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## Missouri Pleadings and Instructions Based on Inconsistent Theories

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# MISSOURI PLEADINGS AND INSTRUCTIONS BASED ON INCONSISTENT THEORIES

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## I. INTRODUCTION

The defendant drove her car into the decedent's automobile. Six months later the decedent killed himself. The plaintiff, administrator of the decedent's estate, brought suit against the defendant in two counts. Count I was an action for personal injuries arising from the accident. Count II, in the alternative, was an action for wrongful death on the theory that the injuries suffered in the accident aggravated an existing epileptic condition and caused the decedent, under an irresistible impulse, to take his own life. Each cause of action is available to a personal representative in Missouri only by statute. The statute applicable to personal injuries allows damages to the personal representative if, but only if, the injuries *did not* result in the decedent's death;<sup>1</sup> claims of wrongful death accrue to the personal representative only if the injuries *did* result in the decedent's death.<sup>2</sup> In Missouri, can a plaintiff plead both causes of action? Can a plaintiff submit instructions to the jury on both counts?<sup>3</sup>

The plaintiff, a business invitee, fell down a stairway leading to a cellar as he sought entrance to a restroom to which he had been directed. The plaintiff sued for injuries suffered as a result of the defendant's negligence. The defendant submitted evidence to establish that it was light enough for the plaintiff to see the stairs and argued that the plaintiff was contributorily negligent in not discovering the stairway. The plaintiff's evidence, however, established that there was not enough light to see the stairs. Consequently, the defendant wanted to submit an instruction that, if the jury found there was not enough light for the plaintiff to see, then the plaintiff was contributorily negligent because he stepped through the doorway when it was so dark that he could not see the stairway. Can a defendant do so in Missouri?<sup>4</sup>

1. RSMo § 537.020 (1978).

2. RSMo § 537.080 (1978).

3. This example is based on *Wallace v. Bounds*, 369 S.W.2d 138 (Mo. 1963). The Missouri Supreme Court in *Bounds* did not allow the plaintiff to submit instructions based on both theories. For a discussion of *Bounds*, see text accompanying notes 49 & 50 *infra*.

4. This factual situation is based on *Pigg v. Bridges*, 352 S.W.2d 28 (Mo. En Banc 1961). The court in *Pigg* held that the instructions were inconsistent and could not be submitted in the conjunctive. The court suggested in dictum, however, that both theories could have been submitted in the disjunctive. See text accompanying notes 64-66 *infra*.

Trial attorneys are often confronted with situations where more than one possible legal theory may be pursued, with the proper theory dependent upon which set of inconsistent facts the jury finds to be true. This problem traditionally surfaces both in pleading and in the submission of instructions to the jury.<sup>5</sup> Missouri now allows the pleading of inconsistent claims and apparently allows the pleading of inconsistent defenses.<sup>6</sup> Less clear is Missouri's approach to the submission of instructions based on inconsistent theories of law. Although a party generally cannot submit instructions based on inconsistent theories,<sup>7</sup> cases vary in their applications of this standard, and several cases suggest that this standard need not be applied at all.<sup>8</sup> The purpose of this Comment is to clarify and critique the Missouri position regarding pleadings and submissions based on inconsistent theories.

Before a detailed analysis is undertaken, several terms should be defined. Missouri case law discusses inconsistent claims<sup>9</sup> and defenses<sup>10</sup> at the pleading stage and inconsistent theories<sup>11</sup> at the submission stage. In both situations "inconsistency" customarily means that the proof necessary to establish one theory, claim, or defense would necessarily disprove a fact necessary to support the other.<sup>12</sup> Several cases further suggest that a mere "theoretical inconsistency," as opposed to inconsistent proof, will not prevent a party from being allowed to plead inconsistent claims or defenses or to submit instructions based on inconsistent theories.<sup>13</sup> For example, even though one theoretically cannot hold title to property both by adverse possession and by having paid the purchase price, the proof necessary to establish these theories may not be inconsistent. Thus, pleading both theories may not be "inconsistent" and was allowed by one Missouri court.<sup>14</sup> Other cases consider *only* a "theoretical inconsistency." These cases hold the theories *themselves* to be inconsistent, rather than looking at the evidence supporting the theories, and therefore the pleading of both or submission of both would be improper. For example, one Missouri court has held instructions based on contract and *quantum meruit* to be "inconsistent," without ever considering the facts.<sup>15</sup>

5. See, e.g., *Kick v. Franklin*, 342 Mo. 715, 117 S.W.2d 284 (1938); *Payne v. White*, 288 S.W.2d 6 (Mo. App., Spr. 1956).

