

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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JUL 21 2016

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 other similarly situated Respondents

vs.

Horry Electric Cooperative Appellant

**APPELLANT'S REPLY TO RESPONDENT'S
REQUEST TO TAX COSTS**

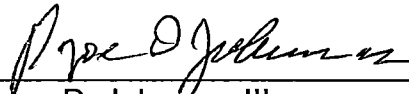
The Appellant submits this reply to the Respondent's request to tax costs.

Appellant objects to Respondent's request that attorney's fees in the amount of
\$1,000.00 be taxed against the Appellant pursuant to Rule 222(b), SCACR. Rule 222(b),
SCACR provides as follows:

"Costs Allowed. The party entitled to recover costs under this rule may, to
the extent the party actually incurred these costs, recover the following: (1) the
filing fee paid under Rule 203(d); (2) the cost of the court reporter's transcript; (3)
premiums paid for costs of supersedeas bond or other bonds obtained to preserve
rights pending appeal; (4) the cost of printing the Record on Appeal under Rule

209; and (5) the cost of printing the party's final brief(s) under Rule 210. In addition, the party shall be entitled to recover an attorney's fee in an amount which shall be set by order of the Supreme Court. The allowance of additional costs will generally not be allowed except in the most extraordinary of circumstances."

Upon information and belief, no such attorney fees were actually incurred by the Respondents and there is no fee agreement or obligation on the part of the Respondents to pay any fees to its attorneys. Under the Court Approved Settlement Agreement, the attorneys received \$990,000.00. See attached Final Approval Order. The Circuit Court Judge retained jurisdiction over all matters relating to the administration and consummation of the settlement agreement. Thus, further work was anticipated at the time the \$990,000.00 award of fees was made. In the absence of any proof that fees were incurred by Respondents and in the absence of the filing of a fee agreement or some showing that the Respondents incurred and will have to pay the attorney fee connected with this appeal, the claim for attorney fees should be denied.



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Attorney for the Appellant

Columbia, South Carolina
July 21, 2016

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY)
)
 Ronnie Ferrell, Tammy Vance and)
 David Montorio, on behalf of themselves)
 and all others similarly situated,)
)
 Plaintiffs,)
)
 vs.)
)
 Horry Electric Cooperative,)
)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 FIFTEENTH JUDICIAL CIRCUIT
 CASE NO. 2011-CP-26-1266

FINAL APPROVAL ORDER

FILED
 14 MAY 30 AM 10:20
 CLERK OF COURT
 Horry County, SC

WHEREAS the Court held a final approval hearing on May 30, 2014 to determine whether (i) whether the terms and conditions of the settlement agreement ("Agreement") preliminarily approved on March 3, 2014 are fair, reasonable and adequate for the settlement of all claims released by Plaintiffs against Defendant in this litigation; (ii) whether judgment should be entered dismissing the Defendant with prejudice; (iii) whether and in what amount to award incentive payments to some or all of the class representatives; and (iv) whether and in what amounts attorneys' fees and expenses will be awarded to Class Counsel.

WHEREAS the Court, having considered all matters submitted to it at the hearing and otherwise; and having previously certified the Class pursuant to S.C.R.C.P. 23, HEREBY FINDS that:

- a. The Court has jurisdiction over the parties and has subject matter jurisdiction to approve the Agreement;
- b. The Court has held a hearing to consider the fairness, reasonableness and adequacy of the Agreement;

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- c. There were no objections to the Agreement;
- d. The Settlement is the result of arm's length negotiations, taken in good faith, between counsel for Plaintiffs and Defendant; and
- e. The terms of the Agreement is in all respects fair, reasonable and adequate -- in light of the risks of the litigation -- and in the best interests of the class.

ACCORDINGLY, the Agreement is hereby fully and finally APPROVED and it is hereby ORDERED, ADJUDGED AND DECREED that:

1. The Court grants final approval to the Agreement as fair, reasonable and adequate.
2. Notice to the Class including, but not limited to, the forms of notice and methods of identifying and notifying members of the Class, has been given in an adequate and sufficient manner, constituting the best notice practicable, satisfying and complying in all respects with S.C.R.C.P. 23 and due process.
3. The parties are directed to implement and consummate the Agreement according to its terms and conditions.
4. The persons identified on Exhibit A of this Order of Final Judgment have timely and validly requested exclusion from the Class, and are excluded from the Class. Such persons are not included in, or bound by, this Order of Final Judgment, nor are they entitled to any recovery provided for by the Agreement.
5. Neither the Agreement, nor any of its terms or provisions, nor any of the negotiations or proceedings in connection therewith, shall be construed as an admission or concession by Defendant of the truth of any of the allegations in the litigation, or of any liability, fault or wrongdoing of any kind.

6. Class representatives David Montorio and Tammy Vance will each receive an award of \$5000 each as compensation for their time and effort in this litigation.

