Election of Remedies in South Carolina

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NOTE

ELECTION OF REMEDIES IN SOUTH CAROLINA

I. INTRODUCTION

The new South Carolina Rules of Civil Procedure will alter existing state law concerning the doctrine of election of remedies. In South Carolina, the election of remedies doctrine is complex and multifaceted—it defies attempts to provide a simple, single definition. The doctrine's effects are, however, pain-


2. The election of remedies doctrine originated under a Roman law forbidding a person to accept a benefit under a will and later refuse to carry out the will's mandates. See Note, Election of Remedies: A Delusion?, 38 COLUM. L. REV. 292, 293 (1938)(surveying 1400 cases addressing the law on the election of remedies). Modern interpretations of the doctrine provide that a party who chooses one of two available inconsistent remedies may not later pursue the other. Fraser, Election of Remedies: An Anachronism, 29 OKLA. L. REV. 1, 1 (1976). Further, when two inconsistent remedies exist for the redress of a single wrong, a party may be forced to elect between the two. See D. Dobbs, HANDBOOK ON THE LAW OF REMEDIES § 1:5 (1973).

Prior to adoption of the new South Carolina Rules of Civil Procedure, Circuit Court Practice Rule 78 was the procedural mechanism used to force an election. This rule provided:

No motion to require the plaintiff to elect as to which cause of action alleged in the complaint he will rely on shall be made, unless previous notice thereof in writing, stating the grounds, is given not less than four days before the hearing. But if such notice be given the motion may be heard upon the call of the case for trial or at any time prior thereto.

S.C. CIR. CT. PRACT. R. 78.

3. For example, the South Carolina Supreme Court has required an election of "remedies" when a party asserted two separate causes of action. See Scott v. McIntosh, 167 S.C. 372, 166 S.E. 345 (1932); infra notes 41-44 and accompanying text. The supreme court has also characterized election of remedies as a choice between different forms of redress afforded by law for the same injury. See Tzouvelekas v. Tzouvelekas, 206 S.C. 90,
fully clear for many litigants. Prior to adoption of the new rules, parties faced with a motion to elect were forced to choose among several available causes of action4 or several remedies5 at a very early stage in litigation. The alternative pleading provisions in the rules will eliminate the need to elect between causes of action at the pleading stage of a trial.6 Additionally, the rules will probably forestall the requirement of an election of remedies at an early stage of litigation. This article will examine existing South Carolina law concerning election of remedies and explore the probable changes to this doctrine under the new rules.

II. ELECTION OF REMEDIES IN SOUTH CAROLINA

A. Definition

Over the years a number of courts in South Carolina have attempted to define the phrase "election of remedies." In 1932, for example, the South Carolina Supreme Court stated: ""The doctrine of election of remedies applies only where there are two or more remedies all of which exist at the time of election, and which are alternative and inconsistent with each other, and not cumulative, so that after the proper choice of one, the other or others are not available.'"7 In a more recent discussion, the supreme court defined election of remedies as "'a choice between different means of redress afforded by law for the same injury, or different forms of proceeding on the same cause of action.'"8

The South Carolina Supreme Court has also attempted to define many of the expressions used in its analyses of the election of remedies doctrine. In fact, the outcome in many cases has turned upon what constitutes an inconsistent remedy,9 a sin-

33 S.E.2d 73 (1945).
6. See Rule 8(e)(2), SCRCP; infra notes 99-125 and accompanying text.
7. Scott v. McIntosh, 167 S.C. 372, 373, 166 S.E. 345, 345 (1932)(quoting 9 R.C.L. Election of Remedies § 3 (1929)).
gle injury, or a single cause of action. The court has, at various times, construed the same term broadly and narrowly to achieve different results.

*Ebner v. Haverty Furniture Co.* contains one of the more useful definitions of the election of remedies doctrine. The supreme court in *Ebner* distinguished two situations in which a plaintiff may be met with an election of remedies objection. In the court's first example, the plaintiff alleged certain facts to invoke one remedy, but in a later action alleged different, contrary facts and sought a different remedy. In the second example, the plaintiff alleged the same facts in two proceedings, but sought a different remedy in each.

The *Ebner* court characterized the first situation as 'a case of 'election of remedial rights,' [rather] than a case of 'election of remedies' . . . .' The court explained: "A remediable right is a legal conclusion from a certain state of facts; a remedy is the appropriate legal form of relief by which that remediable right may be enforced." The court stated that the "forbidden" inconsistency lies not in the remedies a plaintiff has invoked, but rather "in the different statements of fact, the different remediable rights asserted by him in the respective actions." The court also provided a rare insight into the reason for the doctrine's existence: a party who asserts different statements of fact offends the truth seeking function of the court. Thus, "the law, in

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15. *Id.* at 77, 138 S.E. at 20.

16. *Id.* at 78, 138 S.E. at 20.

17. *Id.*

18. *Id.*

19. Few modern opinions have cited the policies underlying the election of remedies doctrine. A federal trial court in New Jersey, however, indicated that the doctrine's purposes are threefold: "to prevent double recoveries, forum shopping, and harassment of defendants by dual proceedings." *Cleary v. United States Lines, Inc.*, 555 F. Supp. 1251, 1256 (D.N.J. 1983), *aff'd*, 728 F.2d 607 (3rd Cir. 1984).
the interest of honest pleading, will hold him estopped or barred by his first complaint, from pursuing a different remedy based upon a repugnant state of facts."20 The court then concluded that the second situation presented a "pure case of election of remedies."21

B. Application of the Doctrine

Most South Carolina cases addressing the election of remedies issue fall into one of the two categories described in Ebner. Nevertheless, sharper distinctions in definitions and a few unusual cases expand to six the number of areas in which the South Carolina Supreme Court has required an election of remedies.