6. See text accompanying notes 26-38 *infra*.

7. See text accompanying notes 39-66 *infra*.

8. See, e.g., *Pigg v. Bridges*, 352 S.W.2d 28 (Mo. En Banc 1961) (discussed in text accompanying notes 64-66 *infra*).

9. See, e.g., *Burckhardt v. General Am. Life Ins. Co.*, 534 S.W.2d 57, 63 (Mo. App., St. L. 1975).

10. See, e.g., *Vaughn v. Conran*, 20 S.W.2d 968, 969 (Mo. App., Spr. 1929).

11. See, e.g., *Mahan v. Baile*, 358 Mo. 625, 633, 216 S.W.2d 92, 95-96 (1948); *Hampton v. Cantrell*, 464 S.W.2d 744, 747-48 (Mo. App., Spr. 1971).

12. See, e.g., *Hampton v. Cantrell*, 464 S.W.2d 744, 747 (Mo. App., Spr. 1971); *Vaughn v. Conran*, 20 S.W.2d 968, 969 (Mo. App., Spr. 1929).

13. See *Mahan v. Baile*, 358 Mo. 625, 633, 216 S.W.2d 92, 96 (1948).

14. See *Schaefer v. Causey*, 8 Mo. App. 142 (St. L. 1879), *aff'd on other grounds*, 76 Mo. 365 (1882).

15. See *Boyd v. Margolin*, 421 S.W.2d 761 (Mo. 1967) (discussed in text accompanying notes 51-52 & 55 *infra*).

It may also be helpful to examine the term "theory" in the context of submitting instructions based on inconsistent theories. The term "theory" can apply to different legal concepts. Thus, the theories of primary negligence and humanitarian negligence may be inconsistent,<sup>16</sup> and the theories of contract and *quantum meruit* may be inconsistent.<sup>17</sup> At the same time, "theory" also may apply to different theories dealing with the same legal concept. For example, two inconsistent theories may be based on one legal concept such as contributory negligence,<sup>18</sup> or humanitarian negligence.<sup>19</sup>

The implementation of the Missouri Approved Jury Instructions (MAI) has not significantly affected the case law in the area of submitting inconsistent instructions.<sup>20</sup> Under the heading of "Old Principles Still in Force," the MAI states, "Many established rules of instructing juries are still in force although not specifically included in this book. . . . [The force of such rules] is subservient to the overriding provisions and philosophy of MAI."<sup>21</sup> Recent Missouri cases thus continue to apply the same rules regarding inconsistent instructions and to cite pre-MAI cases for this proposition.<sup>22</sup>

Certain rules of evidence may control a plaintiff's use of contradictory facts in determining what theory or theories will be used in his submissions. Although these rules have no relationship to the rules which disallow the submission of inconsistent instructions, a discussion of the evidentiary rules is important because both the evidentiary rules and the submissions rules may be applicable to the facts of a given case. In Missouri, a plaintiff generally may not adopt a witness' testimony contrary to the plaintiff's own testimony on basic facts within the plaintiff's knowledge.<sup>23</sup> Consequently, a plaintiff cannot base his theory of recovery on evidence offered by his own witnesses or the defendant's witnesses if it contradicts his own personal testimony. A plaintiff is also bound by the testimony of his own witness unless<sup>24</sup> it is contradicted by other evidence

16. See *State ex rel. Tunget v. Shain*, 340 Mo. 434, 101 S.W.2d 1 (1936) (discussed in text accompanying notes 47 & 48 *infra*).

17. See *Boyd v. Margolin*, 421 S.W.2d 761 (Mo. 1967) (discussed in text accompanying notes 51-52 & 55 *infra*).

18. See *Pigg v. Bridges*, 352 S.W.2d 28 (Mo. En Banc 1961) (discussed in text accompanying notes 64-66 *infra*).

19. See *Kick v. Franklin*, 342 Mo. 715, 117 S.W.2d 284 (1938) (discussed in text accompanying notes 58 & 59 *infra*).

20. The effective date of the Missouri Approved Jury Instructions was January 1, 1965. MO. APPROVED INSTR. XXXI (1965 ed.).

21. MO. APPROVED INSTR. L (1965 ed.).

22. See, e.g., *Cover v. Phillips Pipe Line Co.*, 454 S.W.2d 507, 511 (Mo. 1970).

23. *Migneco v. Eckenfels*, 397 S.W.2d 682, 686 (Mo. 1965).

