IN THE SUPREME COURT OF FLORIDA.

CLAUDE E. GAYNON and MAGGIE M. GAYNON, as Co-Partners trading and doing business as GAYNON IRON WORKS,

Appellants,

-vs-

H. A. STATUM,

Appellee.

BRIEF FOR APPELLEE.

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CLERK SUPREME COURT

John E. Teate,

George C. Bedell,

Counsel for Appellee.

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IN THE SUPREME COURT OF FLORIDA.

CLAUDE E. GAYNON and MAGGIE M.
GAYNON, as Co-Partners trading
and doing business as GAYNON
IRON WORKS, Appellants,

-vs-

H. A. STATUM, Appellee.

B R I E F F O R A P P E L L E E.

Errors and Omissions in Appellants' History of the Case.

By the first count of the original declaration, the plaintiff Statum asserted claims for bodily injuries sustained by him by the negligence of the defendant, damage to his automobile, loss of services, companionship and consortship, and expenses incurred by him by reason of bodily injuries sustained by his wife in consequence of the said negligence of defendant.

By the second count of said declaration the wife, Edna Statum, joined by plaintiff husband, claimed damages for bodily injuries sustained by her by reason of the said negligence of defendant.

Defendant demurred to the said declaration "and to each count thereof, severally, and for substantial matters of law to be argued, states the following, severally: * * * 7. Said count is duplicitous." (R. I-3 - 8)

On July 18, 1941, it was by the Court ordered and adjudged: "1. Said demurrer is sustained upon the ground that the said declaration is duplicitous." (R. I-8)

On July 28, 1941, plaintiff H. A. Statum filed an amended declaration in a single count in his own name alone against Claude Gaynon and Maggie Gaynon as co-partners etc. eliminating all claims on account of injuries to his wife, Edna Statum. (R.I-9)

Appropriate orders were entered dismissing the cause as to plaintiff Edna Statum, amending the pleadings with respect to parties defendant, overruling demurrer to the declaration, and denying motion for compulsory amendment. (R. I-12, 13, and 14)

To this amended declaration three pleas were filed:
1. Not guilty. 2. Traversing specific act of negligence.
3. That the automobile of plaintiff was insured with a named company, which by payment to plaintiff of $447.29 became subrogated to his claim for damages to his automobile to the extent of said sum. (R. I-14) Issue was joined on these pleas December 12, 1941. (R. I-15)

By order entered December 29, 1941, the cause was set for trial on March 16, 1942, and on said day defendant tendered additional pleas to the filing of which objection was made. (R. I-16, 36, 40)

The first of those pleas purports to contain the record of a suit instituted in the Civil Court of Record for Duval County,

by Edna Statum, joined by H. A. Statum, her husband, and H. A. Statum, plaintiffs, July 24, 1941, six days after the entry of the order adjudging the original declaration in the Circuit Court case duplicitous. (R. I-17, 18) The declaration in this Civil Court case appears to have been in two counts: 1. Claiming damages for personal injuries sustained by the wife, plaintiff, in consequence of the negligence of defendants. 2. A second count by H. A. Statum claiming loss of services, companionship and consortship, and expenditures by him made in and about endeavoring to have his said wife cured of her said injuries. (R. I-19)

To this declaration the defendants, appellants here, on December 8, 1941, filed two pleas: 1. Not guilty, and 2. Traversing specific act of negligence alleged. (R. I-24) Joinder of issue on these pleas was filed December 12, 1941. (R. I-25)

On March 11, 1942, in this Civil Court case said defendants moved for leave to file and tendered an additional plea to the second count of the declaration as amended, in which plea they alleged the institution on May 21, 1941, of the Circuit Court suit (now before this Court on appeal) setting forth in full the first count of the amended declaration in said Circuit Court suit, and alleging said Circuit Court suit to be pending. This plea concludes "Wherefore, defendants say that said H. A. Statum ought not to be allowed to maintain this action as set forth in the second count of the amended declaration herein, and that the

second count of the amended declaration herein and this cause as to all matters set forth in said second count ought to be abated or dismissed." (R. I-25, 30)

On the following day, March 12, 1942, said motion and plea "came on for hearing before the Court" and it was upon consideration "ordered that said motion be and it is hereby denied upon the ground that said plea constitutes no defense to said count." (R. I-31) It is alleged in the first of the additional pleas tendered in this present Circuit Court suit that on the following day, March 13, 1942, trial was had, resulting March 14, 1942, in a verdict and judgment for plaintiff Edna Statum in the sum of $1,300.00, and H. A. Statum in the sum of $200.00. Said plea alleges said judgment to be in full force and effect and asserts the said judgment in favor of plaintiff H. A. Statum to be a bar to this present Circuit Court suit now on appeal. (R. I-32)

The second additional plea tendered in said Circuit Court suit March 16, 1942, was substantially similar. (R. I-32)

The third and fourth of said additional pleas are now immaterial as stated in appellants' brief, page 3.

Analysis of the Evidence. *

The analysis of the evidence submitted by Appellant will admit of amplification. The collision occurred about 2:30 A. M. and "it was a pretty moon light night." (R. II-209) "It was real light." (R. I-91)

The plaintiff's car was a new Ford. (R. I-164, II-211)

The entire length of the truck and trailer was thirty-nine feet over all. (R. I-134) The distance from the outer edge of one front fender to the outer edge of the other front fender on the tractor was six feet. (R. I-131, 132) The gas tank at the rear of the tractor extended out beyond the running board five and three-quarter inches. (R. I-133, II-276)

The gas tank was itself two feet in height, thirty-two inches long and two feet wide. It was twelve inches from the ground and the dent in the tank damaged was approximately eighteen inches from the ground. The distance from the hub cap to the ground was seventeen and one-half inches. (R. I-133)

The trailer was eight feet in width and extended beyond the gas tank on the tractor six inches and beyond the dual tires four and one-quarter inches. (R. I-134) The height of the trailer in the front from the ground to the lower rail was forty-seven inches. (R. I-132)

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* Note: Three toys were used by witnesses as models to illustrate their testimony. Plaintiff's car was represented by one colored red, the ice truck by one colored blue, and the tractor and trailer by a toy truck.

