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.	)

REPLY BRIEF FOR APPELLANTS

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SUBJECT INDEX

TABLE OF AUTHORITIES

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CLAUDE E. GAYNON and
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APPELLANTS,

-Versus-

H. A. STATUM,

APPELLEE.

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

REPLY BRIEF FOR APPELLANTS.

Under the caption "Errors and Omissions in Appellants' History of the Case" (Brief for Appellee, pp. 1-22), the appellee has made some reference to the pleadings and has "amplified" (so he states, Brief, p. 5) the analysis of the evidence made in the Brief for Appellants, pp. 5-11. As we see it, the appellee has not pointed out any errors in appellants' statement of the case before the Court (Brief for Appellants, pp. 1-11), and appellee's amplification shows that the substance of the pleadings and the evidence is fairly stated in the appellants' brief.

Consequently, laying aside all quibbling as to minute details, we again respectfully call the attention of the Court to the following points which the record amply sustains, viz: The appellee (plaintiff), over the objection of the appellants (defendants) was erroneously permitted to split his damages and to recover successive judgments in different Courts, by reason of a single wrongful act. The evidence, upon which the recovery was had before a sympathetic jury, was, to a very substantial degree, utterly impossible

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or inherently improbable, and the damages awarded are so grossly excessive as to indicate that the jury was prompted by prejudice and passion rather than by reason and justice.

FURTHER DISCUSSION OF THE EVIDENCE.

Though the first question argued in the briefs on file relates to the splitting of damages (Appellants' Brief, pp. 13-26; Appellee's Brief, pp. 24-33), yet we believe that some additional comments upon the evidence will serve as an appropriate preface to our reply to the appellee's discussion of the FIRST QUESTION.

(a) In the First Instance, the Driver of Defendants' Vehicle was Exonerated and the Entire Blame for the Accident was Placed upon the Negro Driver of the Ice Truck.

Everyone agrees that defendants' vehicle was being driven in a Southerly direction, and that the ice truck was being driven in a Northerly direction. These two vehicles collided and the ice truck continued on and collided with the plaintiff's automobile in which he was riding. Likewise, it is agreed that there was not a head-on collision between the two trucks, but, on the contrary, the fronts of the two trucks cleared, and the left front wheel of the ice truck came into contact with the gas tank, near the rear wheels of defendants' tractor, on the left side of defendants' vehicle. As shown by the photographs (Defendants' Exhibits A, C, and D) and the expert testimony regarding the physical facts (R.I. 281-97; 323-32), the wheels of the ice truck had to be cut to the left (or into defendants' vehicle) at the time of the collision.

The vehicle of defendants never came in contact with the plaintiff's automobile. On the contrary, the ice truck first collided with the gas tank on the left side of defendants' vehicle, and then

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continued on, colliding with plaintiff's automobile and causing all the damage.

In the first instance, there was no inclination on the part of anyone, except Cleveland Crane, the negro driver of the dilapidated ice truck (Defendants' Exhibits C and D), to place any blame for the accident upon the driver of defendants' truck. This fact is conclusively demonstrated by the first report made by the County Road Patrolmen who investigated the accident, observed the road marks and questioned the witnesses. After so doing, the officers placed the entire blame for the accident on the negro driver of the ice truck and charged him with careless and reckless driving (Defendants' Exhibit H; also testimony R.I. 111-19; 159).

The last four lines of the original or first road patrol report (Defendants' Exhibit H) are as follows:

> "Negro to Be arrested for careless and reckless driving when released from Hospital.
> "Weather clear and road dry.
> "V-8 Sedan stored Hinsons Garage request this Dept.
> "Panel Body stored Boree's Garage request this Dept."

The supplement to the report (Defendants' Exhibit B) which attempts to place the blame on the driver of defendants' truck, rather than the negro, was made on May 13th, two days after the accident (R.I. 114), and that supplement and the officers' testimony regarding it are wholly inexplicable. This is so because an honest man could not have talked with the witnesses, examined the road marks and the vehicles involved, and placed the entire blame upon one party when, in fact, the accident was solely the fault of the other party. If, as the two County Road Patrolmen testified at the trial, the road marks showed that defendants' truck was 2½ feet over on the negro's (or wrong) side of the road at the time of the collision, they, as honest men, could not have placed the entire blame upon the negro driver of the ice truck and ordered his arrest for careless and reckless driving. But they did place the

entire blame upon the negro, and they did order his arrest for careless and reckless driving.

