

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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JUN 23 2017

Appellate Case No. 2017-001384

S.C. SUPREME COURT

Allendale County School District Petitioner,

v.

James H. "Jay" Lucas, Speaker of the S.C. House of Representatives, Kevin L. Bryant, as President of the S.C. Senate, Molly Spearman, Superintendent of Education, and the State of South Carolina Respondents.

**SENATOR HUGH K. LEATHERMAN'S
MOTION FOR LEAVE TO INTERVENE AND
SUBSTITUTE AS RESPONDENT FOR
KEVIN L. BRYANT, AS PRESIDENT
OF THE SOUTH CAROLINA SENATE**

Pursuant to Rule 240 of the South Carolina Appellate Court Rules, the Honorable Hugh K. Leatherman, Sr., in his capacity as President Pro Tempore of the South Carolina Senate, hereby moves the Court for leave to intervene as a respondent pursuant to Rule 24 of the South Carolina Rules of Civil Procedure. President Pro Tempore Leatherman further moves the Court for leave to substitute for Kevin L. Bryant as a party to this suit pursuant to Proviso 91.28 of Act 284 of 2016¹, the General Appropriations Act for Fiscal Year 2016-17 and Rule 265(C) of the South Carolina Rules of Appellate Practice. The arguments in support of intervention and substitution are set forth in the attached memorandum of law.

¹ Act 284 of 2016 is still effective as of the date of filing this Motion. Therefore, the provisions contained in Proviso 91.28 still have the full force and effect of law. Should the Court rule on this Motion on or after July 1, 2017, Senator Leatherman's argument for intervention and substitution pursuant to Rule 24(a)(1) of the South Carolina Rules of Civil Procedure and pursuant to Rule 265(c) of the South Carolina Appellate Court Rules remain the same but the basis for his argument under that scenario changes to Proviso 91.26 in Act 97 of 2017, the General Appropriations Act for Fiscal Year 2017-2018. Proviso 91.26 in Act 97 of 2017 is identical to Proviso 91.28 in Act 284 of 2016.

Petitioner Allendale County School District filed with this Court a Petition for Original Jurisdiction on June 21, 2017. No other pleadings have been filed in this case. Because President Pro Tempore Leatherman's request for intervention is made prior to this Court making a determination concerning the Petition for Original Jurisdiction, substitution would not disrupt or delay the proceedings in this matter.

Additionally, Counsel for Respondent Lucas consents to the President Pro Tempore's intervention in this matter and consents to his substitution for the Lieutenant Governor.

If the Court grants intervention, President Pro Tempore Leatherman respectfully requests that this Court permit him to file his Return to the Petition of Original Jurisdiction and his Answer to Petitioner's Complaint five days after intervention is granted, or July 11, 2017, whichever occurs later.

Respectfully submitted,

By:



Kenneth M. Moffitt
S.C. Bar No. 74179
KenMoffitt@SCSenate.gov
Daina M. Riley
S.C. Bar No. 102810
DainaRiley@SCSenate.gov
P.O. Box 142
Columbia, SC 29202
(803) 212-6300

*Counsel for President Pro Tempore Hugh K.
Leatherman, Sr.*

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**MEMORANDUM OF LAW IN SUPPORT
OF SENATOR HUGH K. LEATHERMAN, SR.'S
MOTION FOR LEAVE TO INTERVENE
AND FOR SUBSTITUTION**

Rule 24 of the South Carolina Rules of Civil Procedure permits intervention in an existing action as a matter of right or upon permission granted by the Court. In this matter, Senator Hugh K. Leatherman, Sr., in his capacity as President Pro Tempore ("President Pro Tempore Leatherman") of the South Carolina Senate ("the Senate"), respectfully requests that the Court grant his motion to intervene as a matter of right pursuant to Rule 24(a). Specifically, President Pro Tempore Leatherman requests that he be granted this intervention as a respondent.

Additionally, Rule 265(c) of the South Carolina Appellate Court Rules permits substitution of parties by motion to this Court. Specifically, President Pro Tempore Leatherman requests that he be substituted for Kevin L. Bryant as the respondent representing the interests of the Senate in this suit.