24. *Zabol v. Lasky*, 555 S.W.2d 299, 305 (Mo. En Banc 1977). *But see Vaeth v. Gegg*, 486 S.W.2d 625, 628 (Mo. 1972) (plaintiff not bound by his own or his witness' estimate of time, speed, or distance). It has recently been held that neither the rule binding a party to his own testimony nor the rule binding a party to the uncontradicted testimony of his own witness applies to defendants. *Overton v. Tesson*, 355 S.W.2d 909, 912 (Mo. 1962); *Tomlin v. Alford*, 351 S.W.2d 705, 711 (Mo. 1961).

offered by the plaintiff. Thus, a plaintiff cannot rely on evidence offered by the defendant if it contradicts evidence his witness has offered.<sup>25</sup>

## II. PLEADING INCONSISTENT CLAIMS AND DEFENSES

At common law a party could not plead inconsistent claims or defenses.<sup>26</sup> Missouri code pleading allowed inconsistent claims in the alternative<sup>27</sup> but did not allow inconsistent defenses.<sup>28</sup> In 1943 Missouri adopted Supreme Court Rule 55.12, a modified version of Federal Rule of Civil Procedure 8(e)(2),<sup>29</sup> relating to inconsistent pleadings. Missouri Supreme Court Rule 55.12 stated:

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. . . . A party may also state as many separate claims or defenses as he has whether based on legal or equitable grounds or on both.<sup>30</sup>

In 1973 the rule was renumbered to Rule 55.10 and the last sentence was amended to read, "*A party may also state as many separate claims or de-*

25. The rule binding the plaintiff to the uncontradicted testimony of his own witness has not gone uncriticized:

To require a party to forego reliance on any theory opposed to his personal, sworn testimony is one thing. But where he does not swear one way or the other on the matter, it is wholly illogical to permit him to rely on inconsistent theories, both supported by other evidence which he introduces, and yet deny him that privilege if one of the theories comes only from his opponent's case. One might even inquire how his opponent can complain because the jury was asked to believe *his* evidence?

Mo. BAR C.L.E., MISSOURI CIVIL INSTRUCTIONS § 2.3, at 32 (1961). This same author suggests that binding a party to his own witness' evidence that he does not contradict may have had its origin in the archaic doctrine forbidding impeachment of one's own witness, a doctrine which he contends has no present validity since it developed when trials were "inquisitorial rather than adversary and required 'oath-helpers' and compurgators rather than witnesses." *Id.*

26. B. SHIPMAN, HANDBOOK OF COMMON-LAW PLEADING § 318 (3d ed. 1923). There was, however, an exception where one of the allegations was superfluous. *Id.*

27. *Bratton v. Sharp Enterprises, Inc.*, 552 S.W.2d 306, 312 (Mo. App., K.C. 1977). Alternative pleading has been defined as a pleading drafted in terms of "either-or" propositions. 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1282 (1969).

28. *See, e.g., Finley v. Williams*, 325 Mo. 688, 696, 29 S.W.2d 103, 105 (1930); *Payne v. White*, 288 S.W.2d 6, 10 (Mo. App., Spr. 1956).

29. The federal rule is identical to the Missouri rule except for the last two sentences which read:

A party may also state as many separate 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 [dealing with the attorney's signing of the petition which among other things demonstrates his belief that there is good ground to support the pleading].

FED. R. CIV. P. 8(e)(2).

30. Mo. Sup. Ct. R. 55.12, RSMo (1969) (current version at Mo. Sup. Ct. R. 55.10).

*fenses as he has regardless of consistency and whether based on legal or equitable grounds.*"<sup>31</sup>

Both before and after the amendment, Rule 55.12 (current version at Mo. Sup. Ct. R. 55.10) has been interpreted to continue the allowance of pleading inconsistent claims in the alternative.<sup>32</sup> It is still uncertain, however, whether a party can now plead inconsistent defenses. The rule, as originally adopted in 1943 and especially as amended in 1973, on its face allows the pleading of inconsistent defenses. Nevertheless, no cases have been found so holding and one Missouri court of appeals decision in 1956—thirteen years after Rule 55.12 (current version at Mo. Sup. Ct. R. 55.10) was first adopted—stated in dictum the old rule that a defendant may plead as many defenses as he has, so long as they are *not* inconsistent.<sup>33</sup> At the same time, no Missouri cases have held that the rule does *not* allow the pleading of inconsistent defenses.<sup>34</sup> Moreover, several cases suggest in dictum that inconsistent defenses can be pleaded.<sup>35</sup> At least one commentator has interpreted Rule 55.12 (current version at Mo. Sup. Ct. R. 55.10) to allow the pleading of inconsistent defenses,<sup>36</sup> and the nearly identical federal statute has been so interpreted.<sup>37</sup> While the case law is inconclusive,

31. Mo. Sup. Cr. R. 55.10 (emphasis added). This amendment has been interpreted to allow, for the first time, the pleading of both *res ipsa loquitur* and specific negligence. *City of Kennett v. Akers*, 564 S.W.2d 41, 49 (Mo. En Banc 1978); *Bratton v. Sharp Enterprises, Inc.*, 552 S.W.2d 306, 313 (Mo. App., K.C. 1977).