As regards this, the testimony of one of the County Road Patrolmen is as follows (R.I. 113-15):

"Q Mr. Stover, these two pages here constitute your report of this accident, do they not?
"A (Examining documents) Yes, sir.
"Q You signed that, did you not?
"A Yes, sir.
"Q That contains your findings and your opinion as to that accident, does it not?
"A Yes, sir.
"Q It contains all you could learn about it, does it not?
"A Yes, sir.
"Q That is the same paper that you have been refreshing your recollection here in testifying as to how this thing occurred, is it not?
"A Yes, sir.
"Q Your testimony is based on your findings as shown in that paper, is it not?
"A Yes, sir.
****
"Q Examine the back of the first page of this report, at the point where opposing counsel object to any further reading. Is it not true that the next sentence in that report is this: 'Negro to be arrested for careless and reckless driving when released from hospital?'
"A Yes, sir.
"Q Now, is it not true that the other typed portions of your report, that those sentences were made a day or so later?
"A You mean on this page here (indicating)?
"Q No, I don't mean that. The next three paragraphs, typed paragraphs of the report, is it not true that those were made later?
"A They were made two days later.
"Q Two days later?
"A May 13th.
"Q You concluded this entire report on May 13th?
"A Yes, sir.
"Q All right, sir. As I understand, you have here told the jury that the panel body ice truck made the marks, that the collision between the panel body ice truck and the big truck made marks on the road. I understand from your testimony before the jury, and the way you have placed the model cars and trucks here, that you said that the marks on the road, the road marks started two to two and a half feet on the east side of the center line of the road. Is that correct?
"A Yes, sir.
"Q Now, is it not true that when you made the statement in this report that the negro was to be arrested for careless and reckless driving when released from the hospital, you had examined those road marks?

"A Yes, sir.

"Q Is it not true that you had talked to J. M. Haggerty, the driver of the semi-trailer, before you made that statement in this report?

"A Yes, sir.

"Q Is it not true that you had talked to Edward Herschel Rogers, the driver of the Tennessee car, before you made the statement in your report that the negro was to be arrested for careless and reckless driving?

"A I don't know whether I did or not.

"Q There is your report.

"A (Examining report). A Yes, sir.

"Q Is it not true that before you made that statement in your report, that the negro was to be arrested for careless and reckless driving when released from hospital, that you had talked to Fay Meadows?

"A Yes, sir.

"Q Is it not true that when you made the statement in your report that the negro was to be arrested for careless and reckless driving when released from hospital, that you had examined the two trucks and the automobile involved in the collision, and that you had examined the road marks out there?

"A Yes, sir.

"Q Is it not true that in your first report, the one you made on May 11th, which ends, the typewriting part ends, with, 'Panel body stored at Boree's Garage, request of this department', that you made no charge in that report of any negligence or reckless driving on the part of anyone except the negro?

"A Yes, sir." (Underlining supplied).

And the testimony of the other County Road Patrolman shows that before concluding that the accident was solely the fault of the negro, they had also talked with Mrs. H. A. Statum, the wife of the appellee (R.I. 159).

The physical facts and the testimony of the two disinterested witnesses (R.I. 91-4; R.II. 247-52) show that the first or original road patrol report was correct and that the accident was solely the fault of the negro driver of the ice truck. Furthermore, the testimony of another wholly disinterested witness shows that two of the interested parties, who testified in detail about the accident, were asleep at the time and knew none of the facts (R.II. 219-20); and, obviously, in order for the road patrolmen to place the blame upon defendants, it was necessary for the interested witnesses to change

their original stories and the road marks to change sides upon the road.

(b) The Impossible and Inherently Improbable Testimony by Which it is Sought to Fasten Liability Upon Defendants.

In view of the first or original road patrol report, which placed the entire blame for the accident upon the negro driver of the ice truck, it is not surprising that the attempt to fasten liability on the defendants is fraught with obstacles, improbabilities and even impossibilities. These matters are discussed in detail at pages 27-30 of the "Brief for Appellants", and it is unnecessary to elaborate upon them here. However, we do wish to notice the attempt of the appellee (Brief, pp. 35-36) to explain away the impossibility of the ice truck having made skid marks of 129 feet between the point it collided with the defendants' vehicle and the point it collided with plaintiff's automobile.

