, prompting Plaintiffs to notice a cross-appeal on August 29, 2024. The appeals were consolidated and thereafter dismissed without prejudice by order of this Court filed October 14, 2024. (R. p. 56.)

[50] (R. pp. 1390–1391.)

[51] (R. pp. 1392–1393.)

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

p. 8.) The circuit court filed a formal order as to its rulings on Plaintiffs' Maintenance Fee Conversion Claim and the Trailer-removal issue on September 26, 2024,[53] and thereafter denied Plaintiffs' timely motion for reconsideration of the same[54] by order filed December 17, 2024. (Supp. R. p. 15.)

By form order filed November 19, 2024,[55] and formal order filed December 9, 2024, the circuit court reiterated its ruling that Plaintiffs were the prevailing party under the Fees/Costs Provision and ordered that $163,644.25 in attorney fees and costs be added to the judgment in 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 attorney fees and costs they incurred, which, given Plaintiffs' had incurred a total of $218,192.33 in attorney fees and costs as of August 7, 2024, worked out to $163,644.25. (R. p.

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[53] (R. pp. 50–53.) Although the circuit court's form order of August 27, 2024, includes the language "Defendant's counsel to prepare a formal order" (Supp. R. p. 8 (original bold print and capitalization omitted)), given the placement of this language in the context of the circuit court's ruling on the Trailer-removal issue, it was Plaintiffs' understanding that Defendant was to submit a proposed formal order as to the Trailer-removal issue only, not as to Plaintiffs' Maintenance Fee Conversion Claim. Indeed, as evidenced by the fact that its proposed formal order did not address the attorney fee/cost issue (Supp. R. pp. 20–23), even Defendant recognized that the form order did not request a proposed formal order as to all the issues addressed therein. Yet Defendant maintained that the form order requested a proposed formal order as to both the Trailer-removal issue and Plaintiffs' Maintenance Fee Conversion Claim and submitted such an order to the circuit court over Plaintiffs' objection. (R. pp. 1447–1449.)

[54] (R. p. 1441–1452.)

[55] (Supp. R. p. 12.)

66.)[56] "At Plaintiffs' request, in the interest of simplicity, and so th[e] Court d[id] not have to apportion the fees and costs among Plaintiffs, the award of fees and expenses is in favor of Plaintiff, Poly-Med, Inc., only." (R. p. 66.)

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 attorney fees and costs in the amount of $163,644.25) and its rulings in favor of Defendant on Plaintiffs' Maintenance Fee Conversion Claim, Plaintiffs' Maintenance Fee Unjust Enrichment Claim, Plaintiffs' 15% Requirement Claim, and Defendants' Trailer Removal Claim (albeit without the imposition of a date certain by which removal of the Trailers must be accomplished). (R. pp. 71–72.)[57]

This consolidated appeal follows. (R. pp. 1506–1616; *see also* R. pp. 1453–1505.)

## STANDARD OF REVIEW

The character of an action as legal or equitable depends on the relief sought. *Compare O'Shea v. Lesser*, 308 S.C. 10, 14, 416 S.E.2d 629, 631 (1992) (holding an action for breach of restrictive covenants was at law because relief sought was general damages for loss of view and

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[56] Recognizing that the Fees/Costs Provision allows the prevailing party to recover attorney 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 attorney fees and costs, they may move the court for an additional award for any attorney fees and costs incurred in this matter, including any appellate attorney fees and costs, to account for any not already covered by the order. (R. pp. 61–62, 66.)

[57] Although the circuit court's final judgment does not mention Plaintiffs' Common Area Conveyance Claim, it does state "[i]f, and to the extent, there were other claims or counterclaims of the parties in this action, they were disposed of by prior Orders of the Court" (R. p. 72), and the circuit court disposed of Plaintiffs' Common Area Conveyance Claim via form order filed November 6, 2023 (Supp. R. p. 1), and formal order filed February 29, 2024. (R. p. 37.)

