South Carolina Law Review

Volume 43
Issue 1 *ANNUAL SURVEY OF SOUTH CAROLINA LAW*

Article 15

Fall 1991

Practice and Procedure

PRACTICE AND PROCEDURE

I. REQUIREMENTS TO INTERVENE OF RIGHT ESTABLISHED

In *Berkeley Electric Cooperative, Inc. v. Town of Mt. Pleasant*[1] the South Carolina Supreme Court addressed the requirements for intervention as a matter of right under the South Carolina Rules of Civil Procedure (SCRCP) adopted in 1985.[2] The *Berkeley Electric* court established a four-part test under Rule 24(a)(2) of SCRCP and reversed the trial court's denial of a motion to intervene as a matter of right.

Berkeley Electric Cooperative, Inc. (Berkeley Electric) initiated an action against the town of Mt. Pleasant and sought an order to prohibit the town from interfering with Berkeley Electric's rights under a contract between the two parties. Berkeley Electric also sought an order permanently enforcing its rights as sole supplier of electrical services to a newly annexed area of Mt. Pleasant.[3]

South Carolina Electric & Gas Company (SCE&G) also claimed the right to service the newly annexed area based on a subsequent franchise agreement it had executed with Mt. Pleasant. SCE&G moved to intervene in Berkeley Electric's suit against Mt. Pleasant as a matter of right under Rule 24(a) of SCRCP or, alternatively, for permissive intervention under Rule 24(b) of SCRCP.[4] The trial judge denied SCE&G's motion to intervene, and SCE&G appealed.

The South Carolina Supreme Court held that SCE&G was entitled to intervene as a matter of right under Rule 24(a)(2) of SCRCP.[5] The court stated that the rules permit liberal intervention when it pro-

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1. 394 S.E.2d 712 (S.C. 1990).

2. Rule 24(a) of SCRCP provides:

> (a) Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

S.C. R. CIV. P. 24(a).

3. *Berkeley Electric*, 394 S.E.2d at 713.

4. S.C. R. CIV. P. 24(b).

5. Because the court found that SCE&G had a right to intervene under Rule 24(a)(2) of SCRCP, it did not address SCE&G's other exceptions. *Berkeley Electric*, 394 S.E.2d at 716.

motes judicial economy.[6] Because Rule 24(a)(2) of SCRCP is almost identical to Rule 24(a)(2) of the Federal Rules of Civil Procedure,[7] the court looked primarily to federal cases in establishing its guidelines.[8]

In determining whether the trial judge abused his discretion in denying SCE&G's motion to intervene, the court adopted a four-part test used by the United States Court of Appeals for the Ninth Circuit in *Sagebrush Rebellion, Inc. v. Watt.*[9] To satisfy this test the intervening party must:

> (1) establish timely application; (2) assert an interest relating to the property or transaction which 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.[10]

Addressing the first part of the test, the court noted that SCE&G filed its motion to intervene shortly after Berkeley Electric filed its complaint. Therefore, an issue of timeliness did not exist.[11]

Under the second part of the test, SCE&G asserted that it had a financial interest in the dispute because it stood to lose both potential income and any investments it had made based on the belief that it owned the exclusive right to serve the property in question. The court found SCE&G's interest sufficient to warrant intervention under Rule 24(a)(2) of SCRCP. The court stated that the interest "must be determined in relation to the overall subject matter of the action and not in relation to the particular issue that is before the Court."[12] However, the court did not specify the particular types of interests that would satisfy the test. This ambiguity is not surprising in light of the federal courts' traditional inability to precisely define the interest necessary to support intervention as a matter of right.[13]

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6. *Id.* at 714.

7. FED. R. CIV. P. 24(a)(2).

8. *See* South Carolina Tax Comm'n v. Union County Treasurer, 295 S.C. 257, 260, 368 S.E.2d 72, 74 (Ct. App. 1988) (discussing appropriateness of using federal law to interpret Rule 24 of SCRCP).

9. 713 F.2d 525 (9th Cir. 1983).

10. *Berkeley Electric*, 394 S.E.2d at 714 (citing Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir. 1983) (quoting Smith v. Pangilinan, 651 F.2d 1320, 1323-24 (9th Cir. 1981))).

