IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
SEP 11 2015
SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2015-000641

Tammy Vance and David Montorio, on behalf of themselves and all others similarly situated .... Respondents

v.

Horry Electric Cooperative .... Appellant

RESPONDENTS' FINAL BRIEF

Nate Fata
Nate Fata, P.A.
Post Office Box 16620
1500 U.S. Hwy. 17 North
The Courtyard, Suite 215
Surfside Beach, SC 29587
(843) 238-2676

T. Christopher Tuck
James L. Ward, Jr.
Catherine H. McElveen
Richardson, Patrick, Westbrook & Brickman, LLC
1037 Chuck Dawley Blvd., Bldg. A
Mount Pleasant, SC 29464
(843) 727-6500

Attorneys for Respondents

TABLE OF CONTENTS

STATEMENT OF THE ISSUE ON APPEAL 1

STATEMENT OF THE CASE 1

STANDARD OF REVIEW 5

ARGUMENT 6

I. The Lower Court Properly Interpreted and Applied the Unambiguous Language of the Settlement Agreement in Ordering Horry to Pay All Claimants Identified as Class Members Pursuant to the Settlement 6

II. Horry's Issues on Appeal are Non-Issues 10

A. The Lower Court Did Not "Misapprehend" Horry's Position 10

B. Horry's Reliance on *Butler v. Sears, Roebuck & Co.* is Misplaced 12

C. Horry's Appeal is Barred by the Law of the Case 13

CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Blakeley v. Rabon,
266 S.C. 68, 221 S.E.2d 767 (1976) 6

Buckner v. Preferred Mutual Insurance Co.,
255 S.C. 159, 177 S.E.2d 544 (1970) 5, 6, 14

Butler v. Sears, Roebuck & Co.,
702 F.3d 359 (7th Cir. 2012) 12, 13

Butler v. Sears, Roebuck & Co.,
727 F.3d 796 (7th Cir. 2013) 12, 13

Byrd v. Livingston,
398 S.C. 237, 727 S.E.2d 620 (Ct. App. 2014) 6

Campbell v. Bi-Lo, Inc.,
301 S.C. 448, 392 S.E.2d 477 (Ct. App. 1990) 5

Ecclesiastes Production Ministries v. Outparcel Associates, LLC,
374 S.C. 483, 649 S.E.2d 494 (Ct. App. 2007) 6, 7, 10

Ellis v. Taylor,
316 S.C. 245, 449 S.E.2d 487 (1994) 7

Felts v. Richland County,
303 S.C. 354, 400 S.E.2d 781 (1991) 5

In re Morrison,
321 S.C. 370, 468 S.E.2d 651 (1996) 5, 14

Jordan v. Security Group, Inc.,
311 S.C. 227, 428 S.E.2d 705 (1993) 7

Pee Dee Stores, Inc. v. Doyle,
381 S.C. 234, 672 S.E.2d 799 (Ct. App. 2009) 6

Quinn v. Sharon Corp.,
343 S.C. 411, 540 S.E.2d 474 (Ct. App. 2001) 10

Schulmeyer v. State Farm Fire & Casualty Co.,
353 S.C. 491, 579 S.E.2d 132 (2003) 6

Southern Atlantic Financial Services, Inc. v. Middleton,
349 S.C. 77, 562 S.E.2d 482 (Ct. App. 2002) 6

Superior Automobile Insurance Co. v. Maners,
261 S.C. 257, 199 S.E.2d 719 (1973) 6

Rules

Fed. R. Civ. P. 23 13

Rule 203, SCACR 14

Rule 208, SCACR 1

Rule 23, SCRCP 12

STATEMENT OF THE ISSUE ON APPEAL

Did the Lower Court err in ordering Defendant-Appellant Horry Electric Cooperative to pay the claims of those persons identified as Class members under the Settlement Agreement dated February 28, 2014, according to the terms of the Settlement Agreement previously approved by the Lower Court in its Final Approval Order dated May 30, 2014?[1]

