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PRACTICE AND PROCEDURE

I. Personal Jurisdiction Asserted over Nonresident Defendant in Support Proceedings

The South Carolina Supreme Court in *Crowe v. Crowe*[1] upheld a family court's assertion of personal jurisdiction over a Georgia resident who, twenty years before, had deserted his wife and children in South Carolina. *Crowe* ignored the nonresident defendant's entitlement to due process of law and significantly eroded established jurisdictional analysis.

Nellie and Norman Crowe were married in South Carolina in 1961. Both parties remained in the state until 1964, when Crowe abandoned his wife and children and moved to Georgia. Crowe remained in Georgia after deserting his family. His wife remained a resident of South Carolina.[2]

In March 1984 Mrs. Crowe filed a petition in family court seeking a divorce, alimony and attorneys' fees. Her husband was served with process in Georgia, but failed to respond to the petition or to the decree granting the relief sought.[3] After receiving an Order and Rule to Show Cause in November 1984, Crowe made a special appearance before the court to move to dismiss the case for lack of personal jurisdiction with regard to alimony and attorneys' fees. The court denied the motion to dismiss,[4] predicating its jurisdiction on sections 20-7-420(31)[5] and 36-2-803(1)(g)[6] of the South Carolina Code.

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1. 289 S.C. 330, 345 S.E.2d 498 (1986).
2. Brief of Respondent at 1.
3. *Id.*
4. *Id.* at 2.
5. South Carolina family courts have exclusive jurisdiction to hold a spouse liable for support if, at the time of the filing of the petition for support, the spouse meets the following requirement:

> He is neither residing or domiciled nor found in the area but, prior to such time and while so residing or domiciled, he shall have failed to furnish such support, or shall have abandoned his spouse or child and thereafter shall have failed to furnish such support, provided that the petitioner is so residing or domiciled at the time.

S.C. Code Ann. § 20-7-420(31)(C) (Law. Co-op. 1985).
6. S.C. Code Ann. § 36-2-803(1)(g) (Law. Co-op. 1976) provides in pertinent part:

On appeal the supreme court affirmed the family court's assertion of personal jurisdiction over Crowe. The court noted that South Carolina was the parties' last matrimonial domicile. In addition, the cause of action for divorce arose in the state, the living expenses of Crowe's wife and children were paid in the state,[7] and Crowe's wife and children were domiciled in South Carolina. The court dismissed his assertion that his contacts with the state were attenuated. The court held that Crowe's duty to support his wife continued throughout the period of abandonment.[8]

Crowe relied on *Carnie v. Carnie*[9] to support his assertion that the South Carolina court lacked personal jurisdiction to require his payment of support and attorneys' fees. In *Carnie* a wife and her husband separated in Virginia in 1963. In 1965 the wife, a resident of South Carolina except for the years she was married, filed for and obtained a divorce in South Carolina. The court ordered her husband to increase his support and alimony payments and to pay attorneys' fees. In response he entered a special appearance to contest the court's assertion of personal jurisdiction over him in the suit for support payments and fees. The supreme court reversed the family court order because the husband had never resided in South Carolina, had not received adequate service of process, and had not voluntarily subjected himself to the court's jurisdiction. The *Carnie* court noted that a simple divorce decree is a judgment in rem. Constructive service, therefore, is sufficient to obtain personal jurisdiction over a nonresident.[10] A divorce decree, like that in *Carnie*, that also grants alimony, child support, and attorneys' fees against a nonresident defendant, however, is an in personam judgment which cannot

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"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 . . . entry into a contract to be performed in whole or in part by either party in this State . . . ."

7. 289 S.C. at 332, 345 S.E.2d at 499.

8. *Id.*

9. 252 S.C. 471, 167 S.E.2d 297 (1969).

10. *Id.* at 475, 167 S.E.2d at 299. In rem jurisdiction allows a court to determine the status of property. "Because a court proceeding in rem adjudicates conflicting claims to local property, which already has been subjected to the forum's physical control by attachment, due process does not require the court to summon, or even to identify all those whose interests might be affected by the judgment." J. FRIEDENTHAL, M. KANE, A. MILLER, CIVIL PROCEDURE 114 (1985).

be rendered without jurisdiction over the defendant's person.[11]

The *Crowe* court held that the husband's reliance on *Carnie* was misplaced and distinguished the factual situations. Unlike the Carnies who were residents of Virginia during their marriage, the Crowes entered into marriage and lived in South Carolina. The Crowes' last marital domicile was South Carolina. In *Carnie* the couple separated in Virginia and the wife returned to South Carolina to live;[12] Crowe, however, abandoned his wife and moved to Georgia.

These factual dissimilarities fail to extinguish the underlying rationale of *Carnie*. As the case implies, a divorce may be granted without personal jurisdiction over a nonresident defendant. A proceeding relating to personal status has been treated traditionally as being in rem to allow the state with the most interest in the relationship to adjudicate the status of the relationship.[13] South Carolina, the last marital domicile of the parties, is therefore the proper forum to grant a divorce to the Crowes.

Unlike divorce, adjudication of the property rights incident to a marriage—alimony or support—requires a more tangible contact through jurisdiction over the person of the defendant or over the property to be affected. One authority notes that the state of last marital domicile, for a reasonable time after one party has left the state, has jurisdiction to make a decree of alimony and support if a statute in the state authorizes jurisdiction and contains reasonable provisions for notice and opportunity to be heard.[14]

The reasonableness of the assertion of personal jurisdiction over the absent husband was a significant issue in *Crowe*, but received no attention. Instead, the family court predicated its determination of personal jurisdiction upon two sections of the

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11. 252 S.C. at 475, 167 S.E.2d at 299. "A court must have in personam jurisdiction over the defendant to render a valid judgment in a proceeding to establish alimony or child custody, since it is adjudicating personal as well as property rights." J. FRIEDENTHAL, *supra* note 10, at 115.

12. 289 S.C. at 332, 345 S.E.2d at 499.

13. Pennoyer v. Neff, 95 U.S. (5 Otto) 714 (1877). One hundred years later, the Court in Shaffer v. Heitner, 433 U.S. 186 (1977), held that minimum contacts analysis should be applied to the assertion of all forms of jurisdiction, thereby obviating the need for jurisdictional classifications.

