Oral Argument
Wed. Nov. 4. 1942
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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.

BRIEF FOR APPELLANTS

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SUBJECT INDEX

	Page
HISTORY OF THE CASE	1
A. THE PLEADINGS	1
1. The Original Pleadings	2
2. The Amended Pleadings	3
3. The Additional Pleas Setting Up The Prior Judgment	3
B. THE JUDGMENT FOR PLAINTIFF AND THE MOTION FOR NEW TRIAL	5
C. THE EVIDENCE	5
1. Analysis of Testimony Respecting Plaintiff's Theory of the Accident	6
2. Analysis of Testimony Respecting Defendants' Theory of Accident	8
3. Analysis of Evidence Respecting Contributory Negligence	9
4. Analysis of Evidence as to Damages	10
D. THE ASSIGNMENTS OF ERROR	11
STATEMENT OF THE QUESTIONS INVOLVED	11
ARGUMENT	13
FIRST QUESTION: May One Plaintiff Obtain More Than One Judgment Against One Alleged Wrongdoer for Damages Sustained by Reason of One Wrongful Act?	13
(a) The Only Cases in Point Sustain the Proposition that this Action was Barred	14
(b) The Rule in Florida is in Accordance with the General Rule that a Plaintiff May Not Split His Damages and Obtain Successive Judgments on a Single Wrongful Act	17
(c) The Authorities Relied Upon by the Trial Court and the Plaintiff Are Not in Point or Have Been Overruled	20
SECOND QUESTION: Where a Plaintiff's Case is Based Upon an Inherently Impossible Theory and Improbable Testimony, as Demonstrated by the Physical Facts and Evidence Consistent therewith, Should Not a Verdict for Plaintiff be Set Aside?	27

Page

THIRD QUESTION: Where a Plaintiff's Evidence Shows that He was Observing the Alleged Negligent Operation of a Vehicle Ahead, but Notwithstanding He Continued to Follow it at a Distance of Approximately 50 Feet and at a Speed of Approximately 35 Miles Per Hour and Made No Effort to Prevent His Involvement in a Collision Caused by the Negligent Operation He was Observing, is He Not Guilty of Contributory Negligence? 34

FOURTH QUESTION: Where Injuries (Including Loss of an Already Crippled Leg) Sustained by a 48 Year Old Carpenter Earning $20.00 to $25.00 Per Week, When Employed, Did Not Substantially Affect His Capacity to Carry on His Trade After His Total Disability Period Ended, and Where His Special Damages Including Loss of Earnings Approximated $3,000.00, Is Not a Verdict in the Amount of $11,000.00 Excessive? 37

(a) The Evidence Shows no Injury to Plaintiff Which Will Substantially Affect His Capacity to Carry on His Trade, and Under Applicable Decisions of this Court, the Verdict is Grossly Excessive 38

(b) Other Illustrative Authorities Showing the Verdict to be Excessive 42

CONCLUSION 46

TABLE OF AUTHORITIES

American Car & Foundry Co. v. Kindermann (C.C.A.8), 216 Fed. 499 33

American Jurisprudence, Vol. 1, pages 480-81 19

American Jurisprudence, Vol. 15, pages 502-3; 798 42

American Jurisprudence, Vol. 20, pages 1033-35 33

Baggett v. Davis, 124 Fla. 701, 169 So. 372 39

Bell v. Globe Lumber Co., 107 La. 725, 31 So. 994 43

Birmingham Southern Ry. Co. v. Linter, 141 Ala. 420, 38 So. 363 19

Blashfield Cyclopedia of Automobile Law and Practice (Perm. Ed.), Vol. 2, page 96 35

Brockbank v. The Whitehaven Junction Ry. Co., 7 (Exchq.) Hurlstone & Norman's Reports, 834 21

Budaj v. Connecticut Co., 108 Conn. 474, 143 Atl. 527 32

	Page
Carson, Florida Common Law Pleading, Practice and Procedure, pages 61-62	18
Catlett v. Chestnut, 107 Fla. 498, 146 So. 241, 91 A.L.R. 212.	32
Day's Common Law Procedure, Sec. 40, page 79	21,22
Florida Motor Lines v. Bradley, 121 Fla. 591, 164 So. 360; 128 Fla. 392, 174 So. 863	42
Florida Railway & Navigation Co. v. Webster, 25 Fla. 394, 5 So. 714	39,40
G. Ferlita & Sons v. Beck, 143 Fla. 509, 197 So. 340	36
Griffin Bros. Co. v. Winfield, 53 Fla. 589, 43 So. 687	18
Johnston v. Southern Railway Co., 155 Tenn. 639, 299 S.W. 785.	14,18, 20,26
Latchtimacker v. Jacksonville Towing & Wrecking Co. (D.C. Fla.) 181 Fed. 276	45
Lowe v. Morgans' Louisiana & T. R. & S. S. Co., 150 La. 30, 90 So. 429	44
Malone v. Folger, 132 Fla. 76, 180 So. 522	37
Mansfield v. King, 142 Fla. 650, 197 So. 200	2
McGehee v. Hines, 12 La. App. 13, 124 So. 846	35
M. K. & T. Ry. Co. v. Collier (C.C.A.8), 157 Fed. 347	33
Mullin v. Central R. Co., 77 N.J.L. 241, 72 A. 425	45
Myhra v. Park, 193 Minn. 290, 258 N.W. 515	22,23
Oregon-Washington Railroad, etc. Co. v. Braham, 259 Fed. 555	43
Riggie v. Grand Trunk Ry. Co., 93 Vt. 282, 107 A. 126	33
Skoglund v. Minneapolis Street R. Co., 45 Minn. 330, 47 N.W. 1041	22
Smith v. Cincinnati N. O. & T. P. R. Co., 136 Tenn. 282, 189 S.W. 367	15,16, 18,26
Smith v. Jackson County, 129 Fla. 787, 176 So. 858	27
Tidwell v. Witherspoon, 21 Fla. 359	17
Walker v. Smith, 119 Fla. 430, 161 So. 551	2
Ward v. Stanley, 130 Fla. 642, 178 So. 398	40,41,46

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,

Versus

H. A. STATUM,

APPELLEE.

(Appeal From the Circuit Court, Duval County, Florida).

BRIEF FOR APPELLANTS.

This case is before the Court upon an appeal (R.I. 46) by defendants in the Circuit Court from a judgment in the amount of $11,000.00 in favor of the appellee, plaintiff below (R.I.37). The case arose out of an automobile accident and involves the claims of appellee, H. A. Statum, for injuries sustained in the accident. The record is in two Volumes, the first Volume being referred to herein as "R.I.__" and the second Volume as "R.II.__". The original exhibits have been certified to the Court (R.II.357).

HISTORY OF THE CASE.

A. THE PLEADINGS.

In substance, the pleadings of the plaintiff allege that he was injured in a collision between his automobile and another automobile, and that the collision was caused by the negligent operation of a truck of the defendants (R.I.9). The defendants deny their alleged negligence (R.I.14) and assert that plaintiff was precluded

from maintaining this action by reason of a prior judgment recovered by him on the same wrongful act (R.I.16). While the only pleadings as to which error is assigned are two additional pleas setting up the prior judgment (R.I.16,32), yet a clear understanding of the matter necessitates a brief summary of the pleadings.

1. The Original Pleadings.

Both the plaintiff, H. A. Statum, and his wife, Edna Statum, were injured in an automobile accident, which occurred about two o'clock A.M., May 11, 1941, in Duval County, between Jacksonville and Callahan, Florida. In the first instance, one suit was filed in the Circuit Court by both the husband and wife against the defendant, Claude E. Gaynon only (R.I.3). In the first count of the original declaration, the husband claimed damages for injuries to himself, including the loss of his right leg, damages to his automobile, and also for loss of consortium and medical expenses by reason of the injuries to his wife (R.I.3). In the second count of the original declaration, the wife, Edna Statum, claimed damages for her injuries (R.I.5).

The defendant, Claude E. Gaynon, demurred to the original declaration upon the ground, among others, that it was duplicitous (R.I.8), and the Court sustained the demurrer (R.I.8) 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, 197 So. 200, there being an improper joinder of claims by the husband and wife in one suit. After such ruling, the plaintiff, H. A. Statum, filed an amended declaration, and the defendant, Maggie M. Gaynon, was made a party, and the suit proceeded against the defendants as co-partners (R.I.9). Upon motion of the plaintiff, the cause was dismissed as to Edna Statum (R.I. 12).

2. The Amended Pleadings.

In the amended declaration, the plaintiff alleged that he was riding in his automobile (which was being operated in a Southerly direction), approximately 50 feet* in the rear of an automobile truck and trailer of defendants (which was also being operated in a Southerly direction); that the truck of defendants was carelessly and negligently driven to the left of the center of the highway, and sideswiped a truck approaching from the opposite direction, knocking said truck out of control and into the path of plaintiff's automobile; by reason whereof, plaintiff was injured (R.I.9).

To the amended declaration, the defendants filed plea of "not guilty" and a plea denying the specific allegation of negligence (R.I.14).

3. The Additional Pleas Setting Up The Prior Judgment.

On Monday, March 16, 1942, the date the trial commenced, the defendants tendered certain additional pleas (R.I.16), setting up a prior judgment, entered Saturday, March 14, 1942, in favor of the plaintiff on the same wrongful act. Though finding that the pleas were seasonably tendered, the Court denied the motion to file them (R.I.41,45).

The third and fourth additional pleas raise the question of plaintiff's contributory negligence (R.I.32-3). As the Court covered this matter in his charge, those pleas are now immaterial, and only the first two additional pleas are here involved (Assignments of Error 1 to 5, R.II.358).

In substance, the first and second additional pleas allege that the plaintiff, H. A. Statum, and his wife were injured in the same

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* The original declaration alleged that plaintiff's automobile was being operated "several hundred feet in rear of defendants' automobile truck and trailer" (R.I.4).

accident. While the suit filed by H. A. Statum for his injuries and proper damage was pending in the Circuit Court, he and his wife, Edna Statum, filed suit in the Civil Court of Record, Duval County, against the same defendants upon the same wrongful act. In the Civil Court, the wife claimed damages for her personal injuries (Count 1, R.I.19) and the husband claimed damages for the medical expense of the wife and for loss of consortium and services (Count 2, R.I.20). In the Civil Court suit, defendants filed a plea to the husband's count, alleging the pendency of the Circuit Court suit brought by H. A. Statum on the same wrongful act, and asserting that the husband's cause of action as set forth in Count 2 of the Civil Court declaration ought to be abated or dismissed (R.I.26). The Civil Court ruled that the plea stated no defense (R.I.31).

The Civil Court case proceeded to trial and on March 14, 1942, judgment was entered, the wife obtaining a judgment for $1,300.00, and the husband, H. A. Statum, a judgment for $200.00 (R.I.32,34).

