

THE STATE OF SOUTH CAROLINA  
In the Original Jurisdiction  
Of the Supreme Court

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Governor Marshall C. Sanford, Jr. .... Petitioner,

v.

South Carolina State Ethics Commission and  
Herbert R. Hayden, Jr. in his official capacity  
as Executive Director of the State Ethics Commission ..... Respondents.

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MEMORANDUM OF LAW IN SUPPORT  
OF REPRESENTATIVE ROBERT W. HARRELL, JR.'S  
MOTION FOR LEAVE TO INTERVENE

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As is well known by this Court, 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, Representative Harrell, in his capacity as Speaker of the House of Representatives (hereinafter referred to as "Speaker Harrell"), respectively requests the Court grant this motion pursuant to Rule 24(a)(2) or, in the alternative, pursuant to Rule 24(b)(2). Specifically, Speaker Harrell requests he be granted this intervention as a petitioner.

**I. Speaker Harrell should be allowed to intervene as a matter of right pursuant to Rule 24(a)(2).**

To intervene as a matter of right pursuant to Rule 24(a)(2), the court has held that a party must: (1) establish timely application; (2) assert an interest relating to the property or transaction that is the subject of the action; (3) demonstrate that 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) demonstrate that its interest is inadequately represented by other parties.” In re Horry County State Bank, 361 S.C. 503, 604 S.E.2d 723, (S.C. App. 2004). Failure to satisfy any one of the four requirements precludes intervention. Ex parte Reichlyn, 310 S.C. 495, 427 S.E.2d 661 S.C. (1993). Speaker Harrell asserts that he has satisfied all of the court’s required elements, and, thus, asks that his motion be granted.

In Davis v. Jennings, the Court adopted a four-part test for determining timeliness. Davis v. Jennings, 304 S.C. 502, 504, 405 S.E.2d 601, 603 (1991). The Davis case concerned an action involving the sale of property. Id. at 503, 602. Prior to trial, the case was settled and the record was sealed. Id. The Charlotte Observer (hereinafter referred to as “newspaper”) filed a motion to intervene in the case to object to the sealing of the records, but that motion was denied. Id. The newspaper appealed the decision. One issue on appeal was whether or not the newspaper had timely filed its motion to intervene. The Court held that in determining whether a motion to intervene has been timely filed, the Court must consider the following: (a) the time that has passed since the applicant knew or should have known of his or her interest in the suit; (b) the reason for the delay in filing the application to intervene; (c) the stage to which the litigation has progressed; and (d) the prejudice the original parties would suffer from granting intervention and the applicant would suffer from denial. Id. at 504, 603. The Court in Davis found that the newspaper had no reason to seek intervention prior to the sealing of the record and that the motion was filed within one month after the order, which sealed the record, was issued. Id. Additionally, the Court found that simply because the case had come to judgment prior to the time the motion was filed did not mean that the motion to intervene was

untimely. Id. at 505, 603. In fact, the Court stated that when a motion to intervene is filed after a judgment has been made, it may help to prove the relevant merits of the intervenor's plea. Id. Finally, the Court found that if the intervention relates to an ancillary issue and will not disrupt the resolution of the underlying merits, untimely intervention is much less likely to prejudice the other parties to the case. Id. In Davis, the Court found that the record did not seem to show that any undue prejudices would be placed on the other parties if the newspaper's motion was granted. Id. As such, the Court reversed the order denying the newspaper's motion to intervene. Id.

In the present matter, it is clear that Speaker Harrell's motion is timely. Similar to the Davis case, Speaker Harrell's motion to intervene, much like the newspaper's motion, is being filed upon discovering the House of Representatives' interest in the matter. In Davis, the newspaper discovered its interest in the case when the court ordered the record be sealed. Id. at 504, 603. Here, Speaker Harrell discovered his interest in the matter when Governor Sanford filed suit against the State Ethics Commission requesting that the commission conceal any documents related to their findings on the Governor's alleged misconduct and ethical violations. Additionally, in Davis, the Court found the newspaper timely filed its motion to intervene because it had done so within a month after the record had been sealed. Id. Similarly, in this matter, the Court should find Speaker Harrell's motion timely because he is filing it within days of the Governor filing this action with the Court. Accordingly, the Court should find there has been no delay on the part of Speaker Harrell. Also, in Davis, the stage at which the newspaper sought to intervene in the case was after the case had been settled, and the Court allowed the newspaper's intervention. Davis at 505, 603. In the pending case, no