ARGUMENT

I. THIS COURT SHOULD ALLOW PRESIDENT PRO TEMPORE LEATHERMAN'S INTERVENTION AS A MATTER OF RIGHT PURSUANT TO SCRCP 24(a)(1) BECAUSE STATE LAW REQUIRES INTERVENTION.

Rule 24(a)(1) of the South Carolina Rules of Civil Procedure allows a party to intervene when a statute confers an unconditional right to do so. President Pro Tempore Leatherman moves to intervene in this matter under Rule 24(a)(1), because Proviso 91.28 of Act 284 of 2016, the General Appropriations Act for Fiscal Year 2016-17, provides the unconditional right for intervention.¹

In South Carolina, an appropriation act “has equal force and effect as a permanent statute. . . .” *Plowden v. Beattie*, 185 S.C. 229, 236, 193 S.E. 651, 654 (1937). Furthermore, the rules for intervention are to be interpreted to permit liberal intervention, particularly in cases in which judicial economy will be promoted by the declaration of rights of all parties that may be affected. *See Berkeley Electric Co-op., Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 190, 394 S.E.2d 712, 715 (1990).

Proviso 91.28 of Act 284 of 2016, the General Appropriations Act for Fiscal Year 2016-17 provides:

When the Lieutenant Governor is named as a party to a lawsuit challenging actions taken by the Senate, the President Pro Tempore shall be automatically substituted as the party representing the Senate as the Lieutenant Governor is not a party in interest. Upon being served with the lawsuit, the Lieutenant Governor shall immediately notify the President Pro Tempore of the Senate and the Clerk of the Senate. Upon receiving notice from the Lieutenant Governor, the President Pro Tempore shall notify the court and the plaintiff/petitioner that the President Pro

¹ Act 284 of 2016 is still effective as of the date of filing this Memorandum and corresponding Motion. Therefore, the provisions contained in Proviso 91.28 still have the full force and effect of law. Should the Court rule on this motion on or after July 1, 2017, Senator Leatherman's argument for intervention and substitution pursuant to Rule 24(a)(1) of the South Carolina Rules of Civil Procedure and pursuant to Rule 265(c) of the South Carolina Appellate Court Rules remain the same but the basis for his argument under that scenario changes to Proviso 91.26 in Act 97 of 2017, the General Appropriations Act for Fiscal Year 2017-2018. Proviso 91.26 in Act 97 of 2017 is identical to Proviso 91.28 in Act 284 of 2016.

Tempore of the Senate is invoking the provisions of this proviso and substituting himself as the party representing the Senate. The Court shall make necessary changes to the caption of the lawsuit and otherwise. However, the provisions of this proviso are not effective if the actions challenged are solely the actions taken by the Lieutenant Governor. The provisions contained in this proviso do not apply to actions filed before, or otherwise pending, as of the effective date of this act.

Proviso 91.28 does not specifically use the word “intervene,” but the intent of the Legislature is clear. By adopting this proviso, the Legislature intended the President Pro Tempore to participate in litigation challenging an action taken by the Senate. Since a general appropriations act has the effect of permanent statute, Proviso 91.28 confers the unconditional right to intervene to President Pro Tempore Leatherman. The allegations contained in this case are of the type referred to by Proviso 91.28, since the case challenges the constitutionality of Act 97 of 2017, the passage of which required Senate action. Because the rules of intervention are interpreted liberally and Proviso 91.28 expressly confers a right to intervene, President Pro Tempore Leatherman respectfully requests that the Court grant his motion to intervene as a matter of right according to Rule 24(a)(1) of the South Carolina Rules of Civil Procedure.

II. IN THE ALTERNATIVE, THIS COURT SHOULD FIND THAT PRESIDENT PRO TEMPORE LEATHERMAN IS ALLOWED TO INTERVENE AS A MATTER OF RIGHT PURSUANT TO RULE 24(a)(2).