Upon this state of facts, the first two additional pleas asserted that the plaintiff, H. A. Statum, having already recovered a judgment in the Civil Court on the very same wrongful act alleged in the amended declaration in the Circuit Court case (this case), was precluded or barred from obtaining another judgment on the said same wrongful act (R.I.32).

At the trial of the Circuit Court case, the parties stipulated that if the said additional pleas were held sufficient, then judgment should be entered for defendants, regardless of the verdict of the jury (R.I.48). The purpose of this stipulation was to give counsel for the plaintiff time within which to brief the questions raised by the pleas, and also give the Court time within which to consider the matters. Following the rendition of the verdict, defendants filed motion for judgment (R.I.39) in accordance with the stipulation, but the Circuit Court ruled that the pleas were insufficient (R.I.41).

5.

B. THE JUDGMENT FOR PLAINTIFF AND THE MOTION FOR NEW TRIAL.

As indicated above, the jury returned a verdict for the plaintiff, upon which judgment was entered in the amount of $11,000.00 (R.I.37). The defendants duly filed motion for new trial, challenging the sufficiency of the evidence to support the verdict, and asserting that the verdict was excessive (R.I. 38). The motion was denied (R.I.41,45).

C. THE EVIDENCE.

In substance, the assignments of error (R.II.358) raise but two questions regarding the evidence. The first of these questions has to do with the sufficiency of the evidence to support the verdict, and the appellants' assertions that the verdict is contrary to the weight and preponderance of the evidence, and shows contributory negligence on the part of the plaintiff. The other question relates to the sufficiency of the evidence to justify the amount of the verdict, and the appellants' assertion that the verdict is excessive.

As the evidence must be discussed in some detail in the Argument, it is deemed sufficient to summarize it briefly at this juncture, and to go into detail only enough to show the conflicting theories of the case. Before doing so, we may observe that there is no dispute as to the following facts (R.I.111):

(a) At the time of the accident, defendants were the owners of a truck and trailer that was being operated by J. M. Haggerty in a Southerly direction on New Kings Road, a straight, concrete road, 20 feet in width. Original Exhibits 1, 2 and A are photographs of the semi-trailer.

(b) The plaintiff's automobile was being operated by E.H. Rogers in the same direction as, and in the rear of, the semi-trailer of the defendants. This car was occupied by H. A. Statum, Edna Statum and Edward H. Rogers, a nephew of the Statums, and a small child.

(c) Another truck (referred to in the evidence as the "panel body" or "ice truck") was being operated by a negro, Cleveland Crane, in a Northerly direction on the highway. Original Exhibits C and D are photographs of the ice truck. It was occupied by three negroes, Cleveland Crane, Sam Madison and Randolph Brooks.

(d) The ice truck and the semi-trailer collided and the ice truck continued on in a Northerly direction, pulling to its left, and collided with the Statum automobile on the West side of the road. As shown by the photographs above referred to, the fronts of the two trucks did not collide, but the semi-trailer was first struck on the gas tank on its left at the rear of the cab.

(e) In the collision between the ice truck and his car, the plaintiff, H. A. Statum, was injured, and it was necessary to amputate his right leg between the knee and the hip (R.I.99). For many years before the accident, the plaintiff had had an anky-losed or solidly stiffened right knee (R.II.249), the leg being bent at approximately a 45 degree angle, and the undisputed testimony is that an artificial leg will serve the plaintiff substantially as well as the leg it was necessary to amputate (R.II.255-66).

With the above review of the undisputed facts, we proceed to analyze the evidence:

1. Analysis of Testimony Respecting Plaintiff's Theory of the Accident.

The plaintiff, H. A. Statum, his wife, Edna Statum, his nephew, Edward H. Rogers, and the three negroes all testified that at the time of the collision between the semi-trailer and the ice truck, the semi-trailer was from two to three feet to the left of the center-line of the road (R.I.50; 163;180;197; R.II.204;210). Statum, his wife and nephew testified that at the time of the collision between the two trucks, the Statum car was 50 or 60 feet behind the semi-trailer

and was traveling at a speed of 35 to 40 miles per hour (R.I.65;66;164; 169; R.II.210); and plaintiff's witnesses testified that the ice truck was being driven at a speed of 25 to 30 miles per hour (R.I.68; 189). The theory of the witnesses for the plaintiff was that at the time of the collision, both the ice truck and the semi-trailer were going perfectly straight (R.I.168;181;186;197; R.II.205;212).

Although the two Duval County road patrolmen, who investigated the accident (R.I.111) concluded and stated in the report (Defendants' Exhibit H) that the "Negro (the driver of the ice truck) to be arrested for careless and reckless driving when released from the hospital" (R.I.114) and thus completely exonerated the driver of defendants' truck, yet a few days later they supplemented their report and changed their findings (R.I.114-18). The first report made by the officers ended with the words: "Panel body stored at Boree's Garage, request of this department" (R.I.117).

Notwithstanding the first report, which was made after the officers had questioned the witnesses and examined the road marks (R.I. 114-17; 158-60), and placed the entire blame for the collision on the negro, yet they both testified at the trial that the road marks made by the ice truck started some $2\frac{1}{2}$ feet on the East side of the road (that being the wrong-side as to the Gaynon truck) and extended 129 feet (R.I. 107;118;149). But plaintiff's evidence shows that the overall length of defendants' trailer was $29\frac{1}{2}$ feet, and the overall length of the truck and trailer was 39 feet (R.I.134).

Thus, in final analysis, plaintiff's evidence presents an inherently impossible state of facts, viz: The testimony is that the ice truck made road marks for <u>129 feet</u> between the point it collided with the Gaynon truck and the point it collided with the Statum car -- but, at most, the ice truck and the Statum car were <u>90 feet</u> apart at the time of the first collision, and were meeting at speeds of around 25 and 35 miles per hour, respectively; and the most the ice truck could

have traveled after the first collision was approximately 37 feet.

2. Analysis of Testimony Respecting Defendants' Theory of Accident.

John M. Haggerty, U.S. Army, the driver of defendants' truck and a former employee of defendants, testified that as the ice truck approached him, it was coming across the center line; he checked his speed and pulled over to the edge of the pavement; the ice truck passed the front of his truck, but hit the gas tank (R.I.229).

Fay Meadows, the only disinterested witness who had first-hand knowledge of the accident, was driving a truck from Atlanta to Jacksonville. The Statum car had been passing him off and on all day (R.II.247); and just before the accident, the Statum car passed him (R.II.248). He did not actually see the wreck, because his attention had been distracted for an instant, but was only 3 or 4 blocks behind the Gaynon truck when the wreck occurred (R.I.251-2). Immediately before the collision, the Gaynon truck was over at the West edge of the pavement, and was further over on its side of the road than was the Statum car (R.II.251-2).

Another disinterested witness was J. L. McIntosh (R.I.91). He did not see the accident, but came upon the scene shortly afterwards. He testified that the road marks indicated that the two trucks had collided on the West (the Gaynon truck's) side of the road (R.I.92;94).

The testimony of these three witnesses bears out the original road patrol report (Defendants' Exhibit H) that the negro driver of the ice truck was solely responsible for the accident.

In addition to the above, defendants showed by J. H. Underwood, U.S. Army, that Randolph Brooks told him on two occasions that he and Sam Madison were asleep at the time of the collision and did not know what happened (R.II.219-20).

The road patrol report (Defendants' Exhibit H, certified to the Court) shows that Statum's nephew, Rogers, told the officers that the ice truck sideswiped the semi-trailer, and not vice versa, and that the officers placed the entire blame for the accident on the negro who was

driving the ice truck. After the officers changed their minds, they made the supplemental report (Defendants' Exhibit B, certified to the Court) and stated that both Rogers and Cleveland Crane first told them that they did not know how the accident happened.

The physical facts, as demonstrated by the photographs certified to the Court (Defendants' Exhibits A, C, and D) completely refute and show the inherent impossibility of plaintiff's theory of the case. The Court will observe from defendants' Exhibit A that the Gaynon truck was struck on the left gas tank at the rear of the cab. Defendants' Exhibit C shows that the left front wheel of the ice truck (note the bent rim) struck the gas tank and Cleveland Crane, the driver of the ice truck, so testified (R.I.180;184). The Court will also observe from defendants' Exhibits C and D that the left front bumper of the ice truck was not bent backward or broken off. These facts conclusively demonstrate that at the time the ice truck hit the Gaynon truck, the wheels of the ice truck were cut to the left, and could not have been going straight as plaintiff's witnesses testified.

According to defendants' expert witnesses, the physical facts show that at the time of the collision, the wheels on the ice truck had to be cut to the left at an angle of approximately 45 degrees (R.I.281-97;323-32). The Court may prove the correctness of this testimony, as the witnesses did, by demonstrations with the gas tank and rim which have been transmitted to the Court (Defendants' Exhibits F and I).

3. Analysis of Evidence Respecting Contributory Negligence.

The plaintiff, H. A. Statum, was the owner of the car in which he was riding. He testified that he had been following the Gaynon truck for 1½ miles, and every "once in awhile" the Gaynon truck would get over on the wrong side of the road (R.I.65-66). The truck was gradually traveling "a little more over the center line" (R.I.72). Notwithstanding this, the plaintiff's car was driven at a speed of 35 or 40

miles per hour and within 50 to 60 feet of the rear of the Gaynon truck (R.I.73-5). According to the plaintiff, his wife and nephew, they all saw the ice truck approaching from the opposite direction, and must have known what was going to happen if they continued on. But nothing was done or attempted to prevent involvement of the Statum car in the inevitable collision ahead.

4. Analysis of Evidence as to Damages.

The plaintiff was 48 years old; he was a carpenter (R.I.49), and worked from job to job (R.I.77). He testified that he averaged $20.00 to $25.00 per week, and that for one short period he had made $70.00 per week (R.I.60). According to his testimony, he was not working at the time of the accident, and in his last employment he had made $25.00 per week. However, the evidence showed that during a 2½ month period, plaintiff claimed to be making an average of $30.00 per week (R.I.78;80), he actually made from $2.50 per week to $29.70 per week and an average of $17.28 per week (R.I.81-3; Defendants' Exhibit G, certified to the Court). The $17.28 figure is the only actual figure in the case as to plaintiff's earnings.

In the accident, plaintiff was badly injured. His right leg was broken, gas gangrene developed, and amputation was necessary (R.I. 99-100). Also, plaintiff's nose was fractured as was the ulna styloid in the right wrist (R.I.103). The plaintiff had some contusion in the chest, but no fractures were proved (R.II.249). The plaintiff remained in the hospital five weeks and testified that he had incurred Doctors' of $225.00; hospital bill of $397.95; and claimed $150.00 for an artificial leg (R.I.53-4).

As indicated above, the undisputed testimony showed that before the accident, plaintiff's right leg was stiff at a 45 degree angle, and his ability to carry on his occupation was little, if any, affected by the amputation (R.II.255-65). The testimony was that an artificial limb would have some advantages over a leg such as plaintiff had before

the accident, viz: with the artificial limb, the plaintiff could walk faster, he could bend it to a right angle at the knee, and it would eliminate pain caused by stress on the spine (R.II.258-59).