11. *Id.*

12. *Id.* (citing Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir. 1983)). The dissent argued that the subject of the action was the contract between Mt. Pleasant and Berkeley Electric. Because SCE&G was not a party to the contract, the dissent concluded that SCE&G had no interest in the subject of the action. *Id.* at 716 (McInnis, J., dissenting).

13. *See* 3B J. MOORE & J. KENNEDY, MOORE'S FEDERAL PRACTICE ¶ 24.07[2] (2d ed.

In explaining the third part of the test, the court stated, "[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."[14] The court indicated that a declaration in Berkeley Electric's favor in the suit between Berkeley Electric and Mt. Pleasant would as a practical matter prevent SCE&G from realizing the financial benefits of its agreement with Mt. Pleasant. In addition, the court noted that it would be extremely difficult for SCE&G to attack collaterally any ruling adverse to its rights under the agreement.[15]

The final part of the test requires that the applicant demonstrate that its asserted interest will not be adequately represented by the existing parties. Although the burden of showing inadequate representation is on the applicant,[16] the South Carolina Supreme Court followed a United States Supreme Court decision construing Rule 24(a)(2) of the Federal Rules of Civil Procedure and declared that the burden is minimal.[17]

To determine whether the existing representation was adequate, the court relied on three factors used by the Ninth Circuit in *Sagebrush*: "(1) whether the existing parties will undoubtedly make all of the intervenor's arguments; (2) whether the existing parties are capable and willing to make such arguments; and (3) whether the intervenor offers different knowledge, experience, or perspective on the proceedings that would otherwise be absent."[18] Applying these factors the court found that SCE&G (1) raised issues outside the existing pleadings, (2) could assert certain defenses unavailable to Mt. Pleasant, and (3) could bring in its experience in territorial service questions that

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1990); 7C C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1908 (2d ed. 1986); H. LIGHTSEY & J. FLANAGAN, SOUTH CAROLINA CIVIL PROCEDURE 219 (2d ed. 1985). The Court of Appeals for the District of Columbia has stated that "the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967).

14. *Berkeley Electric*, 394 S.E.2d at 715 (citing Spring Constr. Co. v. Harris, 614 F.2d 374 (4th Cir. 1980)).

15. *Id.*; *cf.* Atlantis Dev. Corp. v. United States, 379 F.2d 818 (5th Cir. 1967) (holding that stare decisis may provide a practical disadvantage that warrants intervention as a matter of right when the party that seeks to intervene claims an interest in the property that is the subject of the main action).

16. *Berkeley Electric*, 394 S.E.2d at 715 (citing South Carolina Tax Comm'n v. Union County Treasurer, 295 S.C. 257, 368 S.E.2d 72 (Ct. App. 1988)).

17. The court stated that "the applicant need only show that the representation of his interests 'may be' inadequate." *Id.* (citing Trbovich v. United Mine Workers, 404 U.S. 528, 539 n.10 (1912)).

18. *Id.*; *see* Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 528 (9th Cir. 1983).

arise after annexation.[19]

The court declined to adopt the per se rule that a governmental entity's representation of a private party's interest does not constitute adequate representation.[20] The court noted, however, that Mt. Pleasant lacked a direct economic interest in the proceedings and therefore was not an adequate representative of SCE&G's interests.[21]

The court clearly stated that the pragmatic consequences of a decision to permit or deny intervention must be examined in the context of the unique facts and circumstances of each case.[22] Furthermore, it adopted a four-part test that provides guidance for determining when a court should grant a party's motion to intervene as a matter of right. Whenever a party can demonstrate timely application, an asserted interest in the action, the possible impairment of the right to protect that interest, and the possible inadequacy of representation of that interest by existing parties, the trial court should follow the supreme court's liberal interpretation of Rule 24(a)(2) of SCRCP and grant the party's motion to intervene.

E. Scott Sanders

II. Personal Jurisdiction Requirements Addressed

In *White v. Stephens*[23] the South Carolina Supreme Court held that neither the mere receipt of a power of attorney in South Carolina nor the making of an alleged oral trust that was not to be performed in South Carolina is sufficient to permit a court to exercise personal jurisdiction over a nonresident defendant.[24] The court concluded that these activities do not satisfy the South Carolina long-arm statute[25] or due process requirements.

The appellant, Corrine Stephens, was a Georgia resident and the daughter of Mabel White by her first marriage. The respondents, the children of Jesse A. White, Sr. by his first marriage (the White children), were residents of North Carolina and South Carolina. After their

19. *Berkeley Electric*, 394 S.E.2d at 715-16.