The entire weight of the tractor and trailer, which was loaded with dump car bodies, was approximately thirty-four thousand pounds. (R. II-275)

It is true that the ice truck and trailer collided and the first point of impact appears to have been the projecting gas tank at the rear end of the tractor, but on the morning after the wreck the axle of the trailer was back further on the left side than it was on the right an inch and five-sixteenths, the wheel was pushed back, and repairs made. (R. II-340)

The left side of the trailer was scraped from just before you get to the middle of the trailer back to the end. (R. II-341)

It is true that the plaintiff was injured and it was necessary to amputate his right leg between the knee and hip. It is also true that for many years prior to the accident plaintiff had a stiffened right knee, but that an artificial leg will serve substantially as well as the leg which it was necessary to amputate was by no means established. It is the testimony of one who had known plaintiff for many years, plowing many a day with him on the hillside land, and who had done a lot of carpenter work with him, crawling around on roofs, that he had never known of anything to keep him from doing any work; that he had seen him climbing up ladders and on roofs. (R. II-337, 338) The injury occurred May 11, 1941. (R. I-62) The leg was taken off six days after the accident. (R. I-53) Plaintiff was in the hospital five weeks (R. I-52) and since he went home there have been three pieces of shattered bone worked out of it. "The doctor taken

another one out, and it is still festered up and runs yet." "It will get real free and stay for, maybe, two or three days; and then will come up sort of in an abscess, and then bust out and runs and bleeds." It was not healed when last looked at but was still running and hurts all the time. (R. I-58) This more than ten months after the accident. (The trial commenced March 16, 1942. (R. I-47) Ordinarily you consider healing of a wound about ten to twelve days assuming you clear out all that entire amount of infection. (R. I-101)

1. Analysis of the Evidence in Behalf of Plaintiff.

The driver of the car, E. H. Rogers, Mr. Statum, who sat beside him on the front seat, and Mrs. Statum, who occupied the rear seat with a young child, testified as to the circumstances of the accident. Mrs. Statum says they were following a big trailer-truck about a mile or a mile and a half. She noticed the truck one time "sort of sway over the black line in the road. * * * It was about fifteen or twenty minutes before it met into a car and sideswiped it and knocked that other car around into us." The car that was sideswiped was on its side of the road and the truck and trailer was over across the black line. She was looking down the road and could see the car coming. The truck and trailer was over across the black line about two feet. The panel truck was coming straight. She could see the lights of it good, but would not say that she could see all of the truck until it got right up about even with the other and sideswiped it. At the request of counsel for defendant she demonstrated the position with models and said that

she saw the panel truck when the panel truck and big truck collided. The panel body hit right about between the cab and the body part of it and it was the front wheel of the panel body that hit. She saw them come together, It tore the truck's left front wheel down and tore and throwed it around into us. The Statum car was on the right hand side of the road. The bones in her left leg were cracked and her left arm cracked and mashed. She did not leave the car but sat there in the car and held up her husband until help came. She could see the skid marks caused on the east side of the road by the ice truck when it went down. (R. II-208, 209, 210, 211, 212, 214, 215) The skid marks were right in around behind the back end of the trailer truck and right in around towards the Statum car. (R. II-216)

Mr. Statum saw the light of a truck coming and just then this trailer truck began to pull over to its left across the center line about two feet and a half and sideswiped the ice truck, throwing it right in behind the trailer truck and right across into collision with the Statum car. (R. I-50) The ice truck was on its right hand side of the road coming straight. There was no other car coming in either direction. The trailer truck was traveling about forty miles, just a little bit faster than the Statum car, which was at least fifty or sixty feet behind the trailer truck. Mr. Statum was knocked unconscious and the next thing he knew he heard the ambulance and was taken out of the car and placed in it. (R. I-50, 51 and 52)

The driver of the car, Edward Herschel Rogers, eighteen years old, a relative of the Statums, says they were trailing a big trailer truck about a mile and a half and saw a car coming out of Jacksonville meeting them. It was on its side of the road and the trailer truck got over on the line about two and a half or three feet, and they had a collision and the panel body came around and hit the Statum car headon. He could see the black line down the center of the road and was about fifty or sixty feet behind the trailer. There were no other cars or vehicles approaching and the ice truck hit right along the bed (body) the best he could tell, and the ice truck slid on around the trailer truck and cut across the line and into him. He got out of the car, saw the marks and came around and opened the door on his uncle's side, where he found his uncle and aunt both hurt. He then went down to where the cars came together and found a skid mark on the pavement on the panel truck's side of the center line about two and a half or three feet. It was a clear moonlight night. (R. I-162, 163, 164, 165, 166 and 167)

Two road patrolmen, L. E. Stover and K. H. Haddock, both experienced men, reached the scene of the accident within an hour or less of its happening, and report the semi-trailer was sideswiped on its left side just behind its cab at the gas tank. The car going north struck on its left front fender, running board and hub cap, the V-8 Sedan, going south, was struck almost headon, and the point of impact on the panel body with the V-8 was on its right side in front of the radiator. (R. I-105, 106) The semi-trailer stopped at about two hundred feet south

of the point of impact and they found marks on the east side of the center of the highway between two and three feet east of the center. (R. I-107) The left front wheel of the ice truck was broken down. The tire was flat and the rim was damaged. (R. I-108) They found the panel body Ford truck loaded with ice. It was in contact with the Ford Sedan, the truck headed northwest across the pavement and the V-8 Sedan was headed more or less southeast. There was a large semi-trailer parked just off the edge of the pavement several hundred feet south and headed south. In the Ford Sedan we found a lady and two men and laying out on the side two negroes and one was pinned in the truck by some ice. (R. I-147) The only skid mark observed started about two and a half feet east of the center line. The truck and trailer was damaged on the left side, the gas tank was damaged and a scrape down the side of the body, and the tires scraped. The gas tank appeared to have been hit from the front. (R. I-147, 148, 149 and 150) Both these witnesses demonstrated the situation of the cars with minatures. (R. I-106 and 151)

The officers found marks on the pavement two or three feet East of the center of the highway and extending up to where the ice truck stopped, 129 feet from where they started to where they ended. (R. I-107, 125) There were no scrape marks at all on the other side of the line. (R. I-149) The skid marks started over here and followed on up to the left front wheel of the ice truck. (R. I-152)

Estimates of speed at which the sedan, the semi-trailer, and the ice truck were traveling and estimates of the relative

distance between the sedan and semi-trailer immediately preceding the accident are in testimony. All appear to be estimates or approximations made after the event. There is no testimony that those speeds and distances were maintained after the first impact of the ice truck with the semi-trailer, nor is there testimony that would afford a basis for any accurate determination of the relative effect of the counteracting forces exerted by the ice truck containing 1500 lbs. of ice with the semi-trailer having a total weight of approximately 34,000 lbs. There is no testimony that the power had been shut off from either of them. That the skid marks are marks of the ice truck is not in dispute; that they begin on the East of the center of the road is not in dispute.

The testimony of the road patrolmen is attempted to be discounted by reference to a preliminary report, in which, according to counsel, they placed "the entire blame for the collision on the negro." But the substantive facts entered in the report are testified to by the two officers and corroborate the testimony of the occupants of the Statum car and of the negro, Cleveland Crane.