invasion of privacy) *with Kneale v. Bonds*, 317 S.C. 262, 265, 452 S.E.2d 840, 841 (Ct. App. 1994) ("An action to enforce restrictive covenants by injunction is in equity."); *see also* S.C. *Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001) (holding an action to enforce restrictive covenants by injunction is an equitable action). Accordingly, with respect to the issues in this appeal regarding claims for equitable relief (Plaintiffs' Common Area Conveyance Claim and Defendant's Trailer Removal Claim), the equitable standard of review applies, under which this Court may find facts in accordance with its own view of the evidence. *See Cedar Cove Homeowners Ass'n, Inc. v. DiPietro*, 368 S.C. 254, 258, 628 S.E.2d 284, 286 (2006) ("Because the Association's action is one to enforce restrictive covenants by injunction, it is in equity, and we may find facts in accordance with our own view of the evidence."). Otherwise, the legal standard of review applies, under which the circuit court may be reversed only for errors of law or factual findings without reasonable evidentiary support. *See Electro-Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter*, 357 S.C. 363, 367, 593 S.E.2d 170, 172 (Ct. App. 2004) ("An action for breach of contract is an action at law."); *id.* ("In an action at law, on appeal of a case tried without a jury, the appellate court's standard of review extends only to the correction of errors of law."); *id.* ("The trial [court's] findings of fact will not be disturbed upon appeal unless found to be without evidence which reasonably supports the [court's] findings.").

## ARGUMENT

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

Albeit in the process of ruling in Plaintiffs' favor on Plaintiffs' Maintenance Fee Breach Claim, the circuit court erroneously found that "Defendant had the unambiguous right to charge the prescribed amounts in the Covenants, which was $300 per acre compounded 10% annually [since 1986], for maintenance and upkeep"[59] and thereafter erroneously reiterated and relied on this finding in ruling against Plaintiffs on Plaintiffs' Maintenance Fee Conversion Claim. (R. p. 51 ("In the initial written decision regarding this dispute, this Court held that, under the pertinent covenants, 'Defendant had the unambiguous right to charge the prescribed amounts in the covenants, which was $300 per acre compounded 10% annually' going back to 1986.").)

"'Restrictive covenants are contractual in nature,' so that the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document." *Palmetto Dunes Resort v. Brown*, 287 S.C. 1, 6, 336 S.E.2d 15, 18 (Ct. App. 1985) (quoting *Hoffman v. Cohen*, 262 S.C. 71, 75, 202 S.E.2d 363, 365 (1974)); *see also Litchfield Co. of S. C., Inc. v. Kiriakides*, 290 S.C. 220, 223, 349 S.E.2d 344, 346 (Ct. App. 1986) (the purpose of the rules of contract construction is to ascertain the intention of the parties as gathered from the contents of the entire document and not from any particular provision within the contract). "The language of a restrictive covenant is to be construed according to the plain and ordinary meaning attributed to it *at the time of execution*." *Hanold v. Watson's*

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[58] (R. p. 37; *see also* R. p. 51; Supp. R. p. 1.)

[59] (R. p. 37; *see also* Supp. R. p. 1.) To be clear, however, Plaintiffs do not challenge the conclusion the circuit court reached in Plaintiffs' favor on Plaintiffs' Maintenance Fee Breach Claim, only the quoted proposition about Defendant's supposed "unambiguous right." And to be further clear, Plaintiffs challenge this proposition as erroneous in every order of the circuit court in which it is included.

*Orchard Prop. Owners Ass'n, Inc.*, 412 S.C. 387, 396, 772 S.E.2d 528, 533 (Ct. App. 2015), *aff'd* 419 S.C. 162, 797 S.E.2d 47 (2017) (quoting *Hardy v. Aiken*, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006)) (emphasis added). "Common sense and good faith are the leading touchstones of the inquiry." *Farr v. Duke Power Co.*, 265 S.C. 356, 362, 218 S.E.2d 431, 434 (1975). "Where a construction of a contract makes it unusual or extraordinary and another construction, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction must prevail." *Farr v. Duke Power Co.*, 265 S.C. 356, 362, 218 S.E.2d 431, 434 (1975). Likewise, "[a]n interpretation which establishes the more reasonable and probable agreement of the parties should be adopted while an interpretation leading to an absurd result should be avoided." *Koon v. Fares*, 379 S.C. 150, 155, 666 S.E.2d 230, 233 (2008).[60]

To say that "Defendant had the unambiguous right to charge the prescribed amounts in the Covenants, which was $300 per acre compounded 10% annually [since 1986], for maintenance and upkeep . . . ," is to say that Defendant has the right to charge Owners more than $10,000 (and counting) per acre per year for maintenance and upkeep without regard to what is actually spent on maintenance and upkeep—which is patently absurd. Indeed, even Wagner himself admitted that this "would be a little egregious." (R. pp. 322:3–323:3.)