1. Inconsistent Remedies Sought for One Remediable Right

In Thompson v. Watts,22 a buyer of corporate shares brought an action alleging a violation of the Uniform Securities Act23 coupled with an action for fraud and deceit.24 The parties agreed to proceed on the fraud and deceit action first, after the defendant objected that the causes of action were improperly joined. The jury returned a verdict for the defendant on the fraud and deceit action. The trial judge then granted the defendant's motion for a summary judgment on the Uniform Securities Act allegation, holding that the plaintiff had elected his remedy when he agreed to pursue the fraud cause of action.25

The South Carolina Supreme Court affirmed the summary judgment. The court noted that in the securities action the plaintiff buyer sought rescission of the contract and return of his consideration, but in the fraud action sought affirmation of the contract and actual and punitive damages. The court stated that although a party may bring suit alleging both a securities violation and common-law fraud and deceit, he must seek consistent

21. Id.
24. 281 S.C. at 505-06, 316 S.E.2d at 394. The plaintiff in Thompson also alleged wrongful ouster, but that cause of action was not relevant to the appeal. Id.
25. Id. at 506, 316 S.E.2d at 394.
remedies. Thus, even though the plaintiff's fraud and deceit action was unsuccessful, his pursuit of that action constituted an election to affirm the contract and, thus, barred his later efforts to repudiate the contract and recover his consideration.28

Central to the court's finding that inconsistent remedies may not be pursued in the case of a single actionable wrong was the determination that only one remediable right existed. Isolating a single remediable right, however, is often difficult and may provide a trap for the unwary plaintiff. Despite this hardship, the supreme court has, on several occasions, looked beyond the face of the pleadings and concluded that a plaintiff's version of the facts gave rise to only one remediable right.

In Jacobson v. Yaschik,27 the seller of corporate stock sued the buyer of that stock, who was the corporation's president as well as a director and majority shareholder. The seller's complaint alleged two causes of action. First, the complaint charged that the defendant sold the stock at a price in excess of what he paid the plaintiff. Under this cause of action, the plaintiff sought an accounting and recovery of the difference between the price the defendant received for the stock and the price he paid the plaintiff. In the same cause of action, the plaintiff also maintained that the defendant's prior contract to sell the stock was a fraudulent concealment in violation of his duty to her as a fellow shareholder. She therefore sought a pro rata share of the full value of the stock received by the defendant. In the second cause of action, the plaintiff alleged that the defendant's concealment of the prior sales agreement amounted to fraud, and she sought actual and punitive damages.28

The court in Jacobson concluded that although the form of the plaintiff's complaint stated two causes of action, only one action was actually present.29 The court stated:

The sole wrong for which the plaintiff attempts to recover against the defendant is that, while the parties were in a fiduciary relation, the defendant contracted to sell her stock at a price in excess of that which he had contracted to pay her and

26. Id. at 507, 316 S.E.2d at 395.
28. Id. at 580-81, 155 S.E.2d at 603.
29. Id. at 586-87, 155 S.E.2d at 606.
in failing to inform her that he had so contracted.\textsuperscript{30}

Characterizing the situation as one cause of action, the supreme court determined that the plaintiff had to choose between the equitable remedy of an accounting for the loss sustained by the defendant's fraudulent conduct and the legal remedy of actual and punitive damages for fraud.\textsuperscript{31}

In a recent decision the South Carolina Court of Appeals employed a novel analysis to determine whether a single cause of action existed. In \textit{Boardman v. Lovett Enterprises},\textsuperscript{32} limited partners sued defendants who allegedly induced them to enter a limited partnership by fraudulent representations and omissions. Plaintiffs alleged several causes of action, including the following: (1) a fraud action, seeking actual and punitive damages, based upon misrepresentations and omissions stemming from a pro forma financial statement; (2) an action for actual and punitive damages for alleged waste from excessive and unauthorized management fees charged to the limited partnership; and (3) an action based upon fraudulent misrepresentations and omissions, in which the plaintiffs asked the court to dissolve the limited partnership, appoint a receiver to take charge of partnership assets, impress the partnership property with a trust, and require the defendants to make a full accounting of the partnership's affairs.\textsuperscript{33}

The court of appeals noted that each cause of action in \textit{Boardman} relied upon a pro forma financial statement given to the plaintiffs by the defendant.\textsuperscript{34} The court concluded that since

\textsuperscript{30} Id. at 586, 155 S.E.2d at 606.
\textsuperscript{31} Id. at 587, 155 S.E.2d at 606. The South Carolina Supreme Court reached a similar conclusion in Landvest Assocs. v. Owens, 276 S.C. 22, 274 S.E.2d 433 (1981), in which limited partners brought an action against a general partner to recover alleged hidden profits from the sale of real estate by the general partner to the partnership. Plaintiffs alleged in their first cause of action that they were entitled to an accounting under S.C. Code Ann. § 33-41-540 (1976). The second cause of action alleged fraud and sought money damages. The supreme court held that the plaintiffs had to elect either the equitable or the legal remedy because their complaint stated only one cause of action. The primary right discerned by the court was "the [plaintiffs'] right not to be subjected to a hidden profit from one owing them fiduciary duties." Id. at 25, 274 S.E.2d at 434.


\textsuperscript{33} 283 S.C. at 426-27, 323 S.E.2d at 785.

\textsuperscript{34} Id. at 428, 323 S.E.2d at 785-86.
all of the alleged problems arose from this single document, there was only one primary wrong and the plaintiffs were entitled to only one recovery. Thus, an evidentiary link prevented the plaintiffs from successfully asserting the separate causes of action.