settlement has been reached and no arguments have been heard by the Court. Therefore, Speaker Harrell asserts that this is an appropriate time to intervene in the matter. Finally, the Court in Davis found that the newspaper's intervention was sought to reveal the records that had been sealed and not to disrupt any settlement reached by the original parties, and, as such, the original parties would not suffer from the newspaper's motion being granted. Id. As stated previously, no settlement has been reached between the original parties and no ruling has been made by the Court. Therefore, the original parties would not suffer any prejudice if the Court allowed Speaker Harrell's intervention. However, if the Court denies Speaker Harrell's intervention, the Speaker and the House of Representatives would suffer greatly, as they would potentially be bound by a court decision directly affecting them without being given an opportunity to be heard. Because no decisions have been made by the Court and because this action was only recently filed, Speaker Harrell asserts that this motion to intervene is certainly timely.

Additionally, as is required by the Court's holding in In re Horry County State Bank, Speaker Harrell argues that, in the present case, he has an interest in the subject of the action. In re Horry County State Bank, 604 S.E.2d 723, (S.C. App. 2004). The In re Horry County State Bank case cites Ex Parte Reichlyn as another case in which intervention was attempted. In Ex Parte Reichlyn, South Carolina Department of Health and Control (DHEC) brought an action against a chemical company to get the company to comply with an administrative order that required the company to remediate environmental hazards and pay a civil penalty. Ex Parte Reichlyn, 310 S.C. 495, 497, 427 S.E.2d 661, 662 (1993). Judgment was awarded to DHEC, and one month after that judgment was made, the chemical company filed for bankruptcy. Id.

DHEC and the chemical company later entered into a consent order to remediate the hazards. Ex Parte Reichlyn at 497, 662. Subsequently, the former president of the chemical company, Mr. Reichlyn, filed a motion to intervene pursuant to Rule 24(a)(2). Id. One of the issues the court had to decide was whether or not Mr. Reichlyn asserted an interest relating to the property or transaction that was the subject of the action. Id. at 499, 664. The court held that intervention of right requires direct, substantial, legally protectable interest in the proceedings. Id. The court found that Mr. Reichlyn only possessed a desire to preserve the chemical company's assets to be able to fund his indemnification, and that desire was not a direct or legally protectable interest in the property that was subject to the underlying action. Id. As such, the court determined that Mr. Reichlyn did not have a sufficient interest to grant his motion to intervene as a matter of right. Id. at 500, 664.

However, unlike the intervenor in Ex Parte Reichlyn, Speaker Harrell clearly has a sufficient, legally protectable interest in the present case. While Mr. Reichlyn's only interest was to protect himself, Speaker Harrell's interest, as the Chief Executive Officer of the House, in this matter is to have the Court give an opinion as to the role and the responsibility of the State Ethics Commission regarding the release to the House of Representatives of documents it possesses and the findings it has reached concerning Governor Sanford's alleged actions and to protect the House of Representatives' constitutionally granted authority to begin impeachment proceedings using those documents and findings if it deems such action appropriate. This interest is, of course, sufficient because the Court's ruling in the underlying matter will directly affect the House of Representatives' future actions as they concern Governor Sanford. If the case were to proceed without Speaker Harrell's participation, his position would not be

presented, and his interests would not be protected. Therefore, Speaker Harrell asserts that his interest in this case is sufficient and protectable only if he is allowed to intervene.