32. See, e.g., *Bratton v. Sharp Enterprises, Inc.*, 552 S.W.2d 306, 312-13 (Mo. App., K.C. 1977); *Burckhardt v. General Am. Life Ins. Co.*, 534 S.W.2d 57, 63 (Mo. App., St. L. 1975).

33. *Payne v. White*, 288 S.W.2d 6, 10 (Mo. App., Spr. 1956).

34. Perhaps this dearth of cases suggests that courts, as a general practice, allow the pleading of inconsistent defenses.

35. In *Tomlin v. Alford*, 351 S.W.2d 705 (Mo. 1961), the court stated, "Supreme Court Rule 55.12 [current version at Mo. Sup. Cr. R. 55.10] permits the pleading of alternative and hypothetical defenses and specifically permits the pleading of as many defenses as he has . . . Defendant . . . must plead and submit each and every submissible defense available to him, lest they be forever lost." *Id.* at 710.

Another case, *Five Twelve Locust v. Mednikov*, 270 S.W.2d 770 (Mo. 1954), involved a disputed title to property upon which the wall of the defendant's building was located. The defendant claimed title to this property by adverse possession. In an unrelated proceeding against a different plaintiff, the defendant offered as a defense that the wall between his building and an adjoining building was a common wall. The Missouri Supreme Court held that these defenses were not inconsistent, but in dictum stated that, even if inconsistent, a party has a right to assert any number of defenses alternatively or hypothetically, citing RSMo § 509.110 (1949) (current version at Mo. Sup. Cr. R. 55.10). 270 S.W.2d at 776. The language of Rule 55.10 does not suggest that a different standard should be applied to inconsistent defenses in separate proceedings than to inconsistent defenses in the same proceeding. Consequently, if the provision as construed in *Five Twelve Locust* would allow inconsistent defenses to be pleaded in different proceedings, it should allow inconsistent defenses to be pleaded in the same proceeding.

36. C. Wheaton, *Civil Rules Practice*, 15 MISSOURI PRACTICE SERIES § 55.10-2 (1976).

37. See *Simmons v. Orion Ins. Co.*, 366 F.2d 572, 574-75 (8th Cir. 1966); *Little v. Texaco, Inc.*, 456 F.2d 219, 220 (10th Cir. 1972).

it appears that the pleading of inconsistent defenses is allowed in Missouri.<sup>38</sup>

### III. INSTRUCTIONS BASED ON INCONSISTENT THEORIES

Missouri Supreme Court Rule 55.12 (current version at Mo. Sup. Ct. R. 55.10) has been held to be solely a rule of pleading and not to apply to the submission of instructions based on inconsistent theories.<sup>39</sup> Furthermore, the Missouri Approved Jury Instructions have not affected the case law regarding such instructions.<sup>40</sup> Consequently, Missouri case law must be consulted to determine the Missouri rule for inconsistent instructions. The rule generally stated is that a single party cannot submit instructions based on inconsistent theories.<sup>41</sup> While the majority of cases define inconsistency as any situation where proof of one theory necessarily disproves the other theory,<sup>42</sup> this standard has not been applied uniformly, and several cases do not use it at all.<sup>43</sup> Moreover, the courts that apply the rule are in disagreement over whether a mere theoretical inconsistency will prevent submission on both theories.

One line of cases states the definition of inconsistency given above—that proof of one theory necessarily disproves the other—and then holds that when there is only a theoretical inconsistency, not an inconsistency in fact, a party will not be prevented from submitting both theories. The clearest example of allowing the submission of instructions that are only inconsistent in theory and not in fact is shown in cases dealing with instructions based on both primary and humanitarian negligence. In *Mahan v. Baile*,<sup>44</sup> the plaintiff sued for injuries resulting from an automobile collision and submitted instructions on both primary and humanitarian negligence. The primary negligence instruction dealt with driving at an excessive rate of speed; the humanitarian negligence instruction dealt with the defendant's ability to slacken his speed and thereby prevent the accident. The Missouri Supreme Court expressly rejected any concern with a theoretical, abstract, or philosophical inconsistency.<sup>45</sup> It held that inconsistency depended on the facts and there could be consistent evidence

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38. Despite this uncertainty, it has been held that a defendant can plead a counterclaim even if it is inconsistent with one of his defenses. *Seiser v. Maggard*, 457 S.W.2d 678, 680 (Mo. 1970).