Cleveland Crane, a negro twenty-eight years old and all his life a resident of Callahan, Florida, was the driver of the ice truck and had come to Jacksonville to get a load of ice to

be sold by him the next day. (R. I-179) He says in going out toward Callahan with his load of ice he met the big truck which was across the left side of his line, the middle of the road, maybe about two or three feet. He ran right along and hit the side of the truck. He does not know what was on the side but something on the side of the big truck hit. "And our truck went right aside of it until it got to the back end; then it cut across the road, on the other side of the road." It hit about the left front wheel some place on the wheel, he doesn't know. It seemed to be the wheel but he doesn't know what it was. He was just pulled right on across the road. He was unable to steer it. (R. I-180) It seemed like the wheel broke or something, he doesn't know what broke, but knows the tire went down when it hit. He skidded along side of the truck and around the back of it and run right into the other car head into it. Both cars were going straight at the time of the sideswipe. (R. I-181)

The two thirteen year old negro boys, Randolph Brooks and Sam Madison testified to the effect that the truck in which they were riding was on the right hand side of the line and that just before the collision took place the big truck and trailer came across the line. "The big truck was just swaying across the line." (Randolph Brooks, 195, 196, 197) "We saw a big truck coming; * * * we was a pretty good ways from it, and it came across the road about two feet or two feet and a half, and we went right--we was going straight, and it was on our side, and it sideswiped our truck, it hit something on the side, and it went right along the side; and when we passed, there was another car coming, and it went right into that car." (Sam Madison, R. II-204)

It appears that witness J. H. Underwood, Jr., was paid by a Mr. Huffman $15.00 for some time he took in trying to get some information, for trying to find out the location of some negroes that telephoned from his service station on the night of the accident. (R. II-220, 221) And the Brooks boy, "to keep him from bothering" him told witness Underwood that he, Randolph Brooks, was asleep at the time of the accident. (R. I-200)

Both officers examined the dent in the gas tank and express the opinion that it was caused by a sideswipe, two cars meeting each other straight. "It was caused from a sideswipe like two trains passing each other and they were close together" both of them going perfectly straight at the time. (R. I-121, 122, 148, 149 and 150)

Mr. E. E. Hinson, a man of great experience in automobile repair work, including tanks and fenders and bodies and metals of all kinds says, "I would say it was struck from directly in front." "Well, I don't see any wrinkles on the front side but the wrinkles are on the back side." "Well, it generally wrinkles up back behind the lick." (R. I-136)

Mr. E. P. Koester in charge of the frame straightening department of the Consolidated Automotive Company, experienced in straightening metal, including metal tanks and in bending iron and steel, and for twenty-five years engaged in that kind of work, expressed the opinion that the tank was hit on the front side and it appears that it was sideswiped; that the dent in the tank looks like the bumper slid off of it and when it hit it rolled the metal

back on the outside edge of the tank. There was a concave there due to the front going back. It looks like the bumper hit on the front side of the tank and went by. (R. I-139, 140) He knows the tank has to have a blow on the front side to dent it in like that, whether the sill/or (axle?) the bumper. It appears that the two trucks were both going straight at the time. The bumper, he thinks, hit right along about midway there and when the metal went up it had to buckle, it had to pull. On the older cars a great many of them, especially Fords, the bumper brackets sag and some bumpers on some Fords are lower than others. The spring may sag an inch or a half-inch and the height of the bumper would not measure the same. (R. I-141, 142)

2. Analysis of Testimony Respecting Defendant's Theory.

John M. Haggerty The statement of this witness to the officers as set forth in their report, Exhibit "H", indicates a sideswipe of his trailer rather than that the truck turned into the tractor.

And in identifying the photograph, Exhibit "E", (Defendant's Exhibit 11 for identification) witness said he was present when the picture was taken on a Monday following the accident, (R. II-225) and that he definitely identified the place as the place where the accident happened by taking his hub cap on the rear of his tractor wheels and placing it about fifteen yards off the pavement. (R. II-226) But on cross-examination it appears that he testified in Mrs. Statum's case in the Civil Court

of Record that he identified the place of the accident by a lot of glass on the road. (R. II-226, 227, 231) The picture shows no glass. (R. II-231)

He says that the first thing that the truck hit was the tank. "It passed the front of my tractor and connected with my saddle tank." (R. II-229) "Q Mr. Haggerty, what direction was this negro's ice truck coming when the sideswipe took place? A It was coming due north, sir." (R. II-232) "A It came due north, sir, but I wouldn't be absolutely positive of it, sir, where it hit me at, because I didn't see it. * * * Sir, the ice truck sideswiped me and continued on." (R. II-233)

<u>Fay Meadows:</u> The testimony of Fay Meadows is not materially inconsistent with the testimony of plaintiff's witnesses. The Statum car passed him at the junction of the new and old Kings Roads. Just a few seconds passed from the time he last saw it until it was wrecked. He looked over at the old Kings Road where the two cars drove head lights right up together to see if that was a wreck and looked right back. He noticed the truck and trailer ahead. He followed at a distance of about three or four city blocks and the wheels of the trailer were right on the edge of the pavement. The Statum car was on its side of the pavement. He looked off for an instant and when he looked back the wreck had occurred. (R. II-251, 252, 253) He would say it

was around a mile and a half from the old Kings Road where he looked over, down to where this accident happened. (R. II-269) On cross-examination, he says: "Q Now, you were way up the road, four blocks, four city blocks, as you call it, and you looked over to this other what you thought was a wreck, and just before you looked over at this other wreck, you saw the wheels of the truck and trailer that figured in this accident, and they were way over on the right hand side of the road? A No, sir, I never seen the wheels; I seen the clearance lights on the edge of his body. Q Well, isn't that even with the edge of the wheels, sir? A Well, it is very near it, I would imagine. I didn't look at the truck, but I figure it is very near the edge of the wheel." (R. II-270) He got out, carrying his fire extinguisher, and seeing they weren't going to catch fire, went back and put flares out. (R. II-253) He makes repeated reference to the flares and says that one of them was one hundred feet behind their truck and one at the end of the trailer and one one hundred feet in front of the tractor. (R. II-254) Neither of the officers, (R. I-110, 150) nor Mrs. Statum, (R. II-218) nor Cleveland Crane, (R. I-183) saw them. We are aware of no reference to them by any other witness.

J. L. McIntosh: The testimony of Mr. McIntosh comes to this: There were marks on the east side of the road and marks on the west side of the road from which the witness made his own deductions. "When I got there, this truck was on the edge of the road, on the shoulder of the road; and this red Ford, which is the Tennessee car, was about in the angle like this when I got there and this blue Ford, the panel truck, which was an ice truck, was about in that shape, like that, (placing models). (R. I-91) "The marks that I seen on the road was on the west side of the road; and there was some on the east side, too, where the truck hit this other truck. The signs on the road, it looked like where it hit the truck, was on the west side of the road; and it bounced off, it looked like, and that is when it come on into this Tennessee car according to the signs on the road. * * * And where the car bounced back over the road, over the mark in the middle of the road, it looked like a tire had went down, or had blowed out, from the hit on the truck; and that is the reason, I figure, that it went into the Tennessee car." (R. I-92)

But beyond the existence of the marks, the testimony of this witness is inference of the witness from what he may have observed and as to which he testified, matters upon which the jury was bound to make its own finding upon a consideration of all of the testimony in the case.