20. *Id.* at 716.

21. *Id.*; *cf.* South Carolina Tax Comm'n v. Union County Treasurer, 295 S.C. 257, 368 S.E.2d 72 (Ct. App. 1988) (affirming a denial of the Tax Commission's motion to intervene as a matter of right in a dispute between a private party and a county treasurer on the grounds that the treasurer adequately represented the interest of the Tax Commission).

22. *Berkeley Electric*, 394 S.E.2d at 714.

23. 300 S.C. 241, 387 S.E.2d 260 (1990).

24. *Id.* at 246, 387 S.E.2d at 263.

25. S.C. Code Ann. § 36-2-803 (Law. Co-op. 1976).

spouses died, Jesse and Mabel married.

In February 1968 Jesse deeded to Mabel the title to his house in Chester County, South Carolina. After Jesse's death Mabel sold the property and purchased a house on Sunset Drive in Chester County. In September 1977 Mabel executed a will in which she left the Sunset Drive property to the White children. In June 1982 Mabel executed and recorded a power-of-attorney in Chester County with her daughter Stephens listed as attorney-in-fact. Stephens never exercised the power-of-attorney in South Carolina.

In May 1983 Mabel moved to Georgia, and in October 1983 she sold the Sunset Drive property. Although Stephens attended the closing and helped her mother sell the furniture from the house, she was not involved with the transaction and did not sign any documents related to the sale of the property. Mabel deposited the proceeds from the sale in a Georgia bank. In 1985 Mabel executed a new will in Georgia in which she left her entire estate to Stephens. On August 13, 1987, Mabel died. The White children did not contest the 1985 will.[26]

On June 29, 1988, the White children filed suit against Stephens in the Chester County Court of Common Pleas. They alleged breach of contract and demanded an accounting of the proceeds from the sale of the Sunset Drive property. The White children claimed that at the sale of the property, Stephens entered into an oral agreement with them whereby the proceeds from the sale would be held in trust, the interest from the trust would be used to take care of Mabel during her lifetime, and upon Mabel's death the principal and any accrued interest would be distributed among the White children.[27]

Stephens denied that she entered into an agreement with the White children and filed a motion to dismiss the case for lack of personal jurisdiction. The trial court denied her motion, and Stephens appealed. The sole issue on appeal was whether the trial court could exercise personal jurisdiction over Stephens.[28]

The South Carolina Supreme Court began its analysis by describing the process by which a court determines if it may exercise personal jurisdiction over a nonresident. "First, in order for a court to have statutory authority to exercise jurisdiction, the nonresident's conduct must meet the requirements of South Carolina's long-arm statute. Second, the nonresident must have sufficient contacts with South Carolina so that the constitutional standards of due process are not violated."[29]

The court began with the statutory analysis. It cited subsection

26. *White*, 300 S.C. at 243-44, 387 S.E.2d at 261.
27. *Id.* at 244, 387 S.E.2d at 261.
28. *Id.* at 243-44, 387 S.E.2d at 261.
29. *Id.* at 245, 387 S.E.2d at 262.

36-2-803(1)(a) and subsection 36-2-803(1)(g) of the South Carolina long-arm statute, which provide:

> (1) A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's (a) transacting any business in this State; . . . or (g) entry into a contract to be performed in whole or in part by either party in this State . . . .[30]

The court then considered whether Stephens's activities satisfied either of these subsections. Addressing subsection 36-2-803(1)(a), the court stated, "The only actions that could possibly constitute the 'transaction of business' in South Carolina for the purposes of the long-arm statute would be the receipt of the Power of Attorney and the making of the alleged oral trust agreement."[31] The court immediately rejected the possibility that the long-arm statute covered those actions. The court held that because Stephens never exercised the power of attorney in South Carolina and because the White children did not allege that Stephens made the oral agreement as Mabel's attorney-in-fact, "the mere receipt of a Power of Attorney does not constitute the transaction of business for jurisdictional purposes."[32] The court further held that "the making of the oral trust agreement could not constitute the transaction of business in South Carolina since it was not alleged that the contract was entered into or that it was to be performed in this state."[33]

Addressing subsection 36-2-803(1)(g), the court considered whether Stephens's making of the alleged oral trust agreement with the White children constituted the "entry into a contract to be performed in whole or in part by either party in this State."[34] The court concluded "that a *prima facie* showing of a contract to be performed in the state was not made."[35]