39. *Wallace v. Bounds*, 369 S.W.2d 138, 141 (Mo. 1963). The opposite result has been obtained by the federal courts and the Illinois courts. See text accompanying notes 73-77 *infra*.

40. See text accompanying notes 20-22 *supra*.

41. See, e.g., *Wallace v. Bounds*, 369 S.W.2d 138, 142 (Mo. 1963); *State ex rel. Tunget v. Shain*, 340 Mo. 434, 440, 101 S.W.2d 1, 4 (1936); *Hampton v. Cantrell*, 464 S.W.2d 744, 747 (Mo. App., Spr. 1971).

42. See, e.g., *Wallace v. Bounds*, 369 S.W.2d 138, 142 (Mo. 1963); *Mahan v. Baile*, 358 Mo. 625, 633, 216 S.W.2d 92, 96 (1948).

43. See text accompanying notes 64-66 *infra*.

44. 358 Mo. 625, 216 S.W.2d 92 (1948).

45. *Id.* at 633, 216 S.W.2d at 96.

of both excessive speed *and* failure to slacken speed.<sup>46</sup> Thus, the court held that both instructions could be submitted.

Instructions based on both primary and humanitarian negligence at times will be factually inconsistent and the court will force a party to elect only one of the instructions before going to the jury. Such a situation was present in another automobile accident case, *State ex rel. Tunget v. Shain*.<sup>47</sup> The primary negligence instruction in *Shain* was based on the defendant's failure to keep his automobile under reasonable control; the humanitarian negligence instruction predicated recovery on the defendant having sufficient control of his automobile to stop it and avoid the collision. The Missouri Supreme Court held that the defendant could not both be out of control of his car and still have the ability to stop the car.<sup>48</sup> Because both theories were *factually* inconsistent, the supreme court reversed the trial court for allowing the plaintiff to submit both instructions to the jury.

Another case where a court considered a factual rather than a theoretical inconsistency was *Wallace v. Bounds*,<sup>49</sup> the case upon which the first example in the introduction is based. The decedent's administrator wanted to sue for personal injury and for wrongful death. The statute allowing him to sue for personal injury was applicable only if the accident did not result in the decedent's death; the wrongful death statute was effective only if the accident caused the decedent's death. The Missouri Supreme Court held these to be inconsistent theories because "proof of one negates, repudiates and disproves the other."<sup>50</sup> *Mahan, Shain, and Wallace*, taken together, imply that if the theories are inconsistent, but can be proven by the same set of facts or by two sets of facts which are not contradictory, then a party will be allowed to submit both theories in his instructions. Conversely, if the facts supporting the two theories are inconsistent, a party cannot submit instructions based on both theories.

Another line of cases does *not* require a factual inconsistency before disallowing submissions based on inconsistent theories. In these cases, the courts look only to the theories, and not to the facts supporting each theory, for inconsistency. In one such area, dealing with contract and *quantum meruit*, the courts disagree over whether there is a theoretical inconsistency. In *Boyd v. Margolin*,<sup>51</sup> the plaintiff alleged that he had arranged a buyer for the defendant's truck line according to an agreement entered into with the defendant. The plaintiff's first count sought a

46. *Id.* at 633-34, 216 S.W.2d at 96.

47. 340 Mo. 434, 101 S.W.2d 1 (1936).

48. *Id.* at 438, 101 S.W.2d at 3.

49. 369 S.W.2d 138 (Mo. 1963).

50. *Id.* at 142. In *Downs v. Exchange Nat'l Bank*, 24 Ill. App. 2d 24, 163 N.E.2d 858 (1959), the court held that it was improper to require an administrator to elect between a count under the Illinois Wrongful Death Act and a count for pain and suffering under the Illinois Survival Act even though such claims were inconsistent.

51. 421 S.W.2d 761 (Mo. 1967).



five percent commission based on this contract; his second count was for a five percent commission based on *quantum meruit*. Without considering the facts, the Missouri Supreme Court stated: "[I]t seems that these theories of recovery are inconsistent and a party may be required to elect as to which he will submit to the jury."<sup>52</sup>

To the extent that the theories are themselves inconsistent, it would seem that a party could *never* submit instructions based on both contract and *quantum meruit*. Other cases suggest, however, that contract and *quantum meruit* are not theoretically inconsistent. In *Kaiser Aluminum & Chemical Sales, Inc. v. Lingle Refrigeration Co.*,<sup>53</sup> the plaintiff sought, in contract and *quantum meruit*, payment for making dies. The Kansas City Court of Appeals did not consider the facts in determining whether these theories were inconsistent. Rather, it relied exclusively on earlier case law. In *Kaiser*, however, the court determined that the two theories were *not* inconsistent and held that the trial court properly allowed both submissions to go to the jury.<sup>54</sup> The holding by the Kansas City Court of Appeals in *Kaiser* would seem to have been implicitly overruled by the supreme court ruling in *Boyd* that contract and *quantum meruit* are inconsistent. *Kaiser*, however, has more precedential support than *Boyd*, and could be argued as the proper law of Missouri.<sup>55</sup>

Another case that considered only a theoretical inconsistency to de-

52. *Id.* at 768.