The photographs and exhibits, of course, for the most part speak for themselves. The photograph, Exhibit "E", is very

definitely not a photograph of the place involved in the scene of the collision, as appears from the foregoing statement of Mr. Haggerty's testimony. And Herschel Rogers testified the sides of the road don't look the same and it shows no skids. (R. I-170, 171) But those photographs and physical objects, all indicating conditions following the accident, are to be considered in the light of the circumstances of the happening as shown by the testimony of the witnesses. For example: the wheel in evidence may be compared with the dent in the tank along with the testimony of Cleveland Crane that he thinks the left front wheel hit the other truck, (R. I-184) but it must be considered in connection with his preceding testimony that the truck was across the line "and we just ran right along and hit the side of that. It hit the side of the truck. I don't know what was on the side, but something on the side of it just hit * * * And our truck went right aside of it until it got to the back end; then it cut across the road, on the other side of the road." (R. I-180) "Q You don't know whether it was the fender, bumper, or wheel, do you? A No, sir, it seemed to be the wheel; I don't know what it was. * * * I was trying to hold it. * * * I was just pulled right on across the road. * * * " (R. I-180) " * * * I know the tire went down when it hit. Q And you say that you skidded along the side of the truck? A Yes, sir. Q And around the back of it? A Yes, sir. * * * both cars were going straight." (R. I-181)

It is true that defendant called expert witnesses who testified to the effect that the wheel had to be cut to the left in order for the bumper to miss the tank. (John E. Sikes, R. II-

284, 303) (W. G. Brennan, R. II-288) (A. W. Stone, R. II-295, 314) (K. A. Stowe, R. II-325)

On cross examination it appears:

John E. Sikes: that a front blow would cause a concave on the front side of the tank, and that there is a concave behind the corner (R. II-305), that bumper steel will bend (R. II-307), that in the picture the bumper bracket is bent down slightly (R. II-308), that the hub cap passing the tank could have scraped it (R. II-309), that if the end of the axle struck the tank, it could have bent it; or if the bumper or bumper bracket struck it, it could have bent it, if it hit it hard enough; or if the fender struck it, it could have bent it. (R. II-309) The bumper is concave on the front and if that had scraped along the tank, it would not have made a scrape mark three and one half inches. (R. II-334)

W. G. Brennan: Bumpers are made out of spring steel. Once in a while they will bend. Most of the time they will break. (R. II-290) After exhibiting photograph to witness: "Well, I will probably admit that one is bent." (R. II-290)

A. W. Stone: "Now, if the weight that was required to fold that wheel and let it pass by this tank was great enough to turn it around, yes, it would do so. But, now, whether that required amount of weight would be there, I cannot answer your question." (R. II-318) "This spot here -- the hub would have hit it, but not down here (indicating). * * * Well, as a matter

of fact, part of the car could have hit it, sir, in passing by. * * * This here running board could have done that. It is a little lower, I believe, than the hub cap. * * * Of course we all know that the hub cap, itself, could not have bent it, but the head of the sill (axle?) could have. The hub cap is simply a little piece of tin." (R. II-319, 320) Referring to going flat of the bursted tire, "Not before it hit; * * * I don't think you have ever seen one burst and go down in a split second. They usually require a minute or so." (R. II-320, 321) And on the former trial in the Civil Court of Record, witness thinks he said, or believes he said: "'Q You don't know, then, whether the bumper hit it or whether the fender hit it, or whether the hub cap hit it first, do you?'" "'A I say that the bumper hit it first, if it was going straight.'" The witness finds two folds (in the rim) on the wheel shown in Defendants' Exhibit "C". (R. II-322, 323)

K. A. Stowe, asked, "if there was a straight railroad track, head on, that is a parallel railroad track collision (indicating), between the front end of that, and the front end of that Ford: would it not make a concave around behind that corner, sir?" Witness answered, "Yes, it would bend in. I believe it would bend in. The metal has to go some place * * * Regardless of how it hits, it takes more to bend metal out, than it does in. It goes in easier, regardless of how it is hit. In my opinion, any place in that corner, would have bent it like that." (R. II-329)

Referring to the straight lines along the side of the tank: "I believe that part of the hub on the Ford made that.

That is my opinion. It is about the same size." If the rim looked immediately after the accident as indicated on the photograph, it is quite possible that the end of that axle would knock (an indicated hole) in the tank. (R. II-330) If the rim had been cut at an angle and hooked on the front of that corner, the truck and trailer, at a speed of about forty-five miles an hour, it would naturally jerk that wheel around. (R. II-331, 332)

Redirect: Referring to the fold on the left front wheel shown in Defendants' "C", "Well, it was caused by it going in at that angle and also passing the tank; it would have bent it right straight back, if it got by it." (R. II-332) "The axle could have bent and helped it go by. * * * Oh,as soon as it hit, it would pull it like that and shove that bend in it." (R. II-333)

In response to questions by the Court: "Isn't it a fact that after an impact between this panel body truck and the other truck, the direction that either the big truck or the panel body truck would take after the impact would depend, in addition to the angle at which the impact took place, on the weight and the speed of the truck, and on the weight and the speed of the little panel body? A Yes, sir, a whole lot would depend on that, I would think. The Court: The momentum and the weight and all those things would enter into the direction that the big truck and the little truck would have taken? A I think so, too. The Court: That is correct, isn't it? A yes, sir." (R. II-333)

We do not find in the Road Patrol Report, Exhibit "H", anything that would discredit the testimony of the driver of the Statum car, Herschel Rogers, the officers, or Cleveland Crane. It is true the report recorded Herschel Rogers as having stated that all of a sudden a truck or car going North sideswiped the trailer in front of him and then crashed head on into his car, but we find in the statement no occasion for the italicized statement (in the Brief, page 8) "and not vice versa". Patrolman Stover says Crane and Rogers were both in great pain and he would say a semi-conscious condition. (R. I-126) Patrolman Haddock says "The driver of the Tennessee car, and the negro, were both suffering from head injuries; and that is the reason we questioned them again a day or so later. * * * They seemed to be rather dazed, and we wanted to improve our report a little." (R. I-161)

QUESTIONS INVOLVED.

First Question.

The primary question involved is this: Defendant, having demurred to the original declaration "and to each count thereof severally," and for substantial matters of law to be argued, stated the following: "* * * 7. Said count is duplicitous"; the declaration consisting of two counts, the first by plaintiff husband seeking recovery for injuries sustained in his own body and limbs, damage done his automobile, and loss of services, companionship and consortship and expenses incurred in consequence of personal injuries to his wife, and a second count by the wife, Edna Statum, joined by her husband, seeking recovery for injuries sustained by her in her own person, and the Court having sustained the said demurrer upon the ground that the said declaration was duplicitous, and the plaintiff having amended his declaration to meet the demurrer by eliminating all reference to the wife, may the defendant thereafter contend that in so doing plaintiff split a single cause of action.

The Circuit Court declined leave to file proposed pleas making such contention. (R. I-41)

Subordinate to this is the question whether the defendant when later sued in the Civil Court of Record for damages arising out of injuries to the wife so eliminated from the first suit by amendment, having refrained from filing a plea of former action pending until more than three months after filing pleas

to the merits and issue joined thereon, (R. I-24, 25) and the Civil Court of Record having denied the application to file said plea of former action pending upon the ground that said plea constitutes no defense to said count, and defendant having failed to appeal from the judgment for plaintiff in that Court and cause, may defendant be heard to contend that the matters asserted in the said original declaration or the several counts thereof constituted a single cause of action.