D. THE ASSIGNMENTS OF ERROR.

There are 13 Assignments of Error (R.II.358). These may be grouped around the following principal points in the case:

1. The plaintiff was precluded from maintaining this suit by reason of the fact that he had already recovered a judgment on the very same wrongful act, and the Court erred in denying defendants' motion to file the additional pleas (Assignments 1 to 6, inclusive).

2. The verdict is contrary to the weight and preponderance of the evidence, and the Court erred in denying defendants' motion for new trial (Assignments 6 to 11, inclusive).

3. The evidence shows that plaintiff was guilty of contributory negligence, and the Court erred in denying defendants' motion for new trial (Assignments 6 to 11, inclusive).

4. The verdict is excessive (Assignments 5 to 13, inclusive).

All of the Assignments are relied upon.

STATEMENT OF THE QUESTIONS INVOLVED.

As indicated in the discussion of the Assignments of Error, the appellants propose four principal questions for the consideration of the Court, viz:

FIRST QUESTION.

Where a plaintiff obtains a judgment for a portion of the damages sustained by him by reason of an alleged wrongful act, may he thereafter maintain another action against the same wrongdoer for other damages sustained by such litigant by reason of the very same wrongful act?

Stated differently: May <u>one</u> plaintiff obtain more than <u>one</u>

judgment against one alleged wrongdoer for damages sustained by reason of one wrongful act?

The trial Court answered this question in the affirmative (R.I.41-45).

SECOND QUESTION.

Where a plaintiff's case is based upon an inherently impossible theory and improbable testimony, as demonstrated by the physical facts and evidence consistent therewith, should not a verdict for plaintiff be set aside?

The trial Court, in denying defendants' motion for new trial, answered this question in the negative (R.I.41;45). Under this question, we shall discuss the incidental point that the verdict is contrary to the weight and preponderance of the evidence.

THIRD QUESTION.

Where a plaintiff's evidence shows that he was observing the alleged negligent operation of a vehicle ahead, but notwithstanding he continued to follow it at a distance of approximately 50 feet and at a speed of approximately 35 miles per hour, and made no effort to prevent his involvement in a collision caused by the negligent operation he was observing, is he not guilty of contributory negligence?

The trial Court, in denying defendants' motion for new trial, answered this question in the negative (R.I.41;45).

FOURTH QUESTION.

Where injuries (including loss of an already crippled leg) sustained by a 48 year old carpenter, earning $20.00 to $25.00 per week, when employed, did not substantially affect his capacity to carry on his trade after his total disability period ended, and where his special damages, including loss of earnings, approximated $3,000.00, is not a verdict in the amount of $11,000.00 excessive?

13.

The trial Court, in denying defendants' motion for new trial, answered this question in the negative (R.I.41;45).

While appellants may assert, with some justification, that not every detailed element of the case is included in the above questions, yet as the Second, Third and Fourth Questions are based entirely upon the evidence, they cannot be concisely stated unless some details be excluded. In any event, the foregoing questions are stated as accurately as we can state them, and make the statement concise.

A R G U M E N T.

We believe that the points to be argued are sufficiently indicated by the discussion of the Assignments of Error and the Statement of the Questions Involved. Consequently, we proceed to discuss the Questions before the Court without further summary of the contentions of appellants.

FIRST QUESTION.

MAY ONE PLAINTIFF OBTAIN MORE THAN ONE JUDGMENT AGAINST ONE ALLEGED WRONGDOER FOR DAMAGES SUSTAINED BY REASON OF ONE WRONGFUL ACT?

This question is raised by Assignments of Error 1 to 6, inclusive (R.II.358). It is a clear question and the answer is as simple as the question itself. The answer is "No", because the law does not permit a plaintiff to split his damages. On the contrary, the law mandatorily requires that all damages sustained by, or accruing to, one person as a result of a single wrongful act must be claimed and recovered in one action, or not at all. The only cases squarely in point as to facts, the Florida decisions adhering to the principles of these decisions, and the authorities in general, sustain the proposition that the plaintiff having split his damages and recovered a judgment for a

portion of them was barred or precluded from maintaining this action.

(a) The Only Cases in Point Sustain the Proposition that this Action was Barred.

Recalling that the facts before the Court are simply these: Plaintiff and his wife were injured by the very same wrongful act. The plaintiff brought an action in the Circuit Court for his personal injuries and property damage (R.I.9). Thereafter, he and his wife joined in another suit in the Civil Court of Record against the same defendants, the wife claiming in one count damages for her personal injuries (R.I. 19-20), and the husband claiming in another count damages for his loss of consortium, loss of services and medical expenses of the wife (R.I.20-22). In the second (Civil Court) suit, defendants filed a plea to the husband's count setting up the pendency of the prior action (R.I.26), thereby negativing any notion that defendants consented to or acquiesced in the husband's attempt to split his damages. But the point was ruled against defendants; the second (Civil Court) suit proceeded, and the husband obtained judgment for the damages claimed by him in the Civil Court suit. Thereupon, defendants pleaded the Civil Court judgment as a bar to the husband's Circuit Court suit for his personal injuries (R.I.16).

Simply stated, defendants assert that there was but one wrongful act, and, therefore, there can be but one cause of action in one and the same person. All elements of damage sustained by H. A. Statum, plaintiff below, by reason of such single wrongful act, were recoverable in one action. The damages could not be split, and recovery of a portion of them in one action was a bar to recovery of the other portion in a separate action.

Johnston v. Southern Railway Co., 155 Tenn. 639, 299 S.W. 785, is squarely in point. In that case, the facts were as follows: The plaintiff and his wife were riding in an automobile, which was struck by defendant's train and both husband and wife were injured. The husband

filed a suit for his injuries. He subsequently instituted a separate suit for loss of his wife's services as a result of the same accident. The latter case was tried first, and resulted in a judgment in the amount of $200.00, exactly as in the case at bar.

Thereupon, defendant filed in the first suit (the one instituted by the husband for damages for his own injuries) a plea of former adjudication, just as was done in this case. The trial Court sustained the plea and dismissed the husband's suit; and on appeal the Supreme Court affirmed the action of the trial Court, saying:

> "Here there was but one tort committed, and there can be but one recovery.
>
> "In Encyclopaedia of Pleading & Practice, vol. 9, p. 611, it is said: 'Former adjudication is, when pleaded, a plea in bar of the further prosecution of a suit, on the ground that the same subject-matter has been already litigated between the same parties, or their privies, and a judgment rendered on the merits of the case.'
>
> "Applying this test to the instant case, it is apparent that the trial court properly sustained the plea and dismissed the suit. The subject-matter -- that is, the negligent act that produced the injury -- is necessarily the same in both cases; the parties are the same, and judgment was rendered upon the merits of the case." (Underlining ours).

In quoting and discussing the authorities upon the subject, the Court further said:

> " 'Indeed, if the plaintiff fail to sue for the entire damage done by the tort, a second action for the damages omitted will be precluded by the judgment in the first suit brought and tried. Southern R. Co. v. Birgman, 95 Tenn. 628, 32 S.W. 762, 12 Am. Neg. Cas. 585; Freeman, Judgm. Sec. 241; Carraway v. Burton, 4 Humph. 108.'
>
> "In Cincinnati, N. O. & T. P. R. Co. v. Roddy, 132 Tenn. 568, L.R.A. 1916E, 974, 179 S.W. 143, the court quoted approvingly from Freeman on Judgments, as follows: 'A single tort can be the foundation for but one claim for damages * * * All damages which can by any possibility result from a single tort form an indivisible cause of action. Every cause of action in tort consists of two parts, to wit, the unlawful act, and all damages that can arise from it. For damages alone no action can be permitted. Hence, if a recovery has once been had for the unlawful act, no subsequent suit can be maintained.' (Underlining ours).

The Court then examined its decision in Smith v. Cincinnati, etc., 136 Tenn. 282, 189 S.W. 367, and said of it:

> "We have carefully considered the case, and, in our opinion, it is sound in principle and well supported by authority. No satisfactory reason has been suggested for its modification. The fact that the second suit was tried first in no wise alters the rule. As stated in the foregoing authorities, the object of the plea is to bar the further prosecution of a pending suit, and such is its effect when properly pleaded."

The facts in Smith v. Cincinnati, N. O. & T. P. R. Co., 136 Tenn. 282, 189 S.W. 367, supra, are even somewhat more analogous to the facts in the case at bar than are the facts in the Johnston case -- though the analogy of the Johnston case is complete enough.

In the Smith case, it appeared that the plaintiff and his wife were both injured as a result of the derailment of defendant's train on which they were riding. Suits were instituted in the Federal Court to recover damages for injuries sustained by the wife, and also for the injuries to plaintiff, property damage and loss of services of the wife. In response to motions made by the defendant in the Federal Court, all of the suits were dismissed except for injuries to the wife and for the loss of the wife's services.

Plaintiff recovered judgment in the Federal Court. Thereupon, defendant pleaded the judgment in bar of a suit brought by the husband in the State Court for damages for personal injuries and property damage sustained by him in the same accident. The trial Judge held the plea bad. On appeal, the Civil Court of Appeals reversed the judgment, and dismissed the husband's suit. The Supreme Court of Tennessee affirmed the judgment of reversal, saying:

> "The following quotation from Freeman on Judgments is made in Brigman v. Railway Co., supra, and Cincinnati, N. O. & T. P. R. Co. v. Reddy, supra:
>
> " 'A single tort can be the foundation for but one claim for damages. * * * All damages which can, by any possibility, result from a single tort, form an indivisible cause of action. Every cause of action in tort consists of two parts, to wit, the unlawful act, and all damages that can arise from it. For damages alone no action can be permitted. Hence, if a recovery has once been had for the unlawful act, no subsequent suit can be maintained. There must be a fresh act, as well as fresh damages.'

> "It is said also in Railroad v. Matthews, supra, that if the plaintiff failed to sue for the entire damages done him by the tort, a second action for damages omitted will be precluded by the judgment in the first suit brought and tried. For this statement, Southern Ry. Co. v. Brigman, supra, Freeman on Judgments, § 241, and Carraway v. Burton, 6 Humph., 108, are cited.
>
> "Mr. Freeman and the case of Carraway v. Burton fully sustained the proposition stated by the court. This last case discusses the question in the exact phase in which it is presented to us. We think all of our cases, while not deciding the question presented exactly, furnish a basis from which the necessary corollary is drawn that if the plaintiff, suing for damages for injuries resulting from a single tort, does not include in his suit all the injuries sustained, a subsequent suit for those omitted will be barred upon a plea of res judicata, aptly pleaded. This follows naturally from the conclusion that the recovery is for the tort, and not for the injuries. If 'a single tort can be the foundation for but one claim for damages', it inevitably follows that there can be but one suit to recover for injuries resulting from that tort." (Underlining ours).