7. An award of attorneys' fees and reimbursement of costs is warranted in this case under the South Carolina common law, which holds that attorneys' fees may be awarded from a common fund created by counsel. *Petition of Crum Johnson v. Williams*, 196 S.C. 528, 531, 14 S.E.2d 21, 23 (1941) (“[A] court exercising equitable jurisdiction may make an allowance of a reasonable fee out of the common fund or property created or preserved, for an attorney representing a party who, at his own expense, has maintained a suit for the recovery, preservation, protection, or increase of a common fund or common property, or has created or brought into the Court a fund in which others are entitled to share.”); *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 511 S.E.2d 372 (Ct. App. 1998); *Laymen v. State*, 376 S.C. 434, 452, 658 S.E.2d 320, 329 (2008). “The justification for awarding attorneys' fees in this manner is based on the principle that ‘one who preserves or protects a common fund works for others as well as for himself, and the others so benefited should bear their just share of the expenses.’” *Laymen*, 376 S.C. at 452, 658 S.E.2d at 329 (2008) (quoting *Petition of Crum Johnson v. Williams*, 196 S.C. 528, 531, 14 S.E.2d 21, 23 (1941)).

8. Before attorneys' fees can be charged to a fund in which others are entitled to share, the following elements much be met: (1) the attorney must preserve or protect a common fund; (2) the attorney's services much have aided in creating, preserving, or protecting the fund, and the services must prove fruitful to the general class; and (3) there must be a “principle of representation or agency *as in a class suit*, that is, before one may be allowed compensation out of the common fund belonging to others for services rendered on behalf of the common interest there must be a contract of employment, either expressly made or superinduced by the law upon

the facts." *First Union Nat'l Bank*, 333 S.C. at 573-74, 511 S.E.2d at 382 (emphasis added) (citations omitted).

9. In this case, Class Counsel has met each of the elements set forth by the Court of Appeals in *First Union Nat'l Bank*. First, Class Counsel has created a common fund represented by the monies paid by the Defendant in accordance with the terms of the Agreement. Second, Class Counsel's services clearly aided in creating and preserving that fund, and their services have proved fruitful to the general class. Each qualifying Class member will derive a benefit from the settlement achieved by Class Counsel. Third, this is a class suit and the Named Plaintiffs and Class Counsel, by virtue of Rule 23 and by order of this Court, have been appointed representatives of the class. Moreover, the contingency fee agreement between the named Plaintiff and Class Counsel provides for the payment of an attorneys' fee of one-third of any recovery in this case. Accordingly, based upon the common law of this state, Class Counsel is entitled to a reasonable award of attorneys' fees. In further support of an award of attorneys' fees and litigation expenses from the common fund, the Court finds that the prosecution of this matter was an immense and highly risky undertaking for Class Counsel given the complexity of the issues presented and the defense mounted by Defendant, as the discussions below clearly support.

10. **Analysis of Pertinent Factors.** In *Jackson v. Speed*, 326 S.C. 289, 308, 486, S.E.2d 750, 760 (1997), the South Carolina Supreme Court set forth factors for courts in South Carolina to consider when deciding whether to award attorneys' fees. While these factors were not issued in the context of a class action suit, this Court chooses to analyze those factors in this case. In doing so the Court has determined that the amount of attorneys' fees and costs requested is more than reasonable.

i. *The nature, extent, and difficulty of the case.* The case involved numerous complex factual and legal issues. The breadth and scope of fact and expert discovery, coupled with the complex legal issues, demonstrates that the requested fee is justified by the nature, extent, and difficulty of the case.

ii. *The time necessarily devoted to the case.* Class Counsel expended significant time on the litigation and settlement of this case over a period of three years and will continue to expend significant time while the settlement is implemented. The case could only be settled on the eve of trial.

iii. *Professional standing of counsel.* Class Counsel are experienced in civil litigation and have particular expertise in class actions. Further, Class Counsel enjoy excellent reputations in the legal community. Finally, Class Counsel have consistently demonstrated their competence, preparedness, tenacity, skill, and perseverance to the Court over the course of this litigation.

iv. *Contingency of compensation.* As previously noted, the contingency fee agreements between the named Plaintiffs and Class Counsel provide for a contingency fee of one-third of the recovery, if any. The Court is well aware of the risk inherent in contingency fee litigation, where neither recovery for the plaintiff nor compensation for the attorneys who undertake the risk is guaranteed. Additionally, Class Counsel advanced expenses with no assurance of reimbursement.

v. *Beneficial results obtained.* Class Counsel have secured a real, valuable benefit for the Class totaling \$6 million (including the award of attorneys' fees and costs), and all Class members are entitled to receive a cash payment.

vi. *Customary legal fees for similar services.* The attorneys' fee request is consistent

with the fees customarily awarded in similar cases. “When awarding attorneys’ fees to be paid from a common fund, courts often use the common fund itself as a measure of the litigation’s ‘success.’” *Laymen*, 376 S.C. at 453, 658 S.E.2d at 330 (2008). Consequently, courts customarily base the award of attorneys’ fees on a percentage of the common fund created. *Id.* The South Carolina Supreme Court has acknowledged that this percentage-of-the-recovery approach “may be appropriate under circumstances in which a court is given jurisdiction over a common fund from which it must allocate attorneys’ fees among a benefited group of litigants.” *Id.* at 453-54, 658 S.E.2d at 330; *see also Ex parte Condon*, 354 S.C. 634, 636-37, 583 S.E.2d 430, 431 (2003) (approving a circuit court’s award of attorneys’ fees based on a percentage-of-the-recovery approach where the parties’ agreement stipulating that the circuit court would calculate and award attorneys’ fees clearly contemplated an award based on a percentage of the common fund recovered).

