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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.

FINAL RESPONDENTS' BRIEF OF RESPONDENTS/APPELLANTS

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A. Did the circuit court err in finding that Defendant breached the Covenants by charging Plaintiffs maintenance fees in excess of actual maintenance and upkeep costs?

B. Did the circuit court err in finding that Defendant's breach of the Covenants caused Poly-Med recoverable damages in the amount of $74,001.41?

II. Did the circuit court err in awarding Plaintiffs attorney fees and costs and denying Defendant the same?

III. If this Court rules in favor of Plaintiffs in this appeal, and/or with respect to Plaintiffs' own 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?[2]

COUNTER-STATEMENT OF THE CASE

Plaintiffs incorporate herein by reference the statement of the case set forth in their appellants' brief.

STANDARD OF REVIEW

Defendant's appeal challenges the circuit court's ruling in Plaintiffs' favor on Plaintiffs' Maintenance Fee Breach Claim. Because Plaintiffs' Maintenance Fee Breach Claim is a claim for

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[1] In this cross-appeal, Plaintiffs have already filed an appellants' brief. Shorthand references defined in that brief 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] 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).

breach of restrictive covenants seeking money damages, it is an action at law. *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 invasion of privacy). "In an action at law, tried without a jury, the appellate court's standard of review extends only to the correction of errors of law." *Smith v. Auto-Owners Ins. Co.*, 377 S.C. 512, 515, 60 S.E.2d 271, 272 (Ct. App. 2008). The appellate court "will not disturb the trial court's findings of fact unless those findings are wholly unsupported by the evidence or controlled by an erroneous conception or application of the law." *Id.*

Defendant's appeal also challenges the circuit court's decision regarding attorney fees. When, as here, an award of attorney fees is based on contract, the determination of the fees is left to the discretion of the trial court and will not be disturbed absent an abuse of discretion. *S.C. Elec. & Gas Co. v. Hartough*, 375 S.C. 541, 550, 654 S.E.2d 87, 91 (Ct. App. 2007). "An abuse of discretion occurs when a [trial] court's order is controlled by an error of law or there is no evidentiary support for the [trial] court's factual conclusions." *Wilson v. Dallas*, 403 S.C. 411, 425, 743 S.E.2d 746, 754 (2013).

ARGUMENT

I. The circuit court did not err in awarding Poly-Med judgment in the principal amount of $74,001.41 on Plaintiffs' Maintenance Fee Breach Claim.

A. The circuit court did not err in finding that Defendant breached the Covenants by charging Plaintiffs maintenance fees in excess of actual maintenance and upkeep costs.

In ruling for Plaintiffs on Plaintiffs' Maintenance Fee Breach Claim, the circuit court correctly found that Defendant breached the Covenants by charging maintenance fees in excess of actual maintenance and upkeep costs. At the heart of the court's ruling is its construction of the

Covenants as not intending maintenance fees to be a profit center for the Park Authority,[3] but rather as limiting the use and collection of maintenance fees to that which is necessary for the maintenance and upkeep of the Park,[4] with "maintenance and upkeep" expenses being those associated with physical repair, upkeep, and preservation, and not administrative or managerial expenses. (R. pp. 34–35.) In so doing, the court properly applied 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—and rightly declined 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"[5] 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 profit.

"'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) (emphasis added) (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

[3] (R. p. 37 ("The fees charged for maintenance and upkeep were not intended to be a profit-making mechanism.").)

[4] (R. pp. 33–34 ("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 [Park] Authority (SCRA) and the covenant of good faith and fair dealing, such a limitation may be certainly implied.") (emphasis in original).)

[5] (R. p. 743.)

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 Orchard Prop. Owners Ass'n, Inc.*, 412 S.C. 387, 396, 772 S.E.2d 528, 533 (Ct. App. 2015) (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)).

"When a [contract] does not define a term, the term should be defined according to the usual understating of the term's significance to the ordinary person." *Hutchinson v. Liberty Life Ins. Co.*, 393 S.C. 19, 24, 709 S.E.2d 130, 134 (Ct. App. 2011). "[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 that there exists in every contract an implied covenant of good faith and fair dealing." *Com. Credit Corp. v. Nelson Motors, Inc.*, 247 S.C. 360, 366–67, 147 S.E.2d 481, 484 (1966).

> A contract includes not only what is expressly stated but also what is necessarily to be implied from the language used and external facts, such as the surrounding circumstances; and terms which may clearly be implied from a consideration of the entire contract are as much a part thereof as though plainly written on its face. In the absence of an express provision therefor, the law will imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made.