In so far as we can find, the Smith and Johnston decisions are the only two cases in the books upon the state of facts which is before the Court in this case. Both of those decisions are squarely in point; they clearly and unequivocally sustain the position of the appellants in the case at bar, and discussion of them would be superfluous.

As the following discussion will show, the decisions of this Court (though they are distinguishable as to facts) are in accord with the principles of the Smith and Johnston cases.

(b) The Rule in Florida is in Accordance with the General Rule that a Plaintiff May Not Split his Damages and Obtain Successive Judgments on a Single Wrongful Act.

The applicable decisions of this Court affirm the principle of the Smith and Johnston cases, supra, and thus support the position of the appellants that a plaintiff may not split his damages and obtain more than one judgment by reason of one wrongful act.

Thus, in Tidwell v. Witherspoon, 21 Fla. 359, it appeared that on November 8th, Tidwell had spoken slanderous words of Witherspoon, and, on December 2nd, had caused him to be arrested for doing the act

charged in the slanderous words. Witherspoon sued Tidwell for malicious prosecution, and the action terminated in favor of defendant. He then sued him for slander, and the defendant pleaded the former judgment. In holding the plea good, the Court said:

> "That suit was a bar to any other suit for the same charge, though made on a different occasion, if made before suit brought. * * * The injured party cannot be entitled to two recoveries for the same cause, and a recovery in that form must be a bar to a subsequent action of slander for the same identical accusation.' " (Underlining ours).

Though readily distinguishable in fact, the decision of this Court in Griffin Bros. Co. v. Winfield, 53 Fla. 589, 43 So. 687, states the rule relied upon by appellants in the case at bar. In the cited case, this Court said:

> "* * * the rule is that when a cause of action accrues, there is a right, as of that date, to all the consequent damages which ever ensue. Such damages, without reference to the time they actually accrue, are entire, and cannot be recovered piecemeal by successive actions." (Underlining ours).

This quotation makes it clear that in Florida (as in Tennessee where the Johnston and Smith cases arose) the cause of action is the wrongful act and not the various elements of damages that result from a wrongful act. In this regard, Carson in his revised edition of Florida Common Law Pleading, Practice and Procedure, pp. 61-62, states:

> "As to actions ex delicto, the general rule is that a single tort affords a single cause of action. * * * A personal injury cannot be split up so as to permit separate recoveries for different kinds of damages. A judgment in one action arising from the same tort bars another action brought on a different theory for the same injuries or for those that were forgotten or unclaimed in the first one. A recovery for malicious prosecution bars a later suit for slander based upon the same words, although these words were not spoken at the same time or place but at another place and before the action for malicious prosecution was brought.
>
> "It would seem that in any action where injury results to a person and his property, damages for both injuries give one cause of action rather than two, as the wrongful act is single and different injuries therefrom are merely items of damages.
>
> "Splitting a cause of action is dividing it into two or more parts so that separate actions can be brought. The rule is that a single cause of action cannot be split, and insofar

> as it applies to actions ex contractu, an entire contract or claim arising from it may not be split; all damages that arise from it must be obtained in one action. An exception is where the contract calls for performance in installments. The rule against splitting applies to actions ex delicto as well." (Underlining ours).

The rule stated by Carson and enunciated in the last cited Florida case is the general rule. It is accurately stated in Volume 1, Am. Jur., pages 480-81, as follows:

> "One may bring separate suits on separate causes of action even if joinder of the separate causes in one action is permissible, subject, however, to the power of the court to order consolidation. On the other hand, one who has a claim against another may take a part in the satisfaction of the whole, or maintain an action for a part only, of the claim, * * *. But after having brought suit for a part of a claim, the plaintiff is barred from bringing another suit for another part. The law does not permit the owner of a single or entire cause of action or an entire or indivisible demand, without the consent of the person against whom the cause or demand exists, to divide or split that cause or demand so as to make it the subject of several actions. The whole cause must be determined in one action. If suit is brought for a part of a claim, a judgment obtained in that action precludes the plaintiff from bringing a second action for the residue of the claim, notwithstanding the second form of action is not identical with the first, or different grounds for relief are set forth in the second suit. This principle not only embraces what was actually determined, but also extends to every other matter which the parties might have litigated in the case. The rule is founded upon the plainest and most substantial justice, -- namely, that litigation should have an end and that no person should be unnecessarily harassed with a multiplicity of suits." (Underlining ours).

Though involving a question of pleading only, the decision in Birmingham Southern Ry. Co. v. Lintner, 141 Ala. 420, 38 So. 363, is an additional authority for the application of the rule against splitting damages in cases of the kind at bar. In that case, it appeared that the wife of the plaintiff was driving his horse and buggy. The buggy was struck by a train and damaged, and the wife was injured. The husband brought suit, claiming damages for loss of consortium and medical expenses of the wife, and for damages to his property. In holding that all damages suffered by the husband as a result of the single

wrongful act were properly and necessarily claimed in one action, the Court said:

> "It may be stated as a very general if not universal proposition that one who is entitled to sue at all for the consequences of a wrongful act may recover all the damages that such act has proximately inflicted upon him. His cause of action is the one wrongful act of the defendant. We know of no principle of law or decided case which requires him to split this one cause of action into two or more because the injuries he sustains may be diversified in character. To the contrary, he must lay all he has suffered in one action, or failing in that, he foregoes his claim for such part of the injury as he does not count upon. * * *" (Underlining ours).

The Alabama decision is not so analogous as to facts as are the two Tennessee (Johnston and Smith) cases discussed above, but that decision lays down the same principle and clearly supports our position.

As we see it, the only decisions which are squarely in point are grounded upon the very same principle that is laid down in the above cited decisions of this Court. This being so, there is no apparent reason why those decisions should not be applied and the judgment in this case reversed.

(c) The Authorities Relied Upon by the Trial Court and the Plaintiff are not in Point or Have Been Overruled.

In the order denying the defendants' motion to file the additional pleas, the trial Court stated (R.I.44): "I have studied their briefs carefully and made an independent investigation of the law myself extending over a period of some weeks. There are authorities cited to me supporting the contention of the defendant in this case but I think the authorities on the other side have the better reasoning and display the logic and justice of this case".

In so far as we can find, and in so far as appears from the trial Court's opinion, there are no "authorities on the other side" upon the state of facts before the Court in this case. The only authorities referred to by the trial Court (who had himself "made an

independent investigation of the law") as being "on the other side" are (R.I.42-3):

Brockbank v. The Whitehaven Junction Ry. Co., 7 (Exchq.) Hurlstone & Norman's Reports, 834; and

Day's Common Law Procedure, Section 40, page 79.

The Brockbank case construes Section 40 of the Common Law Procedure Act of 1852, which is the same, in effect, as Section 4226, C.G.L. of Florida, 1927. This Section permits the husband in action for "injury done to the wife" to assert his claim for damages arising out of the wife's injury.

The Brockbank case in nowise supports the ruling of the trial Court and is not contrary to the contentions of the appellants. Thus, the declaration in the Brockbank case alleged that the wife of the plaintiff was negligently injured by the defendant, and plaintiff claimed damages for loss of society and expenses in connection with his wife's injuries. To the declaration, defendant filed a plea asserting that in a former suit by the husband and wife, they had recovered a judgment for the wife's injuries (not for the husband's damages). The Court ruled the plead had, because the Common Law Procedure Act permitted, but did not require, the husband to join claims in his own right for damages sustained by him on account of the wife's injuries in an action by the wife for her injuries.

In other words, the Court held that where the wife was injured, she, joined by her husband as a plaintiff in name only, could sue for her injuries; and that while in such suit the husband was permitted, yet he was not required, to assert his damages arising from his wife's injuries, in the wife's suit, but could maintain a separate action.

The decision has no bearing on the case at bar, because there the husband was not suing for his own personal injuries and property damages, and had in nowise attempted to split his damages which had resulted from a single wrongful act. Indeed, the decision

supports the contention of the appellants that in the case at bar, H. A. Statum was not required to claim in his wife's Civil Court suit the damages accruing to him solely by reason of the injury to the wife. On the contrary, H. A. Statum was mandatorily required to claim such damages in the Circuit Court action for his own injuries.

The point is that if only Edna Statum, the wife, had been injured, the husband, H. A. Statum, could have claimed the damages sustained by him either in the wife's suit for her injuries, or he could have filed a separate suit. But as both the husband and wife were injured, separate suits were required, and the husband was mandatorily required to assert all his damages in one suit, because he could not split his damages and obtain two judgments on one wrongful act.

The Note in Day's Common Law Procedure Acts, page 79, referred to in the trial Court's order (R.I.43) shows that before the passage of the Act, the husband was obliged to sue alone for any special damage sustained by him as a result of an injury to the wife. The Note further shows that the purpose of Section 40 was to permit the husband, in a joint action by him and the wife, to claim his special damages accruing from the injury to his wife, and "those alone". It was not the purpose of Section 40 to create multiple causes of action where only one had previously existed, and the Section has nothing whatever to do with splitting damages, and is wholly irrelevant in the case at bar.

The only other decision cited to the trial Court by the plaintiff that might be said to have bearing upon the facts in this case was Skoglund v. Minneapolis Street R. Co., 45 Minn. 330, 47 N.W. 1041. In that case it was held that a judgment in an action by a husband for his injuries was not a bar to his action for loss of his wife's consortium resulting from injuries to her in the same accident. But the Skoglund case was overruled in Myhra v. Park, 193 Minn. 290, 258 N.W. 515:

In the Park case, it appeared that plaintiff and his wife were riding in plaintiff's automobile and both were injured in a collision between the automobile and defendant's truck. The husband brought suit for injuries to his person and his automobile, but made no claim in that suit for the damages suffered by him (the husband) by reason of the injuries to the wife. The defendant obtained judgment.

The husband then brought suit (upon the same alleged negligent act set forth in the first action) to recover moneys expended for treatment of his wife, and for loss of consortium and services. In the second action, the former judgment was pleaded and sustained as a defense. In affirming the judgment, the Supreme Court of Minnesota said:

> "It is obvious that there is only one negligent act upon which plaintiff's cause or causes of action may be founded. So the only inquiry presented is whether a negligent act giving rise to several items of damage may be made the basis for several actions to recover therefor as against the tort-feasor on the part of the individual who has suffered these damages. In King v. Chicago, Milwaukee & St. Paul Ry. Co., 80 Minn. 83, 82 N.W. 113, 50 L.R.A. 161, 81 Am. St. Rep. 238, a question very similar to the present, if not identical, was presented for determination. There plaintiff brought an action to recover property damage after he had previously collected a judgment in his favor for injuries to his person arising out of the same accident and the same negligent act. The Court said (pages 88, 89 of 80 Minn., 82 N.W. 1113, 1114):
>
> " 'We are of the opinion that the cause of the action consists of the negligent act which produced the effect, rather than in the effect of the act in its application to different primary rights, and that the injury to the person and property as a result of the original cause gives rise to different items of damage. * * *
>
> " 'Our attention has been called to the case of Skoglund v. Minneapolis St. Ry. Co., 45 Minn. 330, 47 N.W. 1071, 11 L.R.A. 222 (22 Am. St. Rep. 733). We cannot accept the reasoning of the court in that case as applicable to the one before us. The facts were different, and it is not necessary at this time to review it. The rule there applied should certainly not be extended.' " (Underlining ours).