In contrast to the cases discussed above, an earlier South Carolina Supreme Court case defined the parameters of a cause of action in a manner more favorable to plaintiffs. In Tzouvelakas v. Tzouvelakas, the plaintiff asserted two causes of action. In one he alleged that the defendant had sole title to certain property; in the other he alleged that he himself held title to the same property. The supreme court refused to force an election because the plaintiff was able to support each cause of action with different and consistent facts and because he sought only one recovery.

Tzouvelakas is, arguably, distinguishable from Jacobson and Boardman because the plaintiffs in the latter two cases did not isolate separate, compatible facts to support each of the causes of action alleged. This factual alignment for causes of action, however, will not guarantee success for a plaintiff. Rather, practitioners must be aware that even if a plaintiff convinces the court that separate causes of action are present, the court may still find that the remedies sought are inconsistent and force an election upon that ground.

35. Id., 323 S.E.2d at 786.
36. 206 S.C. 90, 33 S.E.2d 73 (1945).
37. Id. at 92-93, 33 S.E.2d at 73. The plaintiff, conceding that his wife held legal title to a certain house and lot, sought to have the property impressed with a constructive trust on the ground that her conduct barred her from ascertaining any right or title to the property. Id.
38. Id. at 93, 33 S.E.2d at 74. In his second cause of action, the plaintiff alleged that he was the owner of a note which was secured by a purchase money mortgage executed by the defendant on the same property. The plaintiff sought foreclosure of the mortgage. Id.
39. Id. at 94-95, 33 S.E.2d at 74. The court stated that it was obvious that if the plaintiff succeeded at trial in having the property impressed with a trust, there would be no point in proceeding with a mortgage foreclosure action because the lesser estate would merge into the greater estate. Id. at 95, 33 S.E.2d at 74.
40. This election is based on the principle that a plaintiff is not entitled to a double recovery. The courts may refuse to permit a plaintiff both to rescind a contract and recover his investment and to assert that the contract is in force and recover damages thereon. See, e.g., Hipp v. Kennesaw Life & Accident Ins. Co., 301 F. Supp. 92 (D.S.C. 1968), aff'd per curiam, 412 F.2d 1186 (4th Cir. 1969)(plaintiff could not rescind insurance contract and then later sue defendant insurer for fraud); Spencer v. Nat'l Union
2. Inconsistent Actions Alleged

The South Carolina Supreme Court has also applied the election of remedies doctrine to force an election between inconsistent causes of action. In *Scott v. McIntosh*, the supreme court reversed a jury verdict for the plaintiff and held that the plaintiff should have been required to elect, before trial, between two contradictory causes of action. The plaintiff in *Scott* sued the defendant warehouse owner, alleging causes of action based upon a violation of a written lease agreement and upon a theory of *quantum meruit*. The court maintained that an election was required because "the evidence necessary to establish the one differs from that necessary to establish the other. The two causes are inconsistent, and the defendants were put to a disadvantage by permitting the plaintiff to go to trial on both causes."

Dean Harry M. Lightsey of the University of South Carolina School of Law has criticized the result in *Scott*, asserting that the decision failed to distinguish between inconsistency of remedies and inconsistency of causes of action:

The two doctrines should not be confused. The modern, liberal trend which allows alternative pleadings seems far more preferable, since often a party may not be in a position, at the pleading stage of a case, to know precisely what the facts are... [A]lternative inconsistent remedies should not be allowed since to do so would, in substance, authorize a double recovery. The parties should not be put to such an election, however, until after the conclusion of the trial of the case, at which stage there should be sufficient information upon which to meaningfully decide which remedy should be pursued.

*Scott* may be limited in its application today, however, as courts move in the direction suggested by Dean Lightsey. The South Carolina Court of Appeals recently rejected the blurring

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41. 167 S.C. 372, 166 S.E. 345 (1932).
42. *Id.* at 375, 166 S.E. at 345.
43. *Id.* at 373-74, 166 S.E. at 345.
44. *Id.* at 375, 166 S.E. at 345.
of distinctions between an election of remedies and an election between causes of action.46 Furthermore, the decision in Scott has apparently not been extended to instances in which a petitioner alleges mistake in selecting an initial cause of action47 or when an earlier action did not result in a final adjudication of the merits.48

In Thackston v. Shelton,49 a case decided only three years after Scott, the court demonstrated its willingness to avoid the harsh effects of Scott in certain situations. In Thackston the plaintiff attempted to assert two causes of action. First, he brought suit on a bond signed by the defendant in an attachment proceeding against a car that the defendant sold to the plaintiff. Second, he asserted a tort cause of action for fraud and deceit at the time of the sale.50 The supreme court found that the trial judge, by sustaining a demurrer on the ground that the two causes of action were improperly joined, did not rule upon the sufficiency of the causes of action. Thus, although an election between two inconsistent rights extinguishes the right not elected, no "true election" occurred in this case.51 Consequently, "the effect of going to trial on the second cause of action was no greater than an Amendment of the Complaint by omitting the first cause of action and is not a case of true election."