If the Court concludes Proviso 91.28 does not provide for intervention as a matter of right by statute, President Pro Tempore Leatherman respectfully requests intervention according to Rule 24(a)(2). Pursuant to Rule 24(a)(2) of the South Carolina Rules of Civil Procedure, a party is permitted to intervene in an action as a matter of right if the party:

- (1) establishes timely application;
- (2) asserts an interest relating to the property or transaction that is the subject of the action;
- (3) demonstrates it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and
- (4) demonstrates its interest is inadequately represented by other parties.

See In re Horry County State Bank, 361 S.C. 503, 508, 604 S.E.2d 723, 725 (Ct. App. 2004); *see also* SCRCP 24(a). As previously discussed, the rules for intervention are to be interpreted to permit liberal intervention, particularly in cases in which judicial economy will be promoted by the declaration of rights of all parties that may be affected. *See Berkeley Electric Co-op., Inc.*, 302 S.C. at 190, 394 S.E.2d at 715. “[F]ailure to satisfy any one of the four requirements precludes intervention.” *Ex parte Reichlyn*, 310 S.C. 495, 500, 427 S.E.2d 661, 664 (1993). President Pro Tempore Leatherman asserts all elements of intervention by right are satisfied and respectfully requests this Court grant his motion for intervention.

A. President Pro Tempore Leatherman’s Application Is Timely.

President Pro Tempore Leatherman’s request to intervene is timely made. Petitioner Allendale County School District filed with this Court a Petition for Original Jurisdiction and an accompanying Complaint for Declaratory Judgment on June 21, 2017. No other pleadings have been filed in this case. Because President Pro Tempore Leatherman’s request for intervention is made prior to this Court making a determination concerning the Petition for Original Jurisdiction, intervention would not disrupt or delay the proceedings in this matter.

B. President Pro Tempore Leatherman Satisfies the Requirement of an Interest in This Action.

President Pro Tempore Leatherman, in his capacity as the representative leader of the Senate, possesses a significant interest in the issues presented in this matter. The question of an intervenor’s interest is determined in relation to the overall subject matter of the action and not in relation to particular issues before the Court. *See Berkeley Elec. Co-op.*, 302 S.C. at 189-90, 394 S.E.2d at 714 (1990) (citing *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983)).

The subject matter at issue in this case involves the legislative actions taken by the General Assembly in relation to Act 97 of 2017. As one of the two distinct branches of the General

Assembly, the Senate played an indispensable role in the enactment of Act 97 of 2017. Specifically, Petitioner is asking this court to declare that Act 97 of 2017 violates Article III, Section 17 of the South Carolina Constitution. Furthermore, Petitioner's claim, that Act 97 of 2017 violates Article III, Section 17 of the South Carolina Constitution, requires a constitutional interpretation of an act of the General Assembly that may affect the legislative process prospectively and may have a direct impact on the Department of Education, in addition to the Allendale County School District. Accordingly, President Pro Tempore Leatherman, in his capacity as the representative leader of the Senate, has a significant interest in the subject matter of this case.

C. Without Intervention, This Court's Decision Might Impair President Pro Tempore Leatherman's Ability to Protect the Interest of the South Carolina Senate.

Failure to grant President Pro Tempore Leatherman leave to intervene in this action might impair or impede the Senate's ability to protect its interests. As previously described, the Senate played an indispensable role in the enactment of Act 97 of 2017, and this case challenges the constitutionality of that Act. If this case proceeds without Senate intervention, the Senate's role in the enactment of Act 97 of 2017 could be construed by this Court without an opportunity for the Senate to defend its interests. Furthermore, the legislative process, the operations of the Department of Education, and the State's ability to address challenges faced by local school districts could be altered without an opportunity for input by the Senate. The Senate has a significant interest in preserving its role in the legislative process, which requires intervention in this case.