11. The attorneys’ fees requested here are only 16% of the total common fund. This percentage is well within the range of reasonableness for attorneys’ fees in class actions. *See Fairey v. Exxon Corp.*, No. 94-CP-38-118, Order filed October 9, 2003 (First Judicial Circuit) (J. Goodstein) (approving attorneys’ fees and costs representing 40% of recovery); Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 14:6 (4th ed. 2002) (“Empirical studies show that . . . fee awards in class actions average around one-third of the recovery.”). It is also well below what federal district courts within the Fourth Circuit have previously awarded in the percentage of the fund context. *See, e.g., In re: The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 264 (E.D.Va. 2009) (chart outlining fee awards).

12. The Agreement calls for an award of attorneys’ fees and costs in the total amount of Nine Hundred Ninety Thousand and no/100 (\$990,000.00) dollars. Class Counsel already

incurred over \$40,000 in out-of-pocket expenses. Defendant set forth in the Agreement, and has advised the Court, that it has no opposition to an award in that amount, and agrees to the payment of such amount.

13. After consideration of the factors noted above, Class Counsel are awarded attorneys' fees and reimbursement of reasonable expenses incurred in connection with the Action in the total amount of \$990,000.00, which sum the Court finds to be fair and reasonable, and which shall be paid from the common fund as set forth in the Agreement.

14. Final approval operates as a release to Defendant and its present or former officers, directors, employees, agents, heirs, executors, administrators, successors, reorganized successors, assigns, subsidiaries, affiliates, parents, divisions, and predecessors, that they shall forever be released and discharged from any and all claims by the Class members and their assigns against Defendant which arise out of or are in any way related to vapor barriers installed under the Good Cents Program. This release and discharge will discharge the common liability of any joint tortfeasors and will be binding on any subsequent purchasers of the subject homes.

15. The Action is hereby dismissed with prejudice as to the Defendant and against Plaintiffs and all other members of the Class on the merits and, except as provided in the Agreement, without costs.

16. Without affecting the finality of this Order and Final Judgment in any way, this Court reserves jurisdiction over all matters relating to the administration and consummation of the Agreement.

IT IS SO ORDERED.

DATE: May 30, 2014

Benjamin H. Culbertson

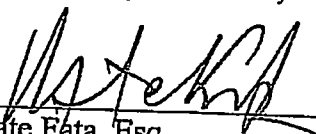
BENJAMIN H. CULBERTSON
PRESIDING JUDGE
FIFTEENTH JUDICIAL CIRCUIT

EXHIBIT

A

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/mhc

Respectfully submitted,



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Class Counsel

May 14, 2014

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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JUL 21 2016

APPEAL FROM HORRY COUNTY
Court of Common Pleas

SC Court of Appeals

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

vs.

Horry Electric Cooperative..... Appellant

PROOF OF SERVICE

I, Sherry W. Wise, of Pope D. Johnson, III, Attorney at Law, hereby certify that I have served Nate Fata, T. Christopher Tuck, and James L. Ward, attorneys for the Respondents, with the following pleadings by mailing a copy of same, postage prepaid and return address clearly indicated, to them at the following addresses on the 21st day of July, 2016.

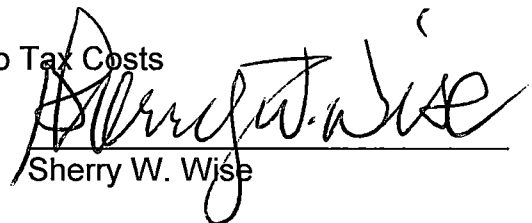
COUNSEL SERVED:

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PLEADINGS:

Appellant's Reply to Respondent's Request to Tax Costs


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July 21, 2016

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JUL 21 2016

SC Court of Appeals

(Via Hand Delivery)

Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RE: Tammy Vance and David Montorio, on behalf of themselves and all others
similarly situated v. Horry Electric Cooperative
Case No. 2015-000641

Dear Ms. Kitchings:

Enclosed herewith are the original and 6 copies of Appellant's Reply to Respondent's Request to Tax Costs regarding the above-referenced action. Please file the original and clock and return the additional copy to me.

With a copy of this letter to Nate Fata, T. Christopher Tuck, and James L. Ward, attorneys for the Respondents, I am serving a copy of the Appellant's Reply to Respondent's Request to Tax Costs upon them.

Sincerely,


Pope D. Johnson, III

PDJIII/sjm
Enclosures

cc: Nate Fata, Esquire
T. Christopher Tuck, Esquire
James L. Ward, Esquire