Id. (quoting 17A C.J.S. *Contracts* § 328, pp. 282–84); *Boddie-Noell Properties, Inc. v. 42 Magnolia P'ship*, 344 S.C. 474, 484, 544 S.E.2d 279, 284 (Ct. App. 2000), *aff'd as modified* 352 S.C. 437, 574 S.E.2d 726 (2002).

"Common sense and good faith are the leading touchstones of [contract construction]." *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." *Id*. 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).

Prior to the Park Authority's conveyance of any portion of the Park to the Association as Common Area, the Covenants allow the Park Authority to collect "a maintenance fee *for the maintenance and upkeep of the Park*." (R. p. 743 (emphasis added).) Contrary to Defendant's assertion that "[t]he Covenants do not place any limitations on [its] ability to pay for expenditures out of the maintenance fees,"[6] the very language authorizing the maintenance fee is self-limiting and expressly ties the allowable maintenance fee to "maintenance and upkeep of the Park." And while the terms "maintenance" and "upkeep" are not defined by the Covenants, the circuit court properly looked to evidence of their usual and customary meaning from dictionary definitions and case law to determine that "maintenance and upkeep" did not embrace the disputed uses to which Defendant had put maintenance fees, which included, "expenses for mortgage payments, attorney fees, accounting fees, management expenses, insurance premiums and marketing expenses." (R. p. 35.)[7]

The circuit court did not, as Defendant asserts, "expressly limit the types permissible expenses [to be paid out of maintenance fee funds] to landscaping, power, and water." (Def.'s Appellant's Br. p. 13; *see also id.* at 31 (accusing the circuit court of "proscribing the use of

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[6] (Def.'s Appellant's Br. p. 31.)

[7] There is no question that Defendant used maintenance fees 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, 763–765, 768–781), and simply for Wagner's own personal use. (R. pp. 333:14–335:24, 766–781.)

maintenance fees to only and exclusively ordinary physical asset preservation, which the court later defined as only and exclusively landscaping, power, and water.").) Rather, the court correctly found that, out of the actual expenditures of maintenance fees that Defendant made, the only ones that constituted valid expenditures of maintenance fees were those that Defendant had spent on landscaping, power, and water. (R. p. 36 ("The Court finds that the only expenses actually used 'for maintenance and upkeep of the Park' incurred by Defendant since it took ownership of the Park, and became Park Authority in October 2018, were expenses for water, power and landscaping.").) While properly confining the use of maintenance fees to "physical repair, upkeep, and preservation,"[8] the circuit court left ample room for the expenditure of maintenance fees in any ways that are consistent with the usual and customary meaning of terms "maintenance" and "upkeep." The circuit court did not unduly limit the meaning of "maintenance and upkeep" but rather kept Defendant from unduly expanding it.[9]

Read in proper context and in keeping with the rules of contract construction, the Covenants necessarily limit the "maintenance fee" that the Park Authority may charge to that which is reasonably needed "for maintenance and upkeep." To accept Defendant's position is to endorse the absurd view that the SCRA—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

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[8] (R. p. 34 (finding that "'maintenance' connotes a state of physical repair, upkeep, and preservation, and does not include administrative expenditures").)

[9] To be clear, Defendant's reliance on the language in the circuit court's order regarding Defendant's supposed "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 misplaced because, as explained in Plaintiffs' appellants' brief (and incorporated herein by reference), the circuit court erred in this regard—indeed, even Wagner himself admitted that for Defendant to act in accordance with this supposed right "would be a little egregious." (R. pp. 322:3–323:3.)

promoting "economic growth in the State of South Carolina through science and engineering"[10]—intended maintenance fee charges to be divorced from actual maintenance and upkeep expenses, such that it was free to grossly overcharge beyond any actual maintenance and upkeep needs and profit off the difference, or at least free to grossly overcharge beyond any actual maintenance and upkeep needs so long as the overage it needlessly collected sits unused.

To accept Defendant's position is also to accept the untenable view that—even though they are expressly treated separately in the Covenants—the "maintenance fee" that the Park Authority is allowed to charge "for maintenance and upkeep" is the same thing as the "Assessments" that the Association is allowed to charge to cover "Common Expenses." (*Compare* R. p. 743 (entitled, "Maintenance Fee to the [Park] Authority" (original underline omitted)) *with* 744–745 (entitled, "Assessments" (original underline omitted).) Unlike the "maintenance fee," which is, after all, expressly denominated as a *maintenance* fee, and which the Covenant's only authorize the Park Authority to collect "for maintenance and upkeep of the Park,"[11] 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.)[12]

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10 (R. p. 728.)