The supreme court, however, has not always been so lenient in characterizing an earlier unsuccessful action in a manner that would permit a later suit on the same facts. In Babb v. Paul Revere Life Insurance Co.,53 for example, the trial court required the beneficiary of an insurance policy to choose between an action alleging fraud, which would negate the policy's exis-

46. See Boardman v. Lovett Enters., 283 S.C. 425, 427-28, 323 S.E.2d 784, 785 (Ct. App. 1985); supra note 32 and accompanying text.
50. Id. at 242, 182 S.E. at 438.
51. Id. at 244-45, 182 S.E. at 438.
52. Id. at 245, 182 S.E. at 438.
53. 224 S.C. 1, 77 S.E.2d 267 (1953).
tence, and an action seeking to reinstate the policy.\textsuperscript{54} The court found that the beneficiary, through an earlier decision to proceed on the fraud claim, had abandoned her claim for recovery in any cause of action that might have accrued under the policy.\textsuperscript{55}

3. Inconsistent Facts

In \textit{White v. Livingston},\textsuperscript{56} the supreme court repeated the proscription, laid down in \textit{Ebner v. Haverty Furniture Co.},\textsuperscript{57} against subsequent actions alleging facts that differ substantially from factual allegations in previous suits. In a prior unsuccessful action, the plaintiff in \textit{White} sued his sister, alleging fraud in the conveyance of a deed. The plaintiff then filed a second suit, alleging that the item he conveyed to his sister was actually a mortgage.\textsuperscript{58} The supreme court adopted the trial judge’s holding that “[u]nder the rule in the \textit{Ebner} case, . . . the mere filing of the complaint in the first action ‘estopped or barred’ plaintiff from maintaining this action. A fortiori, the prosecution of it to judgment did so.”\textsuperscript{59} This use of the election of remedies doctrine may be indistinguishable from the equitable defense of estoppel.\textsuperscript{60}

4. Jumbled Complaint

A motion to elect a remedy is a harsh penalty for an inartfully drafted complaint; yet several older South Carolina cases have forced just such an election.\textsuperscript{61} A motion to elect in

\textsuperscript{54} Id. at 5, 77 S.E.2d at 269.
\textsuperscript{55} Id. at 8, 77 S.E.2d at 270.
\textsuperscript{56} 234 S.C. 74, 106 S.E.2d 892 (1959).
\textsuperscript{57} 138 S.C. 74, 136 S.E. 19 (1926). \textit{See supra} notes 14-21 and accompanying text.
\textsuperscript{58} 234 S.C. at 76, 106 S.E.2d at 893.
\textsuperscript{59} Id. at 80, 106 S.E.2d at 895.
\textsuperscript{60} \textit{See} McMahan v. McMahon, 122 S.C. 336, 115 S.E. 293 (1922)(election of remedies is really application of the law of estoppel); Abdallah v. Abdallah, 359 F.2d 170, 174 (3rd Cir. 1966)(adopting language from \textit{McMahan} characterizing election of remedies doctrine as a form of estoppel). \textit{But see} Myers v. Ross, 10 F. Supp. 409, 411 (S.D. Fla. 1935)(distinguishing the election of remedies from estoppel on ground that a party seeking to force an election need not show that he will be harmed if opposing party is not compelled to abide by his first election).
those instances was timely if made before the reading of the pleadings. Recent South Carolina cases, however, have not forced an election of remedies based on the ground of a jumbled complaint.

5. Two Separate Actions Seeking the Same Relief

In Greenwood Manufacturing Co. v. Worley, defendant Worley successfully asserted a counterclaim against the plaintiff and recovered damages that included expenses to renovate and equip a building, to purchase merchandise, and to compensate for personal services. Subsequently, in Worley v. Greenwood Manufacturing Co., Worley brought a suit directly against Greenwood Manufacturing Co. and sought essentially the same recovery. The South Carolina Supreme Court affirmed the trial court's demurrer in the second suit on three grounds, including the finding that Worley had "elected the remedy of counterclaim" in the first action.

The Worley court apparently sought to prevent the plaintiff from recovering damages more than once for the same cause of action. The court deemed it unnecessary, however, to explain the exact basis for the decision, but merely stated: "The result

63. No South Carolina Supreme Court decision has forced an election by the plaintiff on the grounds of a jumbled complaint since Hodges v. Bank of Columbia, 130 S.C. 115, 725 S.E. 417 (1924). Moreover, in Barnwell Prod. Credit Ass'n v. Hartzog, 231 S.C. 340, 98 S.E.2d 835 (1957), the court stated:
Where, as here, several remedies are available to the plaintiff, it is he, not the defendant, who may choose which of them he will pursue; and the court, in construing a complaint in such case suggestive of more than one theory, will sustain the theory intended by the pleader, if it be supported by the allegations, and will reject as surplusage allegations not in harmony with it.
Id. at 347-48, 98 S.E.2d at 839. The court in Barnwell observed that because the plaintiff sought only one remedy for each cause of action alleged, the issue presented was not one of election of remedies, but rather of construction of the plaintiff's complaint. Id. at 350, 98 S.E.2d at 840.
64. 222 S.C. 156, 71 S.E.2d 889 (1952).
65. 223 S.C. 249, 75 S.E.2d 298 (1953).
66. Id. at 250, 75 S.E.2d at 298.
67. Id. at 251, 75 S.E.2d at 298. The court stated that the demurrer had been sustained "upon the several grounds that the instant plaintiff had elected (and successfully pursued) the remedy of counterclaim in the first action, could not split his cause of action and that the controversy would be res judicata upon finality of the judgment upon the counterclaim in the first action." Id.
of the judgment under review is so obviously just and proper that examination of the various grounds of it in order to determine which, or whether more than one, of them is more appropriate of application than another, is unnecessary."

6. Statutory Interpretation

Failure to comply with statutory procedures may also result in a finding of an election of remedies. In *Fisher v. South Carolina Department of Mental Retardation*, the South Carolina Supreme Court held that a claimant who had entered into a settlement in a tort action without regard to her employer’s statutory rights of subrogation and without complying with provisions of the South Carolina Worker’s Compensation Law, made an election of her available remedies and could not subsequently maintain a worker’s compensation claim.