14. R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 4.20, at 175-76 (2d ed. 1980); *see also* RESTATEMENT (SECOND) CONFLICT OF LAWS § 77(1) (1971).

South Carolina Code. The court found that because Crowe had entered into the contract of marriage, he could be reached under section 36-2-803(1)(g),[15] South Carolina's long-arm statute. The family court relied on section 20-7-420(31),[16] which purports to give family courts personal jurisdiction over a nonresident defendant in support proceedings.[17] While the latter statute ostensibly gives the court power to adjudicate support matters, the statutory language alone cannot control the disposition of this case; like the long-arm statute, the family court provision must still be found to comport with due process. Indeed, any judgment rendered by a state in violation of due process is void and is not entitled to full faith and credit in other states.[18]

Now phrased in terms of "fair play and substantial justice,"[19] due process has become the overriding concern in evaluating controversies over personal jurisdiction. In *International Shoe v. Washington*[20] the United States Supreme Court held that satisfaction of due process must depend on "the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."[21] *Kulko v. Superior Court of California*,[22] cited by the *Crowe* court, stressed the importance of the defendant's purposeful receipt of state benefits. In *Kulko*, as in *Crowe*, the cause of action for support payments arose from the defendant's personal, domestic relations, not from his commercial

15. *See* S.C. CODE ANN. § 36-2-803(1)(g) (Law. Co-op. 1976). This code section was critical to Mrs. Crowe's argument before the family court and seemingly underlies the supreme court's decision; however, both courts glossed over Crowe's contention that the contract section of South Carolina's long-arm statute pertains to sales transactions, not domestic matters. Record at 32. Previous decisions construing this section have dealt solely with commercial issues. *See* Cozi Inv. v. Schneider, 272 S.C. 354, 252 S.E.2d 116 (1979); Aetna Casualty & Sur. Co. v. Jenkins, 282 S.C. 107, 317 S.E.2d 460 (Ct. App. 1984); Atlantic Wholesale Co. v. Solondz, 283 S.C. 36, 320 S.E.2d 720 (Ct. App. 1984); Lackey v. Treadwell, 282 S.C. 81, 316 S.E.2d 724 (Ct. App. 1984).

16. S.C. CODE ANN. § 20-7-420(31) (Law. Co-op. 1985).

17. The supreme court relied on neither of these code sections in framing its opinion.

18. Pennoyer v. Neff, 95 U.S. (5 Otto) 714, 732-33 (1877); *see also* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980).

19. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

20. 326 U.S. 310 (1945).

21. *Id.* at 319.

22. 436 U.S. 84 (1978).

transactions in interstate commerce. The *Kulko* court held that the defendant did not have the requisite minimum contacts with the state and could not reasonably have anticipated being haled before its tribunal.[23] This reasonableness standard used in *Kulko* was posited in *Hanson v. Denkla*,[24] when the court found it essential that "there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefit and protections of its laws."[25]

The "purposeful availment of the state's benefits" criterion is nevertheless subject to the protections inherent in the minimum contacts concept. One protection is the assurance that a state may not reach beyond the limits imposed on it by a federal system.[26] This restriction on state sovereign power can be seen as a function of the individual liberty interest preserved by the due process clause.[27] In turn, the due process clause requires an evaluation of the factual circumstances of each case to determine whether personal jurisdiction over a nonresident defendant comports with fair play and substantial justice. In *Burger King v. Rudzewicz*[28] the Supreme Court recently noted that "[t]he 'quality and nature' of an interstate transaction may sometimes be so 'random,' 'fortuitous,' or 'attenuated' that it cannot fairly be said that the potential defendant 'should reasonably anticipate being haled into court' in another jurisdiction."[29]

Based on the foregoing reasoning, the *Crowe* ruling on support payments and fees would likely be reversed if it were taken before the United States Supreme Court.[30] The decree against Crowe simply does not comport with the due process concerns essential to the personal jurisdiction framework. The defendant has been absent from the state for twenty years and his anticipation of being haled into court has been weakened with each

23. *Id.* at 97-98.

24. 357 U.S. 235 (1958).

25. *Id.* at 253.

26. 444 U.S. at 292.

27. Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982).

28. 471 U.S. 462 (1985).

29. *Id.* at 486 (citations omitted).

30. Although this is an unlikely possibility, the Supreme Court could grant certiorari under 28 U.S.C. § 1257(3) (1982).

passing year. The record does not indicate that Crowe availed himself of any benefits of South Carolina during the time he has been absent from the state.[31] The singular fact that South Carolina has an interest in the litigation because it is the state of last marital domicile cannot serve as the touchstone for asserting jurisdiction over a nonresident defendant in matters of support.

In *World-Wide Volkswagen Corp. v. Woodson*[32] the Court noted that a state's interest in the litigation alone does not satisfy due process concerns:

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.[33]

The facts of *Crowe* do not support the supreme court's affirmance of the decree of alimony and fees against Crowe. *Crowe* indicates that state sovereignty notions may supplant the protection of the nonresident defendant in contravention of the accepted minimum contacts analysis. The family court may be allowed to assert personal jurisdiction over such a defendant *ad infinitum*, in relative disregard of the passage of time and his attenuated contacts within the state. Under the *Crowe* umbrella, practitioners may assume that the traditional due process defenses to the assertion of personal jurisdiction in a support proceeding could be rejected in favor of the state's interest in protecting its residents and to the exclusion of the individual liberty

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31. Crowe may, however, remain criminally liable for nonsupport under S.C. CODE ANN. § 20-7-90 (Law. Co-op. 1985). Although the Code contains no statute of limitations for this misdemeanor, use of this section would prove to be no more attenuated than the civil remedy afforded Mrs. Crowe. Further, the family court noted in its opinion that its contempt order very likely would not be enforced by Georgia officials. Record at 37. To this end, Mrs. Crowe does have the provisions of the Uniform Reciprocal Enforcement of Support Act (URESA) at her disposal. URESA is designed to facilitate the collection of support obligations across state lines through a petition filed in the state where the absent spouse resides. *See* S.C. CODE ANN. § 20-7-960 to -1170 (Law. Co-op. 1985); R. WEINTRAUB, *supra* note 14, at 247.

32. 444 U.S. 286 (1980).

33. *Id.* at 294.

interest of the nonresident defendant.