After reviewing its previous holding to the effect that one wrongful act gives rise to but one cause of action in one person

as indicated in the quoted excerpt, the Court said:

> "If then the cause of action consists of or is founded upon the negligent act which produced the effect, rather than the effect of that act upon different primary rights, plaintiff never had more than one cause of action. That this is sound in law and logic cannot well be denied. There can be no logical justification for holding that an action for injuries to plaintiff's person bars a subsequent action for damages to his car but does not bar a subsequent action for damages flowing from and out of the same accident causing injuries to his wife. The damages are founded upon and are caused by the same negligent act or omission. If such negligent act or omission is not the cause, then there is no cause of action at all for any recovery.
>
> "Plaintiff cites and relies upon the case of Skoglund v. Minneapolis St. Ry. Co., 45 Minn. 330, 47 N.W. 1071, 11 L.R.A. 222, 22 Am. St. Rep. 733. That case harmonized with plaintiff's view. But it is out of alignment with the King case, supra, also with the great weight of authority that counsel's research and our own have discovered. There should be 'simplicity and directness in the determination of controversial rights.' Id., page 89 of 80 Minn., 82 N.W. 1113, 1114. The fact that the Skoglund Case has never been followed strongly indicates that the bar has never considered it as an authority for splitting causes of action." (Underlining ours).

Following this, the Court proceeded to point out the resultant endless litigation and absurdities which could be expected in the event one person were permitted to bring a separate action for each element of damage which he might have sustained by reason of one wrongful act, saying:

> "Any plaintiff could, under plaintiff's theory, be permitted to bring his first action for damages to his car. If he was successful therein, his next action would then be to recover damages to his person. Another action could be brought to recover damages for loss of services, medical expenses, and other items for injuries to his wife. If he had minor children also injured in the same accident, he could bring successive actions for the loss of services and expenses incurred for each of them. And if in any such action a plaintiff was defeated, as he was here, he could still proceed with as many actions as there were different items of injury flowing to him and issuing out of the accident. Such result is abhorrent to reason. It would clog our courts with needless and almost endless litigation. The absurdity of such situation and the evils flowing therefrom are apparent."

The Court then quoted from a prior decision the following:

> " 'The decision of the question (res judicata) involves the elementary rule that a single cause of action cannot be

> split or divided and independent actions brought upon each separated part. The rule is well established by the courts and is strictly followed and applied. (Citing authorities). In Actions in tort for personal injuries, like the case at bar, each item of injury must be included in one suit, and, if voluntarily omitted, no further action can be maintained thereon. In short, the judgment in such an action precludes the parties as to all issues and questions, all items of injury or damage, which were or could have been litigated therein." (Underlining ours).

In short, the Court held that a party could not split his cause of action for damages resulting from a single wrongful act, and that if he did, the judgment as to a portion of the damage constituted a bar as to those omitted. This decision is in accordance with the Florida, Alabama and Tennessee cases which we have referred to above, and completely nullifies the Skoglund case as authority.

In the order, the trial Court expressed the view that to sustain the position of the defendants would result in an injustice, and stated that if there were no authority to support him and all the authorities were against him (which quite accurately described the situation), he would still rule against the defendants (R.I.45). Like the jury, the trial Court was unable to divorce his sympathy for the injured plaintiff from the consideration of the law and the facts.

As we see it, the verdict in this case was an unjust one. We believe that an unbiased analysis of all the evidence convincingly shows that such is the case. If the negro driver of the ice truck, which caused plaintiff's injuries, had been financially responsible, it is doubtful whether the defendants would have been sued. But obviously the negro was not financially responsible, and having sued the defendants, the plaintiff and his witnesses went to unbelievable lengths to sustain his claim. Thus:

(a) One witness saw skid marks at the alleged point of impact of the two trucks. He did so by moonlight, and when the moonlight did not seem sufficient, he brought to his aid the tail light of defendants' truck (R.I.176), which was two hundred feet away.

(b) Another witness, though badly injured and sitting in the rear seat of the Statum car, holding her badly injured husband (R.II.211-12) saw the skid marks by the moonlight, notwithstanding the ice truck was between her and such skid marks (R.II. 216).

(c) Two other witnesses for the plaintiff talked with the witnesses to the accident, examined the road marks and placed the entire blame for the accident on the negro driver of the ice truck (R.I.114-17). Subsequently, they changed their minds (without going back to the scene of the accident) and put the Gaynon truck on the wrong side of the road. They found, so they claimed, skid marks, made by the ice truck, extending 129 feet from the alleged point of the collision between the two trucks, though the distance between the point of collision between the two trucks and the point of collision between the ice truck and the Statum car was not over 90 feet (R.I. 107;118;134;149). Thus, the alleged 129 foot skid mark is an absolute impossibility.

(d) Aside from the above, the physical facts demonstrate that plaintiff's theory of the accident was inherently improbable, if not impossible (Defendants' Exhibits A, C, and D).

In view of the character of the evidence upon which the plaintiff was able to fasten liability upon the defendants before a sympathetic jury, any contention that it would be unjust to apply the well settled law to the facts in this case is wholly out of place. Of course, any rule of law may seem to operate harshly in a particular case, but such does not constitute a valid reason for not applying the law. And in this particular case, we feel quite sure that if the law, as laid down in the Johnston and Smith cases is applied, justice will be done to the plaintiff as well as to the defendants.

And so we respectfully submit that the judgment ought to be reversed with directions to permit the filing of the additional pleas.

SECOND QUESTION.

WHERE A PLAINTIFF'S CASE IS BASED UPON AN INHERENTLY IMPOSSIBLE THEORY AND IMPROBABLE TESTIMONY, AS DEMONSTRATED BY THE PHYSICAL FACTS AND EVIDENCE CONSISTENT THEREWITH, SHOULD NOT A VERDICT FOR PLAINTIFF BE SET ASIDE?

The above stated question is raised by Assignments of Error 6 to 11 (R.II. 358-59).

The decisions of this Court settle the proposition that a verdict not in accord with the manifest weight of the evidence or with the justice of the case should be set aside and a new trial granted:

> Smith v. Jackson County, 129 Fla. 787, 176 So. 858, text 859 and authorities cited.

The question of whether a verdict is contrary to the manifest weight of the evidence and the justice of the case is necessarily a question that must be answered by examination of the evidence in the particular case before the Court. Appellants assert that this is such a case. They say that the plaintiff's case was based upon an inherently impossible theory; that it is supported only by the most improbable character of testimony; that the physical facts completely negative the great mass of plaintiff's testimony; and, in final analysis, that the verdict is contrary to the manifest weight of the evidence and the justice of the case. The principal matters upon which the appellants rely are as follows:

(1) The plaintiff's case was based upon an inherently impossible theory as demonstrated by the physical facts: The plaintiff's witnesses testified that at the time the two trucks collided, both of them were going straight (R.I.168;181;186;197; R.II.205;212). The physical facts as shown by the photographs (Defendants' Exhibits A, C and D) show the impossibility of this testimony. The ice truck did not hit defendants' truck until it reached the gas tank (Defendants' Exhibit F) at the rear of the cab. As shown by defendants' Exhibit C, and as plaintiff's witness Crane testified (R.I.180), the left front wheel of the ice truck hit the gas tank.

These facts mean that at the time of the collision, the wheels of the ice truck were cut to the left, and that the ice truck was cut into defendants' truck. The bumper on the ice truck is flush with the wheels, and the left front bumper on the ice truck was not bent backward or broken off. Therefore, the ice truck could not have been going straight at the time of the collision. This fact may be proved by demonstrations with the gas tank and rim (Defendants' Exhibits F and I), because the rim will not fit the concave in the gas tank unless it is placed at an angle of approximately 45 degrees (R.II.284-5; 288-9; 314-16; 324-27).

Another absolute impossibility in plaintiff's evidence is this: The plaintiff and two occupants of his automobile testified that at the time of the collision between the defendants' truck and the ice truck, the plaintiff's car was 50 to 60 feet behind defendants' truck; and his testimony shows that the overall length of defendants' truck and trailer was 39 feet, and that the length of the trailer was 29½ feet (R.I.134). The point of impact between the two trucks was at the gas tank at the rear of the cab of defendants' truck. Thus, at the time of the collision between the two trucks, plaintiff's automobile could not have been more than approximately 90 feet from the point of collision (i.e., the length of the trailer, 29½ feet, plus 50 or 60 feet). The plaintiff's car was being operated at a speed of 35 to 40 miles, and the ice truck at a speed of 25 to 30 miles per hour. Both continued on in opposite directions until they collided, and the Statum automobile was not slowed down (R.I.65;66;68;164;169; R.II.210).

At a speed of 35 to 40 miles per hour, the Statum car would have traveled in one second between 51.3 and 58.7 feet, depending on the exact speed. In one second, the ice truck would have traveled between 36.62 and 44 feet, depending on its exact speed between 25 and 30 miles per hour. This demonstrates that the most the ice truck could have traveled between the first and second collisions was 38.7 feet

(i.e., the difference between 90 feet and the distance (51.3 feet) the Statum car traveled in one second, at a speed of 35 miles per hour).

Yet plaintiff's case was based in part upon the testimony of the two road patrolmen that the ice truck made road marks of 129 feet between the first and second collisions (R.I.107;118;149) -- a mathematical impossibility.

If the testimony that the ice truck made road marks for 129 feet before it collided with the Statum car be true, this is conclusive proof that road marks started some 75 to 100 feet before the two trucks collided; and in all probability a tire on the ice truck blew-out and pulled it to the left and into the Gaynon truck. Such is the only reasonable explanation of the 129 foot read marks.

(2) <u>The other testimony of plaintiff's witnesses was highly improbable</u>: Notwithstanding the "box car" appearance of defendants' truck on the highway, the two occupants of the front seat and an occupant of the rear seat of the Statum car, as well as the three negro occupants of the ice truck, all described the collision between the two trucks in the same way. All of them said that defendants' truck was from 2 to 3 feet over the center line at the time of the accident (R.I.50;163;180;197; R.II.204;210).

This testimony is most remarkable, because it is highly improbable that three persons traveling in a truck in one direction and three persons traveling in an automobile in the opposite direction would have seen precisely the same thing at night, particularly with a great big old "box car" between them (R.II.209).