The court next considered whether Stephens had "purposefully established 'minimum contacts' with this State such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[36] The court stated the four factors used by South Carolina courts to determine whether the requirements of due process had been satisfied: "(1) the duration of the activity of the nonresident in this state; (2) the character and circumstances of the commission of

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30. S.C. CODE ANN. § 36-2-803(1)(a), (g) (Law. Co-op. 1976).
31. *White*, 300 S.C. at 246, 387 S.E.2d at 262.
32. *Id.*, 387 S.E.2d at 263.
33. *Id.*
34. S.C. CODE ANN. § 36-2-803(1)(g) (Law. Co-op. 1976).
35. *White*, 300 S.C. at 247, 387 S.E.2d at 263.
36. *Id.* (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

the nonresident's acts; (3) the inconvenience resulting to the parties by conferring or refusing to confer jurisdiction over the nonresident; and (4) the State's interest in exercising jurisdiction."[37]

In applying these factors, the court first noted that "the duration of Stephens's activities in this state was minimal."[38] Second, the court noted that the White children had not established that the alleged oral trust agreement was entered into or to be carried out in this state. Third, the court noted that extreme inconvenience would not result if it declined jurisdiction because the defendant resided in Georgia and the funds in dispute were located in Georgia.[39] Finally, the court noted that South Carolina's "interest in providing redress for its citizens . . . diminished when no business was transacted in this state and any contract formed was not to be performed in this State."[40]

Stephens's contacts with South Carolina were limited to occasional visits with her mother. These contacts "[did] not indicate that she purposefully availed herself of jurisdiction nor [did] they create a substantial connection with South Carolina."[41] Under the particular facts of this case, the court's refusal to exercise personal jurisdiction over Stephens was appropriate.

Dunn D. Hollingsworth

III. Court Invalidates Service of Process on a Nonresident Who Was Fraudulently Induced to Enter the Forum State

In *Shaw v. Hughes*[42] the South Carolina Court of Appeals held that service of process upon a nonresident is invalid when the nonresident was fraudulently induced to enter the forum state under the pretext of settling a dispute.[43] The court also found that an invalid service of process is an insufficient basis for a court to acquire personal jurisdiction over a nonresident.[44]

In 1985 Pennie Shaw and Joseph Hughes obtained a Florida divorce decree. The decree awarded Hughes a gun collection that Hughes had stored at the home of Shaw's father in Edgefield, South Carolina.

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37. *Id.* (citing Colite Indus. v. G.W. Murphy Constr. Co., 297 S.C. 426, 377 S.E.2d 321 (1989); Atlantic Soft Drink Co. v. South Carolina Nat'l Bank, 287 S.C. 228, 336 S.E.2d 876 (1985)).

38. *Id.*

39. *Id.* at 248, 387 S.E.2d at 263.

40. *Id.*, 387 S.E.2d at 264.

41. *Id.* at 247-48, 387 S.E.2d at 263.

42. 400 S.E.2d 501 (S.C. Ct. App. 1991).

43. *Id.* at 502.

44. *Id.*

Shaw's failure to return the collection prompted Hughes to file two motions for contempt in a Florida court. Both proceedings resulted in orders requiring Shaw either to deliver the collection to Hughes or to assist Hughes in obtaining the guns. Hughes still did not receive the guns. When Shaw filed a partition action against Hughes in Georgia, the state in which Hughes then resided, Hughes made a third attempt to obtain the guns by filing a counterclaim.[45]

During the pendency of the Georgia partition action, Shaw filed another action in South Carolina for malicious prosecution and for the enforcement of a restraining order issued by a Florida family court. Shaw contacted Hughes's attorney and stated that she would make the guns available to Hughes if he would come to her home in Greenville, South Carolina to pick them up. When Hughes arrived at Shaw's home, he was served with a summons and a complaint for Shaw's South Carolina suit. Shaw had never indicated that she intended to serve Hughes. The trial court quashed the service of process on Hughes and dismissed the action for lack of personal jurisdiction over Hughes.[46]

The court of appeals addressed two issues. The court first considered whether service of process is effective when the party to be served is fraudulently induced to enter the state at the invitation of the resident party for the sole purpose of settling a dispute. The court also considered whether a court has personal jurisdiction over a nonresident based upon an invalid service of process.