Elizabeth Leigh Mullikin

II. NOTICE OF FOREIGN LAW MUST BE PLEADED

On an issue of first impression, the South Carolina Supreme Court construed the Uniform Judicial Notice of Foreign Law Act[34] (Act) in *Marsh v. Hancock*.[35] By reversing the family court judge, the court modified two pre-Act cases—*Copeland v. Craig*[36] and *Rosemand v. Southern Railway*[37]—which concerned the pleading of foreign law. The court implied that although these opinions had been modified slightly by the Act, *Marsh* did not entirely overrule *Copeland* and *Rosemand*.[38] By holding in *Marsh* that practitioners must plead foreign law, the supreme court adopted the view followed by the majority of other states[39] that have construed the Act.

Marsh arose in family court when Marsh attempted to have the South Carolina courts modify a Texas child support order. Marsh and Hancock were divorced in Texas in 1974. Marsh re-

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34. S.C. CODE ANN. §§ 19-3-110 to -180 (Law. Co-op. 1985). The different sections of the Act provide requirements for pleading and introducing evidence of foreign law as follows:

§ 19-3-120: "Every court of this State shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States when such common law or statutes shall have been put in issue by the pleadings."

§ 19-3-130: "The court may inform itself of such laws in such manner as it may deem proper and may call upon counsel to aid it in obtaining such information."

§ 19-3-140: "The determination of such laws shall be made by the court and not by the jury and shall be reviewable."

§ 19-3-150: "Any party may also present to the trial court any admissible evidence of such laws but, to enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties either in the pleadings or otherwise."

§ 19-3-170: "No foreign law shall be received in evidence nor shall any court in this State take judicial notice of any foreign law unless such foreign law shall have been appropriately pleaded in the cause in the manner provided by law."

35. 288 S.C. 341, 342 S.E.2d 607 (1986).

36. 193 S.C. 484, 8 S.E.2d 858 (1940).

37. 66 S.C. 91, 44 S.E. 574 (1903).

38. 288 S.C. at 344, 342 S.E.2d at 609.

39. *See* Annotation, *Uniform Judicial Notice of Foreign Law Act*, 23 A.L.R.2D 1437, 1438 n.3 (1952) for a list of 26 states which have adopted the Act.

ceived custody of the child and was to receive child support under an order from the Texas court. After a Texas court modified the order in 1979,[40] Marsh incurred extraordinary medical expenses on behalf of the child. Seeking to recover some of these expenses, Marsh brought suit in South Carolina[41] to modify the support order under South Carolina law. Hancock failed to plead Texas law in his answer.

The family court judge modified the order, increasing the monthly payments and requiring Hancock to pay half of any future extraordinary medical expenses incurred by the child. The family court judge denied Marsh's request for past medical expenses, stating that the court "as a matter of law" was without authority to grant retroactive relief because such relief was not required under the Texas orders.[42] In support of the family court's decision, Hancock contended at oral argument that the order was modifiable only to the extent it would be under the Texas law that governed the order. The South Carolina Supreme Court rejected Hancock's argument that Texas law was applicable because Hancock did not plead Texas law in his answer. The court held that notice of foreign law must be pleaded; in the absence of such notice South Carolina courts assume the law of the sister state to be the same as South Carolina law. In reaching this conclusion the court relied on pre-Act cases, noting that the cases had been modified by the Act.[43]

The states that have adopted the Act have interpreted the effect of the Act on judicial notice in three ways. First, a minority of jurisdictions interpret the Act to mean the courts have the discretion to apply foreign law, regardless of whether the foreign law has been pleaded.[44] Second, at least one jurisdiction has interpreted the Act to mean that courts have a mandatory duty to apply foreign law if applicable, regardless of whether it is

40. The 1979 modification increased the child support payments to be made by Hancock from $60/month to $150/month and required him to include the child in his medical insurance policy covering ordinary medical expenses. 288 S.C. at 343, 342 S.E.2d at 608.

41. Hancock is currently a resident of South Carolina. *Id.*

42. *Id.*

43. *Id.* at 344, 342 S.E.2d at 609.

44. Annotation, *Uniform Judicial Notice of Foreign Law Act*, 23 A.L.R.2D 1437, 1447 (1952).

pleaded.[45] Third, a majority of jurisdictions interpret the Act to mean that parties no longer have to prove foreign law, but parties still have the burden of pleading foreign law.[46] Most of the states following the majority view also reason that if foreign law is not brought to the court's attention, the court is justified in applying the law of the state where the action is brought.[47] *Marsh* placed South Carolina squarely within the majority view.

Marsh, the first case to address this issue under the Act, modified pre-Act case law rather than overruling it. The modification is two-fold: the Act "relieves the necessity of formal proof of laws of United States jurisdictions"[48] and makes the application of foreign law a question of law.[49] The practitioner, therefore, still must bring foreign law to the court's attention, but is no longer required to prove formally the substance of the foreign law to the jury's satisfaction. Seemingly, the only requirement is a statement which informs the court that the law of another jurisdiction applies. For example, "Texas law is applicable in this case" would appear to suffice in a case such as *Marsh*. Once the issue of foreign law is brought to the court's attention, the judge will determine specifically what foreign laws apply.[50]

Another modification in pleading foreign law concerns how the notice must be given. The court specifically stated that notice to the court must be given "through the pleadings." To support the rationale of this holding, the court pointed to Rule 44(d) of the South Carolina Rules of Civil Procedure.[51] When the court decided *Marsh*, Rule 44(d) provided: "A party who intends to raise an issue concerning the law of a foreign jurisdiction shall give notice in his pleadings or applicable motion

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45. 21 AM. JUR. PROOF OF FACTS 2D, *Law of Foreign Jurisdictions* § 6 (1980).

46. Annotation, *Uniform Judicial Notice of Foreign Law Act*, 23 A.L.R.2D 1437, 1447 (1952).

47. *Id.* at 1448.

48. 288 S.C. at 343, 342 S.E.2d at 609.

49. "Actually, it seems that this rule [that foreign law is a question of law for the court] is merely an affirmation of what would naturally be the result of requiring the court to take judicial notice of a fact." Annot., *supra* note 46, at 1459.

50. "The court may inform itself of such laws in such manner as it may deem proper and may call upon counsel to aid it in obtaining such information." S.C. CODE ANN. § 19-3-130 (Law. Co-op. 1985).

51. Rule 44(d) was cited to support only the reasoning of the opinion because the South Carolina Rules of Civil Procedure had not yet been adopted when *Marsh* arose. The rule, therefore, was not binding on *Marsh*.