Defendants' Exhibit A is a photograph of the so-called "box car". According to the testimony of his witnesses, the plaintiff's car was within 50 to 60 feet of defendants' truck and was further to the right (or West) side of the road than was the truck; yet plaintiff's witnesses testified that they could see around the left side of

defendants' truck and state the position of the ice truck on the road (R.I.169-70; 213-15). The person occupying the right rear of the Statum car claims to have seen the front wheel of the ice truck hit defendants' truck (R.II.215); and this person also saw, by the moonlight, the road marks made by the ice truck, though it was necessarily between her and the road marks (R.II.217). But the fact that this witness knew nothing about how the accident happened is to be inferred from the fact that the road patrolmen had talked with her (R.I.159) and did not mention her in the report.

The attention of the Court is invited to Defendants' Exhibit A. From this photograph, the Court will observe that all this "seeing around the corner" testimony is of the most highly improbable character. It discredits itself. It is likewise highly improbable that the three negroes could have seen the center line of the road. They were meeting defendants' truck, and had they been looking at the center line of the road, they would have been blinded by the lights on the truck. Everyday experience proves this statement. And the testimony of one of plaintiff's witnesses that he saw the road marks at the point of impact by moonlight and a parking light on a truck 200 feet distant is nothing short of ridiculous (R.I.176).

(3) <u>Two of plaintiff's witnesses were asleep and six of them were interested</u>: Randolph Brooks, one of the two negro boys in the ice truck, told Mr. J. H. Underwood on two occasions that he and Sam Madison, the other negro boy, were asleep at the time the collision occurred (R.II. 219-20); yet these two negro boys got on the witness stand and described the accident in detail. But the fact that they were asleep and knew nothing about how the accident happened is to be inferred from the fact that their version of the accident is not mentioned in the road patrol report (Defendants' Exhibit B). In addition, the plaintiff and five of his witnesses were highly interested, the plaintiff and four of them having sued the defendants and the other one was asserting claims against the defendants.

(4) Defendants' evidence is consistent with the physical facts: In the first instance, the officers who investigated the accident placed the entire blame upon the negro driver of the ice truck (Defendants' Exhibits B and H). The officers had examined the road marks and questioned the witnesses (R.I.113-15; 159). As shown by the physical facts, their first version was right, because the ice truck driven by the negro was cut to its left and into the gas tank on defendants' truck.

Aside from the testimony of the driver of defendants' truck (R.II.229), the testimony of two completely disinterested witnesses shows: (a) Immediately before the accident, defendants' truck was being operated on the West (its right) side of the highway very near the edge of the pavement (R.II.251-52); and (b) the road marks showed that the two trucks collided on the West (the Gaynon truck's) side of the road (R.I.91-4). This testimony is obviously true, because after examining the road marks, the officers placed the entire blame for the accident on the negro. If the road marks had shown that the collision between the two trucks occurred on the negro's side of the road, the officers could not have placed the entire blame on him.

Certainly, the above demonstrates that the verdict is contrary to the manifest weight of the evidence and the justice of the case.

This is not a case where one set of witnesses has testified to a reasonable state of facts and another set of witnesses has testified to an equally reasonable, but opposite, state of facts. On the contrary, this is a case where one of the two conflicting versions of an occurrence is based upon inherently impossible and highly improbable testimony, while the other version is reasonable and consistent with the physical facts.

Therefore, this is not a case where it can be said that the jury resolved conflicting testimony in favor of one of the parties and thus settled the matter. On the contrary, the verdict of the jury in this case is based upon such inherently improbable testimony that the

Court is not bound by the verdict:

> Catlett v. Chesnut, 107 Fla. 498, 146 So. 241, 91 A.L.R. 212, text 222.

In the cited case, this Court said:

> "Much of the evidence offered in plaintiff in error's behalf, while uncontroverted, appears to be discredited in many particulars. Such evidence is not necessarily binding upon a court in the consideration of a motion for a directed verdict. Testimony may be unimpeached by any direct evidence to the contrary, and yet be so contrary to natural laws, inherently improbable or unreasonable, opposed to common knowledge, inconsistent with other circumstances established in evidence, or so contradictory within itself, as to be subject to rejection by the court or jury as a trier of the facts. Brannen v. State, 94 Fla. 656, 114 So. 429. While the testimony of an unimpeached witness is not to be arbitrarily disregarded, and must be measured by the standard of common experience in human conduct or business usage, there may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. A witness may be contradicted by the facts he states as completely as by direct adverse testimony. There may be likewise so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story."

A careful analysis of the evidence in this case brings it squarely within the rule stated by this Court in the above case.

As we have shown, much of plaintiff's testimony is contrary to the physical facts and some of it is not only improbable, it is inherently impossible. A verdict based upon this sort of testimony will be set aside by the Court.

In Budaj v. Connecticut Co., 108 Conn. 474, 143 Atl. 527, it appeared that plaintiff was struck by defendant's trolley. There was no obstruction and the lights on the trolley were lighted. Plaintiff testified that he looked in the direction from which the trollery was approaching and saw nothing. In reversing judgment for the plaintiff the Court said:

> "It is obvious that if he looked he could not have failed to see the trolley. * * * where testimony is thus in conflict with indisputable facts, the facts demonstrate that the testimony is either intentionally or unintentionally untrue, and leave no real question of conflict of evidence for the jury concerning which reasonable minds could reasonably differ."

33.

In Riggie v. Grand Trunk Ry. Co., 93 Vt. 282, 107 A. 126, where it was claimed that a jack was unsafe, and plaintiff had been injured when he put his weight on the lever, the Court said:

> "When as here an object shows conclusively that it could not have operated as a witness testifies, the question should not be submitted to the jury, for the simple reason that in such circumstances the minds of reasonable men could not draw conflicting inferences. * * *
>
> "The dog and cogs do not show sufficient wear to impair the efficiency of the jack, and, when on examination the dog was inserted between the cogs or teeth of the standard, it was perfectly obvious that it was impossible to make the dog slip by properly throwing the weight of a man's body upon the lever. The evidence in this regard considered in the light most favorable to the plaintiff, had no tendency to show negligence on the part of the defendant, but rather on the part of the plaintiff, notwithstanding that the plaintiff and one of his witnesses testified that the jack was unsafe in the respect claimed by the plaintiff; for the testimony was unavailing and without probative force to establish the fact to which it related being opposed and contradicted by the fact itself. * * *"

In M. K. & T. Ry. Co. v. Collier (C.C.A.8) 157 Fed. 347, text 353, the Court said:

> "Where a witness' testimony is positively contradicted by the physical facts, neither the Court nor jury can be permitted to credit it."

In American Car & Foundry Co. v. Kindermann (C.C.A.8) 216 Fed. 499, two witnesses testified that a spring on the throttle of the engine was defective and caused the engine to lurch and thus the accident occurred. But tests showed it was not defective and the Court said:

> "In our opinion there is no substantial evidence justifying the submission to the jury of the question as to whether the spring on the throttle to that engine was defective. It is true that the testimony of Mr. Overpeck is positive; but the rule is well settled that when the testimony of a witness is positively contradicted by the physical facts, neither the Court nor the jury can be permitted to credit it."

The above cases are in accord with the general rule upon the subject, 20 Am. Jur. 1033-35, and, therefore, we shall not burden the Court with discussion of further authorities. And we end this portion

of the argument with the observation that the Court can take the photographs showing the physical facts, the gas tank and the rim and with them demonstrate the inherent improbability of the testimony of plaintiff's witnesses upon which a sympathetic jury rendered a verdict for the injured plaintiff.

THIRD QUESTION

WHERE A PLAINTIFF'S EVIDENCE SHOWS THAT HE WAS OBSERVING THE ALLEGED NEGLIGENT OPERATION OF A VEHICLE AHEAD, BUT NOTWITHSTANDING HE CONTINUED TO FOLLOW IT AT A DISTANCE OF APPROXIMATELY 50 FEET AND AT A SPEED OF APPROXIMATELY 35 MILES PER HOUR AND MADE NO EFFORT TO PREVENT HIS INVOLVEMENT IN A COLLISION CAUSED BY THE NEGLIGENT OPERATION HE WAS OBSERVING, IS HE NOT GUILTY OF CONTRIBUTORY NEGLIGENCE?

The above question is raised by Assignments of Error 6 to 11, inclusive (R.II.358-59).

As we have shown, the plaintiff and two of the occupants of his automobile testified that they were following defendants' truck at a speed of 35 to 40 miles per hour and at a distance of 50 to 60 feet. The testimony of these witnesses was that defendants' truck was some 2 to 3 feet over the center line and that such was the cause of the collision. All of these witnesses, so they claim, saw the ice truck approaching from the opposite direction, and were bound to anticipate that a collision between the two trucks was probable.

The plaintiff testified that he had been following defendants' truck for some 1½ miles, and that "Every once in awhile, he would get over across the line" (R.I.66). As regards how long the truck had been over the line before the collision, he said "it hadn't been over there but just a few minutes, just gradually went across" (R.I.65). The plaintiff's car was not slowed up any and was driven within 50 to 60 feet of the rear of the trailer that was being (allegedly) negligently operated (R.I.73;75).

From the above, it is clear that this is not a case where a vehicle ahead is <u>suddenly</u> stopped or swerved in a negligent manner so as

35.

to cause injury to a person in a following vehicle. If such were the case, we would readily concede that ordinarily the question of the contributory negligence of the following vehicle in being operated so close to the vehicle ahead and at such a rate of speed that it could not be stopped in time to prevent involvement in a collision ahead, would be settled by the verdict of the jury.

But here the complaining party was observing the alleged negligent operation of the vehicle ahead and had been observing the same for a considerable period of time. Notwithstanding his observation of the negligence complained of, his automobile was operated at a speed of 35 to 40 miles per hour and within 50 to 60 feet of the rear of the alleged negligent vehicle, and absolutely nothing was done to prevent involvement in the inevitable collision ahead. Such, we submit, constitutes contributory negligence, and, therefore, the verdict of the jury is contrary to the manifest weight of the evidence.

The rule here applicable is stated in Blashfield Cyclopedia of Automobile Law and Practice (Perm. Ed.), Vol. 2, page 96, as follows:

> "The driver of a car following a few feet behind another, under circumstances such that he should anticipate the possibility of obstruction or trouble of some sort, should have his car under such control or proceed at such a rate of speed that he can stop at once if the car in front stops."

According to the testimony of the plaintiff and the occupants of his car, trouble ahead was not only possible, it was inevitable, but absolutely nothing was done to prevent involvement in it.