In affirming the trial court's decision to quash the service of process, the court adopted the majority rule that service of process upon a nonresident should be set aside when fraudulently obtained.[47] The

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45. *Id.* at 501.

46. *Id.* at 501-02.

47. *Id.* at 502. The general rule has been stated as follows:

> A person induced by artifice or fraud to enter a jurisdiction for the purpose of serving process on him is a victim of abuse of process, and may apply to have the summons set aside. Stated in greater detail, the rule provides that if a person resident outside the jurisdiction of the court and the reach of its process is inveigled, enticed, or induced, by any false representation, deceitful contrivance, or wrongful device for which the plaintiff is responsible, to come within the jurisdiction of the court for the purpose of obtaining service of process on him in an action brought against him in such court, process served upon him through such improper means is invalid, and upon proof of such fact the court will, on motion, set it aside.
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> . . . Where a plaintiff or someone acting in his behalf induces a defendant to enter the jurisdiction for the purpose of effecting the settlement of a controversy and the defendant is then served with process while in the jurisdiction, the service will be set aside as having been fraudulently obtained.

62B AM. JUR. 2D *Process* § 52 (1990) (footnotes omitted); *see generally* Annotation, *Attack on Personal Service as Having Been Obtained by Fraud or Trickery*, 98 A.L.R.2D

court noted, however, that if the serving party "clearly indicated" to the nonresident that it intends to serve the nonresident if the nonresident enters the forum state, then the service of process would be valid.[48]

One of the cases cited by the *Shaw* court in its analysis is *Citrexsa, S.A. v. Landsman.*[49] In *Citrexsa* nonresident Mexicans contacted the plaintiffs to conduct settlement negotiations concerning a commercial dispute. The parties agreed to meet in Florida. When the nonresidents arrived at the conference, they were served with a summons and a complaint. The plaintiffs claimed that the trial court properly denied the nonresidents' motion to quash service because the nonresidents initiated the settlement meeting in Florida. The *Citrexsa* court rejected this argument[50] and reversed the trial court's ruling.[51] The court noted that the plaintiffs' "agreement to participate in the settlement conference was merely an artifice to serve [the nonresidents]."[52] The court established that " 'service is void if obtained by securing defendant's presence within the jurisdiction by . . . pretense of settlement, whether the matter of settlement was first broached by plaintiff or defendant.' "[53]

The *Shaw* court next considered the effect of the tainted service on the trial court's jurisdiction. The court concluded that "[b]ecause the service of process on Mr. Hughes proved invalid . . . the court did not acquire jurisdiction over Mr. Hughes."[54] As a general rule, "if per-

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551, 576-80 (1964) (discussing cases in which courts quashed the service of process when a defendant was served after being enticed into the forum state under the pretext of settling a dispute).

48. *Shaw*, 400 S.E.2d at 502.

49. 528 So. 2d 517 (Fla. Dist. Ct. App. 1988).

50. *Id.* at 518.

51. *Id.* at 519.

52. *Id.* at 518.

53. *Id.* (quoting 72 C.J.S *Process* § 47 (1987)). Perhaps the Montana Supreme Court best summarized the policy underlying the general rule that service is invalid when a potential defendant is fraudulently enticed to enter a state: "The law favors the compromise and settlement of disputed claims and should protect a nonresident who comes into this state at the solicitation of his adversary for the purpose of attempting such a disposition of a controversy . . . ." State *ex rel.* Ellan v. District Court, 97 Mont. 160, 170, 33 P.2d 526, 530 (1934) (citation omitted). The Montana Supreme Court concluded with this passage:

> [A] party to a controversy has been induced for this purpose to come within rifle range, as it were, under a flag of truce; if the purpose of the parley is not accomplished, honor and fair dealing should dictate that such person be permitted a reasonable time within which to return to the safety of the position from which he was induced to withdraw, before his adversary goes into action.

Id. at 172, 33 P.2d at 531.

54. Shaw v. Hughes, 400 S.E.2d 501, 502 (S.C. Ct. App. 1991).

sonal service of process is procured by fraud or trickery, it is insufficient to give a court jurisdiction over the person served."[55] There are two bases of support for this rule. Some courts refuse to exercise jurisdiction over a nonresident when the serving party obtained service of process by unlawful means.[56] Other courts hold that service of process acquired by fraud or trickery prevents the court from acquiring personal jurisdiction over the defendant.[57] The *Shaw* court adopted the second approach.[58]

The *Shaw* court joined the majority of jurisdictions by holding that service of process is invalid when the plaintiff fraudulently induces the party served to enter the state for the sole purpose of the settlement of a dispute. The court also decided that a fraudulently obtained service of process is insufficient to give the court personal jurisdiction over the nonresident party.