In his declaration the plaintiff alleged that he was following defendants' vehicle at a distance of approximately 50 feet (R.I. 9). The plaintiff first alleged that he was following defendants' vehicle at a distance of "several hundred feet" (R.I.4), but, obviously, this allegation made a case of contributory negligence on his part, and so he changed it to 50 feet (R.I. 9) --- it being a simple matter in this sort of case to change an unimportant matter of "several hundred feet" to fifty feet, if the circumstances indicate the necessity of such a change.

The plaintiff, his wife, and his nephew, the driver of plaintiff's car, all testified that at the time of the collision between the two trucks, the Statum car was 50 to 60 feet behind the vehicle of defendants and was traveling at a speed of 35 to 40 miles per hour (R.I. 65;66;164;169; R.II. 210); and the plaintiff's evidence

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was that the ice truck was being driven at a speed of 25 to 30 miles per hour (R.I. 68;189). Both the ice truck and the Statum car continued in opposite directions until they collided, and the Statum car was not slowed down (R.I. 65;66;68;164;169; R.II. 210).

Plaintiff's evidence further shows that the overall length of defendants' vehicle was 39 feet, and that the length of the trailer alone was 29½ feet (R.I. 134). The point of impact was at the gas tank at the rear of the cab, or approximately 30 feet from the rear of the trailer.

Thus, at the time of the collision between the two trucks, the ice truck and the Statum car were not more than 80 to 90 feet apart (I.e. approximately 30 feet from the gas tank at the rear of the cab of defendants' vehicle to the rear end of the trailer, plus the 50 or 60 feet distance between the trailer and plaintiff's automobile).

As, according to the evidence, the Statum car was being driven faster than the ice truck and was not slowed down, it would have traveled more of the 80 or 90 feet distance between the points of the two collisions than did the ice truck.

At a speed of 55 miles per hour, the Statum car would have traveled 51.3 feet in one second -- leaving only 38.7 feet which the more slowly moving ice truck could have traveled between the two collisions.

At a speed of 40 miles per hour, the Statum car would have traveled 58.7 feet in one second --- leaving only 31.3 feet which the more slowly moving ice truck could have traveled between the two collisions.

Thus, according to the allegations of the declaration and the plaintiff's evidence (and he is bound by both), the ice truck could not have traveled any further distance than 31.3 to 38.7 feet after it collided with defendants' vehicle.

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How then could the ice truck have made skid marks of 129 feet between the points of the two collisions? Obviously, it could not have, and the testimony of the road patrolmen that it did is impossible.

If the ice truck had made skid marks of 129 feet between the points of the two collisions, and if such skid marks had commenced 2 to 3 feet on the negro's (or ice truck's) side of the road, as the two road patrolmen testified at the trial, why was the entire blame for the accident placed on the negro by the County Road Patrolmen? Why was the driver of defendants' vehicle exonerated?

The obvious answer is that interested witnesses could change their testimony.

But the road marks were the mute and best evidence of what happened. The County Road Patrolmen arrived at the accident shortly after it happened. They examined the road marks, they talked with the witnesses, and they placed the entire blame upon the negro. Their changed testimony and the testimony of the five interested witnesses is contradicted and overcome by the <u>original</u> or <u>first</u> road patrol report and by the photographs (Defendants' Exhibits A, C, D and H), showing the physical facts:

<u>Florida Motor Lines v. Ward</u>, 102 Fla. 1105, 137 So. 163.

The naked truth is that the ice truck ran into defendants' truck, and defendants are not responsible for the plaintiff's damages. We believe that a careful reading of Defendants' Exhibit H (certified to the Court) and examination of the other Exhibits, will show such to be the fact.

<u>FIRST QUESTION</u>.

The simple facts giving rise to this question are: The plaintiff, H. A. Statum, and his wife, Edna Statum, were injured in

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one and the same accident by an alleged negligent act of defendants; also the plaintiff's automobile was damaged. In one suit, H. A. Statum claimed damages for his personal injuries and to his automobile (R.I. 9). In another action in a different Court, the wife claimed damages for her injuries, and in a second count of the declaration in that case, the husband (H. A. Statum) claimed damages for medical expense, and loss of services and consortium, consequent upon the wife's injuries (R.I. 19-21). In the latter action, defendants filed a plea to the husband's count, alleging the pendency of his other (this) suit, and asserting that H. A. Statum must claim all of his damages in one action (R.I. 26). Notwithstanding, the joint suit proceeded to trial, and the husband (H. A. Statum) recovered a judgment for $200.00. Thereupon, defendants filed a plea in the H. A. Statum (this) case, asserting that it was barred, because H. A. Statum had already recovered a judgment for a portion of his damages resulting from the one alleged wrongful act.