The decision in McGehee v. Hines, 12 La. App. 13, 124 So. 846, illustrates our contention. In that case, defendant was following a road grader; and collided with the rear of it, injuring the plaintiff. Respecting the duty of defendant as to that which was apparent to him, the Court said:

> "It was defendant's duty, when he saw this heavy, slow-moving road machinery on the right-hand side of the road ahead of him in the direction he was going, the plaintiff standing upon the rear end of the rear grader, to get his machine

> under control in ample time, and get over on the left-hand side of the road before he got to it. He testifies that he applied his brakes, and that his automobile skidded under them into the road machine. The fact is he was driving too fast, and did not get his car under control as he approached the road machinery in front of him.
>
> "The evidence justifies the conclusion that, although the necessity for such action was apparent, defendant took no precaution, but carelessly and negligently, driving too fast and without having his automobile under control, ran into the rear end of the rear grader, striking it a heavy blow. * * *" (Underlining ours).

While distinguishable in point of fact, the decision of this Court in G. Ferlita & Sons v. Beck, 143 Fla. 509, 197 So. 340, convicts the plaintiff of contributory negligence. In that case, it appeared that defendant's truck was parked on the highway; that plaintiff attempted to pass it and collided with an oncoming automobile. In holding plaintiff guilty of contributory negligence, this Court said:

> "It is well settled in this jurisdiction that it is the duty of one driving upon the highway to drive at such rate of speed as to be able to stop or control his car within the range of his vision, whether it be by night-time or daylight. It was the duty of plaintiff when he saw the tail lights of the truck ahead of him to so control the speed of his automobile as not to injure himself or others. It was also his duty to have kept a lookout ahead and, had he done so, he would necessarily have seen the approaching automobile and would have realized that (if he passed the truck) he must pass the truck which was headed in the same direction in which he was headed and the automobile which was headed in the opposite direction at about one and the same place. His testimony shows that he did not observe the approaching car until he had turned to the left to pass the truck and yet all the evidence shows that the approaching automobile was on the open, straight and unobstructed highway where the plaintiff could have seen it approaching when the two automobiles were several hundred feet apart.
>
> "We are not unmindful of the fact that whether or not the plaintiff is guilty of contributory negligence, is, in most cases, a jury question, but it is a jury question only when the evidence is conflicting. In cases where the undisputed evidence shows that the plaintiff is guilty of negligence which contributed to the proximate cause of the injury then, as a matter of law, he cannot recover. See J. G. Christopher Co. v. Russell, 63 Fla. 191, 58 So. 45, Ann.Cas. 1913C, 564."

In the case at bar, the plaintiff's evidence conclusively shows that he was observing the obvious danger ahead, but went recklessly into it. Therefore, regardless of defendants' negligence, the plaintiff's own negligence bars recovery by him.

FOURTH QUESTION

WHERE INJURIES (INCLUDING LOSS OF AN ALREADY CRIPPLED LEG) SUSTAINED BY A 48 YEAR OLD CARPENTER EARNING $20.00 TO $25.00 PER WEEK, WHEN EMPLOYED, DID NOT SUBSTANTIALLY AFFECT HIS CAPACITY TO CARRY ON HIS TRADE AFTER HIS TOTAL DISABILITY PERIOD ENDED, AND WHERE HIS SPECIAL DAMAGES INCLUDING LOSS OF EARNINGS APPROXIMATED $3,000.00, IS NOT A VERDICT IN THE AMOUNT OF $11,000.00 EXCESSIVE?

This question is raised generally by Assignments of Error 5 to 10, inclusive, and is specifically raised by Assignments 11, 12 and 13 (R.II. 358), which assert error in the denial of the motion for new trial on the ground that the verdict was excessive (R.I. 38-9). The question is material only if the other three points in the case are ruled against the appellants.

At the outset of our discussion of the excessiveness of the verdict, we observe that there is no doubt as to power and duty of this Court in a proper case, to order a remittitur as an alternative for a new trial. In Malone v. Folger, 132 Fla. 76, 180 So. 522, this Court said:

> "Where liability of the defendant appears and the verdict is excessive, a remittitur of the excess may be allowed as an alternative for a new trial by the trial court, Pensacola Electric Co. v. Bissett, 59 Fla. 360, 52 So. 367; De La Vallina v. De La Vallina, 90 Fla. 905, 107 So. 339; or by the appellate court, Ryan v. Noble, 95 Fla. 830, 116 So. 766, or by both courts, Tampa Electric Co. v. Gaffga, 81 Fla. 268, 87 So. 922. This does not interfere with the right to trial by jury, but indicates the amount of recovery that the court considers excessive, the court being required by controlling law to consider the entire record and to administer right and justice thereon. Atlantic C. L. Ry.Co. v. Pipkin, 64 Fla. 24, 59 So. 564."

Recognition by the parties of this settled rule should obviate any discussion as to the jury being the sole judge of the damages and of the reluctance of the Court to interfere. In final analysis, the law is that if the Court considers that the verdict is not excessive, it will not interfere; but if the Court finds that the verdict is excessive, it is the power and duty of the Court to order the remittitur of the excess. Therefore, the question is: Is the

verdict excessive? And appellants assert that the verdict in this case is grossly excessive.

(a) The Evidence Shows no Injury to Plaintiff Which Will Substantially Affect His Capacity to Carry on His Trade, and Under Applicable Decisions of this Court, the Verdict is Grossly Excessive.

The facts in this case are rather unique. Here the plaintiff suffered injuries which, because of infection, necessitated the amputation of his right leg between the hip and the knee. Yet the undisputed evidence is that for years before his injury, plaintiff's right leg had been stiff (anky-losed) at a 45 degree angle; he could not bend his knee; and, in so far as his capacity to follow his occupation is concerned, the loss of the leg has no substantial effect upon the plaintiff (R.II.249;255-65). The following testimony by an admittedly expert orthopedic surgeon is undisputed (R.II.258-59; 260):

> "Q Now, Doctor, assuming that a man with the leg you have shown there had had it cut off, and that the leg had been broken about four inches above the knee, the bone had, so that they had to amputate it; and that this man had to wear an artificial leg the rest of his life, and that this man was a carpenter; pleaseexplain to the jury and to the Court the difference in his ability to do work, carpentry work, with the stiff leg and with the wooden leg, and pointing out, as much as in your opinion you can, the advantages and disadvantages, if any.
>
> "A Well, with the stiff leg, he could walk around and carry some weight; he could climb a little on the good leg; and he could support himself, I mean, take his good leg to balance himself and carry himself in position some. On the other hand, he would not be able to bend his knee to get into certain positions, and he would be a hazard to himself and to everyone around him, trying to climb off of the ground, anyway. A man with an artificial leg would walk faster; they can even run. He could bend his knee to a right-angle. Still, he could climb, but he would be a hazard to himself and to those around him. In some ways, it might be a good thing for him to have, because he could bend his knee to a right-angle, or even more, and get into positions where he could get around better. There would be less pain to him in some ways, because a bent leg is a shortened leg; I mean, it is a short distance between the ankle and the hip, compensated by a bend in the spine. With an artificial leg, that

> shortening would be overcome and he would not have to bend his spine and have the excessive strains on his hip or his foot. * * *
>
> "Q I believe the last question was, Doctor, is so far as ground work, work on the ground for a carpenter was concerned, what, in your opinion, would be the advantages or disadvantages of an artificial leg and a stiff leg at the angle that this assumed person had?
>
> "A There would be very little difference. The artificial leg might be a little -- I think there would be very little difference. The artificial leg would let him get around a little better. On the other hand, with the stiff leg, he might use it as a little better prop in certain positions."

In view of the fact, which is more or less extraordinary, that the testimony shows that although the plaintiff lost a leg in the accident, yet his previous condition was such that his earning capacity was little, if any, affected thereby, it is difficult to locate (and we have been unable to locate) a parallel case. Nevertheless, the decisions of this Court make it clear that upon evidence such as is before the Court in this case, the jury was not warranted in awarding the plaintiff substantial damages as for permanent injury affecting his earning capacity. Thus, in Baggett v. Davis, 124 Fla. 701, 169 So. 372, this Court said:

> "In order that a jury may assess damages for any permanent injury, it must appear to them that the injury is reasonably certain to impair the health and earning capacity of the injured person in the future; and not merely that it will apparently affect the health and earning capacity of the injured party."

Another pertinent decision of this Court is Florida Railway & Navigation Co. v. Webster, 25 Fla. 394, 5 So. 714. In that case, it appeared that plaintiff was severely injured on the right side and head, the medical testimony being that the injury to his right shoulder was such "that he will never be able to do any manual labor with his right arm". (5 So. text 720-21). The plaintiff was 51 years of age (only 3 years older than the plaintiff here); he had done some carpentry work, and during four months of the previous year, he had made $600.00. The jury returned a verdict for $9,000.00. This

Court ordered a remittitur of $3,500.00, thus holding that a verdict of $5,500.00 was all that the case would stand. The decision was based principally upon the fact that plaintiff's showing as to probable loss of earnings was unsatisfactory.

In view of the evidence in the case at bar, we feel that the remitted verdict of $5,500.00 in the Webster case is a fair measure as to what the verdict in this case should be. This is so because there is absolutely no showing as to loss of earnings except during the plaintiff's total disability or recuperation period.

Another illustrative decision of this Court is to be found in the case of Ward v. Stanley, 130 Fla. 642, 178 So. 398. In that case, the jury awarded a 24 year old truck driver the sum of $5,000.00. The evidence showed that he was in the hospital for several weeks, that he was in bed at home for almost a year, and at the time of the trial, about 20 months after the accident, he had been unable to return to work. The trial Court had ordered a remittitur of $500.00, and in awarding a further remittitur of $2,000.00, this Court said:

> "There was no evidence as to the cost of hospitalization, nurses' bills, doctors' bills, or medical bills, and the evidence of earning capacity was too limited to predicate an intelligent judgment. About all that was proven was that Stanley had been seriously hurt and had lost more than a year's work."

If, in the case at bar, the $2,500.00 allowance in the Stanley case be taken as a fair measure of the damages to which the plaintiff, H. A. Statum, was entitled for his pain and suffering, the verdict in the case at bar is grossly excessive. Thus:

(1) The plaintiff's doctor and hospital bills aggregated $1,322.95; and he claimed $150.00 for an artificial leg (R.I.53-54).

(2) According to his testimony, the plaintiff made $25.00 per week in his last employment (R.I.60). At the time of the trial, he had been unable to work from May 11, 1941 to March 16, 1942, approximately 42 weeks. Thus, his loss of earnings at the time of the trial aggregated approximately $1,050.00.