STATEMENT OF THE CASE

On February 9, 2011, Plaintiffs-Respondents Tammy Vance and David Montorio ("Plaintiffs-Respondents" or "Plaintiffs") initiated the underlying class action suit in the Horry County Court of Common Pleas ("Lower Court") against Defendant-Appellant Horry Electric Cooperative ("Horry" or "HEC") due to the alleged defective design specifications and requirements that Horry required homeowners to implement in order to participate in its New Good Cents Program ("Program"). (R. pp. 37-39, ¶¶ 1-17). Specifically, as part of Horry's Program, Horry required a vapor barrier to be installed on the inside of the exterior walls of all residences. (R. p. 39, ¶ 17). Plaintiffs-Respondents alleged that the existence of the vapor barrier on the inside of the exterior walls creates a condition where condensation forms on the outer surface of the vapor barrier which causes, among other things, mold growth on the surface of the vapor barrier and inside Plaintiffs-Respondents and Class members' homes. (R. p. 40, ¶ 23).

[1] This Court should reject Horry's brief in its entirety due to Horry's failure to set forth a statement of the issues on appeal in its Initial Brief. "Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal." Rule 208(b)(1)(B), SCACR. To the extent that this Court considers the substance of Horry's appeal, Plaintiffs-Respondents have set forth what they believe is the issue on appeal due to their dissatisfaction with Horry's statement of the issues pursuant to Rule 208(b)(2), SCACR.

On August 28, 2012, the Lower Court granted Plaintiffs' Motion for Class Certification, certifying a class of persons who currently own homes that were enrolled in Horry's Good Cents Program from 1988-2003. (R. pp. 8-9).[2] On January 14, 2013, the Notice of the Class Action was mailed to more than 1,100 Class members, as identified by Horry and based on its review of its internal records, in order to afford notice and opt-out rights to absent Class members. (R. p. 47, ¶ 2). On March 21, 2013, Plaintiffs and Plaintiff Class Notice of Opt Outs was filed, reflecting that forty-seven persons from Horry's Class list opted out of the case. (R. pp. 53-54). After continued litigation and extensive negotiations, the parties entered into a Settlement Agreement dated February 28, 2014. (R. pp. 411-427).

Pursuant to the express terms of the Settlement Agreement, the "Class" was defined as "each person on the HEC list attached hereto as Exhibit A." (R. p. 413, ¶ 1(c)); (R. p. 105, ¶ 1(c)); (R. pp. 120-155). The list of Class members attached as Exhibit A to the Settlement Agreement was identical to the list that was created and generated by Horry for disseminating the Notice of the Class Action to the members of the Class. Under the terms of the Settlement Agreement, Class members could submit a claim for an automatic payment of two thousand dollars or an enhanced payment if the Class member undertook remediation and removal of the vapor barrier. (R. pp. 107-110, ¶ 4); (R. pp. 415-418, ¶ 4); *see also* Appellant's Final Brief, p. 2 ("Class members were entitled to receive $2,000 or receive up to $12,000 from a Remediation Fund.").

[2] In November 2012, the Lower Court limited the Class to those current owners of homes that were enrolled in the Good Cents Program from February 6, 1998 through 2003.

The parties also agreed that no changes, modifications, amendments, or additions could be made to the Settlement Agreement or its attachments without the express written consent of all parties.

> This Settlement Agreement and its attachments shall constitute the entire Settlement Agreement of the parties and shall not be subject to any change, modification, amendment, or addition without the express written consent of counsel on behalf of all parties to this Settlement Agreement.

(R. p. 115, ¶ 20); (R. p. 423, ¶ 20) (emphasis added).

On February 28, 2014, Plaintiffs-Respondents filed a Notice of Motion and Motion for Preliminary Approval of Class Settlement, as set forth in the parties' Settlement Agreement. (R. pp. 101-157). The Settlement Agreement, along with the list of Class members attached as Exhibit A, was submitted to the Lower Court for consideration. (R. pp. 103-155). Counsel for Horry joined in Plaintiffs' request for preliminary approval. (R. p. 101). On March 3, 2014, the Lower Court granted preliminary approval of the Settlement Agreement, including the Class member list, the proposed notice, and the opt-out and claim documents. (R. pp. 10-21). The parties adhered to the settlement's notice obligations, and on March 13, 2014, Horry mailed the notice of the settlement, via United States mail, to all Class members listed in Exhibit A. (R. p. 172); (R. pp. 272-321).