. . . ." Shortly after *Marsh*, however, Rule 44(d) was amended to provide: "A party who intends to raise an issue concerning law of a foreign jurisdiction shall give notice in his pleadings *or by other reasonable written notice* or applicable motion . . . ."[52] Apparently, therefore, the practitioner may give notice that foreign law applies after he has completed the pleadings.[53]

Marsh signals three changes in the requirements for pleading the law of a foreign state in South Carolina courts. First, the practitioner must bring the issue of applicability of foreign law to the attention of the court, but he is not required to set out the substance of the law in his pleadings. Second, foreign law is now a question of law, removing the burden of establishing the foreign law as a question of fact. Third, according to Rule 44(d) of the South Carolina Rules of Civil Procedure, practitioners may give notice that foreign law applies either through the pleadings or through other reasonable written notice. *Marsh* slightly modified the procedure of pleading foreign law, but the modifications should make the process much easier for the practitioner.

Peter Mathews Thomas

III. MISNAMED PLAINTIFF MAY HAVE CAPACITY TO SUE

The capacity of a misnamed plaintiff to sue and the proper grounds for vacating a default judgment were at issue in *H & H Glass Co. v. Wynne*.[54] The court decided both issues under the codified rules of civil procedure,[55] which were repealed July 1, 1985. The case retains some importance, however, because it remains directly applicable to all cases filed before July 1, 1985,[56]

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52. S.C.R. CIV. P. 44(d) (emphasis added).

53. "It is clear that the purpose of the requirement of Section 19-3-150 that a party give the adverse party reasonable notice of his intent to rely on another state's law is to prevent unfair surprise by allowing the adverse party an opportunity to acquaint himself with the foreign law." Stevenson v. Emerson Elec. Corp., 286 S.C. 331, 334, 333 S.E.2d 355, 357 (Ct. App. 1985). Allowing notice to be given after completion of the pleadings eliminates the prejudice which existed prior to the amendment against a party who did not discover that foreign law applied until after the pleadings had been completed.

54. 289 S.C. 389, 346 S.E.2d 523 (1986).

55. *See* S.C. CODE ANN. §§ 15-13-320, -350, 15-27-130 (Law. Co-op. 1976) (repealed 1985).

56. The present South Carolina Rules of Civil Procedure were promulgated by the South Carolina Supreme Court and replaced the Rules of Practice for the Circuit Courts

and may be applied, by analogy, to cases filed after that date.

H & H Glass instituted this action against Wynne in an attempt to foreclose a mechanic's lien on materials installed in Wynne's residence. Wynne received personal service, but failed to file an answer. The court, therefore, entered a default judgment against him. Wynne later filed a motion for relief from the default judgment. The trial court granted the motion and H & H Glass appealed.

Wynne then moved to dismiss the appeal, asserting that "H & H Glass, Inc.," the name under which the case was filed, was not a registered corporation in South Carolina and that H & H Glass, therefore, lacked capacity to sue.[57] The supreme court remanded the case to the trial judge for additional findings, and Wynne again prevailed. H & H Glass took a second appeal, again asserting that H & H Glass lacked capacity to sue and that the trial court erroneously entered the default judgment.[58]

The supreme court examined two separate components of the capacity to sue issue. The court considered, first, whether the issue was raised in a timely fashion and, second, whether lack of capacity to sue could render the action a nullity. Since Wynne did not file an answer, the court held that the "capacity to sue" issue had been waived.[59] The court also rejected Wynne's contention that the action was a nullity, noting that " '[a]lthough an action brought in the name of that which has no legal entity is a nullity, an action in which a legally existing plaintiff has been misnamed is still a true action.' "[60] H & H Glass merely misnamed itself in the complaint. Despite that error, H & H Glass was a legally existing "person" under South Carolina law and was entitled to maintain a legal action. Had H & H Glass failed to incorporate under *any* name, the result probably would have been different because the company would not have had the status of a legal "person."

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of South Carolina on July 1, 1985. The new Rules are essentially the same as the Federal rules of Civil Procedure.

57. The true name under which the corporation was registered was "H & H Glass of Bluffton, Inc." The plaintiff omitted the phrase "of Bluffton" in its complaint.

58. 289 S.C. at 390, 346 S.E.2d at 524.

59. *Id.* at 391, 346 S.E.2d at 524-25; *see* Dalton v. Town Council, 241 S.C. 546, 129 S.E.2d 523 (1963); Bramlett v. Young, 229 S.C. 519, 93 S.E.2d 873 (1956).

60. 289 S.C. at 391-92, 346 S.E.2d at 525 (quoting Commercial & Sav. Bank v. Ward, 146 S.C. 77, 84, 143 S.E. 546, 548 (1928)).

In considering the default judgment issue, the court held that the trial court abused its discretion in vacating the judgment. Wynne claimed that the papers served on him were ineffective "because of the unusual location of the summons and complaint."[61] According to the court, however, the documents were in the usual order for a mechanic's lien foreclosure. Furthermore, Wynne evidenced his notice of the action by immediately contacting his attorney. The court based its opinion on the well-established principle that "[p]re-occupation with business matters is generally no defense for ignoring service of process."[62]

Had *H & H Glass* been decided under the South Carolina Rules of Civil Procedure, the result arguably would have been the same. Rule 17(b) provides that capacity to sue is determined by the substantive law of the state.[63] Consequently, South Carolina cases holding that for a court to consider a lack of capacity argument, the answer to a complaint must raise the argument[64] would presumably still be applicable, despite the repeal of the statutes under which the cases were decided.[65] In addition, the differences between current South Carolina Rule of Civil Procedure 60(b),[66] which provides for relief from default judgment, and its predecessor, section 15-27-130,[67] are slight and unimportant as applied to the facts in *H & H Glass*.

H & H Glass has one extremely practical message. A motion to vacate a default judgment without truly extenuating circumstances will be unsuccessful, and an error as minor as a misnamed plaintiff will not nullify the action. Practitioners, then, should pay close attention to deadlines for filing responsive pleadings to avoid the unenviable situation in which Wynne

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61. *Id.* at 392, 346 S.E.2d at 525.

62. *Id.* at 393, 346 S.E.2d at 526.

63. S.C.R. Civ. P. 17(b).

64. *See* 146 S.C. 77, 143 S.E. 546.