53. 350 S.W.2d 128 (Mo. App., K.C. 1961).

54. *Id.* at 131-32.

55. *Boyd* relied primarily on cases that limited recovery to the pleaded theory (contract) to the exclusion of any other theory (in this case *quantum meruit*). Such cases would seem not controlling however, when both contract and *quantum meruit* have been pleaded. On the other hand, *Kaiser* cited several earlier Missouri cases holding that a plaintiff cannot be compelled to elect on which contract or *quantum meruit*—he will go to the jury. It is interesting to note that *Boyd* relied on *Krupnick & Assoc., Inc. v. Hellmich*, 378 S.W.2d 562 (Mo. 1964). The *Boyd* court recognized that *Krupnick* did not deal with the issue of election between inconsistent theories. Nevertheless, the court in *Boyd* used dictum in *Krupnick* to illustrate the inconsistencies between the theories being considered. A close reading of *Krupnick* indicates that the court was only concerned with a *factual* inconsistency and not a theoretical one. In *Krupnick*, the plaintiff, an ad agency, contracted to provide advertising services to Branchell Company. The plaintiff's commission was to be a percentage of the cost of media space actually used. The plaintiff did preparatory work for Branchell. Branchell was then acquired by defendant Lenox Plastics, Inc. Lenox ordered the advertising campaign stopped before most of the ads were run and before plaintiff had collected most of its commissions. The plaintiff sued on the contract and lost both at the trial level and on appeal. The plaintiff then moved for a remand to allow amendment of its petition to seek recovery under *quantum meruit*. The court overruled the motion and held that the express contract proved by the plaintiff precluded recovery on *quantum meruit*. The court, however, went on to state that "[t]his express agreement with regard to the source of plaintiff's compensation [*i.e.*, that it be a percentage of the cost of media space] negatives the existence of any agreement implied either in fact or by law to compensate them on a different basis." *Id.* at 570. Thus, the *Krupnick* court looked to a factual inconsistency and is not precedent for a holding that contract and *quantum meruit* are always inconsistent theories.

termine whether both theories could be submitted to the jury dealt with different theories of humanitarian negligence. In *Rosanbalm v. Thompson*,<sup>56</sup> involving a train-car collision, the plaintiff submitted humanitarian negligence instructions based on a failure to slacken speed and a failure to sound a horn. There appears to be no factual inconsistency between slackening speed and sounding a horn because the defendant could have done both. Nevertheless, the Kansas City Court of Appeals held that these theories were inconsistent because evidence that the defendant could have slackened his speed "would have been inconsistent with the theory that a failure to warn was the proximate cause of the collision."<sup>57</sup>

The validity of the *Rosanbalm* holding is questionable. The *Rosanbalm* court concluded that its holding was controlled by a Missouri Supreme Court decision, *Kick v. Franklin*.<sup>58</sup> In *Kick*, two instructions based on humanitarian negligence—failure to sound a horn and failure to slow down—were held to be inconsistent. The inconsistency that the *Kick* court found was that the plaintiff's testimony concerning the location of the train when it could have sounded its horn and effectively have warned the plaintiff was inconsistent with the location of the train when it could have slowed enough to have missed the plaintiff's car.<sup>59</sup> Because *Kick* dealt with a factual inconsistency not found in *Rosanbalm*, *Kick* should not have been controlling.

Several cases disagree over whether a theoretical inconsistency based on the torts of negligence and willfulness should prevent a party from submitting both instructions. In *Ervin v. Coleman*,<sup>60</sup> the plaintiff sued for damages suffered in an automobile accident. His verdict director was based on negligence, but he also asked for punitive damages based on the defendant's alleged willful conduct. The Springfield Court of Appeals held these to be inconsistent theories of recovery even though they were based on the same acts and conduct. It concluded that the trial court erred in allowing the plaintiff to recover both actual and punitive damages.<sup>61</sup> Thus, the *Ervin* court looked to a theoretical rather than a factual distinction.

An older case, *Waechter v. St. Louis & Meramac River Railroad*,<sup>62</sup>

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56. 148 S.W.2d 830 (Mo. App., K.C. 1941).

57. *Id.* at 834.

58. 342 Mo. 715, 117 S.W.2d 284 (1938).