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

[60] These principles are hereby incorporated into Plaintiffs' other arguments that implicate contract construction.

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

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

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

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

As explained above, the circuit court's ruling against Plaintiffs on Plaintiffs' Maintenance Fee Conversion Claim is erroneous due to the court's mistaken reliance on the proposition that "'Defendant had the unambiguous right to charge the prescribed amounts in the covenants,

which was $300 per acre compounded 10% annually' going back to 1986.'" (R. p. 51.) While this alone is sufficient to warrant reversal, Plaintiffs would make clear that, after getting off on the wrong track by relying on this erroneous proposition, the circuit court continued further in the wrong direction.

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

> In the initial written decision regarding this dispute, this Court held that, under the pertinent covenants, "Defendant had the unambiguous right to charge the prescribed amounts in the covenants, which was $300 per acre compounded 10% annually" going back to 1986. The undisputed evidence at trial was that, for the duration of Defendant's ownership of the Clemson Research Park, Defendant had charged property owners $600 per year per acre owned, and that this was substantially less than the amount authorized by the covenants, which is a mathematical fact. Accordingly, the Court held that the amount Defendant had charged property owners under the covenants was consistent with the covenants, while also holding that Defendant's use of funds collected from property owners for anything other than "maintenance and upkeep," as that term is defined in this Court's prior decision, was inconsistent with the covenants.
>
> Plaintiffs' interpretation of the covenants appears to conflate two issues: collection of maintenance fees and their expenditure. It appears to be Plaintiffs' contention that, under the covenants, Defendant may only collect maintenance fees from property owners necessary to cover "maintenance and upkeep;" that the collection of any amount of maintenance fee in excess of what is necessary for "maintenance and upkeep" constitutes conversion.
>
> To reach this construction, however, the Court would have to disregard the plain language of the covenants, which establish the method by which annual maintenance fees are calculated, and which further establish that each property owner's obligation is to pay the maintenance fees as calculated. And, while the covenants do give Defendant the authority to reduce the amount of the maintenance fee in any given year according to its discretion, the covenants do not establish an obligation to do so. Therefore, if the Court were to adopt Plaintiffs' construction of the covenants, the Court would also be required to create a new term in the covenants—one providing an alternative method of calculating the

> maintenance fee—even though the covenants already establish the method by which the fee is calculated. Consistent with well-established precedent, the Court declines the invitation to create a new contractual obligation.
>
> The question of whether Defendant's collection of maintenance fees remains distinct from the question of how the maintenance fees are spent.

(R. pp. 51–52.)

This analysis is inconsistent with the circuit court's February 29, 2024, order, which, in granting Plaintiffs judgment in an "amount represent[ing] the difference *in what Defendant charged Plaintiff[s] for maintenance and upkeep* and the amount defendant actually spent on maintenance and upkeep . . . ,"[61] had already correctly recognized that "[t]he Covenants provide that the Authority may collect 'a maintenance fee for maintenance and upkeep of the Park,'"[62] and ruled that, under the terms of the Covenants, the Park "authority is limited to charging parcel owners for 'maintenance and upkeep,"[63] and that:

> To the extent the Covenants do not *expressly* provide that maintenance fees collected by the [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.

(R. pp. 33–34 (bold print added for emphasis) (italics in original).)

As explained above, by the time of the inconsistent September 26, 2024, order, the circuit court had already denied Defendant's motion for reconsideration of the February 29, 2024, order via its July 29, 2024, order, which ruled, "Defendant['s] motion to reconsider is denied as to the Court's ruling on maintenance and upkeep and related fees. Plaintiffs['] award of damages is

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61 (R. p. 37 (emphasis added); *see also* R. p. 39.)

62 (R. p. 35.)

63 (R. p. 28.)

affirmed. The Court finds that Plaintiff is the prevailing party in the case." (Supp. R. p. 5 (original bold print omitted).)[64] Therefore, at that time, Plaintiffs' Maintenance Fee Conversion Claim, the amount of attorney fees and costs to be awarded Plaintiffs, and the removal of the Trailers were the only matters still under advisement. (Supp. R. p. 5.)