11 (R. p. 743.)

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

> The Assessments [assessed against all Parcels by the Association] shall be based upon annual estimates of the Association's cash requirements to provide for payment of all estimated expenses arising out of or connected with maintenance and operation of the Common Areas. Such estimated expenses may include, among

And it only makes sense that the Covenants would treat maintenance fees and Assessments differently, because the Park Authority and the Association are very different animals. 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 v. S.C. Research Auth.*, 290 S.C. 415, 417, 351 S.E.2d 155, 156 (1986) (quoting S.C. Code Ann. § 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 not only had a different incentive structure and institutional prerogatives (as a state agency, rather than a private, for-profit developer) but also had the means to pay expenses beyond maintenance and upkeep from sources other than maintenance fees collected from Owners. Whereas, 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."

> 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.)

Defendant wrongly asserts that the circuit court's ruling prohibits the Park Authority from engaging in the same activities,[13] claiming the Covenants contain no such restriction, and wrongly suggests that the court determined "that the [Park] Authority—through the Covenants—had reserved less governance and financial opportunity for itself than would ultimately be granted to the Association." (Def.'s Appellant's Br. pp. 24–25.) The Covenants specifically authorize the *Association* to engage in certain activities,[14] in addition to "repairs and maintenance." (R. pp. 742–744, 747.) Even though the Covenants do not specifically authorize the Park Authority to engage in such activities, neither the Covenants nor the court's order prohibits the Park Authority from doing so. Entirely consistent with the terms of Covenants, the court's order merely provides that the only one of those activities for which the Park Authority may charge maintenance fees is the maintenance and upkeep of the Park. (R. pp. 35–36.)

Defendant's challenge that the circuit court's ruling is improperly based on the covenant of good faith and fair dealing is misguided. As an initial matter, Plaintiffs' Maintenance Fee Brech Claim is a claim for breach of contract,[15] and "the implied covenant of good faith and fair dealing is not an independent cause of action separate from the claim for breach of contract;"[16] thus, even if it were the case that Plaintiffs' Maintenance Fee Breach Claim rested on Defendant's breach of the implied covenant of good faith and fair dealing, such a claim is subsumed and sufficiently raised within Plaintiffs' Maintenance Fee Breach Claim. But more importantly, neither Plaintiffs' Maintenance Fee Breach Claim nor the circuit court's ruling in Plaintiffs' favor thereon rests on

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[13] Such activities include, among others, creating a contingency reserve fund, retaining a professional manager or management company, incurring legal and accounting fees, and procuring liability insurance. (Def.'s Appellant's Br. p. 24.)

[14] *See* note 13, *supra*.

[15] *See O'Shea*, 308 S.C. at 14, 416 S.E.2d at 631.

[16] *RoTec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct. App. 2004).

the covenant of good faith and fair dealing creating new contractual duties that are not already expressly or fairly implied in the Covenants themselves.

The circuit court did not, as Defendant asserts, "rest[] its construction of 'maintenance and upkeep' on the implied covenant of good faith and fair dealing . . . ." (Def.'s Appellant's Br. p. 13.) Rather, in accordance with Plaintiffs' position regarding the correct construction of the Covenants, the court reasoned as follows:

> 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,[17] given the language used in the Covenants, the intent of them and of the original [Park] Authority (SCRA) and the covenant of good faith and fair dealing, such a limitation may be certainly implied.

(R. pp. 33–34 (emphasis in original).) Besides the that fact that the court's reference to the covenant of good faith and fair dealing was not improper—as, indeed, good faith[18] and fairness[19] are proper considerations in construing a contract[20]—it expressly rests its construction of the Covenants on their language and underlying intent, which is, of course, exactly what it is supposed to do in construing a contract. *See Palmetto Dunes Resort*, 287 S.C. at 6, 336 S.E.2d at 18; *Hanold*, 412 S.C. at 396, 772 S.E.2d at 533.

Lastly, Defendant's reliance on the business judgment rule is also misplaced. The business judgment rule applies to claims for breach of a duty "between the directors of a homeowners

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[17] Defendant wrongly asserts that the circuit court limited the use of maintenance fees to Common Areas. (Def.'s Appellant's Br. p. 22.) As the above-quoted language shows, the court expressly referred to "maintenance and upkeep of the *Park*." (R. p. 34 (emphasis added).)