65. S.C. Code Ann. §§ 15-13-320, -350 (Law. Co-op. 1976) (repealed 1985). For a general discussion of the difference in the repealed statutes and the new rule, see S.C.R. Civ. P. 17(b) (Reporter's Note).

66. S.C.R. Civ. P. 60(b) provides in pertinent part: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, or excusable neglect . . . ."

67. Section 15-27-130 read in pertinent part: "The court may . . . relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect . . . ." S.C. Code Ann. § 15-27-130 (Law. Co-op. 1976) (repealed 1985).

found himself.

S. Lester Tate III

IV. STANDARD OF REVIEW OF MASTER'S FINDING OF FACT UPHELD

The South Carolina Court of Appeals in *May v. Hopkinson*[68] defined the proper scope of review on an appeal from a master's final judgment to a circuit court. The court of appeals held that a circuit court will not disturb a finding of fact unless no evidence reasonably supports the master's conclusion.

The defendant Hopkinson listed her house for sale with the defendant real estate agent. The Mays entered into a contract to purchase the house and pursuant to the contract, requested that the agent engage a certain termite inspector to certify that the house was free of termites. The agent hired a different inspector, the defendant Hutcherson, who inspected the house and reported the presence of termites and fungi. Hutcherson's report also stated that the house had been treated and that there was no other damage. After conclusion of the sale the Mays discovered structural damage to the house.[69]

The Mays sued the vendor, the real estate agent, and the termite inspector for fraud, alleging that each knew of the damage and withheld this material fact from the plaintiffs. All parties agreed to refer the case to the master for final judgment in the case.[70] The master found for the Mays against all of the defendants.[71] The defendants appealed to the circuit court, which found that no evidence supported the master's conclusion that the agent and inspector had defrauded the plaintiffs; the court also reduced the damages.[72] All parties appealed the decision. The Mays appealed the reduction in damages and the finding that no evidence supported the master's conclusion that the inspector and agent defrauded the Mays. The Mays asserted that

68. 289 S.C. 549, 347 S.E.2d 508 (Ct. App. 1986).

69. *Id.* at 555, 556, 347 S.E.2d at 511, 512.

70. The parties referred the action pursuant to S.C. CODE ANN. § 15-13-10 (Law. Co-op. 1976) (repealed 1985). They agreed to have the master enter final judgment pursuant to S.C. CODE ANN. § 14-11-90(6) (Law. Co-op. Supp. 1986).

71. 289 S.C. at 552, 347 S.E.2d at 510.

72. Record at 78, 84.

the circuit court stated but misapplied the proper rule of law in holding that no evidence supported the allegations of fraud against the inspector and agent.[73] The defendant-vendor appealed the circuit court's conclusion that there was evidence to support the master's finding that she defrauded the Mays. She also appealed the circuit court's computation of damages and its finding that the Mays had sustained their burden of proof by clear and convincing evidence.[74]

The court of appeals, like the circuit court, found that under the proper standard of review, a finding of fact by a master entering final judgment should not be disturbed upon appeal to a circuit court unless no evidence reasonably supports the conclusion.[75] The court of appeals, however, disagreed with the circuit court's ruling that there was no evidence to support the finding of fraud by the agent and inspector. The court of appeals decided that while the circuit court correctly stated the standard of review, the master, not the reviewing court, had a duty to determine the credibility of the evidence, to weigh it, and to resolve any evidentiary conflicts.[76]

All the parties agreed that to disturb a finding on appeal, the reviewing court must find no evidence reasonably supporting the factual conclusion.[77] The court of appeals, not surprisingly, agreed, reasoning that the scope of review of a final judgment should not depend upon which court is determining the appeal.[78] The court in *May* supported its decision with an 1884 opinion which emphasized the policies of maintaining uniformity in the law and of respecting the intent of the parties.[79] The court reviewed the record and found evidence supporting the master's factual conclusions. The court noted that certain elements of fraud must be proved circumstantially and that the evidence

73. Brief of Plaintiff-Appellant at 5, 7, 14.

74. Brief of Respondent-Appellant Hopkinson at 3, 8, 10.

75. 289 S.C. at 555, 347 S.E.2d at 511.

76. *Id.* at 556, 347 S.E.2d at 512.

77. Brief of Plaintiff-Appellant at 6; Brief of Respondent C.R. Aydelette at 4. Defendant Hutcherson, the termite inspector, settled with plaintiffs during the pendency of the appeals. 289 S.C. at 552, 347 S.E.2d at 510.

78. 289 S.C. at 554, 347 S.E.2d at 511.

79. *Id.* (citing Meetze v. Charlotte, C. & A. R.R., 23 S.C. 1, 15 (1884)). The court in *May* erroneously cited Chief Justice Simpson's opinion as the dissenting opinion, when in fact it is the majority opinion.

gave rise to reasonable inferences of fraud.[80]

The decision in *May* is consistent with prior cases addressing the scope of review for various types of cases. In *Townes Associates, Ltd. v. City of Greenville*[81] the Supreme Court of South Carolina carefully defined the applicable scopes of review in jury and nonjury cases sounding in both law and equity. It held that "[i]n an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's finding." This rule applied whether the judge's findings were made with or without reference to that evidence.[82] In a recent decision, *Fox v. Munnerlyn*,[83] the court of appeals decided to treat a master's final judgment in an action at law as one tried by a judge sitting without a jury. In *Fox* the decision was reviewed by the Court of Appeals and not by the circuit court. The only issue remaining for the court in *May* was whether to apply the same scope of review when the appeal was made instead to the circuit court.

The decisions in *Townes*, *Fox*, and *May* survive the recent adoption and amendment of the South Carolina Rules of Civil Procedure.[84] Although the rules do not attempt to define the scope of review on appeals, Rule 52(a), before it was amended, had described a scope of review which would apply to equity cases in which the two-judge rule was not applicable.[85] The drafters of the rule apparently did not intend this result and amended it by deleting the provision.[86]

The decision in *May* comports with earlier decisions regarding the scope of review and reaches a fair and reasonable conclusion based upon these decisions. The finding of the court of ap-

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80. *Id.* at 557, 347 S.E.2d at 513.

81. 266 S.C. 81, 221 S.E.2d 773 (1976).

82. *Id.* at 86, 221 S.E.2d at 775.