Rebecca Dorman Groth

IV. AMENDMENT OF REMOVAL NOTICE AFTER EXPIRATION OF THE REMOVAL PERIOD NOT ALLOWED

In *Barnhill v. Insurance Co. of North America*[59] the United States District Court for the District of South Carolina refused to allow a corporate defendant to amend a notice of removal[60] after the thirty-day period for removal[61] had expired. The court remanded the case to state court.

The district court determined that it did not have subject matter jurisdiction and could not allow amendment of the removal notice for three primary reasons. First, the court determined that other federal courts that have construed section 1653,[62] which allows defective alle-

55. 62B AM. JUR. 2D *Process* § 52 (1990).

56. *Id.*

57. *Id.*

58. *Shaw*, 400 S.E.2d at 502 (citing Yarbrough v. Collins, 290 S.C. 76, 81, 348 S.E.2d 194, 198 (Ct. App. 1986) ("A defect in service of process of publication is jurisdictional rendering any judgment or order obtained thereby void."), *rev'd per curiam on other grounds*, 293 S.C. 290, 360 S.E.2d 300 (1987)).

59. 130 F.R.D. 46 (D.S.C. 1990).

60. *See* 28 U.S.C. § 1446(a) (1988).

61. *See id.* § 1446(b). Section 1446(b) requires a defendant to petition for removal within 30 days after receiving the initial pleading or, if the initial pleading has been filed in court and is not required to be served on the defendant, within 30 days after receiving service of the summons, whichever period is shorter. *Id.*

62. *Id.* § 1653. This section applies to actions removed from state courts to federal district courts as well as to actions initiated in federal districts courts. Barrow Dev. Co. v. Fulton Ins. Co., 418 F.2d 316, 317 (9th Cir. 1969) (citing Firemen's Ins. Co. v. Robbins

gations of jurisdiction to be amended in the trial or appellate courts, generally have allowed amendments after the end of the removal period only if the federal court already has entered judgment.[63] Second, the court determined that because Congress intended to restrict removal, the court should resolve all doubts about the propriety of removal in favor of retained state court jurisdiction.[64] Third, the court determined that after the thirty-day period for removal expires, defective allegations could be cured, but missing allegations could not be supplied.[65]

The plaintiff, Joe A. Barnhill, filed a declaratory judgment action in state court to determine whether uninsured motorist coverage was available from the defendant, Insurance Company of North America (INA). INA removed the action to federal district court. The plaintiff filed a timely motion to remand[66] and claimed that the notice of removal failed to allege the state in which INA had its principal place of business or place of incorporation. The notice of removal alleged that the plaintiff and defendant were citizens of different states and that INA was a corporation organized and existing under the laws of some state other than South Carolina. The notice did not name the state of incorporation, nor did it name INA's principal place of business or allege that the principal place of business was diverse to the plaintiff.[67]

Section 1653 provides, "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."[68] The court noted that there is a "critical distinction between evaluating the propriety of removal jurisdiction *after* judgment has been entered in a federal proceeding rather than immediately after removal to federal court."[69] The court cited *Able v. Upjohn Co.*[70] as illustrative of the different approaches federal courts apply depending on the posture of the case. The court noted three factors that allowed the *Able* court to affirm a lower federal court judgment, even though the appellate court

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Coal Co., 288 F.2d 349 (5th Cir.), *cert. denied*, 368 U.S. 875 (1961); Royal Crest Dev. Corp. v. Republic Ins. Co., 225 F. Supp. 76 (E.D.N.Y. 1963); Hernandez v. Watson Bros. Transp. Co., 165 F. Supp. 720 (D. Colo. 1958)).

63. *Barnhill*, 130 F.R.D. at 49-50.

64. *Id.* at 50 (citing Able v. Upjohn Co., 829 F.2d 1330, 1332 (4th Cir. 1987), *cert. denied*, 485 U.S. 963 (1988); Toyota of Florence, Inc. v. Lynch, 713 F. Supp. 898, 900 (D.S.C. 1989)).