[18] *Farr*, 265 S.C. at 362, 218 S.E.2d at 434.

[19] *Koon*, 379 S.C. at 155, 666 S.E.2d at 233.

[20] Context makes clear that the circuit court's consideration of good faith and fair dealing was as interpretative tools and not as creating new contractual terms not already expressly stated or fairly implied in the Covenants.

association and aggrieved homeowners." *Goddard v. Fairways Dev. Gen. P'ship*, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993). It does not apply to claims for breach of restrictive covenants against a limited liability company in which the plaintiff has no membership, ownership, or involvement. *See Patterson v. Witter*, 425 S.C. 213, 235, 821 S.E.2d 677, 689 n.9 (2018) (business judgment rule does not apply to claims for breach of contract); *Bangerter v. Hat Island Cmty. Ass'n*, 199 Wash. 2d 183, 201, 504 P.3d 813, 822 (2022) ("The business judgment rule does not insulate corporate decisions from claims that those decisions violate contractual obligations, such as restrictive covenants."); *Anderson v. Nottingham Vill. Homeowner's Ass'n, Inc.*, 37 A.D.3d 1195, 1197, 830 N.Y.S.2d 882, 884 (N.Y. App. Div. 2007) ("while it may be good business judgment to walk away from a contract, this is no defense to a breach of contract claim"), *amended on reargument* 41 A.D.3d 1324, 840 N.Y.S.2d 880 (N.Y. App. Div. 2007). Moreover, Defendant is not a homeowner's association and the Owners are not members or otherwise involved in the Defendant organization. This is action for breach of a restrictive covenant by separate and distinct parties. The business judgment rule has no application here.

B. The circuit court did not err in finding that Defendant's breach of the Covenants caused Poly-Med recoverable damages in the amount of $74,001.41.

The circuit court correctly found that "the only expenses used 'for maintenance and upkeep of the Park' incurred by Defendant since it took ownership of the Park, and became Park Authority in October 2018, were expenses for water, power and landscaping." (R. p. 36.) This factual finding is duly supported by the accounting prepared by Tamara S. Hannon, CPA, which was solely based on information/documentation provided by Defendant,[21] and which shows all activity in the bank accounts in which Defendant deposited maintenance fees. (R. pp. 797–816.)

[21] (R. pp. 346:11–347:4, 353:22–354:2, 464:25–465:9, 472:6–18.)

As explained by Poly-Med's CFO Don Crossley, together with the respective percentages of ownership of property within the Park (and accounting for the change effected by the Parcel PMI Properties purchased in October of 2019), figures taken directly from Hannon's accounting show damages (in the form of maintenance fee overcharges) to Plaintiffs (in particular, Poly Med, which paid the overcharges) in the amount of $74,001.41. (R. pp. 516:6–524:25.)[22]

All told, Poly-Med paid Defendant $101,902.25 in maintenance fees, comprising $8,322.32 for Plaintiffs' share of the $50,182.82 in collected but unused maintenance fees that Innovate transferred to Defendant when Defendant became Park Authority in November of 2018,[23] maintenance fee invoices paid to Defendant for the years 2019–2023 totaling $88,194,[24] and $5,385.93 in maintenance fees that were paid at closing when Defendant sold a Parcel to PMI Properties in October of 2019. (R. p. 875; *see also* R. p. 829.)

For the period from November 2018, when Defendant became Park Authority, to the time Defendant sold PMI Properties the Parcel it purchased in October of 2019, Plaintiffs' percentage of ownership (i.e., Plaintiffs' percentage of ownership relative to all Owners *other than Defendant*) was 16.58%,[25] and Hannon's accounting showed that Defendant incurred valid maintenance and upkeep expenses for the Park in the total amount of $22,645.95, which amount comprised

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[22] Defendant incorrectly asserts that the financial figures underlying the circuit court's damages award are inconsistent with those in Hannon's accounting. While it is true that Hannon's accounting showed Plaintiffs as having paid $96,516.32 in maintenance fees, as opposed to the $101,902.25 in Plaintiffs' damages calculation, this difference is simply due to the fact that, as Hannon acknowledged at trial, her accounting to did not include the $5,385.93 in maintenance fees that PMI Properties paid at closing on the Parcel it purchased in October of 2019. (R. pp. 473:13–474:25.)

[23] The $8,322.32 figure results from multiplying the $50,182.82 Innovate transferred to Defendant by Plaintiffs' percentage of ownership relative to all other Owners besides Defendant, which, in November of 2018, was 16.58%. (R. p. 874.)