The law upon the point is clear. The two decisions directly in point (Brief for Appellants, pp. 13-17) sustain the proposition that the plaintiff could not split his damages and recover successive judgments on the same wrongful act. Two decisions of this Court affirm the principle of the authorities directly in point (Brief for Appellants, pp. 17-18), and the general rule upon the subject adequately supports the proposition. The general rule is accurately and tersely stated by Carson (revised edition) Florida Common Law Pleading, Practice and Procedure, pp. 61-62, as follows:

> "As to actions ex delicto, the general rule is that a single tort affords a single cause of action. * * * A judgment in one action arising from the same tort bars another action on a different theory for the same injuries or for those that were forgotten or unclaimed in the first one." (Underlining supplied)

The entire subject is extensively discussed in the Brief for Appellants, pp. 14-25, and there seems to be no doubt as to the

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correctness of the position of the appellants.

But, in his reply, the appellee asserts that the defendants (appellants) waived or induced the splitting of damages, and further contends that there was no splitting of damages, because (he says) the plaintiff had separate causes of action for his several items of damages (Brief for Appellee, pp. 24-33). But he cites no authority which sustains any of his contentions.

(a) Defendants Objected to the Splitting of Damages Before the Trial of Either of the Suits Instituted by Plaintiff and There Was No Waiver of the Point.

On pages 24-26 of his brief, the appellee cites authorities to the effect that a defendant may waive the splitting of damages by failing to object before "a trial upon the merits", or "until after the plaintiff recovers judgment in one of the suits" (Brief, p. 26). Granted that such is the rule, it has no application here and cannot aid the appellee. This is so because the defendants, before either of the two actions instituted by the plaintiff came on for trial, filed a plea alleging that there was a prior action pending and asserting that the plaintiff, H. A. Statum, could not maintain two suits for damages arising out of one wrongful act (R. I. 25-30).

(b) Defendants Did Not Induce the Splitting of Damages by the Plaintiff.

Continuing his "grasping at straws", the appellee asserts, in effect, that if defendants did not waive the splitting of damages, they induced it or took inconsistent positions with respect to the matter. These contentions find absolutely no support in the record.

It is true, as the appellee states (Brief, p. 26), that while this action was pending against the defendant Claude Gaynon alone, that defendant did file a demurrer, applicable to each count of the original declaration, in which he asserted that "said count is duplicitous" (R.I. 8), but in nowise did that defendant assert

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that the plaintiff, H. A. Statum, should or could "pull out" a portion of his damages and claim them in another suit.

On the contrary, the record conclusively shows that the defendants have consistently maintained that the plaintiff, H. A. Statum, could not split his damages (R.I. 15-32), and the plaintiff's action in splitting them was entirely voluntary on his part, because the Court never ruled that H. A. Statum could not or should not claim all his damages in this suit. True, the Court ruled that the claims of H. A. Statum and Edna Statum were improperly joined in this action, and thereupon, as shown by the amended declaration (R.I. 9), the claims of Edna Statum were voluntarily omitted from this suit. In so ruling, the Court held that the declaration (not any particular count of it) was duplicitous, meaning that there was an improper joinder of claims (R.I. 8). But the defendants never made any such point, and, therefore, cannot be said to have induced this ruling.

As the record shows, there was a purpose behind the demurrer to the first count of the original declaration (R.I. 3). In that count, H. A. Statum claimed property damages, and the defendants had a defense to the property damage claim that was inapplicable to the personal injury claims. Such defense was timely asserted by the third plea (R.I. 14) and was that the plaintiff had collision insurance with Tennessee Automobile Insurance Company, which had paid his damages and was subrogated to all the rights and remedies of the plaintiff to the extent of $447.29.

As the very authorities relied upon by us in this case hold, it is better practice to declare in different counts (in the same action) for damages to the person and property. Thus, in Johnston v. Southern Railway Company, 155 Tenn. 639, 299 S.W. 785 (discussed at pages 14-15 of Brief for Appellants) it is said:

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> "A single tort can be the basis of one action. It is not improper to declare in different counts for damages to the person and property, when both result from the same tort, and it is the better practice so to do, where there is any difference in the measure of damages, and all the damages sustained must be sued for in one suit." (Underlining supplied).