83. 283 S.C. 490, 323 S.E.2d 68 (Ct. App. 1984).

84. S.C.R. Civ. P. 81 provides in pertinent part, "In any case where no provision is made by statute or these Rules, the procedure shall be according to practice as it has heretofore existed in the courts of this State."

85. Flanagan & Sloan, *Selected Issues Under the New Rules of Civil Procedure*, 37 S.C.L. Rev. 265, 304-05 (1986). The two-judge rule was explained in *Townes*: when the judge concurred with a master's or referee's findings of fact, the findings may not be overturned unless they are lacking evidentiary support or are against the clear preponderance of evidence. 266 S.C. 81, 221 S.E.2d 773.

86. *See* S.C.R. Civ. P. 52(a) (Reporter's Note).

peals that there was evidence to support the conclusion of the master is tenuous and subject to dispute. Because the reviewing court has no jurisdiction to review the sufficiency of evidence even in an action in fraud,[87] which requires a higher standard of proof than most civil actions,[88] it was compelled to agree with the master that there was evidence, however slight and unconvincing it may have been.

Elizabeth T. Thomas

V. Defendant Not Allowed to Assert Collateral Estoppel Against Stranger to Prior Judgment

The South Carolina Supreme Court held in *Richburg v. Baughman*[89] that a defendant could not assert collateral estoppel against a plaintiff who was not a party to a prior action in which the defendant was a party. Finding that the plaintiff had not had a full and fair opportunity to litigate the relevant issue, the court refined its interpretation of the doctrine of collateral estoppel, but remained consistent with its previous treatment of collateral estoppel issues and with the modern trend in other jurisdictions.[90]

Richburg arose as the result of an automobile accident between a truck driver and Richburg's daughter. In the accident the daughter sustained physical injuries and Richburg incurred property damage to his vehicle. Richburg sued Baughman to recover his daughter's medical expenses and damages for property loss to his vehicle, but Baughman prevailed.[91] Because of errors in the jury charge, however, the trial court granted Richburg's motion for a new trial. Later, in a separate action, the daughter sued Baughman for actual and punitive damages for her injuries, but the jury only awarded her actual damages. Neither party appealed that verdict. On retrial of Richburg's claims against

87. Goodwin v. Dawkins, 282 S.C. 40, 317 S.E.2d 449 (1984). In a fraud action at law for damages, "[the court's] review of the trial judge's findings of fact is limited to determining whether there is any evidence which reasonably supports the judge's findings." *Id.* at 42, 317 S.E.2d at 451.

88. The party asserting fraud assumes a heavy burden of proving it by clear, cogent and convincing evidence. Watson v. Wall, 239 S.C. 109, 113, 121 S.E.2d 427, 429 (1981).

89. 290 S.C. 431, 351 S.E.2d 164 (1986).

90. *See infra* note 101.

91. 290 S.C. at 433, 351 S.E.2d at 165.

Baughman the trial court granted Richburg's motion for summary judgment on the issue of Baughman's liability for actual damages. The court found that Baughman was collaterally estopped from denying liability because the jury in the daughter's suit had already adjudged Baughman liable for actual damages.

Correspondingly, Baughman asserted that Richburg should be collaterally estopped from recovering punitive damages since the jury in the daughter's suit had awarded only actual damages and, thus, had exonerated Baughman on the issue of liability for punitive damages.[92] The trial court denied Baughman's motion, however, and after trial the jury returned a verdict against Baughman for punitive damages. Baughman contended on appeal to the supreme court[93] that the trial court should have precluded Richburg from relitigating the same punitive damages issue on which a jury previously had vindicated Baughman.

The supreme court initially noted that in a suit between parties and their privies, collateral estoppel precludes the relitigation of issues actually and necessarily litigated and determined in a previous action.[94] The court held that "[s]ince the father was neither a party in the previous action nor in privity with such a party, the prior verdict refusing punitive damages [was] not applicable to the father,"[95] and the father, therefore, was not estopped from litigating the issue.

Richburg presented the court with an opportunity to further define the doctrine of collateral estoppel as it is applied in South Carolina. In the 1982 decision *Graham v. State Farm Fire & Casualty Insurance Co.*[96] the court abandoned the requirement

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92. Whether the jury exonerated the defendant on the issue of his alleged reckless or wilful misconduct is an open question. The jury only explicitly found liability on the issue of actual damages and failed to stipulate its findings concerning punitive damages. The question is essentially academic, however, because whether the matter actually was litigated is immaterial; in either case, the defendant could not use the prior judgment to estop this plaintiff from litigating an issue which he had never before litigated. *Id.* at 434-35, 351 S.E.2d at 166.

93. The defendant appealed following the denial of his motions for judgment *non obstante veredicto* and for a new trial. *Id.* at 433, 351 S.E.2d at 165.

94. *Id.* at 434, 351 S.E.2d at 166.

95. *Id.* at 435, 351 S.E.2d at 166. The court stated that a parent-child relationship does not engender a state of privity. The determination of lack of privity in this case is logical nonetheless because the father possessed distinct protectable interests separate from those of his daughter.

96. 277 S.C. 389, 287 S.E.2d 495 (1982). For a thorough analysis of *Graham*, see *Practice and Procedure, Annual Survey of South Carolina Law*, 35 S.C.L. REV. 107

of mutuality[97] and allowed the defensive assertion of collateral estoppel by one who was neither a party to nor in privity with a party to the previous action. Because the plaintiff in *Graham* had been given a full and fair opportunity to litigate his claim in a prior action against a different defendant, the plaintiff's due process rights were not violated by the application of collateral estoppel.[98] The *Graham* holding revealed, therefore, that the critical question is "whether the party adversely affected had a full and fair opportunity to litigate the relevant issue effectively in the prior action."[99] Since Richburg was not a party to his daughter's action, he had not had an opportunity to litigate the punitive damages issue and, therefore, was not bound by the prior judgment.

Although the supreme court did not allude to its previous abandonment of the mutuality rule and instead used language suggesting that mutuality remains a requirement,[100] the facts in

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(1983).

97. 277 S.C. at 390, 287 S.E.2d at 496. The court declared this to be the modern trend; as noted in the *Annual Survey*, *supra* note 96, at 108 & n.11, cases from other jurisdictions support this assertion; *see also* Annotation, *Mutuality of Estoppel as Prerequisite of Availability of Doctrine of Collateral Estoppel to a Stranger to the Judgment*, 31 A.L.R.3D 1044, 1067 (1970 & Supp. 1986).