D. The Senate's Interests Are Not Adequately Represented by Existing Parties.

The Senate is not adequately represented in this matter by the existing parties. The Senate and the House of Representatives, represented by Respondent Speaker James H. "Jay" Lucas, have aligned interests in this proceeding. Each body, however, is independent, with varying interests and constituencies preventing one from adequately representing the other. In this case, the House of Representatives has a duly elected officer and member of its body as a named Respondent, while the Senate does not. Like the Speaker of the House in the House of Representatives, President Pro Tempore Leatherman was elected by the members of the Senate to represent the interests of the Senate. The Senate should also have an elected member of its body act as a Respondent in this action, in order to have its interests adequately represented before this Court.

While the Lieutenant Governor serves as the President of the Senate and presides over the Senate while it is in session, he is not an elected member of the body and instead is a member of the Executive Department. *See* S.C. Const. art. IV, Section 8; *see also* S.C. Code Ann. § 1-1-110 (Supp. 2014). Also, unlike the Speaker of the House of Representatives, the Lieutenant Governor's service in the Senate is *ex officio*; he votes only when there is a tie vote among the Senate membership. S.C. Const. Art. IV, Section 10. Finally, the Lieutenant Governor's duties in the Senate are different from those of the membership. During the debate on Act 97 of 2017, the Lieutenant Governor could not participate in debate on the bill, could not submit any amendments, and had no vote on the bill. Because the Lieutenant Governor's role in the Senate differs from the Senators, he is unable to adequately represent the interests of the Senate in this matter.

The Attorney General represents the State of South Carolina, and Secretary Spearman represents the interests of the Department of Education in this matter. Neither the Attorney General nor Secretary Spearman is an elected member of the Senate. Given their representation of existing

Respondents and their lack of membership in the Senate, neither the Attorney General nor the Secretary of Education is able to adequately represent the Senate in this case.

For the reasons stated above, none of the parties currently involved in this proceeding can adequately represent the interests of the South Carolina Senate in this action, and President Pro Tempore Leatherman respectfully requests that this Court grant him leave to intervene as a matter of right.

III. THIS COURT SHOULD SUBSTITUTE PRESIDENT PRO TEMPORE LEATHERMAN FOR LIEUTENANT GOVERNOR BRYANT AS A PARTY TO THIS CASE PURSUANT TO RULE 265(C) OF THE SOUTH CAROLINA APPELLATE COURT RULES.

A. Proviso 91.28 Designates the President Pro Tempore as the Party Representing the Senate in this Matter.

Rule 265(c) of the South Carolina Appellate Court Rules allows the substitution of a party “by motion of the appellate court.” SCACR 265. When making a determination regarding a motion to substitute, the Court may grant the motion, unless the substitution results in a substantial change in the nature of the action or deprives a party of a substantial right. *See Israel v. Carolina Bar-B-Que, Inc.*, 292 S.C. 282, 356 S.E.2d 123 (Ct. App. 1987). Furthermore and as previously described, Proviso 91.28 of Act 284 of 2016, the General Appropriations Act for Fiscal Year 2016-17, requires substitution of the President Pro Tempore for the Lieutenant Governor as a party in interest in all cases challenging an action taken by the Senate.

In their Complaint, Petitioner alleged that Act 97 of 2017 is unconstitutional. The Senate took action with regard to Act 97 of 2017 during March, April, May, and June of 2017. The General Assembly ratified H. 3720 on June 6, 2017, and subsequent to that date the Governor signed it into law.

Petitioners have initiated a “lawsuit challenging actions taken by the Senate” regarding Act 97 of 2017 and have named the Lieutenant Governor as a party to the suit to represent the Senate, an action that triggers the provisions contained in Proviso 91.28. Furthermore, on June 21, 2017, the Lieutenant Governor provided notice to the President Pro Tempore in accordance with the Proviso.

Substitution of the President Pro Tempore for the Lieutenant Governor will not result in “a substantial change in the nature of the action” because the subject of Petitioner’s claims will remain exactly the same. The question before the Court will be whether Act 97 of 2017 violates the South Carolina Constitution. Substitution in this case will ensure the interests of the Senate are adequately represented and will reduce any confusion regarding the party defending the Senate’s actions relating to Act 97 of 2017.