Furthermore, the court requires that a party wishing to intervene as a matter of right must demonstrate that it is in a position that without intervention, disposition of the action may impair or impede its ability to protect its interest. Berkeley Electric Cooperative, Inc. v. Town of Mt. Pleasant, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990). Speaker Harrell asserts that he meets this requirement, as well. In Berkeley Electric Cooperative, the electric cooperative brought action against the town of Mt. Pleasant asserting that the town had interfered with the cooperative's extension of services to new customers by informing developers of a newly annexed area of the town that the cooperative did not have the right to provide that area with service. Id. at 188, 713. The cooperative also sought an order from the court to be the sole supplier of electricity to the property in question. Id. Subsequently, SCE&G moved to intervene in the case pursuant to Rule 24(a). Id. at 188, 714. One of the issues discussed by the court was whether or not SCE&G demonstrated that it was in a position that without intervention, disposition of the action may impair or impede its ability to protect their interest. Id. 190, 715. The court held that to meet that requirement, a party need not prove that it would be bound in a *res judicata* sense by the judgment, only that it would have difficulty adequately protecting its interests if not allowed to intervene. Id. Ultimately, the court found that SCE&G met this requirement because declaration that the cooperative was the sole provider of electricity for the area in question would prevent SCE&G from serving customers that it believed it was legally entitled to serve. Id. at 191, 715. Such an order would

also impair SCE&G's ability to protect investments it had already made in reliance upon its beliefs. Id. Therefore, SCE&G was allowed to intervene in the action. Id.

Likewise, Speaker Harrell should be allowed to intervene in the present action. In Berkeley Electric Cooperative, the Court determined that, unless it allowed SCE&G to intervene, SCE&G would be unfairly burdened if a decision was issued in favor of the cooperative. Id. Similarly, Speaker Harrell would be unfairly burdened unless he is allowed to intervene. If Speaker Harrell's motion is not granted and a decision was issued in favor of Governor Sanford, the House of Representatives would be unfairly burdened because it would be prohibited from obtaining documents possessed by the State Ethics Commission, and it would not be able to interview or depose witnesses who might have insight as to what the Ethics Commission found. As such, the House of Representatives would be prevented from determining whether or not it should take further action concerning impeachment. Therefore, as was done on behalf of SCE&G in the Berkeley case, Speaker Harrell's motion to intervene should be granted by this Court.

Finally, the court requires that a party moving to intervene demonstrate that its interest is inadequately represented by other parties to the action. Berkeley Electric Cooperative, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990). Speaker Harrell meets this last requirement, as well. In Berkeley Electric Cooperative, this issue was also discussed. The Court held that it must determine whether existing parties will undoubtedly make all of the intervenor's arguments, whether existing parties are capable and willing to make such arguments, and whether the intervenor offers different knowledge, experience, or perspective on proceedings that would otherwise be absent. Id. at 191, 715. The Court found that SCE&G, the intervenor, and the

Town of Mt. Pleasant, the defendant, were seeking the same objective, but SCE&G had raised issues that were outside of the pleadings already filed. Id. The Court also found that SCE&G brought a different perspective to the proceeding that would otherwise be absent. Id. Accordingly, the Court granted SCE&G's motion to intervene. Id. at 192, 716.

Similarly, the Court here should grant Speaker Harrell's motion to intervene. Like SCE&G in the aforementioned case, Speaker Harrell's arguments will absolutely not be made by Governor Sanford. In fact, Governor Sanford's pleadings request an entirely opposite ruling from this honorable than will be requested by Speaker Harrell. Governor Sanford is asking that the Court prohibit the State Ethics Commission from releasing its findings, while Speaker Harrell is requesting that the Court allow the findings to be given to the General Assembly. Furthermore, the law of Berkeley Electric Cooperative requires that the Court determine whether existing parties are capable and willing to make the arguments of the intervenor. In that case, it was found that the cooperative was not willing to make SCE&G's arguments. Likewise, Governor Sanford certainly will not be willing to make the Speaker Harrell's argument, as they are in direct contrast to each other.