The Circuit Court declined leave to file proposed pleas making such contention. (R. I-41)

Second Question.

This question as stated ignores the testimony of the only eye witnesses, whose testimony is in no wise impeached or discredited.

Third Question.

This question completely ignores the testimony of the above mentioned eye witnesses, which, if true, shows the sole proximate cause of the injury to have been the negligent operation of defendant's truck and trailer.

Fourth Question.

The fourth question as propounded by appellant completely ignores the fact (undisputed) that the plaintiff H. A. Statum was at the time of the trial suffering from an unhealed wound that more than ten months after the accident was still running and painful. It also ignores the fact (undisputed) that the injury to his right wrist was at the time of the trial still disabling.

ARGUMENT.

First Question.

"Defendant may waive the enforcement of the rule against splitting causes of action, and such a waiver will be implied from a failure to object when the rule is not followed."

1 C. J. S., page 1312.

Thus,

"A defendant waives his right to object to splitting the cause of action by failure to demur or plead in the second action the pendency of the first, or by failure to appeal from an adverse judgment in the second action."

1 C. J. S., 1313, note 52.

"Judgment for property damage held not to bar plaintiff's separate recovery for injuries in the same accident, where action for injuries was first commenced, and defendant failed to alleged nonconsent to splitting cause of action."

1 C. J. S., 1313, note 52.

As we have seen, the defendant in the Civil Court of Record case filed pleas of not guilty and denying negligence on December 8, 1941, the declaration in that case having been filed August 4, 1941. (R. I-19, 24) Joinder of issue on those pleas was filed in that case December 12, 1941. (R. I-25) Not until March 11, 1942, did the defendants file their proposed additional plea with motion for leave to file same. (R. I-25)

Under Section 4319, Compiled General Laws of 1927, pleas in abatement might have been pleaded with pleas in bar or to the merits, but where the Statute is not availed of the common law rule that a plea to the

merits waives all matter in abatement still obtained and obtains, (Stewart v. Bennett, 1 Fla. 437, 441) and the Judge of the Civil Court of Record was obviously right in denying the motion to file this proposed plea "upon the ground that said plea constitutes no defense to said count." (R. I-31)

In Stapp v. Andrews (Tenn.), 113 S. W. (2d) 749, decided March 5, 1938, the Court said:

> "The rule against splitting a cause of action is for the benefit of the defendant to protect him against multiplicity of suits, and may be waived by him; and such waiver will be presumed unless timely and proper objection is made. 1 Corpus Juris Secumdum, Actions, p. 1312; Globe & Rutgers Fire Ins. Co. v. Cleveland, 162 Tenn. 83, 34 S. W. 2d 1059; Matheny v. Preston Hotel Co., 140 Tenn. 41, 203 S. W. 327; Dews v. Eastham, 13 Tenn. 296, 5 Yerg. 297.
>
> "A list of cases illustrating such waiver will be found in the note to the Corpus Juris text referred to above, and the annotation to Georgia Ry. & Power Co. v. Endsley, 167 Ga. 439, 145 S. E. 851, 62 A. L. R. 256. The principle deduced from these decisions is that where the cause of action is split and the defendant submits to a trial upon the merits in the several cases, he will be deemed to have waived the rule against splitting a cause of action. We have been cited to no authority taking a contrary position. In this case, instead of invoking the rule, as it was his privilege to do, the defendant acquiesced in the hearing of both cases at the same time upon the merits. We can conceive of no more effective manner of waiving the rule.
>
> "In Georgia Ry. & Power Co. v. Endsley, supra, and the annotation following the opinion referred to above, it will be noted that in numerous jurisdictions it is held that where an account has been split into several parcels and simultaneous suits instituted on each against the defendant, with his knowledge, by failing to object to either of the actions on the ground 'of another action pending' until after the plaintiff recovers judgment in one of the suits, he will be presumed to have consented to the splitting of the cause of action and precluded from pleading the judgment so obtained in bar of the other suits.

"We find it unnecessary in this case to extend the waiver doctrine as far as the courts have done in the decisions referred to above. But from the modern decisions it appears that courts are reluctant to give effect to rules of procedure which seem harsh and unfair, and which prevent a litigant from having his claim adjudicated upon its merits. Where a defendant has the opportunity to object to the splitting of the cause of action and does not do so, he should be held to have waived same."

Stapp v. Andrews (Tenn.),
113 S. W. (2d) 749.

But in this case not only did defendant waive the splitting, if a splitting there was, but by his demurrer in the Circuit Court case and the order sustaining the same, he induced it.

By his demurrer filed July 7, 1941, "to the declaration herein and to each count thereof severally" he submits for substantial matters of law to be argued, among others, the following: "7. Said count is duplicitous." By order of the Court filed July 18, 1941, "said demurrer is sustained upon the ground that the said declaration is duplicitous." (R. I-8)

It is but simple matter of good faith and fair dealing that

"a party cannot, either in the course of litigation or in dealings in pais, occupy inconsistent positions."

Lyle v. Hunter,
102 Fla. 973, 136 So. 633.

What we are invoking is

"the doctrine of estoppel against inconsistent positions in judicial proceedings, not the doctrine of res adjudicata."

Lee v. Fowler,
115 Fla. 429, 430, 155 So. 647.

"A party is estopped to make defense or objection inconsistent with position previously asserted by him, which position was successfully maintained."

Smith v. Urquhart,
129 Fla. 742, 176 So. 787.

Having by demurrer urged that the first count of the original declaration combining claims for bodily injuries to plaintiff in his own person, damage to his automobile, and loss of services and consortium and expenses incurred in consequence of personal injuries to his wife was duplicitous; defendant will not now be admitted to say that the claim made in the amended declaration for injuries to plaintiff in his own person and damage done his automobile is but part of a single cause of action embracing therewith loss of services and consortium and expenses incurred in consequence of bodily injuries sustained by the wife.

"It is self evident, that if the plaintiff is not authorized to join two or more causes of action, he cannot later be met with the defense that he split such causes of action:"

U. S. v. Pan American Petroleum Co.,
55 Fed. (2d) 755, 777.
(Certiorari denied, 287 U. S. 612,
77 Law Ed. 532.)

This makes it unnecessary to determine whether there was a splitting of the cause of action by the suit in Civil Court of Record. But there was none.

The law relating to the relative rights of husband and wife as against third persons and the law with respect to joinder of actions vary so in the several States as to make the decisions

of other Courts of little value in construing Section 4226, C. G. L. (2586 R. G. S.) which is a part of Chapter 1096, Acts of 1861, modeled upon Section 40 of the English Common Law Procedure Act of 1852.