98. The United States Supreme Court has suggested that provision of a full and fair opportunity is a constitutional due process requirement. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.7 (1979).

99. 277 S.C. at 391, 287 S.E.2d at 496; *accord* Irby v. Richardson, 278 S.C. 484, 298 S.E.2d 452 (1982); *see also* Beall v. Doe, 281 S.C. 363, 315 S.E.2d 186 (Ct. App. 1984). In *Beall* the South Carolina Court of Appeals upheld the offensive use of nonmutual collateral estoppel when the defendant has had a full and fair opportunity to litigate the issue. The court extensively addressed the status of the doctrine in South Carolina and discussed relevant policy considerations. Accordingly, the court adopted the rule of RESTATEMENT (SECOND) OF JUDGMENTS §§ 27-29 (1982): "Because the rule is perfectly in accord with *Graham* and *Irby* and because it represents a 'more flexible modern view,' we adopt it as the rule by which to determine whether a party in South Carolina is precluded from relitigating an issue with a nonparty." 281 S.C. at 370, 315 S.E.2d at 190 (citation omitted); *accord* St. Philip's Episcopal Church v. South Carolina Alcoholic Beverage Control Comm'n, 285 S.C. 335, 329 S.E.2d 454 (Ct. App. 1985). Although the *Richburg* court apparently did not rely on *Beall* or the Restatement position, but relied only on *Graham* and *Irby*, the distinction is neither significant nor outcome-determinative. As noted by the *Beall* court, the operative question in each approach is the same: whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate in a prior action. 281 S.C. at 370, 315 S.E.2d at 190.

100. The court merely stated that "[u]nder the doctrine of collateral estoppel, once a final judgment on the merits has been reached in a prior claim, the relitigation of those issues actually and necessarily litigated and determined in the first suit are precluded as to the parties and their privies in any subsequent action based upon a different claim."

Richburg did not require consideration of the mutuality rule. The holding comports with *Graham* and with decisions in those jurisdictions that also have discarded the mutuality rule.[101] When a stranger to a prior judgment brings suit against a defendant who is bound by that prior judgment, the defendant may not assert collateral estoppel to preclude the plaintiff from litigating an issue decided in that prior proceeding. Taking into account South Carolina decisions mentioned above, one may characterize the aggregate effect of the *Richburg* holding in this manner: while a stranger to a judgment may assert nonmutual collateral estoppel either offensively or defensively,[102] a party may not assert it defensively against such a stranger. This decision is not a major departure from existing South Carolina law, but practitioners should recognize the parameters and potential for use of the doctrine.

Susan M. Jordan

VI. Both Legal and Equitable Remedies May Be Pursued Beyond Pleading Stage of Lawsuit

The South Carolina Court of Appeals in *Harper v. Ethridge*[103] allowed a plaintiff to pursue both legal and equitable remedies beyond the pleading stage of his lawsuit. The decision departed from code pleading orders that required pretrial election between legal and equitable remedies[104] and recognized that

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290 S.C. at 434, 351 S.E.2d at 166. Perhaps because the presence of mutuality would have made no difference to the outcome of *Richburg*, the court did not note that instances exist in which a stranger to a judgment may assert estoppel against an adversary.

101. The rule in other jurisdictions that have rejected the mutuality rule is stated as follows:

> The cases which abandon the mutuality rule, whether in whole or in part, agree . . . that the doctrine of collateral estoppel can be invoked by a stranger to the judgment only against one who was a party, or in privity with a party, to the judgment and had a full opportunity in the prior action to litigate the relevant issue.

Annotation, *supra* note 97, at 1067; *see, e.g.*, Clemmons v. Travelers Ins. Co., 88 Ill. App. 3d 201, 410 N.E.2d 445 (1980), *aff'd*, 88 Ill. 2d 469, 430 N.E.2d 1104 (1981).

102. Although *Graham* concerned the assertion of defensive collateral estoppel by a stranger, *Beall* illustrated that the stranger may also assert collateral estoppel offensively as long as the defendant had a full and fair opportunity to litigate.

103. 290 S.C. 112, 348 S.E.2d 374 (Ct. App. 1986).

104. *See, e.g.* Landvest Assoc. v. Owens, 276 S.C. 22, 274 S.E.2d 433 (1981); Jacobson v. Yaschik, 249 S.C. 577, 155 S.E.2d 601 (1967); Boardman v. Lovett Enter., 283 S.C.

the South Carolina Rules of Civil Procedure[105] allow the trial judge broad discretion to determine when an election is or may be required.

In December 1982 Fann purchased an interest in a partnership between Harper and Ethridge. Under the partnership agreement, Harper assigned a property option held by the partnership to Ethridge and Fann individually. Ethridge and Fann purchased the property covered by the option and held it in trust for the partnership. As contemplated in the partnership agreement, the partners sought a developer to purchase the land; Harper promised to pay his share of the taxes on the property and to contribute proportionately to retire the loan when the property was sold. If Harper failed to pay his share, he forfeited his interest in the partnership.[106]

Ethridge and Fann entered into an option contract with a domestic firm to purchase and develop the property, but the sale was never consummated. Similarly, Harper negotiated an agreement with a British firm, but Ethridge refused to accept that arrangement.[107] Consequently, when the note held by Ethridge and Fann came due, Harper was unable to pay his share and the defendants expelled him from the partnership.[108] Ethridge and Fann then entered into a development contract with the British firm with which Harper had negotiated.[109]

Harper sued Ethridge and Fann, asserting both legal and equitable claims in his complaint. His first and third causes of action requested recovery of a one-third partnership interest in

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425, 323 S.E.2d 784 (Ct. App. 1984), *rev'd on other grounds*, 287 S.C. 303, 338 S.E.2d 323 (1985).