Then, after Plaintiffs submitted proof of their attorney fees, by order filed August 27, 2024, the circuit court gave Defendant an opportunity to challenge the amount of attorney fees sought, denied Plaintiffs' Maintenance Fee Conversion Claim, and announced its ruling on the Trailer-removal issue, which was that it would not set a certain timeframe for their removal but would instead monitor Plaintiffs' progress at Defendant's request. (Supp. R. p. 8.) At the end of paragraph of the order concerning the Trailers, the Court instructed Defendant's counsel to prepare a formal order. (Supp. R. p. 8.)

As noted above, Defendant disagreed with Plaintiffs' position that the circuit court had only requested a proposed formal order from Defendant addressing the Trailer-removal issue. After Defendant's counsel submitted a proposed order addressing both the Trailer-removal issue and Plaintiffs' Maintenance Fee Conversion Claim,[65] Plaintiffs advised the circuit court that Defendant's proposed order appeared to be:

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

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[64] Likewise, at the July 24, 2024, hearing on Defendant's motion for reconsideration, with respect to the maintenance fee issue, the Court stated, "the way I saw it worded was the way I ruled," "I'm not going to change my mind," and "I'm not changing my ruling on that." (R. pp. 690:12–691:1.)

[65] (R. pp. 1448–1449.)

(R. p. 1447 (emphasis in original).) Plaintiffs also advised the court that "many of the purported factual findings in Defendant's proposed order on conversion have little to do with the conversion claim and much to do with the breach of covenants claim that Defendant l[o]st . . . ." (R. p. 1447.)

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

Moreover, the circuit court's conversion analysis is erroneous. "Conversion is the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of the condition or the exclusion of the owner's rights.

Conversion may arise by some illegal use or misuse, or by illegal detention of another's personal property. Conversion is a wrongful act which emanates by either a wrongful taking or wrongful detention." *Hawkins v. City of Greenvi*lle, 358 S.C. 280, 297, 594 S.E.2d 557, 566 (Ct. App. 2004) (internal quotations and citations omitted). "Conversion is a tortious act and 'may arise either by a wrongful taking of the chattel or by some other illegal assumption of ownership, by illegally using or misusing it, or by wrongful detention.'" *Castell v. Stephenson Fin. Co.,* 244 S.C. 45, 50–51, 135 S.E.2d 311, 313 (1964) (quoting *Young v. Corbitt Motor Truck Co.,* 148 S.C. 511, 146 S.E. 534, 542 (1929)). Conversion may result by securing money, "illegally, tortiously, by fraud, or other wrongful conduct." *SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 499, 392 S.E.2d 789, 793 (1990). "If a party wrongfully assume[s] property in goods belonging to another, or wrongfully use[s] them, it amounts to a direct conversion . . . ." *McPherson v. Neuffer & Hendrix,* 45 S.C.L. 267, 281 (S.C. App. L. 1858).

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

[66] (R. pp. 787–790.)

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

In ruling against Plaintiffs on Plaintiffs' Common Area Conveyance Claim, the circuit court erroneously found that, "when taking the Covenants into consideration as a whole, Defendant is under no obligation or requirement to convey Common Areas over to the Association. Based on the Covenants, the conveyance of Common Areas to the Association is discretionary." (R. p. 37; *see also* Supp. R. p. 1.)

The Covenants provide that the "[Park] Authority **shall** develop the Property . . . by designating portions of the Property, and all improvements constructed thereon, if any, as Common Areas, and conveying them to the Association." (R. pp. 730–731 (emphasis added).) The Covenants also provide that "[n]o part of the Property shall be conveyed to the Association as Common Area . . . until such conveyance will result in the [Park] Authority owning less than one-half of the Property so that the [Park] Authority will be entitled to less than one-half the votes in the Association." (R. p. 733.) Because the Covenants do not include a period of time by which the Park Authority must designate Common Areas and convey them to the Association, the Court must imply a reasonable period of time. *Cf. Davis v. Cordell*, 237 S.C. 88, 99–100, 115 S.E.2d 649, 654 (1960) ("Here the contract specified no precise date upon which appellant was required to pay the balance of the purchase price; by presumption of law, he was required to do so within a reasonable time."); *Com. Credit Corp. v. Nelson Motors, Inc.,* 247 S.C. 360, 366–67, 147 S.E.2d 481, 484 (1966) ("[N]oncontradictory terms may be implied in a contract in order to effectuate the manifest intention of the parties when the circumstances warrant it, and . . . there exists in every contract an implied covenant of good faith and fair dealing.").