Additionally, it should be emphasized that Governor Sanford appoints all nine members of the State Ethics Commission, and in fact, four of those members contributed individually and directly to his gubernatorial campaigns. Due to this obvious conflict, Speaker Harrell asserts that the State Ethics Commission will be unable and unwilling to put forth the argument Speaker Harrell intends to make in this matter. Additionally, like SCE&G, Speaker Harrell will bring a different perspective to this matter. While Governor Sanford seeks to keep the State Ethics Commission documents and witnesses hidden, Speaker Harrell seeks to have those

records given to the House of Representatives so that the Governor's alleged misconduct and unethical actions can be assessed by the House in its exclusive jurisdiction. Speaker Harrell wishes to find answers to all of the questions that have been asked by the general public concerning Governor Sanford's travels and spending habits, and it appears Governor Sanford only wishes to continue to hinder the public's ability to know the truth. Therefore, it is evident that Speaker Harrell will bring a different perspective to this case.

Finally, as was the case with SCE&G and the Town of Mt. Pleasant in Berkeley Cooperative, Speaker Harrell seeks the same objective as Governor Sanford, which is to determine whether the State Ethics Commission may release its report to the House of Representatives. However, as is also required by the aforementioned case, Speaker Harrell will be raising issues in his argument that were not raised by Governor Sanford. Specifically, Speaker Harrell will request the Court find that the reports of the State Ethics Commission should be released to the General Assembly because of the responsibility placed on the legislature by the South Carolina Constitution, but Governor Sanford is requesting that those documents be kept private. The current parties to this action are only concerned about this singular instance and this investigation. Speaker Harrell is concerned with the impact of this decision upon our State Constitution, and without Speaker Harrell's involvement in this matter, the larger impact of this case might be lost. As such, Speaker Harrell asserts that he should be allowed to intervene in this matter.

In conclusion, as the court has stated previously, for a party to be able to intervene pursuant to Rule 24(a)(2), it must: (1) establish timely application; (2) assert an interest relating to the property or transaction that is the subject of the action; (3) demonstrate that 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) demonstrate that its interest is inadequately represented by other parties.” In re Horry County State Bank, 604 S.E.2d 723, S.C. Ct. App. (2004). In this matter, Speaker Harrell asserts that he has satisfied all of the required elements, and, therefore, he respectfully requests the court grant his motion to intervene.

**II. Alternatively, Speaker Harrell should be granted permissive intervention pursuant to Rule 24(b)(2).**

If, however, the court denies Speaker Harrell’s motion to intervene pursuant to Rule 24(a)(2), alternatively, Speaker Harrell respectfully requests the court allow him to intervene pursuant to Rule 24(b)(2). This rule provides that a party seeking to intervene must file a timely application and that the applicant’s claim or defense and the main action must have a question of law or fact in common. S.C.R.C.P. 24(b). Additionally, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. Id. Speaker Harrell asserts that he meets all of these requirements, as well.

As stated in the previous argument, South Carolina has adopted a four-part test for determining timeliness in intervention matters. Davis v. Jennings, 304 S.C. 502, 504, 405 S.E.2d 601, 603 (1991). In Davis, the court held that for a motion to be found timely, the court must consider: (a) the time that has passed since the applicant knew or should have known of his or her interest in the suit; (b) the reason for the delay in filing the application to intervene; (c) the stage to which the litigation has progressed; and (d) the prejudice the original parties would suffer from granting intervention and the applicant would suffer from denial. Id. at 504, 603. Again, the Davis case concerned an action involving the sale of property, and the underlying

action was settled prior to trial, with the court ordering that the record be sealed. Id. at 503, 602. The newspaper filed a motion to intervene in to object to the sealing of the records. Id. The court in Davis found that the newspaper had no reason to seek intervention until after the record had been sealed and that the newspaper's motion was filed within one month of that occurring. Id. at 504, 603. Additionally, the court found that the settling of the case prior to the filing of the motion did not automatically make the motion to intervene untimely. Id. at 505, 603. Finally, the court found that if the intervention relates to an ancillary issue and will not disrupt the resolution of the underlying merits, untimely intervention is much less likely to prejudice the other parties to the case. Id. In Davis, the court found that the record did not show that any undue prejudices would be placed on the other parties if the newspaper's motion was granted. Davis at 505, 603. As such, the court granted the newspaper's motion to intervene. Id.