65. *Id.* at 51-52.

66. *See* 28 U.S.C.A. § 1447(c) (West Supp. 1991). This section provides that a motion to remand a case based on any defect in the removal procedure must be made within 30 days after the filing of the notice of removal. *Id.*

67. *Barnhill*, 130 F.R.D. at 49.

68. 28 U.S.C. § 1653 (1988).

69. *Barnhill*, 130 F.R.D. at 49-50.

70. 829 F.2d 1330 (4th Cir. 1987), *cert. denied*, 485 U.S. 963 (1988).

had doubts about the initial propriety of removal jurisdiction. The factors are: "(1) affirmance did not serve to judicially expand the scope of federal jurisdiction; (2) failure of the nonremoving party to object to removal earlier; and (3) encourage judicial economy and finality and avoid wasting judicial resources."[71] Because the plaintiff made a timely motion to remand, no significant pretrial preparation had occurred, and thus, none of the *Able* considerations were present in *Barnhill*.[72]

The court relied on language from the legislative history of the Judicial Improvements and Access to Justice Act[73] to explain its restrictive view of removal.[74] The court listed five policy considerations supporting its interpretation:

> (1) preventing federal court infringement upon the rightful independence and sovereignty of state courts;
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> (2) ensuring that judgments obtained in a federal forum are not vacated on appeal due to improvident removal;
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> (3) reducing uncertainty as to the court's jurisdiction in the marginal cases . . . ;
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> (4) allowing amendment of the notice of removal under § 1653 after the thirty day time limit for removal specified in § 1446(b) would "substantially eviscerate" the specific time provision enacted by Congress; and
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> (5) conceding that the traditional justification for diversity jurisdiction—state court hostility toward nonresident defendants—has been significantly reduced since the time diversity jurisdiction was created.[75]

The final principle the court enunciated in support of its holding was that the majority of courts allow amendment after the thirty-day removal period to permit the removing party to set forth more specifically each ground for removal,[76] but disallow amendments to supply missing or new allegations.[77] The court compared its case to *Van Horn v. Western Electric Co.*,[78] in which the corporate defendant failed to

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71. *Barnhill*, 130 F.R.D. at 50 (citing *Able*, 829 F.2d at 1332-34).

72. *Id.*

73. Pub. L. No. 100-702, 102 Stat. 4642 (1988) (codified as amended in scattered sections of 5, 9, 16, 17, 18, 28, 42 U.S.C.).

74. *Barnhill*, 130 F.R.D. at 48. Specifically, the court referred to the provision in the Act that amended section 1446(a)'s removal procedure. The legislative history of the Act indicates a congressional intent " 'to reduce the basis for Federal court jurisdiction based solely on diversity of citizenship.' " *Id.* (quoting H.R. REP. No. 889, 100th Cong., 2d Sess. 44, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 5982, 6005).

75. *Id.* at 50-51 (citations omitted).

76. *Id.* at 51 (citing Thompson v. Gillen, 491 F. Supp. 24, 27 (E.D. Va. 1980)).

77. *Id.* (citing Richmond, F. & P.R.R. v. Intermodal Servs., Inc., 508 F. Supp. 804, 805 (E.D. Va. 1981) (mem.); *Thompson*, 491 F. Supp. at 27).

78. 424 F. Supp. 920 (E.D. Mich. 1977).

allege its principal place of business in the removal notice.[79] The *Van Horn* court refused to allow the defendant to amend the notice to supply this allegation after the thirty-day period for removal had expired.[80] The court also relied on *Richmond, Fredericksburg, & Potomac Railroad v. Intermodal Services, Inc.*,[81] which held that section 1653 does not permit amendment of the removal notice to correct an omission of an allegation that concerns the corporate defendant's principal place of business after the thirty-day period for removal expires.[82]

Corporate defendants that seek removal of a case to the federal district court in South Carolina must be sure to allege diversity of citizenship from the plaintiff both as to state of incorporation and as to principal place of business. The defendant should allege diversity in a nonconclusory manner that specifically sets forth the plaintiff's state of citizenship as well as the state of incorporation and principal place of business of the corporate defendant.

Susan E. Rowell

79. *Id.* at 923.
80. *Id.* at 925.
81. 508 F. Supp. 804 (E.D. Va. 1981) (mem.).
82. *Id.* at 807.