In the brief for appellants, page 2, it is said: "The Court sustained the demurrer upon the authority of the decisions of this Court in Walker v. Smith, 119 Fla. 430, 161 So. 551, and Mansfield v. King, 142 Fla. 650," (195 So. 700.) In the first of those cases the declaration consisted of four counts, the first two grounded on injuries to the wife, and the third and fourth grounded on damages alleged to have been sustained by the husband for expense incident to the damage done his automobile in the collision described in the first and second counts. (119 Fla. 431) After quoting the Statute, Section 2586 R. G. S., 4226 C. G. L., the Court says:

> "Now as we construe this section it applies to causes of action for damages resulting from injuries done the wife. * * * The same statute which authorized actions to be joined also authorizes separate action in respect to claims within the purview of the statute to be consolidated. * * * We do not hold that the husband could not under the statute here discussed have added to the declaration counts covering claims in his own right resulting from injuries done his wife whether the amount of such damages claimed by him for such injuries was greater or less than the amount which he seeks to recover in his own right in this case. In this case the injury to the wife has no bearing whatever upon the damage claimed for injuries done to the automobile and, therefore, the third and fourth counts of the second amended declaration were properly eliminated on demurrer."
>
> Walker v. Smith,
> 119 Fla. 435, 436.

On the authority of that case, Mansfield v. King, 142 Fla. 650, 195 So. 700, was decided. There the plaintiff wife recovered upon a count for personal injuries sustained by her, and the husband, upon second count, for injuries to himself, to his automobile, as well as damages for loss of the society, companionship and services of his wife. Construing the decision in Walker v. Smith, 119 Fla. 430, 161 So. 551, the Court said:

> "In Walker v. Smith, 119 Fla. 430, 161 So. 551, the husband and wife were bringing an action for personal injuries to the wife, in which there was included two counts wherein the husband claimed $335.00 for damages to his automobile. The amount of damages asked by the husband for his property damage, not arising of course from the injuries done to the wife, was not enough to bring that part of the action within the jurisdiction of the circuit court of Dade County and for this reason the demurrer to the counts seeking recovery by the husband for damages to his property was sustained by the circuit court and upheld by this Court. Had the husband in the case only claimed damages to himself proximately resulting from the wife's injuries, the opinion indicates that the demurrer thereto would have availed nothing. It was the fact that the husband's claim was for property damage, that is, damages not resulting from the injuries sustained by the wife, that manifestly prompted this Court to sustain the circuit court's action in eliminating on demurrer the two counts embodying the husband's claim for damages to his property."
>
> Mansfield v. King,
> 142 Fla. 650, 652, 653.

If this construction of Walker v. Smith be sound, the claim of the husband for loss to himself proximately resulting from the wife's injuries is a separate and distinct cause of action from that accruing to himself by injuries sustained in his own person and property, and there was no splitting of the cause of action. As we have already noted, the section of the

Statute involved is substantially similar to Section 40 of the Common Law Procedure Act of 1852, adopted along with the principal provisions of that Act by the Practice Act, Chapter 1096, Laws of Florida, Acts of 1861. And in Brockbank v. The Whitehaven Junction Railway Co., 7 Hurlstone & Norman, 834, involving that Act, the plaintiff recovered notwithstanding a very similar plea to that now tendered. In the English case plaintiff sought recovery by reason of bodily injuries sustained by his wife, for expenses incurred in nursing her and for loss of her services in the carrying on of the business "as he otherwise might and would have done, etc."

A plea was interposed alleging that before this action a certain other action was brought in the same court by plaintiff and his wife against the defendant for bodily injuries sustained by the wife, in which action defendant pleaded not guilty, and upon a trial plaintiffs recovered a judgment and "that the matters of complaint against the defendants in the said action complained of and for which such judgment was so recovered as aforesaid were and are the same matters of complaint as in the declaration in this action mentioned and none other," etc. To this plea plaintiff replied on equitable grounds to the effect that after issue joined in the said action, the Court, at the instance of the plaintiffs in said action, required defendants to show cause why the declaration in the said action should not be amended and the plaintiff allowed to insert in the said declaration a count in respect of the causes of action in damages in the declaration in this present action, and that the defendants thereupon objected and the Court refused to make any order and thereupon a verdict

was found by the jury by consent of the plaintiffs and the defendants in the said action, and that before the finding of the verdict it was agreed between the parties that such consent should not be an admission on the part of defendants that the plaintiffs in said action or either of them had any right in law or in fact to any further action; nor an admission on the part of the plaintiffs that the plaintiffs in said action or either of them had not a right of action in law or in fact in respect of the negligence alleged in the present action or the consequences thereof. A demurrer was interposed to the replication. Counsel appeared in support of the replication, and was not called upon to argue, the Court (Pollock, C. B., Martin, B., and Channel, B.) saying there must be judgment for the plaintiff after Pollock, C. B., had pointed out that before the Common Law Procedure Act, 1852, Section 40,

> "the plaintiff might have brought, first, one action and then the other; and the Statute has not interfered with that right by making it imperative to join the causes of action, but has only permitted it to be done, giving to the Court or a Judge a discretionary power to consolidate separate actions"

and Baron Martin saying:

> "I think the plea is bad."

Brockbank v. The Whitehaven Junction Railway Co.,
7 Hurlstone & Norman, 834.

And we respectfully submit that the learned judges were right.

The two Tennessee cases relied on by defendants are not shown to have been based upon Statutes similar to the Florida

Statute, nor are they in point with respect to controlling circumstances. In Johnston v. Southern Railway Company, 155 Tenn. 639, 299 S. W. 785, 55 A. L. R. 932, plaintiff and his wife, while riding in an automobile, were struck by a moving engine belonging to defendant. Plaintiff instituted this suit to recover damages for injuries received by him. After a plea of not guilty was filed, plaintiff instituted a second suit for loss of his wife's services resulting from the same accident. It was the latter suit that was prosecuted to judgment and that afforded the basis for the plea of res judicata.

In Smith v. Cincinnati, etc. Railroad Co., 136 Tenn. 282, 189 S. W. 367 L. R. A. 1917 c. 543, plaintiff sued for personal injuries and for damages to certain personal property in an accident to a passenger coach in which he and his wife were traveling. Suits were commenced in the Federal Court to recover damages for injuries sustained by the wife, and also by plaintiff to recover for loss of services of the wife, injuries to himself and to his property. In response to motions made by the defendant in the Federal Court the plaintiff dismissed all of his suits there except for injuries to his wife and for the loss of her services. The nature of these motions is not disclosed. The defendant pleaded the former suit and recovery in the Federal Court as a bar to this action.

Subsequent to the decision in both of those cases the Supreme Court of Tennessee in Stapp v. Andrews, 113 S. W. (2d) 749, 751, makes this comment:

"Counsel for defendant in support of his contention cites our cases of Johnston v. Southern Ry. Co., 155 Tenn. 639, 299 S. W. 785, 55 A. L. R. 932, and Smith v. C., N. O. & T. P. Ry. Co., 136 Tenn. 282, 189 S. W. 367, L. R. A. 1917C, 543. In neither of those cases was the question of waiver involved. The first case is reported in 55 A. L. R. 932, and in the annotation following the opinion it is stated that the decision is out of line with the current of authority."

Stapp v. Andrews,
113 S. W. (2d) 749, 751.

Second Question.

1.

The record as a whole amply supports the verdict on the issue of negligence.