The court in *Fisher* acknowledged that the worker’s compensation law did not specifically provide that a settlement with a third party without the employer’s consent would constitute an election of remedies. The court concluded, however, that the legislature did not intend to permit a claimant to settle his rights against a third party without regard to the employer’s statutory right of subrogation and still maintain a worker’s compensation claim. The plaintiff who ignored the statutory guides was thus held to have made an election of remedies and to have "waived" any rights under the South Carolina Worker’s Compensation Law.

68. Id. at 251, 75 S.E.2d at 299.
71. See S.C. Code Ann. § 42-1-560 (1976)(establishing procedure for a worker seeking to assert a claim against a third party). Writing for a unanimous court in *Fisher*, Justice Ness outlined the following three possible remedies for a plaintiff who alleged a job-related injury: proceeding solely against the employer, proceeding solely against the third party tortfeasor under § 42-1-550, or proceeding against both the employer and the third party tortfeasor by complying with § 42-1-560. 277 S.C. at 575, 291 S.E.2d at 201.
72. 277 S.C. at 576-76, 291 S.E.2d at 201. Waiver is not synonymous with estoppel. In South Carolina, equitable estoppel is established when a party shows the following circumstances: (1) he was ignorant of the truth of facts in question; (2) the party to be estopped made representations or engaged in conduct that was misleading; (3) reliance on the representations or conduct; and (4) prejudicial change in position resulting from this reliance. Crescent Co. of Spartanburg v. Insurance Corp. of N. Am., 266 S.C. 598, 604, 225 S.E.2d 656, 659 (1976)(citing Pitts v. New York Life Ins. Co., 247 S.C. 545, 552,
The supreme court recently provided a procedural device to soften the harsh effects of its decision in Fisher. In Talley v. John-Mansville Sales Corp., the plaintiffs faced a dilemma. If they brought products liability actions against asbestos manufacturers, they would be barred by the Fisher rule from seeking worker’s compensation. On the other hand, if plaintiffs waited until they were disabled before filing a worker’s compensation claim, their third party actions would be barred by the statute of limitations. The court in Talley resolved this problem by requiring the trial judge to order a stay in the third party suit pending resolution of the worker’s compensation issue.

C. Unsuccessful Attempts to Force an Election

Judicial authority in South Carolina enables a party, under certain circumstances, to defeat an attempt to force an election of remedies. At least three theories have been developed to prevent the harsh results that an early election would produce.


Other courts have associated the election of remedies doctrine with the concept of waiver. See, e.g., J. I. Case Threshing Mach. Co. v. Rice, 152 Wis. 8, 139 N.W. 445 (1913)(no election of remedies found in mortgage foreclosure case). The Rice court indicated that although there can be no waiver without intent to waive, such intent may be presumed when a party chooses one of two plainly inconsistent remedies. Id. at 9, 139 N.W. at 446.


74. Id. at 119, 328 S.E.2d at 622. The court noted that asbestosis, the illness allegedly suffered by the plaintiffs, is a progressive disease that may be diagnosed many years before it disables its victims. The statute of limitations for an action against the asbestos manufacturers would generally begin to run from the date of diagnosis. Id. at 119, 328 S.E.2d at 622.

75. Id. at 119, 328 S.E.2d at 623. The court ordered that a stay be issued until one of the following occurred: (1) the plaintiffs became disabled and the Industrial Commission could take jurisdiction; (2) one or more worker’s compensation carriers accepted liability; (3) the plaintiffs moved for the stay to be lifted; or (4) the legislature acted. Id. at 119, 328 S.E.2d at 623. In a footnote the court acknowledged that the stay could delay the resolution of the actions for years, but asserted that the delay was necessary to avoid “the inequity created by Fisher.” Id. at 119 n.2, 328 S.E.2d at 623 n.2.

76. The doctrine of election of remedies may be used against defendants as well as plaintiffs. See Pamlico Bank & Trust Co. v. Prosser, 259 S.C. 621, 193 S.E.2d 539 (1972)(defense of fraud and deceit was not barred by earlier fraud and deceit action because no inconsistent factors were alleged and no final judgment had been rendered in the earlier suit).
1. Mistake

Generally, the South Carolina Supreme Court has been willing to permit a party who mistakenly and futilely pursued one remedy to seek another remedy at a later time.\textsuperscript{77} In \textit{Lancaster v. Smithco},\textsuperscript{79} the court stated:

It is well established that the choice of a fancied remedy and the futile pursuit of it, because either the facts turn out to be different from what the parties supposed them to be, or the law applicable to the facts is found to be other than supposed, does not bar the party from thereafter invoking the proper remedy.\textsuperscript{79}

The court’s reasoning was simple: “If the party has no such remedy as he invokes, his action in pursuing it does not constitute an election.”\textsuperscript{80}

In \textit{Montalbano v. Automobile Insurance Co. of Hartford, Connecticut},\textsuperscript{81} the supreme court applied the mistake theory and rejected the defendant’s assertion that the election of remedies doctrine precluded a second suit by the plaintiff. In the first action, the plaintiff sued his insurer in magistrate’s court to recover benefits under an insurance policy for his dog’s poisoning.\textsuperscript{82} On appeal, the supreme court found that parol evidence had been improperly admitted and reversed a jury verdict for the plaintiff.\textsuperscript{83} In the second trial in circuit court, the plaintiff sought to reform the insurance contract. The defendant objected, claiming that by filing the first action, the plaintiff had elected his remedy.\textsuperscript{84}