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

Defendant currently owns somewhere between 118.81 acres (47.94% of the acres) and 136.40 acres (51.44% of the acres) in the Park, while the Owners other than Defendant currently own somewhere between 129.04 acres (52.07% of the acres) and 128.76 acres (48.56 % of the acres) in the Park. (R. p. 874.) Defendant has breached the Covenants by failing to designate *any* Common Areas and convey them to the Association within a reasonable period of time. The circuit court should have issued an order directing Defendant to designate, as Common Areas, at least ten (10) acres of Defendant's property in the Park, or such lesser amount of acres as will result in Defendant owning less than one-half of the Park Property so that Defendant will be entitled to less than one-half the votes in the Association, and then convey the Common Areas to an Association of Park Owners pursuant to the Covenants.

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[67] (R. pp. 730–731.)

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

In ruling against Plaintiffs on Defendant's Trailer Removal Claim, the circuit court erroneously found "that the Poly-Med Trailers that were once considered temporary structures in accordance with the Covenants, have gone past the time period in which they can reasonabl[y] be considered temporary. As such, these trailers are in violation of the Covenants . . . [and] ordered to be removed within a reasonable time . . . ." (R. p. 38; *see also* Supp. R. p. 1.)[68]

Restrictions on the use of property are historically disfavored. *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 270, 363 S.E.2d 891, 893 (1987). "The historical disfavor of restrictive covenants by the law emanates from the widely held view that society's best interests are advanced by encouraging the free and unrestricted use of land." *Rhodes v. Palmetto Pathway Homes, Inc.*, 303 S.C. 308, 311, 400 S.E.2d 484, 485 (1991). "[A]ll such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property." *Buffington v. T.O.E. Enters.*, 383 S.C. 388, 392, 680 S.E.2d 289, 291 (2009).

Moreover, the relief Defendant seeks with respect to the Defendant's Trailer Removal Claim, i.e., removal of the Trailers, is a mandatory injunction. 27 S.C. Jur. Injunctions § 3 ("A mandatory injunction is an extraordinary remedial process that commands the performance of some positive act."). And "[i]n cases where a mandatory injunction is sought, the general rule in this country is that the court will balance the benefit of an injunction to the plaintiff against the inconvenience and damage to the defendant, and grant an injunction or award damages as seem most consistent with justice and equity under the circumstances of the case." *Forest Land Co. v. Black*, 216 S.C. 255, 266–67, 57 S.E.2d 420, 426 (1950) (internal citation omitted); *see also*

[68] At least implicitly, the court erroneously adhered to this ruling in its orders filed August 27, 2024 (Supp. R. p. 8), September 26, 2024 (R. p. 53), November 19, 2024 (Supp. R. p. 12), and December 20, 2024. (R. pp. 71–72.)

*Hunnicutt v. Rickenbacker*, 268 S.C. 511, 515–16, 234 S.E.2d 887, 889 (1977) ("[I]t is not every case of a structure erected in violation of a restriction which will call for [a mandatory injunction requiring removal of the structure]. The issuance of a mandatory injunction depends upon the equities between the parties, and it rests in the sound judicial discretion of the court whether such an injunction should be granted. *Where a great injury will be done to the defendant, with very little if any to the plaintiff, the courts will deny equitable relief*.") (quoting 20 Am. Jur. 2d. Covenants, etc. § 328) (emphasis added)); *LeFurgy v. Long Cove Club Owners' Ass'n, Inc.*, 313 S.C. 555, 558, 443 S.E.2d 577, 578 (Ct. App. 1994) ("The remedy of injunction is a drastic one and should be cautiously applied only when legal rights are unlawfully invaded or legal duties are willfully or wantonly neglected.").

As an initial matter, the circuit court committed reversible error here by requiring that the Trailers be removed without any balancing of the equities whatsoever. (R. p. 38; Supp. R. p. 1.) Moreover, and in any event, the balance of the equities weighs heavily against requiring Plaintiffs to remove the Trailers.