In any event, the appellee has not pointed to, and cannot point to, a single fact in the record to support his contention that the defendants induced, or have taken inconsistent positions as to the splitting of damages. And while one of the defendants did assert that the first count of the original declaration was duplicitous, yet the point was not sustained. In this connection, it is to be observed that the authorities relied upon by the appellee show that in order to be estopped by a previous inconsistent position, a party must have "successfully maintained it (Brief for Appellee, p. 27; Smith v. Urquhart, 129 Fla. 742, 176 So. 787).

The Splitting of Damages Was the Plaintiff's Own Voluntary Act.

We repeat that the defendants never asserted that the plaintiff, H. A. Statum, could or should be permitted to split his damages and claim them in successive suits. Defendants never intimated that the plaintiff, H. A. Statum, should or could "pull out" a portion of the damages claimed in the declaration in this suit and file a separate suit in the Civil Court of Record. On the contrary, upon the plaintiff's having voluntarily done so, the defendants, before the trial of either case, objected, and, even under the authorities relied upon by the appellee (Brief, pp. 24-25), they preserved their point. For example, Corpus Juris Secundum, upon which appellee relies, states, 1 C.J.S. 1314: "Any question relative to improper splitting of the cause of action should be raised before verdict". And the other authorities relied upon by appellee (Brief, p. 25) show that an objection before judgment is timely. The de-

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fendants objected before the trials commenced.

The fact is that the appellee attempted to take "two bites at the cherry". In the original declaration, the damages claimed on behalf of Edna Statum were $3,500.00 (R.I. 7). Therefore, after the Court ruled that the claims of H. A. and Edna Statum should not be joined in one suit, the Edna Statum claim for damages should have been filed in the Circuit Court in a separate suit, because that Court had jurisdiction of a claim in excess of $3,000.00 and her claim was $3,500.00 (R.I. 7). Had this been done, the two cases could have been consolidated under Section 4226, C.G.L. 1927. But H. A. Statum wanted two suits, the joint suit in the Civil Court of Record and this suit. In order to get the joint suit within the jurisdiction of the Civil Court, the claim of Edna Statum was reduced from $3,500.00 (R.I. 7) to $2,592.00, and the claim of H. A. Statum (for damages consequent upon his wife's injuries) was reduced from $607.00 (R.I. 6) to $307.00 (R.I. 22). This reduction was necessary, because the Civil Court of Record of Duval County does not have jurisdiction of claims in excess of $3,000.00.

In view of this, it is preposterous for the appellee here to assert that the defendants induced the splitting of damages. The record shows that it was the voluntary act of the plaintiff, and that the defendants objected to it "all the way" (R.I. 26-30).

(c) Appellee is Unable to Distinguish the Authorities in Point, and Cites no Authority Which Supports His Position.

The authorities cited at pages 14-20 of the "Brief for Appellants" make it crystal clear that the plaintiff, having split his damages and recovered one judgment for a portion of them, was barred from proceeding in this suit. The appellee cannot distinguish the authorities upon which we rely, and makes no attempt to dis-

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tinguish or explain the decision by the Supreme Court of Alabama in Birmingham Southern Ry. Co. v. Lintner, 141 Ala. 420, 38 So. 363, or the decision of the Supreme Court of Minnesota in Myhra v. Park, 193 Minn. 290, 258 N.W. 515 (discussed at pages 19-20; 22-25 of Appellants' Brief).

The two Tennessee cases (which are squarely in point as is shown by the discussion at pages 14-17 of Appellants' Brief) are commented upon by the appellee as follows (Brief, p. 32):

> "In Johnston v. Southern Railway Company, 155 Tenn.639, 299 S. W. 785, 55 A.L.R. 932, plaintiff and his wife, while riding in an automobile, were struck by a moving engine belonging to defendant. Plaintiff instituted this suit to recover damages for injuries received by him. After a plea of not guilty was filed, plaintiff instituted a second suit for loss of his wife's services resulting from the same accident. It was the latter suit that was prosecuted to judgment and that afforded the basis for the plea of res judicata.
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> "In Smith v. Cincinnati, etc. Railroad Co., 136 Tenn. 282, 189 S.W. 367 L.R.A. 1917 c. 543, plaintiff sued for personal injuries and for damages to certain personal property in an accident to a passenger coach in which he and his wife were traveling. Suits were commenced in the Federal Court to recover damages for injuries sustained by the wife, and also by plaintiff to recover for loss of services of the wife, injuries to himself and to his property. In response to motions made by the defendant in the Federal Court the plaintiff dismissed all of his suits there except for injuries to his wife and for the loss of her services. The nature of these motions is not disclosed. The defendant pleaded the former suit and recovery in the Federal Court as a bar to this action."