On May 1, 2014, Plaintiffs-Respondents moved the Lower Court for entry of an order granting final approval of the class action settlement that was subsequently granted by the Lower Court and filed on May 30, 2014. (R. 170-206); (R. pp. 22-33). Pursuant to the Final Approval Order, the underlying action was dismissed with prejudice. (R. p. 28, ¶ 15).

On August 15, 2014, after the Lower Court granted preliminary and final approval of the settlement and dismissed this action, Horry filed a motion to exclude certain members of the Class from receiving payment on the alleged basis that Horry had since determined that these Class members were "identified as having a manufactured home" and, therefore, were "not entitled to be paid any amount whatsoever" under the Settlement Agreement. (R. pp. 207-216); (R. p. 209, ¶ 2). Horry also submitted an Affidavit of Kelley A. Wilson, the insurance representative for Horry, dated September 3, 2014, who provided a list of claimants that were purportedly mailed checks for $2,000 pursuant to the Settlement Agreement and separate lists of claimants that were excluded on the purported basis that (1) they owned manufactured homes, (2) their property ownership could not be verified through Horry County Land Records, (3) their names did not appear on the Good Cents Certification List that was used to identify potential class members, or (4) their claim forms were postmarked after June 16, 2014. (R. pp. 322-328).

On September 24, 2014, Plaintiffs-Respondents filed a Motion to Enforce Final Order and Payment to Class Members, and on October 27, 2014, Plaintiffs filed a Memorandum in Opposition to Defendant's Motion to Exclude Class Members. In these filings, Plaintiffs-Respondents set forth the reasons why the Lower Court should prevent Horry's unilateral non-payment to Class members, set forth the anomalies in the lists attached to the Affidavits of Eddy Blackburn and Kelley Wilson, and requested an order from the Lower Court to remedy Horry's violations of the Settlement Agreement. (R. pp. 217-239); (R. pp. 240-261).

The Lower Court held a hearing on November 13, 2014 on Plaintiffs' Motion to Enforce Final Order and Payment to Class Members and on Defendant's Motion to Exclude Class Members. On February 9, 2015, the Lower Court issued an Order granting Plaintiffs' Motion to Enforce Final Order and Payment to Class Members and denying Defendant's Motion to Exclude Class Members and ordered Horry to "pay all claimants identified as class members under the Settlement Agreement dated February 28, 2014, according to the terms of said Settlement Agreement previously approved by the Court." (R. pp. 34-36). On February 19, 2015, Horry filed a motion requesting the Lower Court to reconsider its February 9, 2015 order. (R. pp. 266-271). On March 3, 2015, the Lower Court denied Horry's motion to reconsider. Horry filed its Notice of Appeal on March 23, 2015, and this appeal follows.

STANDARD OF REVIEW

The construction of a written instrument is a question of law for the court. *Campbell v. Bi-Lo, Inc.*, 301 S.C. 448, 451, 392 S.E.2d 477, 479 (Ct. App. 1990). Accordingly, "the lower court must be affirmed where there is 'any evidence' to support its findings." *Felts v. Richland Cnty.*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991).

Additionally, an order that is not timely appealed becomes the law of the case. *See In re Morrison*, 321 S.C. 370, 372 n.2, 468 S.E.2d 651, 652 n.2 (1996) (noting that an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal); *Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970) (an unchallenged ruling "right or wrong, is the law of this case and requires affirmance.").

ARGUMENT

I. The Lower Court Properly Interpreted and Applied the Unambiguous Language of the Settlement Agreement in Ordering Horry to Pay All Claimants Identified as Class Members Pursuant to Settlement Agreement

"In South Carolina jurisprudence, settlement agreements are viewed as contracts." *Byrd v. Livingston*, 398 S.C. 237, 241, 727 S.E.2d 620, 621 (Ct. App. 2014) (quoting *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009)). "In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties." *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007) (quoting *Southern Atl. Fin. Servs., Inc. v. Middleton*, 349 S.C. 77, 80-81, 562 S.E.2d 482, 484-85 (Ct. App. 2002)). "The parties' intention must, in the first instance, be derived from the language of the contract." *Id.* (citing *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003)). "To discover the intention of a contract, the court must first look to its language – if the language is perfectly plain and capable of legal construction, <u>it alone</u> determines the document's force and effect." *Id.* at 498, 649 S.E.2d at 501 (emphasis added) (citing *Superior Auto. Ins. Co. v. Maners*, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973)).