The supreme court refused to apply the election of remedies doctrine. The court noted that because of the parol evidence rule, the plaintiff only had one remedy—equitable reformation of the contract. Therefore, he could not have made an election in the first suit; he merely “mistook” his remedy. Because he had

\textsuperscript{77.} See supra note 47 and accompanying text.  
\textsuperscript{78.} 241 S.C. 451, 128 S.E.2d 915 (1962).  
\textsuperscript{79.} Id. at 458, 128 S.E.2d at 919.  
\textsuperscript{80.} Id.  
\textsuperscript{81.} 218 S.C. 367, 62 S.E.2d 829 (1950).  
\textsuperscript{82.} Id. at 368, 62 S.E.2d at 829.  
\textsuperscript{83.} Id. (citing Montalbano v. Automobile Ins. Co. of Hartford, Conn., 217 S.C. 157, 60 S.E.2d 77 (1950)).  
\textsuperscript{84.} 218 S.C. at 368-69, 62 S.E.2d at 829-30.
instituted the first action in magistrate's court, a forum without equitable jurisdiction, he had been prevented from amending his original complaint to seek reformation.  

_Montalbano_ demonstrates the court's willingness to stretch the mistake theory to prevent hardship for a party facing an election of remedies claim. It is unclear, however, to what extent a plaintiff after _Montalbano_ may claim "mistake" to defeat a motion to elect in a second action if the trial judge in a prior action found crucial evidence inadmissible. 

The supreme court has not always been generous in applying the mistake theory to assist a party facing a motion to elect. In _White v. Livingston_, for example, the plaintiff claimed that an earlier suit alleging fraudulent inducement to sign a deed did not preclude a second suit alleging that he had conveyed only a mortgage to the defendant. The plaintiff argued that he had merely mistakenly pursued a remedy that was not available to him. The supreme court, however, adopting the trial judge's order, rejected this contention. The court stated that the plaintiff's mistake lay not in his choice of remedy, but rather in his inability to prove the facts underlying his claim for relief. The supreme court in _White_ apparently drew a distinction between a subjective, actual mistake regarding the availability of a cause of action under a particular set of facts and a strategic miscalculation in the selection of a cause of action to fit the facts of the case. This distinction may prove troublesome in future cases.

2. _No Final Determination on Merits of Prior Suit_

In _Jones v. South Carolina Power Co._, the supreme court held that an involuntary nonsuit in a prior action based on a trespass theory was not a determination on the merits and,

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85. Id. at 370-71, 62 S.E.2d at 830-31.  
86. At least one earlier South Carolina case accepted the mistake theory after key evidence in an earlier trial had been held inadmissible. See _Jones v. South Carolina Power Co._, 198 S.C. 380, 18 S.E.2d 336 (1941).  
88. Id. at 76-77, 106 S.E.2d at 893.  
89. Id. at 77-78, 106 S.E.2d at 894.  
90. The court concluded that the plaintiff was barred from pursuing the second remedy because it was based on facts inconsistent with those required to support the first. See _supra_ notes 55-60 and accompanying text.  
91. 198 S.C. 380, 18 S.E.2d 336 (1941).
therefore, did not bar the plaintiff from pursuing a subsequent action for condemnation. The court noted that in his first action the plaintiff pursued a “mistaken remedy” because the defendant had permission to enter the property and could not, therefore, be liable for trespass. The court also stated that when, as in Jones, a prior action has not reached final adjudication, the election of remedies doctrine will not apply if the plaintiff has not gained an advantage in the first suit or caused a detriment or change in the defendant’s position.

3. Different, Compatible Facts Support Separate Causes of Action and Only One Recovery Is Sought

As previously noted, the South Carolina Supreme Court has permitted a plaintiff seeking a single remedy to allege inconsistent causes of action in the same complaint if separate, compatible facts are established to support each theory of recovery. In Tzouvelekas v. Tzouvelekas, the court stated that separate causes of action supported by separate facts may not be alleged if they are “inherently repugnant and contradictory.” In that case, however, the court found that the plaintiff’s two causes of action, alleging that the same property was subject to both a mortgage and a trust, were conceptually compatible. The court thus permitted both claims to be brought in one action to “avoid a multiplicity of suits, expedite disposition of the litigation, and minimize costs.”

92. Id. at 387, 18 S.E.2d at 339.
93. Id. at 387-88, 18 S.E.2d at 339-46. Thus, the election of remedies doctrine is related to the doctrine of res judicata. See United States v. Oregon Lumber Co., 260 U.S. 290, 301 (1922) (“The doctrine of election of remedies and that of res adjudicata are not the same, but they have this in common: That each has for its underlying basis the maxim which forbids that one shall be twice vexed for one and the same cause.”).
94. See supra notes 36-39 and accompanying text.
95. 206 S.C. 90, 33 S.E.2d 73 (1945).
96. Id. at 94, 33 S.E.2d at 74.
97. Id. at 96, 33 S.E.2d at 74.
98. Id. at 96, 33 S.E.2d at 74-75.
A. Pleading in the Alternative

Among the changes effected by the new South Carolina Rules of Civil Procedure is the adoption of pleading in the alternative. Rule 8(e)(2) states:

A party may set forth two or more statements of a cause of action or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses . . . . A party may also state as many separate causes of action or defenses as he has regardless of consistency and whether based on legal or equitable grounds or both.\(^9\)

The note following rule 8(e) indicates that the measure does not change South Carolina practice and does not allow "jumbling" of two or more causes of action in one count.\(^{100}\) The very word-\ing of the rule, however, suggests that changes in the law of election of remedies are inevitable. In Scott v. McIntosh,\(^{101}\) for example, the South Carolina Supreme Court forced the plaintiff to select one of two alternative, conflicting causes of action before proceeding to trial on the merits of the case.\(^{102}\) Under rule 8(e)(2), however, causes of action may be pleaded regardless of consistency.