[24] Specifically, Plaintiffs paid Defendant $11,550 in 2019 and $19,161 in each of 2020, 2021, 2022, and 2023. (R. p. 874; *see also* R. pp. 787–796.)

[25] (R. p. 874.)

landscaping expenses of $16,959.90[26] and utility expenses for power and water totaling $5,686.05.[27] (R. p. 876.) Multiplying the total valid maintenance and upkeep expenses for this period ($22,645.95) by Plaintiffs' percentage of ownership (16.58%) shows Plaintiffs' share of these expenses to be $3,745.64. (R. p. 876.)

For the period from Defendant's sale of the Parcel to PMI Properties in October of 2019 to June 1, 2023, Plaintiffs' percentage of ownership was 24.81%,[28] and Hannon's accounting showed that Defendant incurred valid maintenance and upkeep expenses for the Park in the total amount of $97,596.75, which amount comprised landscaping expenses of $72,927.57 and utility expenses for power and water totaling $24,669.18.[29] (R. p. 876.) Multiplying the total valid maintenance and upkeep expenses for this period ($97,596.75) by Plaintiffs' percentage of ownership (24.81%) shows Plaintiffs' share of these expenses to be $24,155.20. (R. p. 876.)

Accordingly, given that Poly-Med paid Defendant $101,902.25 in maintenance fees but Plaintiffs' share of Defendant's valid maintenance fee expenses for the Park was only $27,900.84,[30] Plaintiffs duly proved damages (in the form of overpaid maintenance fees) to Poly-Med in the amount of $74,001.41. (R. p. 876.)

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[26] This figure comprises payments to South Greenville Landscaping from November 16, 2018, to July 3, 2019, totaling $11,871.93 and, following a switch in service providers, payments to Piedmont Landscaping from August 9, 2019, to October 2, 2019, totaling $5,087.97. (R. p. 876.)

[27] This figure comprises power bills paid to Duke Energy-Carolina from November 16, 2018, to September 24, 2019, totaling $4,973.36 and water bills paid to Sandy Springs Water from November 16, 2018, to October 2, 20219, totaling $712.69. (R. p. 876.)

[28] (R. p. 874.)

[29] This figure comprises power bills paid to Duke Energy-Carolina from November 16, 2018, to September 24, 2019, totaling $21,437.44 and water bills paid to Sandy Springs Water from November 16, 2018, to October 2, 20219, totaling $3,231.74. (R. p. 876.)

[30] This figure is the total of Plaintiffs' share of valid maintenance fee expenses before ($3,745.64) and after ($24,155.20) October of 2019.

Defendant's challenge to the amount of the damages award is without merit. As an initial matter, Defendant's complaint that the circuit court relied on supposedly "unverified ownership percentages"[31] is a nonstarter. All of the ownership percentages underlying the damages award come from exhibits that were duly admitted into evidence without objection from Defendant. (R. p. 288:21–23 ("[Court:] So we have Exhibits 1 through 28 are admitted without objection; is that correct? [Defendant's Counsel:] Yes, Your Honor.").[32] Having not objected to the admission of this evidence at trial, Defendant cannot now complain that it is supposedly unverified. *McKissick v. J.F. Cleckley & Co.*, 325 S.C. 327, 344, 479 S.E.2d 67, 75 (Ct. App. 1996) ("Failure to object when the evidence is offered constitutes a waiver of the right to have the issue considered on appeal."). Moreover, the only treatment that Defendant gives to this supposed issue in its brief is so scant and conclusory that it should be deemed abandoned. *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000) (holding an issue is abandoned if the appellant's brief treats it in a conclusory manner); *see also McCall v. IKON*, 380 S.C. 649, 659–60, 670 S.E.2d 695, 701 (Ct. App. 2008) (an appealed order comes to the appellate court with a presumption of correctness, with the burden on the appellant to demonstrate reversible error). And Defendant's alternative methodology—which itself results in a substantial amount of damages ($62,410.98)[33]—is unsound because, unlike Plaintiffs' formula, it does not account for the change in Plaintiffs' ownership percentage before and after October of 2019.[34]

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[31] (Def.'s Appellant's Br. p. 36.)

[32] Plaintiffs' Trial Exhibit No. 7 shows the acreage owned by all Owners, including Plaintiffs, other than Defendant prior to Defendant's sale of the Parcel to PMI Properties in October of 2019. (R. p. 762.) Plaintiffs' Trial Exhibits Nos. 12 and 16 show the additional acreage acquired by PMI Properties later transferred to Poly-Med. (R. pp. 782–786, 827–828.)