"Parties are governed by their outward expressions and the court is not at liberty to consider their secret intentions." *Id.* (quoting *Blakeley v. Rabon*, 266 S.C. 68, 73, 221 S.E.2d 767, 769 (1976)). "The court must enforce an unambiguous contract according to its terms, <u>regardless of the contract's wisdom or folly, or the parties' failure to guard their</u>

rights carefully." *Ecclesiastes*, 374 S.C. at 500, 649 S.E.2d at 503 (emphasis added) (citing *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994); *Jordan v. Security Group, Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993)).

The Settlement Agreement entered into between the parties in this case defined the Class as follows:

> **"Class"** means each person on the HEC list attached hereto as Exhibit A, but excluding those persons who previously opted out of the Class as indicated on Exhibit B.

(R. p. 105, ¶ 1(c)); (R. p. 413, ¶ 1(c)); (R. pp. 120-160). Pursuant to the terms of the Settlement Agreement, two funds were established by Horry for the benefit of Class members: an Automatic Payment Fund and a Remediation Fund. (R. 107-110, ¶ 4); (R. 415-418, ¶ 4). The Settlement Agreement provides that "Class members may participate in one fund, but not both, by selecting a fund preference on the Claim Form. . . ." (R. p. 107, ¶ 4); (R. p. 415, ¶ 4). In order to participate in the Automatic Payment Fund, "Class members may claim an automatic payment of $2,000 by submission of a Claim Form and declaration under penalties of perjury of current home ownership." (R. pp. 107-108, ¶ 4(a)); (R. pp. 415-416, ¶ 4(a)). And to participate in the Remediation Fund, "Class members may claim reimbursement for Reimbursable Remediation Expenses by removing the vapor barrier from the home and by submission of a Claim Form and Documented proof." (R. p. 108, ¶ 4(b)); (R. p. 416, ¶ 4(b)).

As mentioned above, the Settlement Agreement also provides as follows:

> This Settlement Agreement and its attachments shall constitute the entire Settlement Agreement of the parties and shall not be subject to any change, modification, amendment, or addition without the express written consent of counsel on behalf of all parties to this Settlement Agreement.

(R. p. 115, ¶ 20); (R. p. 423, ¶ 20).

The list of Class members, attached to the Settlement Agreement as Exhibit A, was indisputably generated and approved by Horry, was used to disseminate the Notice of Class Action to afford absent Class members the right to opt out of the Class, and was submitted by the parties to the Lower Court for approval upon the filing of Plaintiffs-Respondents' Motions for Preliminary and Final Approval of the Settlement Agreement. Horry had numerous opportunities to review and modify its composition of the Class membership list prior to the parties' submission of the Settlement Agreement for preliminary and final approval to the Lower Court.[3] The Class members, which received direct mail Notice of the Class Action in 2013 and the Settlement Agreement in 2014, relied on the notices for opt-out purposes, relied on their inclusion in the Class for the resolution of any claims against Horry, and relied upon the parties' representations that they were entitled to participate in the settlement upon receipt of the notice.

In direct contravention of the express unambiguous terms of the Settlement Agreement, Horry has modified the Settlement Agreement by unilaterally excluding Class members and refusing to pay their claims based on Horry's belief that certain Class members should not have been included on the Class list that it generated and joined in submitting to the Lower Court for consideration and approval. (R. pp. 207-216); (R. pp. 101-169); (R. pp. 170-206). Horry has unsuccessfully repeatedly attempted to "correct"

[3] As demonstrated herein and by the record below, the Class membership list was repeatedly offered and ratified by Horry across multiple years as inclusive of all Class members. Following class discovery, the Class list was utilized for notice of the litigation class (*see* R. pp. 47-52), incorporated into the Settlement Agreement (*see* R. p. 105, ¶ 1(c); R. p. 413, ¶ 1(c); R. pp. 120-155), offered to the Lower Court at preliminary approval, and offered again at final approval (*see* R. pp. 101-169; R. pp. 170-206). Horry failed to raise an objection to Class membership until the administration of this settlement was well underway, and even then, Horry offered unreliable and contradictory information to support its *post hoc* contentions.