As explained above, before Defendant acquired the Park, Poly-Med (via Ellis) duly sought and obtained Innovate's approval (via Nelson) for the Trailers. Innovate never complained about the Trailers thereafter, and for that matter, neither did Defendant until the filing of its Answer and Counterclaim on February 8, 2022, which was Plaintiffs' first notice that Defendant had an issue with the Trailers. (R. p. 1122.) Defendant identified no harm of any kind to itself or any other Parcel Owner(s) as a result of the Trailers. Indeed, the Covenants do not prohibit trailers or temporary structures, they simply require improvements to be approved by the Park Authority or its agent (R. p. 752), which approval Poly-Med did in fact obtain. Likewise, Defendant presented no evidence that the Trailers violate any Park rule or regulation;

nor did Defendant offer any evidence or testimony that it, or anyone else, was dissatisfied with "the quality of materials, harmony of external design and size, [or] location" of the Trailers or other matters to be considered by the Park Authority or Design Review Committee under the Covenants, including as to "the suitability" of the Trailers or materials of which they are built, "the appropriateness and harmony" of them in relation to improvements on contiguous or adjacent Parcels and "in relation to the general plan for the development of the Park," their "architectural merits," the effect of the Trailers "on the outlook from adjacent or neighboring Parcels" or any "other matters as may be deemed to be in the interest and benefit of the Owners of Parcels in the Park as a whole." (R. pp. 752–753.) On the contrary, it is reasonable to infer that Defendant brought Defendant's Trailer Removal Claim merely in retaliation for Plaintiffs bringing this action and/or out of spite.

Removing the Trailers, moving the affected employees and providing them with new offices will be a substantial burden and expense for Poly-Med. (R. p. 1123.) There are currently 40 Poly-Med employees working in the Trailers. (R. p. 1123.) Without the Trailers, Poly-Med does not have enough space for the employees in its current facilities in the Park. (R. p. 1123.) While a small number of the forty (40) employees could potentially be relocated out of the Park, most of them support production in the building at 52 Technology Drive and/or need access to the laboratories at 51 Technology Drive. (R. p. 1123.) When the Trailers are removed, Poly-Med's critical need would be to expand its current building at 52 Technology Drive and continue to employ the forty (40) employees in the Park. (R. p. 1123.)

Further still, under the Covenants, Defendant would have to approve any such expansion. (R. p. 752.) Given the animosity between Plaintiffs and Defendant, Plaintiffs are concerned that Defendant will unreasonably refuse to approve any expansion by Plaintiffs or call for plan

revisions that make the expansion cost prohibitive. That would lead to a reduction in the number of Poly-Med employees in the Park—the exact opposite of the purpose and intent of the Covenants: "to promote the development of high technology industries and research facilities" and "bring about economic growth." (R. pp. 727–728.) Because removal of the Trailers will cause great injury to Plaintiffs and allowing them to remain will cause no harm to Defendant (nor, for that matter, would their removal confer any benefit upon Defendant), this Court should reverse the circuit court's ruling against Plaintiffs on Defendant's Trailer Removal Claim and allow Plaintiffs to maintain the Trailers on their property. *See, e.g., Hunnicutt*, 268 S.C. at 517, 234 S.E.2d at 890 (reversing mandatory injunction for removal of structure based on balancing of the equities).

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

As explained above, while the circuit court (correctly) found Plaintiffs to be the prevailing party under the Fees/Costs Provision, because they prevailed on the "main issue" to which "the vast majority of this case and time at trial was devoted[:] . . . Plaintiffs' claims that Defendant breached the Covenants by collecting maintenance fees well excess of the annual cost of maintenance and upkeep of the Park." (R. pp. 63–64; *see also* Supp. R. p. 12.) But for the express reason that Plaintiffs did not prevail on Defendant's Trailer Removal Claim, the court reduced the amount of attorney fees and costs Plaintiffs could recover by 25%. (R. p. 66 ("Plaintiffs did not prevail on all of their claims, *as the case also involved Defendant's counterclaim for an order requiring removal of the Plaintiffs' office trailers*.") (emphasis added); *see also* R. p. 71 (granting Plaintiffs' judgment in an amount equal to 75% of their total attorney

fees and costs); Supp. R. p. 12 (granting Plaintiffs 75% of their total attorney fees and costs).) Consequently, if this Court reverses the circuit court as to its ruling against Plaintiffs on Defendant's Trailer Removal Claim, and/or any other claim, Plaintiffs should be awarded (either by this Court directly or by the circuit court on remand with instructions from this Court, whichever is procedurally proper) 100% (or at least a higher percentage) of their attorney fees and costs.