In the present matter, Speaker Harrell's motion is timely, as well. In Davis, the newspaper's motion was filed within a month of it becoming aware of its interest in the case. Id. at 504, 603. Similarly, Speaker Harrell's motion is being filed only a short period of time after discovering the House of Representatives' interest in the matter. In Davis, the newspaper discovered its interest in that case when the court sealed the record. Id. Here, Speaker Harrell discovered his interest in this case when Governor Sanford filed the underlying action. Additionally, because Speaker Harrell only very recently became aware of his interest in this case, Speaker Harrell asserts there has been no unreasonable delay in the filing of this motion to intervene. Also, in Davis, the newspaper sought to intervene in the case after the case had come to judgment, and the court allowed the newspaper's intervention. Id. at 505, 603. In the

pending case, no judgment has been given, and, in fact, no arguments have been heard by the Court. Therefore, Speaker Harrell asserts that this is an appropriate time to intervene in the matter. Finally, the court in Davis found that the newspaper's intervention would not disrupt any judgment made in the case, and, as such, the original parties would not suffer from the newspaper's motion being granted. Id. As previously stated, the parties have not settled this matter and no ruling has been made by the Court. Therefore, the original parties will not suffer any prejudice if the Court grants Speaker Harrell's motion to intervene. However, if the Court denies Speaker Harrell's motion, the Speaker and the House of Representatives would suffer because they would possibly be bound by a court decision in which they were not allowed an opportunity to be heard. Again, because no decisions have been made by the Court and because the action was only recently filed, Speaker Harrell asserts that this motion to intervene is timely.

Additionally, Speaker Harrell's claim and the main action in the present matter have a question of law or fact in common. S.C.R.C.P. 24(b). In In re Milliken & Company v. Union County Treasurer, the South Carolina Tax Commission sought to intervene pursuant to Rule 24(b)(2). In re Milliken & Company v. Union County Treasurer, 295 S.C. 257, 258, 368 S.E.2d 72, 73, (S.C. App. 1988). In that case, Milliken sued the Treasurer to collect money it had paid in taxes to Union County. Id. The Tax Commission sought to intervene, among other reasons, because it had a claim or defense with questions of law or fact that were in common with the main action. Id. The court held that when claims or defenses have a question of law or fact common to each other, sound administrative procedures encourage the disposition of all claims and defenses in one action. Id. at 263, 75. The court also stated, however, that permissive

intervention should be allowed only where the prospective intervenor has a cause of action or defense he could bring or assert on his own. Id. at 263, 76. In In re Milliken, the court held that the Tax Commission's only claim would be identical to the Treasurer, and while, obviously, that question of law was in common, it was not a claim that the Tax Commission could bring by itself. Id. As such, the court denied the Tax Commission's motion to intervene. Id. at 264, 76.

However, in the present case, Speaker Harrell's claim has a question of law in common with the main action but is distinct from that action, as well. Similar to the Tax Commission in In re Milliken, Speaker Harrell's claim involves a need to clarify the State Ethics Commission's role and responsibility with regard to the documents and findings concerning the alleged ethical violations of Governor Sanford; however, unlike the case mentioned above where the issues of the intervenor and the defendant were identical, Speaker Harrell's interests here are entirely opposite from Governor Sanford's interests. As mentioned previously, Governor Sanford's pleadings request that the Court determine that the State Ethics Commission records are confidential and, therefore, not able to be released to the House of Representatives. However, Speaker Harrell requests that the Court determine that those documents and findings are public in nature and order the release of them to the House of Representatives so that the House is able to proceed as the South Carolina Constitution mandates. Therefore, Speaker Harrell asserts that his claim is similar but distinct from the main action and requests that he be allowed to intervene.