the lists of Class members that it claims are not entitled to payment as evidenced, in part, by the discrepancies contained in the Affidavits and Supplemental Affidavits of Eddy Blackburn and Kelley A. Wilson. (R. pp. 209-215); (R. pp. 322-328); (R. pp. 377-389); (R. pp. 390-402).[4]

The Lower Court was correct in denying Horry's Motion to Exclude Class Members and granting Plaintiffs' Motion to Enforce Final Order and Payment to Class Members and finding that

1. the list of class members was generated primarily by HEC's identification of people who participated in the "Good Cents Program" during the construction of their homes in the time period set by the court;

2. the class action settlement approved by the court allows those identified as class members to participate in the settlement;

3. subsequent to the court's approval of the class action settlement, HEC claims that it erroneously identified certain individuals as class members and that those individuals are not entitled to recovery under the settlement because they do not meet the definition of class members, said allegations being disputed by the plaintiffs;

4. HEC proposes that the court hold an evidentiary hearing for each individual whose continued identification as a class member is in dispute, with the individual bearing the burden of proving that he/she should be included as a class members; and

---

[4] For example, Class member James Philips is on the "Paid" list according to the September 13, 2014 Affidavit of Kelley A. Wilson, is on the "Untimely Filed" claim list according to the November 12, 2014 Supplemental Affidavit of Eddy Blackburn, and is on the "Not Found on Good Cents Participation" list according to the November 12, 2014 Supplemental Affidavit Kelley A. Wilson. Class member Mary Cardello is on the "Not Found on Good Cents Participation List" and on the "Untimely Filed" claim list according to the November 12, 2014 Supplemental Affidavit of Kelley A. Wilson, and is on the "Untimely Filed" claim list according to the November 12, 2014 Supplemental Affidavit of Eddy Blackburn. Class member Dayna Lewis is listed on the "Untimely Filed" claim list and on the "Never Received Claim Form" list according to the November 12, 2014 Supplemental Affidavit of Kelley A. Wilson. Plaintiffs-Respondents could continue, as there are numerous additional discrepancies.

5. the relief sought by HEC defeats the intended purpose of class certification in class actions.

(R. p. 35, ¶¶ 1-5). As a result of these findings, the Lower Court ordered that Horry "shall pay all claimants identified as class members under the Settlement Agreement dated February 28, 2014, according to the terms of said Settlement Agreement previously approved by the Court." (R. p. 36).

Under South Carolina law, the unambiguous terms of the Settlement Agreement are to be enforced "regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully." *Ecclesiastes*, 374 S.C. at 500, 649 S.E.2d at 503. Accordingly, the Lower Court's order enforcing the Settlement Agreement should be upheld by this Court.[5]

II. Horry's Issues on Appeal are Non-Issues[6]

A. The Lower Court Did Not "Misapprehend" Horry's Position

Horry first argues that the Lower Court "seemed to be confused as to HEC's position. [The Lower Court] repeatedly asked about the need for 299 individual

---

[5] Alternatively, this Court should preclude Horry from adopting a position that conflicts with the position that it has previously taken in this case. *See Quinn v. Sharon Corp.*, 343 S.C. 411, 414, 540 S.E.2d 474, 475 (Ct. App. 2001) ("The supreme court expressly adopted the doctrine of judicial estoppel, as it relates to matters of fact[.] The doctrine precludes a party from adopting a position in conflict with one previously taken in the same or related litigation." (internal citation omitted)). As previously stated herein, Horry has repeatedly offered and ratified the Class membership list for years in this case. *See* FN 3. It should not be permitted to take a conflicting position and exclude Class members from the Class list that it created and repeatedly offered and ratified, especially after the Lower Court granted final approval of the Settlement Agreement and dismissed this case with prejudice.

[6] Because Horry has failed to include a statement of the issues on appeal in its Final Brief, Plaintiffs-Respondents can only surmise that the two headings in Horry's "Argument" section of its Final Brief are the issues that it is attempting to raise on appeal.

evidentiary hearings, which was never an issue." Appellant's Final Brief, p. 5. Horry then contends that "[t]here is no basis in the record for the [Lower Court]'s finding that HEC's counsel proposed individual hearings." *Id.* at 6. Horry states that what it actually requested was for the parties to "meet and identify by categorizing the individuals whose claims were denied, and once the list was tied down, determine what should be done." *Id.*

Horry has misconstrued the basis for the Lower Court's ruling. Based on the record below, the Lower Court was rightly concerned that it would be required to hold an evidentiary hearing for each individual that Horry said should not have been included on the Class member list if the Lower Court did not enforce adherence to the agreed-upon Class member list.[7] (R. p. 76, line 22-25). And it is apparent from Horry's Motion to Reconsider that an evidentiary hearing, with the Class member bearing the burden of proof, is exactly what Horry proposes.