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

The Fees/Costs Provision entitles "the prevailing party . . . to his costs and disbursements and reasonable attorney fees in [any] suit or action [to enforce the Covenants] and *any appeal thereof*." (R. p. 748 (emphasis added).). If this Court rules in favor of Plaintiffs in this appeal, and/or with respect to Defendant's appeal, they should be awarded their appellate attorney fees and costs (either by this Court directly or by the circuit court on remand, whichever is procedurally proper) in an amount to be determined following submission of proof thereof.

## CONCLUSION

For the foregoing reasons, the circuit court should be reversed as to its finding that "Defendant had the unambiguous right to charge the prescribed amounts in the Covenants, which was $300 per acre compounded 10% annually [since 1986], for maintenance and upkeep;" its ruling against Plaintiffs on Plaintiffs' Maintenance Fee Conversion Claim; its ruling against Plaintiffs on Plaintiffs' Common Area Conveyance Claim; and its ruling against Plaintiffs on Defendant's Trailer Removal Claim, and in consequence of the reversal of the circuit court's ruling against Plaintiffs on Defendant's Trailer Removal Claim, Plaintiffs should be awarded (either by this Court directly or by the circuit court on remand with instructions from this Court,

whichever is procedurally proper) 100% (or at least a higher percentage) of their attorney 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 attorney 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,

By: s/Russell G. Hines

Stephen L. Brown (SC Bar No. 66468)
Russell G. Hines (SC Bar No. 72100)
CLEMENT RIVERS, LLP
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

*-and-*

Willam A. Coates (SC Bar No. 1289)
Ross B. Plyler (SC Bar No. 71688)
CASSIDY COATES PRICE, P.A.
1052 North Church Street
Greenville, South Carolina 29601
P.O. Box. 10529 (29603)
(864) 349-2600

*-and-*

Marwan S. Zubi (admitted pro hac vice)
NICOLAI LAW GROUP, P.C.
198 Charlton Road, Suite 8
Sturbridge, Massachusetts 01566
P.O. Box 2840
Worcester, Massachusetts 01613
(413) 272-2000

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

Charleston, South Carolina

February 27, 2026

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SC Court of Appeals

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

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

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

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

Respondents/Appellants,

v.

Research Park, LLC,

Appellant/Respondent.

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# CERTIFICATION FOR FINAL APPELLANTS' BRIEF OF RESPONDENTS/APPELLANTS

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Stephen L. Brown (SC Bar No. 66468)
Russell G. Hines (SC Bar No. 72100)
CLEMENT RIVERS, LLP
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

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

**Additional counsel identified on next page*

Willam A. Coates (SC Bar No. 1289)
Ross B. Plyler (SC Bar No. 71688)
CASSIDY COATES PRICE, P.A.
1052 North Church Street
Greenville, South Carolina 29601
P.O. Box. 10529 (29603)
(864) 349-2600

*-and-*

Marwan S. Zubi (admitted pro hac vice)
NICOLAI LAW GROUP, P.C.
198 Charlton Road, Suite 8
Sturbridge, Massachusetts 01566
P.O. Box 2840
Worcester, Massachusetts 01613
(413) 272-2000

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

I, Russell G. Hines, do hereby certify that the **Final Appellants' Brief of Respondents/Appellants** complies with Rule 211(b), SCACR. Additionally, the undersigned hereby certifies that this filing complies with the Supreme Court order of April 15, 2014.

Respectfully submitted,

By: s/Russell G. Hines

Stephen L. Brown (SC Bar No. 66468)
Russell G. Hines (SC Bar No. 72100)
CLEMENT RIVERS, LLP
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

*-and-*

Willam A. Coates (SC Bar No. 1289)
Ross B. Plyler (SC Bar No. 71688)
CASSIDY COATES PRICE, P.A.
1052 North Church Street
Greenville, South Carolina 29601
P.O. Box. 10529 (29603)
(864) 349-2600

*-and-*

Marwan S. Zubi (admitted pro hac vice)
NICOLAI LAW GROUP, P.C.
198 Charlton Road, Suite 8
Sturbridge, Massachusetts 01566
P.O. Box 2840
Worcester, Massachusetts 01613
(413) 272-2000

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

Charleston, South Carolina

February 27, 2026