If the testimony of the plaintiff's witnesses is true, and they could not well be mistaken about it, plaintiff is entitled to his recovery. Indeed defendants rest their contention on the proposition that the plaintiff's case is based on an inherently impossible theory. Their contention in substance is that the wheels of the ice truck were cut to the left and into defendants' tractor trailer and it is rested on the postulate that the bumper on the ice truck is flush with the wheels, and that the left front bumper on the ice truck was not bent backward or broken off. But as shown by the photograph, defendants' Exhibit "C", the bumper appears to have been hooked and the fender completely smashed back of the front wheel and bent in front of the wheel. This photograph was, of course, taken after the collision with the Statum car, but there is no testimony as to the condition immediately following the collision with the tractor trailer and before it collided with the Statum car; besides which as is

shown by the testimony cited in our analysis of the defendants' testimony, bumpers are made of spring steel, sometimes they bend, and if the bumper or bumper bracket or fender struck the tank, it could have bent it; and if the weight that was required to fold the wheel and let it pass by this tank was great enough to turn it around, it could do so.

The wheel brought before this Court as an exhibit is not the wheel that was on the ice truck at the time of the collision but is an unused wheel relied on as proof that if the wheel on the ice truck at the time of the collision had been precisely such a wheel as the one exhibited, it might have caused the dent in the tank.

"The rim was caved in on that left front wheel." (R. I-119) The photograph of the ice truck shows a folded rim.

The photograph of the tractor trailer, Plaintiff's Exhibit 1, shows scrape marks on the side of the tank strongly suggestive of marks by a bumper, hub cap or axle and the overwhelming weight of the testimony of witnesses Savage, Henson and Koester, and of the road patrolmen, is to the effect that the dent in the front of the fender was made by a headon blow.

It is the testimony of both patrolmen that there was not on the semi-trailer a rear-view mirror sticking out on the left hand side of that trailer, although there was one on the right hand side. (R. I-109, 111, 120, 121, 149, 150)

The argument that insomuch as the measured length of the skid mark was 129 feet and the length of the defendants' semi-trailer was but 39 feet, and the plaintiff's car was but 50 or 60 feet behind the semi-trailer and running at a speed of 35 to 40 miles per hour-- the skid mark must have started before the ice truck sideswiped the defendants' semi-trailer will not bear close examination. The skid-marks started two or three feet on the East of the center of the highway, (R. I-107) and extended 129 feet to the left front wheel of the ice truck, (R. I-118) 129 feet from where they started to where they ended, (R. I-125); and if as contended the defendants' tractor and trailer were crowding the west edge of the road, the ice truck in its skid would have completely avoided defendants' vehicle. And the evidence as a whole is overwhelming as to the circumstances and effect of the sideswipe. Patrolman Haddock says as to what the officers found: The ice truck was in contact with the Ford Sedan. The semi-trailer was parked "just off the edge of the pavement, oh, several hundred feet south. * * * I didn't observe anything with reference to the pavement, other than one skid mark." (R. I-147) It started about two and a half feet to the east of the center line. (R. I-148) He examined the truck and trailer and found it "damaged on the left side, the gas tank was damaged, and a scrape down the side of the body; also, the tires was scraped." (R. I-148)

The argument assumes accuracy of the estimates of the relative distance between the sedan and semi-trailer and to some extent the relative speed of the semi-trailer and sedan. It is

true that Mr. Statum says, "I was at least fifty or sixty feet behind the Gaynon truck at the time they hit." (R. I-65) "Well, we was fifty or sixty foot when it begin to pull over." (R. I-66) "Q * * * When the two trucks collided, did the ice truck stop immediately? A Not until it hit me. Q Well, how far did it travel, would you say, from the time it hit the Gaynon truck until the time it hit you? A Well, we was fifty or sixty feet back. Of course, he was going and it was coming, so I don't know just how it was. When we hit, it knocked me out, so I don't know about that." (R. I-67, 68) And Herschel Rogers testifies that the Statum car was fifty or sixty feet in the rear of the truck and trailer (R. I-164, 169) and that he was going about thirty-five or forty, (R. I-164) and Mrs. Statum says the distance was about fifty feet, "I don't know exactly." (R. II-210) But we do not find in the record or in the references given in Appellants' brief any direct statement that the Statum car was not slowed down. Witness Haggerty testified that he noticed the approaching car and noticed it was going across the center line "and I gradually checked my speed..." (R. II-229) It would seem that unless the speed of the Statum car had been similarly checked, it would have run into the rear of the trailer.

<u>Estimates of speed and distance may not overthrow the weight and effect of positive testimony</u>.

> "A witness's estimate of time, distance, or speed is always regarded as necessarily inexact; so

inconclusive that where witnesses testify positively to matters of fact their testimony is not deemed to be contradicted, nor their credibility affected, by the testimony of others who merely differ with them in their estimates of such matters upon which in the very nature of things opinions of witnesses are likely to be diverse. A party's testimony that an electric car which collided with and threw him from a wagon was running at not 'less than fifteen miles an hour,' was held to be 'a mere guess or conjecture' and insufficient to establish the fact."

Moore on Facts, Sec. 120, page 167.

"Direct evidence as to distance, not established by actual measurement, is matter of opinion based upon opportunity and capacity for observation, and accuracy of observation. There is great difficulty in forming a satisfactory estimate of the distance between two objects which are nearly or quite in one straight line with the observer, * * * . No great weight can be attached to estimates of distance in feet when no special attention was given to the subject. Estimates of distance when given in a haphazard and conjectural way amount to nothing more than a mere guess and ought not to be made the basis of a judgment by court or jury. 'But few witnesses can state with any degree of accuracy the number of feet a car or other object is from them, when called upon to state it without measurement, or without particular thought, at the time the object was seen, as to the number of feet it was away.'"

Moore on Facts, Sec. 397, page 373.

In Keck v. Hinkley (N. H.), 6th Atlantic (2d) 165, the plaintiffs sued for damages arising out of a collision in which the defendant, after passing the plaintiffs, attempted to overtake a car ahead and in so doing collided with an automobile coming toward him which swerved to its left and ran it almost headon into the plaintiff's car. It was contended by the defendant that the plaintiff's evidence and inference must, as a matter of law, be rejected as untrue because the nature of the damage to his car as established by uncontra-

dicted testimony and unimpeached photographs conclusively established that the collision between his car and the car with which he collided occurred in the center lane and further that the testimony of Mrs. Keck who sued in her own right and was administrator of her husband, who was killed in the accident, conclusively established that the collision occurred in the center lane. Concerning which, the Court said:

> "The conclusion which these arguments reach is not compelled as a matter of law because they are both based upon a lay witness's estimate of distance. In the first place such testimony is notoriously inaccurate. In the second place it does not bind the plaintiff because it relates to an objective matter about which she might well be mistaken. Sarkise v. Boston & M. Railroad, 88 N. H. 178, 181, 186 A. 332, and cases cited."

Keck v. Hinkley (N. H.),
6 Atl. (2d) 165.

Toth v. Perry (Conn.),
182 Atl. 464.

2.