> The defendant's position **has been and is** that a single hearing be held for the purpose of determining whether the claimants listed on Exhibits B, C and D of Kelley Wilson's supplemental affidavit dated November 12, 2014 to the extent not previously been paid, own a Good Cents new home with a vapor barrier on the inside of the exterior of the home and filed a timely claim. The claimants, as plaintiffs, should have the burden of proof.

(R. pp. 266-267) (emphasis added). For Horry to now contend that there is "no basis in the record" for the Lower Court's finding that an evidentiary hearing would be required, with the Class members bearing the burden of proof, is disingenuous. Horry's proposed "solution" to the problem that it has created would most certainly require each Class member on its discrepancy-ridden "corrected" lists to come forward with evidence

[7] This is especially true given Horry's repeated production of lists that are inherently unreliable. *See*, *e.g.*, R. p. 82, line 15-20.

demonstrating that he or she is entitled to relief.[8] The Settlement Agreement and Class member list in this class action case was drafted in a way to eliminate this very scenario; accordingly, Horry's proposal should be rejected.

Further, as demonstrated above, the parties entered into a binding Settlement Agreement that clearly and unambiguously defined the Class in an attached exhibit that listed each Class member and included a clause that prohibits the parties from changing, modifying, or amending the Settlement Agreement without the express written consent of counsel on behalf of all parties. The Lower Court did not err in enforcing the Settlement Agreement.

B. Horry's Reliance on *Butler v. Sears, Roebuck & Co.* is Misplaced

Horry next argues that the Lower Court erred in finding that holding an evidentiary hearing would defeat the purpose of class actions since it is commonplace for courts to hold individual hearings to determine individual issues such as damages. In *Butler v. Sears, Roebuck & Co.*, the Supreme Court vacated and remanded the case to the Seventh Circuit "for reconsideration in light of *Comcast Corp. v. Behrend*[.]" *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 797 (7th Cir. 2013). In its prior order certifying the class, the Seventh Circuit stated that "the fact that damages are not identical across all class members should not preclude class certification." *Butler v. Sears, Roebuck & Co.*,

[8] The Lower Court's refusal to engage in evidentiary hearings on the basis of Horry's haphazard submissions should be validated as a core judicial function in class action proceedings. Trial court judges are specifically vested with discretionary authority to manage the class action settlement process. Rule 23(c)-(d), SCRCP.

702 F.3d 359, 363 (7th Cir. 2012).[9] Upon remand, the Seventh Circuit determined that the *Comcast* opinion did not impact its predominance determination and reinstated its prior judgment. *Butler*, 727 F.3d at 802.

Butler does nothing to advance Horry's argument. Here, Horry does not seek a hearing to determine individual damages. The Lower Court certified this case as to liability and damages to avoid the very undertaking that Horry proposes. Further, *Butler* did not involve a settlement agreement entered into between the parties that was twice approved by the lower court and that included a clause that prohibited changes or modifications to the agreement, where the defendant subsequently unilaterally changed the agreement's terms and refused to abide by the unambiguous terms of the settlement agreement. Horry has failed to cite to a single case that stands for the proposition that a party to a settlement agreement can ignore the express terms of a settlement agreement. It has failed to do so because it cannot.

C. Horry's Appeal is Barred by the Law of the Case

As previously stated, the Lower Court granted final approval of the Settlement Agreement and dismissed this case with prejudice on May 30, 2014. (R. pp. 22-33). Horry improperly seeks to modify the Settlement Agreement by redefining its Class list and redefining who can participate in this settlement almost one year after the Lower Court granted final approval in this case and its Final Approval Order became non-

[9] Federal courts may elect to certify classes for declaratory relief, injunctive relief, or on particular issues. Fed. R. Civ. P. 23(b)(2) & (c)(4). Plaintiffs-Respondents acknowledge that partial certification has sometimes occurred in other cases; however, the Lower Court's certification order is not one of them. Horry's unwise suggestion to plunge the Lower Court into Class membership fact-finding would effectively decertify this action post-settlement as to damages – an extraordinary development, particularly on the convoluted record for such relief made by Horry.

appealable. If Horry had any questions or doubts as to its Class list, then it should have appealed the Lower Court's Final Approval Order within thirty (30) days after receipt of written notice of entry of the Order. *See* Rule 203(b)(1), SCACR.