Finally, the court has held that permissive intervention should only be allowed if it does not unduly delay or prejudice the adjudication of the rights of the original parties. S.C.R.C.P. 24(b). While not specifically ruling on Rule 24(b)(2), the court in Davis v. Jennings held that if

intervention relates to an ancillary issue and will not disrupt the resolution of the underlying merits, untimely intervention is much less likely to prejudice the other parties to the case. Davis v. Jennings, 304 S.C. 502, 505, 405 S.E.2d 601, 603 (1991). As previously stated, in Davis, the newspaper was seeking intervention to oppose the court sealing the record of the original claim. Id. at 503, 602. There, the court found that the record did not seem to show that any undue prejudices would be placed on the other parties if the newspaper's motion was granted. Id. at 505, 603. As such, the court allowed the newspaper to intervene.

Similarly, granting Speaker Harrell's motion will not delay or prejudice the rights of the original parties in the present matter. In this case, no resolution has been given by the court. Thus, allowing Speaker Harrell's intervention will not undo any settlement or finality of this case. Additionally, as the intervenor in Davis showed, no undue prejudices will be placed on the original parties here. This court has not yet heard arguments on this matter and has not made any decision as to the merits of this case. Therefore, this is the appropriate time for Speaker Harrell to intervene.

In conclusion, Speaker Harrell asserts that Rule 24(b)(2) is an appropriate manner in which he should be allowed to intervene in this case. The rule provides that a party seeking to intervene must file a timely application and that the applicant's claim or defense and the main action must have a question of law or fact in common. S.C.R.C.P. 24(b). Additionally, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. Id. Speaker Harrell meets all of these requirements, and, as such, respectfully requests this court grant his motion to intervene.

**III. Speaker Harrell should be allowed to intervene as a petitioner in this matter.**

The South Carolina Constitution provides that the Governor shall take care that the laws of the State be faithfully executed, and the Attorney General shall assist and represent the Governor to that end. S.C. Const. Art. IV, §15 (1895). However, the Constitution also provides, in pertinent part, that the Governor's power shall not be construed to authorize any action or proceeding against the General Assembly. Id. In the case of Ex rel McLeod v. McClinnis, an action was brought against the Joint Appropriations Review Committee (hereinafter referred to as "JARC") seeking a declaratory judgment of the constitutionality of the statute creating the review committee. Ex rel McLeod v. McClinnis, 278 S.C. 307, 309, 295 S.E.2d 633, 634 (1982). There, the Court found that the members of the JARC were not being sued as members of the General Assembly but as members of "an entity created by statutory law." Id. at 311, 635. The Court also held that the right of the members to serve in their capacity as legislators was not at issue, and as such, the Court held that the authority of the General Assembly was not in contest. Id. Therefore, the Court found the complaint did not assert a cause of action against the General Assembly and was not in violation of the South Carolina Constitution. Id.

However, if Speaker Harrell, on behalf of the House of Representatives, were allowed to intervene as a defendant to this matter, then this action would be a violation of the State Constitution. Unlike Ex rel McLeod, where the court found that the action was not filed against the JARC members to challenge their authorities as legislative members, the present case would present a case against members of the House of Representatives in their legislative capacities. If such intervention happened, the case would be one against the House of Representatives, and, in that situation, the House's authority to obtain the documents and findings from the State Ethics Commission would be contested. An action of that nature would

violate the South Carolina Constitution. If, however, Speaker Harrell were allowed to intervene as a petitioner in this matter, the constitutional violation would not be an issue. Additionally, it is appropriate for Speaker Harrell to be a petitioner in this matter because he is seeking clarification from the court concerning the role and responsibilities of the State Ethics Commission in this situation. Speaker Harrell requests that the Court issue an order setting forth the appropriate action the State Ethics Commission should take with the documents it has collected and findings it has made in its investigation of Governor Sanford. As such, if Speaker Harrell were to file a separate action, it would appropriately be filed naming the State Ethics Commission as the defendant. Therefore, Speaker Harrell should be granted intervention as a petitioner in this matter.

**Conclusion**

As set forth in this memorandum, 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, Speaker Harrell, respectively requests the Court grant this motion pursuant to Rule 24(a)(2) or, in the alternative, pursuant to Rule 24(b)(2), and that the Court allow Speaker Harrell to intervene as a petitioner.

Respectfully submitted,

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