59. *Id.* at 723-25, 117 S.W.2d at 288-89.

60. 454 S.W.2d 289 (Mo. App., Spr. 1970). To the extent that *Ervin* held as a matter of law that a party cannot recover actual damages predicated on ordinary negligence, or punitive damages predicated on the defendant's complete indifference to or conscious disregard for the safety of others, it has been overruled. *Sharp v. Robberson*, 495 S.W.2d 394 (Mo. En Banc 1973). The *Sharp* court distinguished and limited its holding to punitive damages premised on indifference or disregard for the safety of others. It did not deal with punitive damages premised on willful conduct, the subject for which this Comment cites *Ervin*.

61. *Ervin v. Coleman*, 454 S.W.2d 289, 292 (Mo. App., Spr. 1970).

62. 113 Mo. App. 270, 88 S.W. 147 (St. L. 1905).

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approached the problem differently. In *Waechter*, the plaintiff sued in separate counts on theories of negligence and willfulness for personal injuries resulting from being hit by a trolley car. While recognizing that the two counts based on the same acts were theoretically inconsistent, the St. Louis Court of Appeals allowed submission on both counts, stating that the inconsistency was not in the act but in its quality and thus the evidence would justify a verdict on either count.<sup>63</sup>

As stated previously, one line of cases is not concerned with inconsistencies at all. In *Pigg v. Bridges*,<sup>64</sup> the second example in the introduction, the defendant argued that the plaintiff was contributorily negligent either because it was so dark that he could not see beyond the doorway and should not have entered, or because it was light enough for him to see the stairway. The defendant submitted his instructions in the conjunctive which the Missouri Supreme Court held to be prejudicial error since it required the jury to find two facts which could not coexist.<sup>65</sup> In dictum, however, the court stated that the defendant would have been entitled to submit both theories of negligence *disjunctively*.<sup>66</sup> Thus, even though being light enough to see and being too dark to see were factually inconsistent, the supreme court in effect suggested that such an inconsistency would not prevent submission on both theories.

It is difficult to sum up the Missouri position. Whether courts look to factual or theoretical inconsistencies, strong arguments can be made for allowing both submissions when an inconsistency is found.<sup>67</sup> This is true despite several justifications for not allowing such submissions. One justification for not allowing inconsistent submissions is the likelihood that the jury will be confused by the inconsistency.<sup>68</sup> Such confusion could be

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63. *Id.* at 277-78, 88 S.W. at 149. There is an apparent conflict between these cases, but they can be distinguished. In *Ervin*, the plaintiff was allowed to *recover* under both theories at the trial level and not simply to submit both and see which theory was supported by the facts found by the jury. *Waechter* allowed the plaintiff to *submit* both theories but *recover* under only one. Thus, while the *Ervin* court's language dealt with the submission of inconsistent theories, its opinion could be interpreted as holding only that a party cannot submit *and* recover on inconsistent theories. This would not conflict with the *Waechter* holding that a party can submit verdict directors based on willfulness and negligence and let the jury determine where the truth lies.

64. 352 S.W.2d 28 (Mo. En Banc 1961).

65. *Id.* at 31.

66. *Id.* This statement was cited in *Sanders v. Carl Berry Oil Co.*, 359 S.W.2d 769, 772 (Mo. 1962), but only as dictum. It is interesting to note that, if the defendant had been allowed to submit both alleged acts of contributory negligence in *Pigg* as the court suggested he could have, he would have been able to rely on testimony offered by his opponent which contradicted his own. This would have been contrary to the evidentiary rule binding a party to his own testimony. See text accompanying notes 23-25 *supra*.

67. Of course, a party must have evidentiary support for each theory before he can submit an instruction based on it. See, e.g., *Johnson v. Bush*, 418 S.W.2d 601, 606 (Mo. App., Spr. 1967); *Madison v. Dodson*, 412 S.W.2d 552, 557 (Mo. App., Spr. 1967).

68. *Ervin v. Coleman*, 454 S.W.2d 289, 292 (Mo. App., Spr. 1970).

ameliorated, however, by requiring that inconsistent theories which are submitted be designated as such and be clearly stated.<sup>69</sup>

A second justification for not allowing inconsistent theories to be submitted is an opposition to allowing logical inconsistency. As stated in *State ex rel. Tunget v. Shain*,<sup>70</sup> such inconsistency "presents analogy to that fabled acrobatic feat of riding, at the same time, two horses going in opposite directions."<sup>71</sup> In many situations dealing with inconsistent submissions, a party does not want to ride two horses but rather wants to know which of two horses to ride. In the typical case, a party does not know what the jury will ultimately find as the true facts, and feels that he has a right to recover on either set of facts, but not on both. Forcing a party to choose between inconsistent theories before submission to the jury forces the submitting party to second-guess the finder of fact. If he guesses wrong, he loses even though he may have had a valid claim or defense based upon the theory he was forced to discard.