[33] (Def.'s Appellant's Br. p. 39.)

[34] The other damages figures suggested by Defendant (*see* Def.'s Appellant's Br. pp. 39–41) rely on unduly expansive definitions of "maintenance and upkeep" outside of the circuit court's correct construction of the phrase.

Lastly, Defendant's contention that, even if the circuit court correctly found that Defendant had overcharged Plaintiffs, overcharged funds should be reimbursed to the maintenance fee fund and not returned to the Plaintiffs relies on an absurd construction of the Covenants under which the Park Authority would be free to grossly overcharge Owners for maintenance fees so long as the money collected through such gross overcharging sat unused in the maintenance fee account. In other words, it relies on a construction of the Covenants that would allow Defendant to inflict upon the Owners the pain of overcharging so long as there was no corresponding gain to the Park Authority—under which construction the overcharged funds, being unnecessary for maintenance and upkeep and unusable for anything else, would essentially be left forever to rot. The circuit court's construction of the Covenants rightly rejects this.

II. The circuit court did not err in awarding Plaintiffs attorney fees and costs and denying Defendant the same.

The Fees/Costs Provision entitles the "prevailing party" in an action "to enforce any of the terms, provisions, or restrictive covenants of [the Covenants]" to an award of costs and reasonable attorney fees. (R. p. 748.) The circuit court correctly determined Plaintiffs, not Defendant, to be the prevailing party, and correctly awarded Poly-Med attorney fees and costs in the amount of $163,664.25. (R. p. 66.)

Correctly finding that "[t]he 'prevailing party' is 'the one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention is the one in whose favor the decision or verdict is rendered or entered,'"[35] the circuit court properly found that the maintenance fee issue was the main issue in

[35] (R. p. 63 (quoting *Heath v. Cnty of Aiken*, 302 S.C. 178, 182–83, 394 S.E.2d 709, 711 (1980)).

the case[36] and Plaintiffs had prevailed upon it. (R. pp. 63–64.) At the same time, subject to and without waiving the issues/arguments raised in Plaintiffs' own appeal, the circuit court duly recognized that "the result of the case was not a complete victory for Plaintiffs," and appropriately exercised its discretion to find that this should result in a reduction Plaintiffs' fees/costs by 25%. (R. p. 66.)[37]

The soundness of the circuit court's finding that "the vast majority of this case and the 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"[38] is self-evident upon the record, which shows the vast majority of the witness testimony, evidentiary submissions, and oral argument at trial to have been directed toward this issue. (*See generally* R. pp. 269–638.)

Moreover, properly viewing the result of the case as a whole, there can be no doubt that Plaintiffs' fundamental position on the maintenance fee issue carried the day. Besides the fact that Plaintiffs won judgment in their favor on Plaintiffs' Maintenance Fee Breach Claim, even on the claims on which Plaintiffs were not awarded judgment, their fundamental position—that Defendant violated the Covenants with respect to maintenance fees—was recognized. In other words, even though Plaintiffs were not awarded judgment on Plaintiffs' Maintenance Fee Conversion Claim, it was not because the circuit court did not agree that Defendant had violated

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[36] (R. p. 63 ("[T]he vast majority of this case and the 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.")

[37] Accordingly, the amount of the circuit court's fee/cost award ($163,664.25) represents 75% of the total amount of attorney fees and costs attested to in Plaintiffs' counsel's fee/cost affidavits, which amount is $218,192.33, comprising attorney fees of $212,204.70 and costs of $5,987.63. (R. pp. 65–66.)

[38] (R. p. 63.)

the Covenants with respect to maintenance fees, but rather because the circuit court, while agreeing that Defendant's violation amounted to a breach, did not agree that the violation technically amounted to the tort of conversion. (*See* R. p. 52 ("In the instant case, and consistent with the foregoing discussion, Defendant's collection of the maintenance fee does not constitute conversion.").)[39] Similarly, while Plaintiffs were not awarded judgment on Plaintiffs' Maintenance Fee Unjust Enrichment Claim, it was only because the equitable relief of quantum meruit was unnecessary given the availability of relief in the form of money damages at law on Plaintiffs' Maintenance Fee Breach Claim. (R. p. 539:1–20.)