This comment shows that the two cases are directly in point. Indeed, the analogy between Johnston v. Southern Railway Co., supra, (Brief for Appellants, pp. 14-16) and the case at bar is complete, even as to the amount ($200.00) of the judgment recovered by the husband for his wife's injuries.

The subsequent Tennessee decision of Stapp v. Andrews, 113 S.W.(2d) 749 relied upon by the appellee involved a question of waiver and is wholly beside the point. In that case, the plaintiff had brought two suits in a Justice of the Peace Court for damages

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arising out of breach of a contract. By consent of the parties, the two cases were heard together; and on appeal, the defendant, for the first time, asserted that the plaintiff had split his damages, the Court saying:

> "In this case, instead of invoking the rule as it was his privilege to do, the defendant acquiesced in the hearing of both cases at the same time upon the merits. We can conceive of no more effective manner of waiving the rule." (Underlining supplied)

In the case at bar, the defendants objected to the splitting of damages before the trial of either case, and, therefore, under the very authorities relied upon by appellee (Brief, p. 25), they did not waive the rule.

The case of Brockbank v. The Whitehaven Junction Railway Co., 7 Hurlstone & Norman, 834 has already been distinguished in the Brief for Appellants, pages 21-22, and in nowise supports the position of the appellee. In the Brockbank case, the Court simply held that the wife (joined by the husband) could sue for her personal injuries; and that though the husband was permitted to assert (in the wife's suit) his claim for damages by reason of the wife's injuries (expenses, loss of consortium and services), yet he was not required to do so, and could maintain a separate action as to his damages. The case has absolutely nothing to do with the splitting of damages sustained by one party as a result of one wrongful act, and it has no application here.

As we have shown, the Smith and Johnston cases are squarely in point. They hold that if a husband, suing for damages for injuries resulting from a single tort, does not include in his suit all the damages sustained, a subsequent suit for those omitted will be barred. In other words, a husband may not maintain one suit for his personal injuries, another suit for his property damage, and still another suit for damages consequent upon injuries to his wife --

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where all resulted from the same wrongful act. Though there may be many elements of damages, yet there is but one cause of action in one plaintiff as to one wrongful act. And he must recover all his damages in a single suit, or not at all. If he recovers a portion of such damages in one suit, he is barred from recovering the omitted damages in another action.

Such is the general rule, and the principle is affirmed by the decisions of this Court which hold that damages "cannot be recovered piecemeal by successive actions" (Brief for Appellants, pp. 17-20).

As we see it, the appellee has failed to suggest any valid reason why this Court should not follow the applicable decisions of the Supreme Courts of Alabama, Tennessee and Minnesota (Brief for Appellants, pp. 14-16; 19; 22-25). The appellee has not cited a single authority contrary to them; and, as we have shown, the decisions of this Court affirm the principle of those decisions (Brief for Appellants, pp. 17-18).

SECOND AND THIRD QUESTIONS.

These questions relate to the evidence and are fully discussed in the Brief for Appellants, pages 27-36. In the first part of this brief, we have further discussed the evidence, and believe that such constitutes a sufficient reply to appellee's contentions.

FOURTH QUESTION.

This question relates to the excessiveness of the damages, and is fully discussed at pages 37-46 of the Brief for Appellants. There we have shown that by reason of H. A. Statum's previous condition, the undisputed evidence is that his earning capacity was

not substantially affected by the loss of his already crippled leg. From comparable decisions of this Court, we have shown that a verdict in excess of approximately $6,000.00 would be excessive. Here the verdict was $11,000.00 and is grossly excessive.

Appellee's reply is that 10 months after the trial, the plaintiff's injuries were still disabling (Brief, p. 43). But this was taken into account in our calculations (Brief for Appellants, p. 41) by giving him an additional 42 weeks' disability from the time of the trial. From his own doctor's testimony (R.I. 100-01), this period appears to be more than adequate.

In final analysis, the appellee offers no real argument and cites no authority in opposition to our position (and the authorities cited in support of it) that the verdict is grossly excessive.

Respectfully submitted,

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