Horry's failure to appeal the Lower Court's Final Approval Order warrants dismissal of this appeal under the law of the case doctrine. *See In re Morrison*, 321 S.C. 370, 372 n.2, 468 S.E.2d 651, 652 n.2 (1996) (noting that an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal); *Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970) (an unchallenged ruling "right or wrong, is the law of this case and requires affirmance."). The law of the case is that all Class members identified in the Settlement Agreement and approved by the Lower Court in its Preliminary and Final Approval Orders are entitled to participate in the settlement benefits. Accordingly, Horry is precluded from altering the Settlement Agreement and re-litigating Class membership.

CONCLUSION

Plaintiffs-Respondents respectfully request that this Honorable Court uphold the Lower Court's order granting their Motion to Enforce Final Order and Payment to Class Members and denying Horry's Motion to Exclude Class Members.

Respectfully submitted,

T. Christopher Tuck, Esq.
James L. Ward, Jr., Esq.
Catherine H. McElveen, Esq.
Richardson, Patrick, Westbrook & Brickman, LLC
1037 Chuck Dawley Blvd., Bldg. A
Mount Pleasant, SC 29464
(843) 727-6500

Nate Fata, Esq.
Nate Fata, P.A.
Post Office Box 16620
1500 U.S. Hwy. 17 North
The Courtyard, Suite 215
Surfside Beach, SC 29587
(843) 238-2676

Attorneys for Respondents

Mount Pleasant, South Carolina
Dated: September 10, 2015

RECEIVED
SEP 11 2015
SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2015-000641

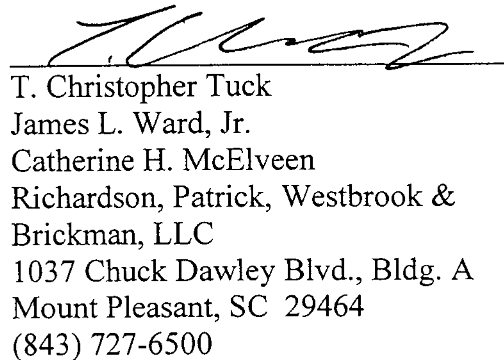
Tammy Vance and David Montorio, on behalf of themselves
and all others similarly situated .... Respondents

v.

Horry Electric Cooperative .... Appellant

CERTIFICATE

Respondents hereby certify that Respondents' Final Brief complies with Rule 211(b), SCACR.



T. Christopher Tuck
James L. Ward, Jr.
Catherine H. McElveen
Richardson, Patrick, Westbrook &
Brickman, LLC
1037 Chuck Dawley Blvd., Bldg. A
Mount Pleasant, SC 29464
(843) 727-6500

Nate Fata
Nate Fata, PA
PO Box 16620
1500 US Highway 17 North
The Courtyard, Suite 215
Surfside Beach, SC 29587
(843) 238-2676

Attorneys for Respondents

Mount Pleasant, South Carolina
September 10, 2015

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
SEP 11 2015
SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2015-000641

Tammy Vance and David Montorio, on behalf of themselves and all others similarly situated .... Respondents

v.

Horry Electric Cooperative .... Appellant

PROOF OF SERVICE

I, T. Christopher Tuck, of Richardson, Patrick, Westbrook, Westbrook & Brickman, LLC, hereby certify that I have served Pope D. Johnson, III, attorney for the Appellant, with the following documents by mailing a true and correct copy of same, postage prepaid and return address indicated, to the following address on September 10, 2015.

Pope D. Johnson, III
Attorney at Law
1230 Richland Street
Columbia, SC 29201

DOCUMENTS:
Respondents' Final Brief
Respondents' Certificate of Compliance with Rule 211(b), SCACR

T. Christopher Tuck