As for Plaintiffs' Maintenance Fee Accounting Claim, it took this litigation[40] and Defendant's realization that the circuit court was going to require it anyway before Defendant eventually agreed to the accounting[41] and Plaintiffs were awarded summary judgment on the claim. (R. p. 71.)[42] And although Plaintiffs were not awarded judgment on Plaintiffs' 15% Requirement Claim, the circuit court did in fact agree that it would violate the Covenants for Defendant to sell Parcels in violation of the 15% Requirement and for a time expressly imposed an injunction against it doing so. (R. pp. 6, 296:3–13.) The only one of Plaintiffs' claims as to which it might be fair

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[39] In their cross-appeal, Plaintiffs maintain that the court's decision in favor of Defendant on Plaintiffs' Maintenance Fee Conversion Claim was in error.

[40] Before Plaintiffs filed suit, Defendant steadfastly refused to provide any form of accounting. (R. pp. 832–838.)

[41] (R. pp. 237:17–238:9.)

[42] Besides being unduly hairsplitting, Defendant's contention that, since an accounting is an equitable remedy and "the Covenants do not expressly establish any right for a party who claims to be an Owner to demand an accounting from the Authority," obtaining an accounting does not constitute prevailing in an action to enforce the Covenants (Def.'s Appellant's Br. p. 44), Defendant overlooks the fact that, as the circuit court recognized, and as Defendant's counsel agreed, an accounting to "see what monies were or were not used for maintenance and upkeep or otherwise" (R. p. 237:17–21) was absolutely necessary to Plaintiffs' vindication of contractual rights via their success on Plaintiffs' Maintenance Fee Brech Claim.

to say that Plaintiffs simply lost before the circuit court was Plaintiffs' Common Area Conveyance Claim, which was an undeniably small part of the overall litigation effort.[43]

Conversely, of Defendant's claims, Defendant's Maintenance Fee Payment Claim was wholly lacking in evidentiary support and summarily disposed of in Plaintiffs' favor,[44] and the claim on which Defendant prevailed, Defendant's Trailer Removal Claim, was another undeniably modest component of the case in comparison to the maintenance fee issue.[45]

As duly set forth in the circuit court's order, having properly identified the main issue in the case and Plaintiffs as the prevailing party thereon, the circuit court properly examined Plaintiffs' fee/cost request in light of the factors required by *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997), and, again, subject to and without waiving the issues/arguments raised in Plaintiffs' own appeal, duly exercised its discretion to reduce Plaintiffs' fee/cost award in proportion to their overall degree of success in the case. (R. pp. 64–66.) There is no question that the amount of the circuit court's fee/cost award comports with the law and the facts of this case. In effect, Defendant's challenge does not ask this Court to correct the circuit court but rather to second guess it.

And although Plaintiffs were entitled to the fees/costs, collectively, "[a]t 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 . . . Polly-Med, Inc., only." (R. p. 66.) Defendant argues the award to Poly-Med was somehow improper. In fact, there is nothing to see here.

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[43] Plaintiffs' Common Area Conveyance Claim is also the subject of Plaintiffs' cross-appeal.

[44] (R. pp. 626:12–627:10.)

[45] Defendant's Trailer Removal Claim is also the subject of Plaintiffs' cross-appeal.

Defendant contends "the record is not immediately clear whether, as of the time of trial, PMI Properties, LLC was a property owner within the Research Park, or whether Poly-Med, Inc. was a property owner." (Def.'s Appellant's Br. p. 8.) On the contrary, the evidence at trial plainly shows that Poly-Med is, indeed, an Owner, having taken ownership of the Parcel formerly owned by PMI Properties (and formerly leased by Poly-Med from PMI Properties) in March of 2021. (R. pp. 416:3–417:13, 782–786, 827–828.) While Plaintiffs' written complaints allege Poly-Med leased Parcels, (a) this was not untrue, as Poly-Med did lease the Parcel PMI Properties purchased before taking ownership of the Parcel and has at all times leased the Parcels at 51 and 52 Technology Drive from TD51 and TD52, respectively;[46] (b) the allegation of Poly-Med's leasehold interest does not necessarily foreclose the possibility of Poly-Med also having an ownership interest; and (c) even though Plaintiffs' written complaints refer to Poly-Med's leasehold interest, the circuit court granted Plaintiffs' motion to conform the pleadings to the evidence presented at trial, which evidence, again, plainly shows Poly-Med to be the Owner of the Parcel formerly owned by PMI Properties. (R. p. 578:18–20.)