Election of remedies is the act of choosing between different remedies allowed by law on the same statement of facts in order to avoid a double recovery. *See* Tzouvelekas v. Tzouvelekas, 206 S.C. 90, 33 S.E.2d 73 (1945); Save Charleston Found. v. Murray, 286 S.C. 170, 333 S.E.2d 60 (Ct. App. 1985); 283 S.C. 425, 323 S.E.2d 784. *But see* Scott v. McIntosh, 167 S.C. 372, 166 S.E. 345 (1932) (election of remedies required when party asserted two separate causes of action). The *Harper* court believed the issue before it involved election of remedies, not election between causes of action. 290 S.C. at 120, 348 S.E.2d at 379. For a discussion of the state courts' treatment of this distinction, see Note, *Election of Remedies in South Carolina*, 37 S.C.L. REV. 369, 369 n.3 (1986); H. LIGHTSEY, SOUTH CAROLINA CODE PLEADING 240-43 (1976).

105. The South Carolina Rules of Civil Procedure became effective July 1, 1985.

106. 290 S.C. at 115, 348 S.E.2d at 376.

107. *Id.* at 116, 348 S.E.2d at 376-77.

108. *Id.* at 116-17, 348 S.E.2d at 377.

109. *Id.* at 117, 348 S.E.2d at 377.

partnership property and an equitable accounting among the partners. Harper's second cause of action alleged wrongful exclusion from the partnership and sought damages for breach of contract accompanied by a fraudulent act.[110] The defendants demurred to Harper's joinder of inconsistent causes of action and moved to require him to elect between his legal and equitable remedies before trial.[111]

In code pleading, a motion to elect was often made when the pleader alleged inconsistent causes of action or sought conflicting remedies.[112] Because code pleading was designed to apprise an opponent of the precise issues involved in the litigation, the pleader who did not comply with the procedural restrictions could be forced to choose which of his causes of action or legal remedies he would pursue at trial.[113] The South Carolina Rules of Civil Procedure discard the restriction on pleading inconsistent causes of action[114] and thus minimize the need to require election of remedies at an early stage.[115]

The *Harper* court noted that the point at which an election

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110. *Id.* at 114-15, 348 S.E.2d at 376.

111. *See* Defendants' Demurrer, Motion to Elect and Motion to Make More Definite and Certain, Record at 20.

112. *See* S.C. CODE ANN. §§ 15-13-220, -320 (Law. Co-op. 1976) (repealed 1985); S.C. Cir. Ct. R. 78 (1976)(repealed 1985); *see also* H. LIGHTSEY & J. FLANAGAN, SOUTH CAROLINA CIVIL PROCEDURE 282-83 (1985).

113. *See* Scott v. McIntosh, 167 S.C. 372, 166 S.E. 345 (1932); H. LIGHTSEY & J. FLANAGAN, *supra* note 112, at 282; 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1282, at 368 (1969).

114. South Carolina Rule of Civil Procedure 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. 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 separate causes of action or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

S.C.R. CIV. P. 8(e)(2). FED. R. CIV. P. 8(e)(2) is substantially similar to the state rule.

115. Lightsey, *South Carolina Code Pleading*, in S.C. CIVIL PROCEDURE (FEDERAL AND STATE) 1, 7 (1982). The draftsmen of FED. R. CIV. P. 8(e)(2) realized that flexible pleading was necessary to ensure a full presentation of all relevant facts and legal theories at trial. 5 C. WRIGHT & A. MILLER § 1282, *supra* note 113, at 368; *see also* Lightsey, *South Carolina Code Pleading* at 2 (code pleading objective was to provide fundamental facts involved in the litigation, thereby limiting further factual development; the federal rules approach views pleadings as providing notice and relies on subsequent stages of the case for development of facts).

is made "should be determined by the trial judge in light of the record as it develops."[116] Election may still be required at an early stage of the proceedings if a plaintiff asserts only one primary wrong or joins legal and equitable causes of action which require different modes of trial or involve different proof.[117] When a plaintiff does not know which of his remedies is the correct one to pursue, however, the trial judge may postpone election until after discovery or even until the close of the case when all available proof has been submitted.[118]

In *Harper* the plaintiff asserted both legal and equitable causes of action in his complaint. He alleged only one primary wrong:[119] the defendants' breach of their fiduciary duty to act in good faith.[120] Proof of damages required different evidence and the remedies sought required different modes of trial. Yet the court of appeals agreed with the trial judge that in this particular instance, fairness required election at a later stage of the suit. The court found that Harper did not know which cause of action the evidence would establish; therefore, an order requiring early election would deprive him of reasonable discovery and a full opportunity to prove his claim.[121]

Federal courts in South Carolina historically have been reluctant to require a plaintiff to elect his remedy at an early stage of the proceedings.[122] *Harper* aligns state law with these federal decisions and with the new rules of civil procedure. Furthermore, *Harper*, in recognizing the ability of the trial judge to determine when an election between legal and equitable remedies

116. 290 S.C. at 122, 348 S.E.2d at 380 (citing Vitale v. Coyne Realty, Inc., 66 A.D.2d 562, 568, 414 N.Y.S.2d 388, 393 (1979) (Callahan, J, dissenting); *see also* Wills v. Regan, 58 Wis. 2d 328, 206 N.W.2d 398 (1973) (decision of when election is required rests within the sound discretion of the trial court).

117. *See* Jacobson v. Yaschik, 249 S.C. 577, 588, 155 S.E.2d 601, 607 (1967); Boardman v. Lovett Enter., 283 S.C. 425, 428, 323 S.E.2d 784, 786 (Ct. App. 1984), *rev'd on other grounds*, 287 S.C. 303, 338 S.E.2d 323 (1985). *Cf.* Landvest Assoc. v. Owens, 276 S.C. 22, 25, 274 S.E.2d 433, 434 (1981) (only one primary right alleged).

118. 58 Wis. 2d at 345, 206 N.W.2d at 407.

119. 290 S.C. at 123, 348 S.E.2d at 380.

120. Brief of Appellant at 7.

121. 290 S.C. at 123, 348 S.E.2d at 381. The court did note that appellants could renew their motion to require election after discovery was completed.

122. *See* Cooley v. Salopian Indus., 383 F. Supp. 1114 (D.S.C. 1974); Hipp v. Kinnesaw Life & Acc. Ins. Co., 301 F. Supp. 92 (D.S.C. 1968), *aff'd per curiam*, 412 F.2d 1186 (4th Cir. 1969); Note, *Election of Remedies in South Carolina*, 37 S.C.L. REV. 369, 386 (1936).

is warranted,[123] discards the lingering restrictions of code pleading in favor of a more flexible pleading process.

Elizabeth Leigh Mullikin

123. 290 S.C. at 124, 348 S.E.2d at 381.