B. Timing of Election

Although the new rules permit pleading in the alternative, plaintiffs will surely still be allowed only a single recovery. Thus, trial courts will require plaintiffs, at some point, to elect a remedy in order to prevent a double recovery. The key issue under the new rules will probably be the timing of this forced election. Because the rules were patterned after the Federal Rules of Civil Procedure, federal case law construing rule 8 of the federal

\(^9\) Rule 8(e)(2), SCRCP (emphasis added).
\(^{100}\) The note to rules 8(e) and 8(f) states: "Rules 8(e) and 8(f) substantially restate [S.C. Code Ann. §§ 15-15-40, -20 (1976)] and are no change to state practice. This rule does not allow 'jumbling' of two or more causes of action in one count." Rule 8(e), (f), SCRCP advisory committee note.
\(^{101}\) 167 S.C. 372, 166 S.E. 345 (1932).
\(^{102}\) Id. at 375-76, 166 S.E. at 345-46. See supra notes 41-44 and accompanying text.
rules\textsuperscript{103} may help predict at what stage such an election will be required. Practitioners may also seek guidance from the timing requirements formulated in the case law developed under the old South Carolina Circuit Court Practice Rules.

1. Federal Court Treatment of Election of Remedies

Generally, federal courts applying the Federal Rules of Civil Procedure in South Carolina cases have been unwilling to force plaintiffs to make an election of remedies at an early stage in the trial. In \textit{Cooley v. Salopian Industries},\textsuperscript{104} for example, a federal district judge held that the plaintiffs were entitled to proceed under both a tort theory and a contract theory at the trial on the merits of the case.\textsuperscript{105} In rejecting the defendant’s motion to force an election, Judge Hemphill criticized the use of that motion in federal courts: “The motion to elect is inappropriate. This is a federal court, and not a state court. The mischievousness that grew up around the doctrine concerning the election of inconsistent remedies was jettisoned with the adoption of the Federal Rules of Civil Procedure on January 3, 1938.”\textsuperscript{106}

Occasionally, however, federal courts in South Carolina have applied the doctrine of election of remedies at an early stage. In \textit{Hipp v. Kennesaw Life & Accident Insurance Co.},\textsuperscript{107} for example, a federal district court judge held that the plaintiff’s actions prior to trial constituted an election of remedies that prevented a suit for alleged fraud and deceit.\textsuperscript{108}

Before filing suit, the plaintiff in \textit{Hipp} demanded that his insurer cancel additional insurance he had purchased and rein-

\textsuperscript{103} Federal rule 8(e)(2) states:
A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many claims or defenses as he has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

F.R. Civ. P. 8(e)(2).

\textsuperscript{105} Id. at 1116.
\textsuperscript{106} Id.
\textsuperscript{107} 301 F. Supp. 92 (D.S.C. 1968), aff’d per curiam, 412 F.2d 1186 (4th Cir. 1969).
\textsuperscript{108} 301 F. Supp. at 94.
state the savings account that, under his original policy, had been used to pay the premiums for the additional insurance. The insurer complied with the insured's demands.\(^\text{109}\) The district court then refused to permit the plaintiff to seek damages for alleged fraud in inducing the purchase of additional insurance. The court explained:

Plaintiff's letter, demanding the recission of the questioned transaction, represented a "decisive act," indicating an unequivocal election on his part; and, when his demand was acceded to by the defendant and he was restored to his former status under his original contract, he had made an effective election of remedies, precluding him from suing in fraud and deceit.\(^\text{110}\)

Although they reached different conclusions, Cooley and Hipp can be reconciled. The court in Cooley refused to force an election before the merits of the case were decided.\(^\text{111}\) The court did not address the issue of whether, upon resolution of the merits of the case, the plaintiff would then be forced to choose between two incompatible remedies. In Hipp, however, the plaintiff had, in a sense, recovered on the contract claim before trial—the policy was rescinded, and he was returned to his former position. Thus, the federal courts apparently have recognized South Carolina law concerning the substance of election of remedies, but have been unwilling to require a plaintiff who has not yet recovered on a claim to choose between possible causes of action.

2. **South Carolina Case Law on the Timing of a Motion to Elect**

In South Carolina a motion to require an election of remedies is an affirmative defense that is waived unless raised in the defendant's answer.\(^\text{112}\) When a plaintiff seeks remedies both at law and in equity and it is clear that both remedies pertain to

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109. Id. at 93.
110. Id. at 94. The quoted language suggests that the court interpreted the plaintiff's pre-trial actions as a waiver of the right to seek damages for fraud. On waiver and election of remedies, see supra note 72 and accompanying text.
111. 383 F. Supp. at 1116.
the same cause of action, an election may be forced at any stage in the proceeding.113 The plaintiff, however, will not be required to elect until after the defendant has answered.114

In Riddle v. Pitts,115 the South Carolina Supreme Court refused to find that a plaintiff made a binding election at a pre-trial conference during which he told a judge that he would "probably" proceed under one of the two available causes of action.116 The supreme court agreed with the trial judge that unless the defendant made a motion to require the plaintiff to elect, the plaintiff's pretrial responses did not constitute a binding election.117

The election in Riddle was, strictly speaking, between available causes of action rather than remedies. In the past, however, the supreme court has labeled similar forced choices as elections of remedies.118 While it is unclear whether this categorization still applies today, Riddle may, by analogy, provide a useful precedent for parties faced with an election of remedies.