Moreover, the Covenants expressly provide that they "inure to the benefit of . . . each and every person or entity, their heirs, successors and assigns, who shall acquire any interest in the Property or any part or portion thereof." (R. p. 728.) A leasehold interest necessarily qualifies as "any interest in the Property or any portion thereof," and for the Covenants to fully inure to the benefit of a person or entity with such an interest, the person or entity must have the ability to enforce the Covenants in court. *Cf. Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005) ("A third-party beneficiary is a party that the contracting parties intend to directly benefit."); *Touchberry v. City of Florence*, 295 S.C. 47, 48–49, 367 S.E.2d 149, 150 (1988)

[46] (R. pp. 415:20–417:16.)

("This Court has recognized that individuals may be third party beneficiaries of public contracts. The presumption that the contract is not enforceable by an individual may be overcome by showing he was intended to be the direct beneficiary of the contract. The language of the agreement here clearly shows that the contracting parties intended for the agreement to be enforceable by residents of the MSA.") (internal citations omitted)).

Further still, the Fees/Costs Provision, like the above-quoted language about the Covenants inuring to the benefit of any person or entity with an interest in property in the Park, expressly refers to enforcement actions being brought by the "assigns" of an Owner. (R. p. 748.) To be the lessee of an Owner is to be the assignee of the Owner to the extent of the leasehold interest. *Compare Black's Law Dictionary* p. 115 Assignment (7th ed. 1999) ("The transfer of rights or property.") *with id.* at p. 898 Lease ("A contract by which a rightful possessor or real property conveys the right to use and occupy the property."); *see also Hilton Head Air Service, Inc. v. Beaufort County*, 308 S.C. 450, 456, 418 S.E.2d 849, 853 (Ct. App. 1992) ("The assignment of a lease or the subletting of leased premises conveys an interest in the land."). There is no doubt that, under the Fees/Costs Provision, Poly-Med, the party that, besides, of course being an Owner itself, took assignment of leasehold interests and actually paid the maintenances fees charged Plaintiffs, is an "assign" entitled to an award of attorney fees and costs in a suit in which it is the prevailing party.

Lastly, to be clear, it is indisputable that Defendant breached the Covenants. That is, even under Defendant's wildly expansive (and, to be sure, incorrect) view "that its authority to engage in 'maintenance' and 'upkeep' of the Park empowers it to do anything that is necessary, proper, or appropriate, in its sound discretion, to put care and work into the property so as to continue its

operations and productivity in good condition,"[47] and charge Owners maintenance fees for all the cost of doing so, Wagner was still not allowed to divert maintenance fee funds to his own personal use, which, without question, he did. (R. pp. 333:14–335:25; *see also* R. p. 319:10–15.) And even if, as Defendant argues, the remedy for this breach of the Covenants is to have Wagner reimburse the management fee account, as opposed to repaying those from whom the wrongfully collected money was wrongfully collected, Plaintiffs still clearly won the most substantial victory in the case by halting tens of thousands of dollars (and counting, if not stopped via this litigation) of malfeasance with respect to the maintenance fee account. Thus, even assuming, *arguendo*, the circuit court is to be reversed in some part as to its award of damages to Poly-Med (as to the amount and/or whether it should be paid to Poly-Med or reimbursed to the maintenance fee fund), its determination that Plaintiffs were the prevailing party and award of attorney fees to Poly-Med should still stand.[48]

III. If this Court rules in favor of Plaintiffs in this appeal, and/or with respect to Plaintiffs' own 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 attorneys' 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 Plaintiffs' own 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.

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[47] (Def.'s Appellant's Br. pp. 25–26.)

[48] To the extent that any of the within analysis regarding Poly-Med's entitlement to an award of attorney fees and costs may be relevant to the question of Poly-Med's entitlement to an award of damages, the analysis is hereby incorporated by reference into Plaintiffs' arguments regarding the damages issue.

CONCLUSION

Subject to and without waiving the issues/arguments raised in Plaintiffs' own appeal, for the foregoing reasons, and, pursuant to Rules 208(b)(2) and 220(c), SCACR, for any other reasons appearing on the record, to include, without limitation, any reasons supporting affirmance that are set forth in the appealed orders themselves, Plaintiffs ask the Court to affirm the circuit court's ruling in their favor on Plaintiffs' Maintenance Fee Breach Claim and its award of attorney fees. Additionally, provided the Court rules in favor of Plaintiffs in this appeal, and/or with respect to Plaintiffs' own appeal, Plaintiffs 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.

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Charleston, South Carolina

February 27, 2026

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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.

CERTIFICATION FOR FINAL RESPONDENTS' BRIEF OF RESPONDENTS/APPELLANTS

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I, Russell G. Hines, do hereby certify that the **Final Respondents' 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.

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