(3) There was no definite showing as to the length of time, after the trial, that the plaintiff would be disabled, but the testimony of his physician was as follows (R.I.100-01):

> "Q Under ordinary circumstances, Doctor, what can you say as to how long it will be from now before that condition will clear up?
>
> "A It depends entirely on whether there is any dead bone left on the lower end of the stump; but I don't think it would be, sir -- you couldn't be sure of making a statement without an X-ray at the present time.
>
> "Q You couldn't do it?
>
> "A No, sir.
>
> "Q Well, do you recommend an X-ray now, sir?
>
> "A I do.
>
> "Q Doctor, in the event that leg continues to be infected, or that condition continues to exist there, is it possible that the entire bone may have to come out into the hip joint later?
>
> "A It is a possibility, but not much of a probability.
>
> "Q Well, in the event an X-ray should be made now, and in the event that it is determined that there is some dead bone inside of the sinus, and in the event the bone is removed, how long thereafter before that leg or stump would heal up sufficiently to enable Mr. Statum to attach an artificial limb and bear any weight on it?
>
> "A Well, your question is a little bit difficult. However, there is, ordinarily you consider healing of a wound about ten to twelve days. That is, assuming that you clear out all that entire amount of infection. And as an average proposition, it is somewhere between six and twelve weeks before you could put an artificial leg on any stump; I mean, before you can start shrinking it down to get your artificial leg on."

Under this testimony, certainly an outside estimate of an additional 42 weeks' disability would be fair. Such would entitle the plaintiff to an additional $1,050.00. And, under the decisions of this Court in Ward v. Stanley, a verdict based upon the following is the absolute maximum this case will stand:

Pain and suffering	$ 2,500.00
Expenses, including hospital and doctor bills ...	1,472.95
Actual 42 weeks' disability at $25.00 per week ..	1,050.00
Additional 42 weeks' disability at $25.00 per week	1,050.00
Total verdict	$ 6,072.95

And bear in mind that the above is calculated upon steady employment at $25.00 per week, whereas the fact is that the plaintiff worked from job to job, and during the period he claimed to be making $30.00 per week, he actually earned from $2.50 to $29.70 (R.I.78;80), or an average of $17.28 per week (Defendants' Exhibit G, certified to the Court).

Still another illustrative decision of this Court is found in Florida Motor Lines v. Bradley, 121 Fla. 591, 164 So. 360; 128 Fla. 392, 174 So. 863. There the plaintiff, at the time of the injury, was earning $100.00 per month. She had a permanent and severe injury to her knee and other injuries from which she suffered severely, and was required to spend large sums for doctors' and hospital bills. In this case, this Court held that a verdict for $6,000.00 was excessive by $2,000.00.

The above decisions of this Court demonstrate that in this case there was no evidence sufficient to entitle plaintiff to damages for loss of earnings or disability beyond his total disability or recovery period, and, by comparison, they show that the verdict of $11,000.00 is grossly excessive.

(b) Other Illustrative Authorities Showing the Verdict to be Excessive.

The rule enunciated in the decisions of this Court, to the effect that to recover damages for permanent disability and consequent loss of earnings, a plaintiff must show with reasonable certainty the extent of his disability and loss, is sound. It is the general rule: 15 Am. Jur. 502-3; also page 798, where it is stated:

> "In order to recover for loss of time and loss or impairment of earning capacity, the burden is upon the plaintiff to establish with reasonable probability that his injury did bring about a loss of time and earnings, and he must prove both the amount of time lost and its value."

In the ordinary case, where a plaintiff has lost a leg, it will appear that the plaintiff's capacity to earn has been substan-

tially impaired. But this is not the ordinary case, for here the undisputed evidence is that plaintiff's capacity to follow his trade was not substantially affected, and, indeed, in some respects an artificial limb will serve him better than the crippled limb he had; particularly, the artificial limb would enable him to get around better and eliminate pain and suffering caused by the crippled leg (R.II.258-60). In reality, the evidence in this case shows no probable loss of earnings by the plaintiff, except for the actual loss during the time his wound was healing and he was being prepared for the artificial limb.

In Oregon-Washington Railroad, etc. Co. v. Braham, 259 Fed. 555, the Court, in dealing with a situation where the loss of earnings was not shown by proof, said:

> "Obviously she was entitled to nominal damages therefor. But as the amount of such damage was susceptible of some proof, and none was produced, the case is brought within the general rule that the amount should not have been left to the conjecture of the jury. In Leeds v. Metropolitan Gaslight Co. 90 N.Y. 26, the court of appeals of New York spoke of the element of damage which consisted of lost time as purely a pecuniary loss or injury, and said: 'The rule of recovery is compensation. Where the loss is pecuniary, and is present and actual, and can be measured, but no evidence is given showing its extent, or from which it can be inferred, the jury can allow nominal damages only . . . Where actual pecuniary damages are sought, some evidence must be given showing their existence and extent. If that is not done, the jury cannot indulge in an arbitrary estimate of their own.' "

The above case is applicable here, as it shows that there can be no recovery for loss of earnings unless the probable loss be proved.

The fact that a person who has lost a good leg is not precluded from following a gainful occupation, may be demonstrated by the authorities. In Bell v. Globe Lumber Co., 107 La. 725, 31 So. 994, in reducing a verdict from $10,000.00 to $6,000.00, the Court said:

> "The evidence shows that Bell was earning from $1.75 to $2.20 a day at the time of the accident; that his leg was crushed practically off, and was subsequently amputated and reamputated; and that, whilst it was not entirely sound at the date of the trial, he was, nevertheless, at that time, enabled to earn in some way an average of about $7 a week. After the verdict and judgment in his favor,

> he died, and his widow and minor children have been made parties to the appeal. The verdict of $10,000 is rather larger than this court has been in the habit of affirming in similar cases, and we think should be reduced. It is therefore ordered, adjudged, and decreed that the amount allowed by the judgment appealed from be reduced from $10,000 to $6,000, and that, as thus amended, said judgment be affirmed."

The case of Lowe v. Morgans' Louisiana & T. R. & S. S. Co., 150 La. 30, 90 So. 429, convincingly also shows that the verdict in this case is excessive. There it appeared that plaintiff's ankle was crushed, and several operations were performed. The evidence was that either there must be an amputation or plaintiff would have a stiff joint. The plaintiff was a carpenter; he was 36 years old (12 years younger than the plaintiff, Statum), and was earning $19.40 per week (about the same as shown by the evidence here that Mr. Statum was capable of earning).

At the trial, it was admitted that plaintiff's "foot in the present condition is worse than useless". In ordering a reduction of a $11,000.00 verdict to $7,390.00, in view of the fact that plaintiff had received $2,710.00 in compensation, the Court said:

> "In any event, plaintiff has not been totally disabled, and whichever alternative is pursued, either with a stiff joint, or artificial foot, he should still be able to pursue his calling, and we think the allowance was excessive. True he suffered a great deal, still he should only be allowed such a sum as will reasonably compensate therefor, together with the loss in earning capacity, disfigurement, etc. He was 36 years old, and earning $19.40 a week, or about $85 per month. We, therefore, think that a judgment of $10,000, less the compensation which he is receiving and will receive from his employer, amounting to 50 per cent of his weekly wages for 300 weeks, or $2,710, would be just and reasonable." (Underlining ours).

It may be thought by opposing counsel that the above decision would justify a verdict for $10,000.00 in this case. But such is not the situation, for there the plaintiff had no previous disability and was 12 years younger than the plaintiff here. There the Court took into account the permanent impairment of the earning capacity of the plaintiff, while here the evidence shows no such impairment.

45.

In Mullin v. Central R. Co., 77 N.J.L. 241, 72 A. 426, it appeared that plaintiff's leg was badly crushed by an engine. It was necessary to amputate it below the knee. The jury rendered a verdict in favor of the plaintiff for the sum of $6,000.00. On appeal, the verdict was held excessive, the Court saying:

> "The third reason advanced for the setting aside of this verdict, however, we think is meritorious. The plaintiff was 54 years of age at the time of the trial. He was an ordinary laborer, earning at the time of the accident from $1.25 to $1.40 a day. Although the loss of his leg is a very serious injury, yet he admits that with the help of an artificial leg he is able to get around with sufficient dexterity to earn about the same wages since the accident as he was receiving before it occurred. It does not appear that he was put to any expense for surgical or medical treatment. In view of the plaintiff's age and of his limited earning capacity before the accident, coupled with the fact that his present earnings seem to be but little, if at all, diminished by the loss of his leg, we are of the opinion that an award of $3,500 would have been a full compensation for the injuries received by him."

The above case is not factually in point, but it is quite applicable in principle because, in the cast at bar, the undisputed evidence is that plaintiff's earning capacity was little, if any affected by his injury. If we add here the plaintiff's medical expenses and cost of an artificial leg, to the sum of $3,500.00, plus approximately $1,500.00 for the time he was unable to work, it appears that a verdict of around $6,500.00 would be ample.

In Latchtimacker v. Jacksonville Towing & Wrecking Co. (D.C. Fla.) 181 Fed. 276 (affirmed by the 5th Circuit Court of Appeals without opinion), it appeared that plaintiff was twenty-seven years old and was earning around $20.00 per month. His life expectancy was thirty-seven years. The injuries were such that it was necessary to amputate one arm and one leg. The jury returned a verdict for $10,000.00, and the Court ordered a remittitur of all in excess of $4,826.00. In doing so, the Court pointed out that the money loss to the plaintiff was approximately $2,800.00, and with regard to the mental pain and suffering said:

> "Mental pain which is separable from physical suffering, such as future pain or mortification from a crippled condition, have been held to be too remote and intangible to constitute an element for which the jury could allow damages. While it might be difficult to estimate the plaintiff's physical and mental pain, and while a wide latitude is allowed the jury in estimating for this element, it should nevertheless be confined within reasonable limits, and not left to arbitrary adjustment. The estimate of $2,000 for mental pain and physical suffering consequent upon and inevitable as a result of the injury would under the circumstances have been a reasonable and liberal allowance. Therefore, after due consideration of the case, I have reached the conclusion that a verdict for $4,826 should not be set aside. Plaintiff therefore will be given the right to elect whether he will enter a remittitur for the excess of this amount or take chances on another trial."

In the last cited case, the Court allowed a plaintiff $2,000.00 for pain and suffering due to the loss of an arm and a leg. This is a further indication that an allowance here of $2,500.00 (taking the measure from this Court's decision in Ward v. Stanley, 130 Fla. 462, 178 So. 398, supra) for Mr. Statum's pain and suffering would be fully adequate. If that allowance be made, then a verdict of approximately $6,000.00 is the most that should be allowed to stand.

We submit that the verdict is grosaly excessive and that a very substantial remittitur should be ordered. Under all the circumstances shown by the evidence, a verdict of around $6,000.00 would be ample to compensate the plaintiff in the case at bar.

C O N C L U S I O N.

The record in this case shows that the plaintiff had split his damages and had recovered a judgment for a portion of them; therefore, under the authorities, he was precluded or barred from obtaining another judgment upon the same wrongful act. Notwithstanding this, he was allowed to proceed and a sympathetic jury awarded him $11,000.00 upon evidence that was inherently impossible, highly improbable, or otherwise discredited. In addition, the plaintiff's own testimony clearly indicates that he was guilty of contributory negligence. Upon this state of facts, the judgment should be reversed.

But if these points be ruled against the appellants and judgment be not reversed upon one of the three main questions which we have argued, we think that the verdict is grossly excessive and that a substantial remittitur should be ordered.

Respectfully submitted,

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