Additionally, no party is denied a substantial right. The Lieutenant Governor’s actions have not been called into question. He did not participate in the debate of the bill, could not submit amendments to the bill, and could not vote on the bill. Therefore, substituting a party in his stead does not deprive the Lieutenant Governor of the “substantial right” to defend his actions. Likewise, the Petitioner is seeking remedies from the Court that can be imposed regardless of whether the President Pro Tempore or the Lieutenant Governor are named as a party to the action to defend the Senate. Therefore, the Petitioner is not deprived of a “substantial right” to the remedy sought if the court holds in its favor. Finally, the House of Representatives represented by Respondent Lucas, is free to defend its actions before this Court regardless of who is named to defend the Senate. Therefore, President Pro Tempore Leatherman should be substituted as a party to this suit in the official capacity of a respondent to ensure that the Senate’s interests are adequately represented.

CONCLUSION

For the foregoing reasons, this Court should find that President Pro Tempore Leatherman is entitled to intervene pursuant to Rule 24(a)² of the South Carolina Rules of Civil Procedure. President Pro Tempore Leatherman respectfully requests that this Court grant his motion to intervene in this case as a respondent.

Furthermore, for the foregoing reasons, this Court should substitute President Pro Tempore Leatherman in his official capacity for Lieutenant Governor Kevin L. Bryant as the respondent representing the interests of the Senate. Substitution should be granted pursuant to Rule 265(c) of the South Carolina Appellate Court Rules.

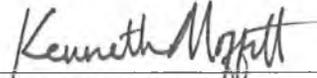
If the Court grants intervention, President Pro Tempore Leatherman respectfully requests that this Court permit him to file his return to the Petition for Original Jurisdiction five days after intervention is granted, or July 11, 2016, whichever is later.

Respectfully submitted,

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² The Court granted Senator Leatherman's Motion to Intervene pursuant to Rule 24(a), SCRPC, and substituted Senator Leatherman for then Lieutenant Governor Henry D. McMaster pursuant to Proviso 91.28 of the General Appropriations Act for 2016-2017 in *South Carolina Public Interest Foundation, et. al. v. The S.C. House of Representatives, et. al.* (Appellate Case No. 2016-002160) in an Order dated February 13, 2017.

By:



Kenneth M. Moffitt

S.C. Bar No. 74179

KenMoffitt@SCSenate.gov

Daina M. Riley

S.C. Bar No. 102810

DainaRiley@SCSenate.gov

P.O. Box 142

Columbia, SC 29202

(803) 212-6300

*Counsel for President Pro Tempore Hugh K.
Leatherman, Sr.*

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PROOF OF SERVICE

I hereby certify that I have served Respondent Hugh K. Leatherman, Sr.'s **Motion for Leave to Intervene and for Substitution** on counsel for each of the other parties by mailing a copy to them at the addresses below via the United States Mail this June 23, 2017.

[Addresses on Following Page]

Catherine McNicoll
Office of the Lieutenant Governor
State House, 1st Floor
PO Box 142
Columbia, SC 29202

J. Emory Smith, Jr., Esq.
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

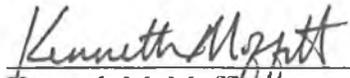
Carl L. Solomon
Daryl L. Bush
Solomon Law Group, LLC
3501 North Main Street
Columbia, SC 29203
Counsel for Petitioner
Allendale County School District

Molly Spearman
State Superintendent of Education
1429 Senate Street
Columbia, SC 29201

Robert E. Stepp
1310 Gadsden Street
PO Box 11449
Columbia, SC 29211
Counsel for Respondent
James H. "Jay" Lucas
Speaker of the S.C. House of Representatives

[Signature Page Follows]

By:



Kenneth M. Moffitt
KenMoffitt@SCSenate.gov
S.C. Bar No.: 74179
Daina M. Riley
DainaRiley@SCSenate.gov
S.C. Bar No.: 102810

P.O. Box 142
Columbia, SC 29202
(803) 212-6300
*Counsel for President Pro Tempore
Hugh Leatherman, Sr.*

Columbia, South Carolina
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