<u>Nor is the testimony of the occupants of plaintiff's car in any respect improbable.</u>

They were nearing the City of Jacksonville. It was a bright moon light night in early May. They were traveling over a clear, straight road and there was no reason why they could not see the center mark a long distance ahead of them, and, as we all know, the lights of an approaching car keeping well to its own side of the road are apparent a long distance before it is shut out by a vehicle meeting it. There is no testimony that Mr. Haggerty was blinded by the lights on the ice truck. There is no basis for the assumption that the occupants of the

car following were blinded by those lights.

While it is true that Mrs. Statum was sitting in the back seat and on the right hand side, (R. II-213) which is not necessarily synonymous with "occupying the right rear of the Statum car", her little eight-year old boy was the other occupant of that rear seat (R. II-208) and it is quite within the realm of probability that Mrs. Statum was so located that she could see the happenings in the middle of the road. Nor would the fact, if it were a fact, that the road patrolmen "did not mention her in the report" (Brief, page 30) afford any basis for assuming her testimony to be a fabrication. The fact is that she is mentioned in the report along with Mr. Statum and "their eight-year old son". (R. I-111) The statement, properly enough, is by the driver of the car, Herschel Rogers, following the statement by the driver of the semi-trailer and followed by the statements of Crane and Fay Meadows. Nowhere in the record have we found any inquiry by counsel as to what statement was made by Mrs. Statum to the officers.

And as for the negroes in the ice truck not being able to see the center line of the road because of the lights on the defendants' truck, the testimony of Mr. Haggerty is that he noticed the approaching car and blinked his lights, noticed it was going across the center line and gradually checked his speed and started to the edge of the pavement. (R. II-228,229)

3.

There is no evidence that any of the witnesses were asleep.

The circumstances of the statement by the thirteen year old negro boy, Randolph Brooks, to witness J. H. Underwood, Jr., has been adverted to. (Ante, page 13) But such a statement by a thirteen year old negro in the circumstances testified to (R. I-200) is not substantive evidence against the plaintiff. As to plaintiff, it is but hearsay. Lowe v. State, 130 Fla. 835, 839, 178 So. 872, 874.

Nor may it be inferred that they were asleep from the fact that their version of the accident is not mentioned in the road report. When the patrolmen reached the scene of the accident, two of the negroes were laying out on the side and one of them was pinned in the truck by some ice. (R. I-147) The Brooks boy got his thigh broke and his shoulder. (R. I-196) The Madison boy got his left leg broke. (R. II-204)

4.

The clear preponderance of the evidence is with the plaintiff.

The merits of the plaintiff's case are to be tried according to law before a legally constituted tribunal and may not

be prejudiced by a report of the road patrolmen that the negro driver of the ice truck was to be held for careless and reckless driving when released from hospital. (R. I-115)

Nor may counsel's conception of the physical facts overcome the clear preponderance of credible witnesses.

The witnesses gave their testimony in the presence of the jury, and were in no way discredited. As we have already said, if their testimony is true, plaintiff is entitled to recover.

Neither of the "two completely disinterested witnesses" referred to in Appellant's Brief, page 31, saw the accident. (R. I-90, 91; R. II-251) The "few seconds" or "instant" that elapsed between the time that witness Meadows observed the position of the trailer on the edge of the road and the time of the collision was but an approximation of time. (R. II-251, 253, 268, 269) He observed no road marks. (R. II-254, 267) Witness McIntosh professes to have seen marks on both sides of the road (R. I-92, 94) and his interpretation was in no sense binding on the jury.

The plaintiff and his family were residents of a distant State. (R. I-49; R. II-207, 336) Defendants' firm was an established business concern in Jacksonville. (R. II-296, 297, 298, 339) Whatever advantage of venue there was, if any, was with defendants.

The record shows that the issue of negligence has been twice tried; once in the Civil Court and a few days later in the instant case in the Circuit Court. In each case the jury found for plaintiff. (R. I-20, 24, 25, 34, 35)

Third Question.

Plaintiff's recovery is not to be defeated by contributory negligence.

The Statum car at no time came into contact with the defendants' semi-trailer and its proximity to the trailer was not a proximate efficient cause of the injury. But for the swerving of the tractor trailer to the left hand side of the road the plaintiff's car could have traveled on behind the trailer precisely as it had been traveling for more than a mile. (R. II-209) It is of course elementary that contributory negligence to bar recovery must be negligence that is a proximate cause of the injury. Cooley on Torts, 2nd Edition, 679. Plant Investment Co. v. Cook, 74 Fed. 503, 505, quoting 1 Beach on Contributory Negligence, Sec. 7.

"A plaintiff who has been guilty of negligence may be barred from recovery for a harm caused by such negligence, but he is barred by such negligence only in cases where the harm was in part occasioned by his failure to conform to proper standards of care under circumstances amounting to a legal invasion of the opposite party's legal rights at the time."

Shayne v. Saunders,
129 Fla. 355, 176 So. 495.

One driving on the public highway has the right to assume that others using the highway will conform to the law of the road.

Walker v. Smith,
119 Fla. 430, 161 So. 551.

"There is no rule, other than that relating to the exercise of reasonable care, which prescribes a distance that must be maintained between vehicles while running along the highway."

Tonges v. Walter (Ind.),
32 N. E. (2d) 95, quoting Harnik v. Astoria Mahogany Co., Inc., 1926, 127 Misc. 41, 215 N. Y. S. 219, 220.

So in the case of Bourestom v. Bourestom (Wis.), 285 N. W. 426, with respect to contributory negligence, the

Court observed:

> "Until the defendant saw the headlights of the approaching car, he had a right to assume that no one would suddenly and without warning invade his side of the highway. He was not obliged to drive with the expectation that a car would suddenly enter the wrong side of the road, any more than he would be expected to anticipate that a tree might be felled across his path. It was his duty to drive in such a way as to be able to avoid another vehicle lawfully upon his side of the highway, and if he had become involved in a collision with such a vehicle, it may be that his following too closely another car might have been regarded as a cause. But the defendant cannot be held liable because of what might have happened. It is considered that under the circumstances existing, following too closely was not a cause of the accident."
>
> Bourestom v. Bourestom,
> 285 N. W. 426, 429.

Fourth Question.

The expert testimony of the doctor as to the value of an artificial leg (R. II-258, 259, 260) is based upon an hypothesis in this case non existent. The testimony heretofore referred to as to the unhealed condition of the stump of the amputated limb nearly ten months after the accident (R. I-58) is not indicative of any present help, or of any help in the immediate future, to be had from an artificial limb. That the plaintiff had been able to maintain himself and his family despite the stiff knee as it existed before the accident is amply established. (R. I-49, 50, 59, 60, 61; R. II-208, 336, 337, 338) The injury to his right wrist is still disabling. (R. I-58, 59) He has lost time and been put to great expense. (R. I-52, 53, 54)

The verdict is well within a reasonable estimate of damages sustained based upon the evidence. We find in the evidence nothing to suggest the verdict to be attributable to a disregard of the evidence, or passion, or prejudice.

In Conclusion.

The judgment appealed from should be affirmed.

Respectfully submitted

Geo. E. Teale

George C. Bedell

Of Counsel for Appellee