The majority of cases give no justification for disallowing the submission of inconsistent theories; instead, they rely solely on the weight of precedent. Reliance on such precedent is questionable since forcing an election between inconsistent theories may have been derived from earlier outdated ideas of pleading when the purpose of pleading was to produce a single issue.<sup>72</sup>

The federal courts have been unwilling to limit a party to an instruction based on one legal theory when there are other inconsistent theories available.<sup>73</sup> In *Western Machinery Co. v. Consolidated Uranium Mines, Inc.*,<sup>74</sup> the plaintiff filed suit to recover \$23,000 for labor and materials furnished. The United States Court of Appeals for the Tenth Circuit allowed the plaintiff to submit instructions based *both* on contract and *quantum meruit*, and stated:

Point is made of inconsistencies of the two legal theories with the suggestion that a choice should have been required. But we are not concerned with the nicety of pleaded legal theories. It is enough that both counts, considered separately or together, state a claim on which relief can be granted, and we are therefore interested to know whether the proof supports either or both theories, whether inconsistent or not.<sup>75</sup>

The Illinois courts have also adopted a liberal attitude toward submitting inconsistent theories based on contrary facts. For example, in

69. This is the practice of Illinois courts. See *McCormick v. Kopmann*, 23 Ill. App. 2d 189, 197, 161 N.E.2d 720, 726 (1959).

70. 340 Mo. 434, 101 S.W.2d 1 (1936).

71. *Id.* at 438, 101 S.W.2d at 2.

72. F. JAMES & G. HAZARD, *CIVIL PROCEDURE* 89 (2d ed. 1977).

73. See *Whitt v. E.I. DuPont De Nemours & Co.*, 461 F.2d 1152 (6th Cir. 1972); *Western Mach. Co. v. Consolidated Uranium Mines, Inc.*, 247 F.2d 685 (10th Cir. 1957); C. WRIGHT, *LAW OF FEDERAL COURTS* 322 (3d ed. 1973).

74. 247 F.2d 685 (10th Cir. 1957).

75. *Id.* at 686.

*McCormick v. Kopmann*,<sup>76</sup> the plaintiff's husband was killed in an automobile accident and there was evidence that he was intoxicated at the time. In one count, the plaintiff sued one defendant for negligently driving a truck into the decedent's automobile. In a separate count, the plaintiff sued another defendant for negligently providing the decedent with alcohol. These two counts were inconsistent because the latter assumed the plaintiff's decedent was drunk and the former assumed he was not. The court allowed the submission on both counts and stated:

Plaintiff pleaded alternative counts because she was uncertain as to what the true facts were. . . . [S]he was entitled to have all the evidence submitted to the trier of fact, and to have the jury decide where the truth lay. . . . The provisions of the Civil Practice Act authorizing alternative pleading [and patterned after Rule 8(e)(2) of the Federal Rules of Civil Procedure], necessarily contemplate that the pleader adduce proof in support of both sets of allegations or legal theories, leaving to the jury the determination of the facts.<sup>77</sup>

#### IV. CONCLUSION

Inconsistent pleadings are presently allowed in Missouri, if worded in the alternative. It would also seem that Rule 55.10 permits the pleading of inconsistent defenses, and good arguments can be made that it should. The case law, however, is unclear.

Missouri's position regarding the submission of instructions based on inconsistent theories is likewise unclear. The general rule is that such submissions are not allowed, but Missouri case law is in conflict regarding this rule. Several cases disallow instructions only if factual inconsistencies are present, while other cases find instructions inconsistent on the basis of theoretical inconsistencies without considering the facts.

Regardless of the proper test, Missouri's concern with inconsistent instructions seems misplaced. No strong justifications have been made for not allowing both instructions to be submitted when they are found to be inconsistent. Furthermore, such a practice is often unfair to a party who does not know what facts will be found by the jury. Through the operation of such rules a party is faced with the possibility of choosing a theory that may subsequently be determined not to be supported by the facts. Justice and fairness would more often be served by allowing parties to go to the jury on both theories and letting the jury determine where the truth lies.

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76. 23 Ill. App. 2d 189, 161 N.E.2d 720 (1959).

77. *Id.* at 205, 161 N.E.2d at 730. This language is cited in *Downs v. Exchange Nat'l Bank*, 24 Ill. App. 2d 24, 29, 163 N.E.2d 858, 861 (1959), which dealt with two inconsistent claims against one defendant. *Downs* is discussed in note 50 *supra*.