The supreme court in Riddle provided another clue for determining the moment when a party may be forced to elect. The court refused to find that the trial court had erred, even though the plaintiff had been permitted to elect at the close of evidence.119 The court failed to indicate, however, whether the trial judge could have required an earlier election.

The South Carolina Court of Appeals has provided clearer guidance on whether the post-evidence forced election is mandatory or permissive. In Robert Harmon and Bore, Inc. v. Jenkins,120 the court of appeals held that the trial court erred in

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114. Id. at 588, 155 S.E.2d at 607.
116. The parties in Riddle stipulated that during the pre-trial conference a judge other than the trial judge told the plaintiff that he would be required to elect. Id. at 388, 324 S.E.2d at 60.
117. Id.
118. See supra notes 41-55 and accompanying text. The South Carolina Court of Appeals has refused to label as an election of remedies a situation in which the defendant sought to label as an election of remedies a situation in which the defendant sought to force the plaintiff to elect between causes of action. See Boardman v. Lovett Enters., 283 S.C. 425, 323 S.E.2d 784 (Ct. App. 1984); supra notes 32-35 and accompanying text.
119. 283 S.C. at 388, 324 S.E.2d at 60.
forcing the plaintiff to elect between causes of action before the plaintiff was able to determine which ground of recovery he would be able to prove.\(^\text{121}\)

The Jenkins court stressed that the separate grounds of recovery must be consistent.\(^\text{122}\) The new South Carolina Rules of Civil Procedure, however, clearly state that inconsistent claims may be asserted.\(^\text{123}\) Despite this conflict with the mandate of the new rules, Jenkins liberalized existing law by providing a plaintiff with the invaluable opportunity to observe the development of evidence at trial before being forced to choose a cause of action. Jenkins also appears to contradict Scott v. McIntosh,\(^\text{124}\) an early South Carolina case that permitted a defendant to employ the election of remedies doctrine, on similar facts, to force the plaintiff to elect before trial between alternative causes of action.\(^\text{125}\)

C. Demands for Relief in the Alternative

Dean Harry M. Lightsey has argued that demands for relief in the alternative should be a necessary corollary to alternative pleading. A plaintiff, he asserted, should be permitted to seek the same relief from one or more parties on the grounds that one or the other was liable. The pleader should also be entitled to seek one of alternative remedies depending on which cause of action is pursued.\(^\text{126}\) The South Carolina Supreme Court, however, has not been willing to permit alternative remedies, even when alternative causes of action are stated.

In the recent case of Thompson v. Watts,\(^\text{127}\) the supreme court noted that a plaintiff may properly bring suit alleging both a securities violation and a cause of action for common-law fraud and deceit, but cautioned that the remedies the plaintiff seeks must be consistent. The court concluded that once the

\(^{121}\) 282 S.C. at 198, 318 S.E.2d at 376.

\(^{122}\) Id.

\(^{123}\) Rule 8(e)(2), SCRCP.

\(^{124}\) 167 S.C. 372, 166 S.E. 345 (1932). See supra notes 41-44 and accompanying text.

\(^{125}\) Id. at 375, 166 S.E. at 346. In both Jenkins and Scott, the election was between quantum meruit and breach of express contract.

\(^{126}\) H. LIGHTSEY, SOUTH CAROLINA CODE PLEADING 71 (1976).

plaintiff in *Thompson* pursued his fraud and deceit action, he elected to affirm the contract and was, therefore, barred from seeking to repudiate the contract and recover his consideration under the securities violation.\(^{128}\)

In the wake of *Thompson* and the subsequent adoption of the South Carolina Rules of Civil Procedure, it is unclear whether a plaintiff may plead inconsistent remedies. The parties in *Thompson* agreed to proceed first with the fraud and deceit action, and the jury found for the defendant on that cause of action.\(^{129}\) Although a plaintiff should, arguably, be permitted to pursue inconsistent remedies until the issue of liability is settled, language in *Thompson* stating that a plaintiff must "seek" consistent remedies\(^{130}\) suggests otherwise.

### IV. Conclusion

The South Carolina Rules of Civil Procedure add a new layer of complexity to the already complicated case law on election of remedies. The new rules will certainly permit alternative claims within a single suit. Less certain are whether inconsistent remedies will be permitted at the pleading stage and at what stage the court will force an election of remedies.

Clearly, a plaintiff should not be permitted to recover twice for a single wrong; a double recovery would punish the defendant twice and provide a windfall for the plaintiff. On the other hand, the plaintiff should be permitted to assert alternative demands for relief during the liability phase of a trial. An "election" of remedies could be made at the conclusion of the presentation of evidence or when the finder of fact returns a verdict in the plaintiff's favor. Special verdict forms could be used to prevent confusion over which cause of action a jury considered meritorious.\(^{131}\) The new South Carolina Rules of Civil Procedure

\(^{128}\) Id. at 507, 316 S.E.2d at 395.

\(^{129}\) Id. at 506, 316 S.E.2d at 394.

\(^{130}\) Id. at 507, 316 S.E.2d at 395.

\(^{131}\) See also Mendelsohn, *Electioin of Remedies and Settlement—New Lyrics to an Outworn Tune*, 12 St. Mary's L.J. 367 (1980). Mendelsohn suggested that adoption of a subrogation procedure might prevent the possibility of double recovery and, thus, obviate the need for the election of remedies doctrine. Mendelsohn asserted that a subrogation procedure would allow one who paid a claim, which was not in fact owed, in an earlier proceeding to recover that amount in a later proceeding. *Id.* at 401-03.
may, perhaps, alleviate the harsh results that have sometimes arisen from a mechanical application of the doctrine of election of remedies.

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